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School Desegregation

ARTHUR V. NYQUIST
712 F.2D 816 (2ND CIR. 1983)

GENERAL RULE OF LAW: A desegregation plan's requirement that laid-off teachers be rehired without regard to seniority rights is constitutionally impermissible.

PROCEDURE SUMMARY:

Plaintiffs: Arthur (P), a student in the Buffalo City School District, et al.

Defendants: Nyquist (D), Commissioner of Education of the State of New York, and Buffalo Teachers Federation (Federation) (D)

U.S. District Court Decision: Ordered the implementation of a desegregation plan to achieve 21% minority teachers that ignored seniority when rehiring laid-off teachers

U.S. Court of Appeals Decision: Reversed in part

FACTS: In 1976, the Arthurs (P) and other white and African American parents whose children attended school in the Buffalo Metropolitan School District brought a class action to force desegregation of their school system. The district court found in favor of Arthur (P) and ordered the schools desegregated. Among the discriminatory policies enjoined was the intentional segregation of the teaching and administrative staffs. Buffalo had intentionally assigned all minority teachers and staff to schools with a predominately minority student body, while assigning white teachers and staff to schools with mostly white students. The court ordered implementation of a desegregation plan designed to achieve 21% minority teachers in all teaching areas through a race-conscious system for hiring and laying off teachers. The plan required that a minority teacher be hired for every majority teacher hired, even with respect to the rehiring of laid-off teachers. The Federation (D) appealed the plan, contending that imposition of the one-for-one hiring requirement, without regard to seniority with respect to rehiring laid-off teachers, was constitutionally impermissible.

ISSUE: Is the imposition of the one-for-one requirement with respect to rehiring decisions an impermissible infringement of the teachers' seniority rights?

HOLDING AND DECISION: (Newman, J.) Yes. The imposition of the one-for-one requirement with respect to rehiring decisions is an impermissible infringement of the teachers' seniority rights. A remedial plan that infringes statutory and contractual rights of majority teachers is not per se invalid. The district court clearly has power to override any practice that perpetuates unconstitutional practices. However, the court may not exercise that power excessively or too harshly. The portion of this plan that impairs the seniority rights of laid-off teachers is an abuse of that power. According to their contract with the state, although teachers may be laid off when the number of positions shrinks, those teachers have a right to first consideration should a position become available. The court's order required Buffalo to hire minority teachers instead of laid-off personnel. This would have the same effect as if the court had ordered Buffalo to fire teachers and hire minority staff. This would have been beyond the court's power and, therefore, so is that part of the court's order affecting laid-off teachers. Reversed in part and remanded.

COMMENT: The *Nyquist* court clearly indicated that some impairment of teachers' seniority rights can be imposed in efforts to desegregate school faculty. The limitation is that the impairment cannot be too harsh. The court gave no definition of what makes a particular action too harsh. However, this qualification evidences the court's recognition of a necessary balancing of interest: To allow the seniority system to continue unaffected would only serve to perpetuate the segregation, but to allow substantial impairment of the system could create a new injustice in the effort to alleviate the effects of another.

Discussion Questions

1. Did the Buffalo Metropolitan School District violate teacher seniority rights with respect to rehiring?
2. What was the purpose of the one-for-one requirement for rehiring teachers?
3. When implementing a desegregation plan, what makes an imposed action too harsh?
4. Did this case set a precedent for the implementation of desegregation plans and their effect on teachers' rights?

BROWN V. BOARD OF EDUCATION OF TOPEKA (BROWN II) 349 U.S. 294, 75 S. CT. 753 (1955)

GENERAL RULE OF LAW: The district courts are to enter such orders as are necessary and proper to admit, with all deliberate speed, African American students to public schools on a racially nondiscriminatory basis.

PROCEDURE SUMMARY:

Plaintiff: Brown (P), an African American student

Defendant: Board of Education of Topeka (Board) (D)

U.S. Supreme Court Decision: Ordered admittance, with all deliberate speed, of African Americans to public schools on racially nondiscriminatory basis

FACTS: In 1954, the Court held in *Brown I* that maintaining segregated schools was inherently unequal and violated the equal protection clause of the Fourteenth Amendment. After its decision in *Brown I,* the Court requested further argument on the question of relief, to correct the constitutional violations found in *Brown I*.

ISSUE: Should the district courts order admittance, with all deliberate speed, of African American students to public schools on a racially nondiscriminatory basis?

HOLDING AND DECISION: (Warren, C. J.) Yes. The district courts are ordered to enter such decrees as are necessary and proper to admit, "with all deliberate speed," African American students to public schools on a racially nondiscriminatory basis. In fashioning such decrees, the courts are to be guided by equitable principles, which will allow them flexibility and the ability to fully consider both public and private needs. Nevertheless, the school authorities have the primary responsibility for solving these problems and implementing the desegregation mandate of *Brown I*.

COMMENT: Ordering the desegregation of public schools with all deliberate speed was a break from the usual rule that individuals whose rights are violated by state action are entitled to immediate relief. In departing from this rule, it seems the Court not only was concerned that mandatory immediate desegregation would lead to violence, but the Court also seemed cognizant of the difficulty of fashioning a single decree or plan to deal with the multitude of complexities and issues facing local school districts' desegregation efforts. In some respects, this was an accurate prediction, as there was initial opposition, and even some violence, associated with the implementation of remedial orders. Nevertheless, the common pattern was that local districts tended to avoid attempts to implement desegregation plans. The definition of "with all deliberate speed" was simply unworkable from the perspective of correcting constitutional violations in the volatile environment of public school systems. It was not until *Alexander v. Holmes County Board of Education* (1969) that the Court finally ordered immediate action in stating that further delays, now 15 years after the *Brown I* decision, would not be tolerated.[1]

Discussion Questions

1. Why didn't the Supreme Court itself handle the relief owed to each school?
2. One Justice is reputed to have said that agreeing to "with all deliberate speed" was the worst decision he ever made. Why do you think he said this?
3. How long did the Court give the schools to enact a desegregation plan?
4. What is the purpose to be served by desegregating schools?
5. Why did the Court consider "separate but equal" not to be equal? Do you agree?

COLUMBUS BOARD OF EDUCATION V. PENICK 443 U.S. 449, 99 S. CT. 2941 (1979)

GENERAL RULE OF LAW: A school board has an affirmative and continuing duty to eliminate the effects of its past discriminatory policies and actions.

PROCEDURE SUMMARY:

Plaintiff: Penick (P), a student

Defendant: Columbus Board of Education (Board) (D)

U.S. District Court Decision: Held for Penick (P)

U.S. Court of Appeals Decision: Affirmed

U.S. Supreme Court Decision: Affirmed

FACTS: Penick (P), a student, brought an action alleging that the Board's (D) policies and actions had the purpose and effect of causing and perpetuating racial segregation in public schools in violation of the equal protection clause. At trial, the district court found that the Board (D) maintained dual school systems in 1954 and had since failed to discharge its duty to eliminate this segregation. It further found that current segregation in the schools was the effect of the Board's (D) past discriminatory actions and policies. The district court thereafter enjoined the Board (D) from continuing to discriminate and ordered it to submit a systemwide desegregation plan. The Board (D) appealed, contending the systemwide remedy was improper. The court of appeals disagreed and affirmed the district court decision. The U.S. Supreme Court granted review.

ISSUE: Does a school board have an affirmative and continuing duty to eliminate the effects of its past discriminatory policies and actions?

HOLDING AND DECISION: (White, J.) Yes. A school board has an affirmative and continuing duty to eliminate the effects of its past discriminatory policies and actions. There was sufficient basis for the lower courts to conclude that the Board's (D) conduct at the time of and before trial sufficiently perpetuated the effects of past intentional segregative acts to justify imposition of a systemwide remedy. The Board (D) failed to present evidence sufficient to demonstrate that its past acts were not causally related to current discrimination in its schools. It also failed to prove that it was now taking affirmative action to eliminate any such discriminatory effects. In fact, the record supports the lower court's finding that the Board's (D) current actions were merely perpetuating current systemwide discrimination, which is a proper basis for a systemwide remedy. Affirmed.

COMMENT: *Penick* reaffirms the notion that school boards must not only cease intentionally discriminatory actions and policies but must take affirmative steps to eliminate the effects of past discriminatory action. Distinct in *Penick,* however, is the Court's approval of the lower courts' use of disparate impact evidence to find that the Board's (D) current actions had the effect of perpetuating past discrimination.

Disparate impact evidence simply demonstrates that services and facilities provided to minority students are less than those provided to white students.

Discussion Questions

1. What arguments or precedents could or would the Columbus Board of Education use to defend its actions since the *Brown* decision of 1954?
2. Did the Columbus Board of Education violate the equal protection clause of the Fourteenth Amendment? If so, how?
3. Did the lower courts use of disparate impact evidence have significance in this case? If so, how?
4. Why do you think a systemwide desegregation plan was ordered instead of letting the defendant submit its own more limited plan?

DAYTON BOARD OF EDUCATION V. BRINKMAN (BRINKMAN I) 433 U.S. 406, 97 S. CT. 2766 (1977)

GENERAL RULE OF LAW: A systemwide desegregation remedy is improper if it is not shown that the homogenous character of a school is the result of intentionally segregative actions.

PROCEDURE SUMMARY:

Plaintiff: Brinkman (P), a class representative of parents of African American schoolchildren

Defendant: Dayton Board of Education (Board) (D)

U.S. District Court Decision: Held for Brinkman (P), ordering the Board (D) to implement a systemwide remedy to correct the racial imbalances within its schools

U.S. Court of Appeals Decision: Affirmed

U.S. Supreme Court Decision: Vacated and remanded

FACTS: In 1972, Brinkman (P) and the class of parents of African American students filed suit against the Board (D), alleging that certain policies and actions, primarily the use of optional attendance zones in three high schools implemented by the Board (D), resulted in a cumulative violation of the equal protection clause of the Fourteenth Amendment. Brinkman (P) sought the formulation of a desegregation plan, and the district court so ordered. Subsequently, the court ordered the Board (D) to implement a plan to eliminate optional attendance zones and tailor faculty assignment and hiring practices to achieve representative racial distribution in all Board (D) schools. The court of appeals affirmed the district court's findings of fact but remanded for redetermination of the proper remedy, finding that the remedy ordered was inadequate given the scope of the violations. The district court thereafter ordered implementation of a broader, systemwide plan, which the court of appeal affirmed. The Board (D) appealed, and the U.S. Supreme Court granted review.

ISSUE: Is a systemwide desegregation remedy proper when it has not been shown that the homogenous character of a school is the result of a board's intentionally segregative actions?

HOLDING AND DECISION: (Rehnquist, J.) No. A systemwide desegregation remedy is not proper when it has not been shown that the homogenous character of a school is the result of a board's intentionally segregative actions. The district court's findings as to the optional attendance zones were limited to three offending high schools, thus only raising the potential for remedial action in systemwide high school redistricting. Thus, the sweeping systemwide remedy ordered was by no means justified by the violation found by the district court. And the district court's use of the ambiguous phrase "cumulative violation" in no way cured this disparity. More findings of fact must be made, and since mandatory racial segregation has long since ceased, it must be determined whether the Board (D) intended to, and did in fact, discriminate, resulting in systemwide segregation, before a systemwide remedy may be imposed. Vacated and remanded.

COMMENT: *Brinkman I* reconfirms that the Court is going to require evidence of systemwide discrimination before a systemwide remedy may be granted. Further, it confirms the Supreme Court's position in *Milliken I,* that the extent of the remedy is limited to the extensiveness of the constitutional violations established. It is but another demonstration of the Court's concern for tailoring the remedy to match the proven harm. Such a concern exists throughout the Court's equal protection cases, including more recent cases such as *City of Richmond v. J. A. Croson* (1989), in which the Court invalidated a city program that required at least 30% of the city's construction contracts to go to minority contractors.[2] The Court held that there was no compelling reason for the ordinance to discriminate based on race, even beneficially. Although there was evidence of discrimination in the construction industry in other parts of the country, there was no evidence of past discrimination in Richmond's construction industry.

Discussion Questions

1. What are the three elements of the "cumulative violation" found in *Dayton v. Brinkman*? How are they in violation of the equal protection clause?
2. What impact does the Dayton Board of Education's intent to discriminate have on any remedy that might be mandated by the courts?
3. Why do you think Justice Thurgood Marshall took no part in the consideration or decision of this case? Does his having headed the NAACP legal defense fund in *Brown v. Topeka* have anything to do with his not taking part?

DAYTON BOARD OF EDUCATION V. BRINKMAN (BRINKMAN II) 443 U.S. 526, 99 S. CT. 2971 (1979)

GENERAL RULE OF LAW: A school board has a continuing duty to eradicate the effects of segregation where it is found that the board operated dual systems in 1954.

PROCEDURE SUMMARY:

Plaintiff: Brinkman (P), a class representative of parents of African American students

Defendant: Dayton Board of Education (Board) (D)

U.S. District Court Decision: Held for the Board (D), dismissing Brinkman's (P) action

U.S. Court of Appeals Decision: Reversed, holding for Brinkman (P) and finding that the Board (D) had operated a dual school system in 1954

U.S. Supreme Court Decision: Affirmed

FACTS: In *Brinkman I,* the Supreme Court reversed and remanded a lower court order to implement a systemwide desegregation plan, finding that there was insufficient evidence to support a finding of systemwide segregation. On remand, the district court found that the Board (D) had taken intentional segregative actions in the past but dismissed Brinkman's (P) complaint because there was insufficient evidence to prove that the Board's (D) past acts of intentional segregation had any current incremental segregative effects. The court of appeals reversed, finding that the Board (D) had maintained dual systems in 1954 (when *Brown I* was decided) and holding that the evidence demonstrated that the Board (D) failed to eliminate the continuing systemwide effects of its prior discrimination. It further found that the Board (D) had, in fact, exacerbated the racial separation. The U.S. Supreme Court granted review.

ISSUE: Does a school board have a continuing duty to eradicate the effects of segregation where it is found that the board operated dual systems in 1954?

HOLDING AND DECISION: (White, J.) Yes. A school board has a continuing duty to eradicate the effects of segregation where it is found that the board operated dual systems in 1954. There is no basis to disturb the court of appeals' finding that dual school systems existed in 1954. And this finding furnishes prima facie proof that current segregation in the school system was, at least in part, caused by that past segregative policy. In fulfilling its obligation to cure the wrongs of its past acts, the Board (D) must do more than abandon its past discriminatory activities. It has the affirmative duty to ensure that the effects of this past policy are not perpetuated. The issue is not the purpose of the Board's (D) actions since 1954 but the effectiveness of its actions to eliminate segregation. Affirmed.

COMMENT: *Brinkman II* creates a presumption that pre-1954 official segregation is causally related to present racial imbalance. The critical date is 1954 because that is the year the Supreme Court found the maintenance of segregated school systems unconstitutional and mandated that they be eliminated. It was the first case in which the Court announced that the state not only had to cease discriminatory activity but had to take affirmative steps to eliminate the effects of its past discriminatory acts. The dissent strongly disagreed with the notion that discrimination that occurred in the school systems in 1954 could place a greater burden on those districts' boards to satisfy a greater affirmative duty to eliminate current discrimination, even where the boards are no longer engaging in discriminatory activities.

MILLIKEN V. BRADLEY (MILLIKEN II)
433 U.S. 267, 97 S. CT. 2749 (1977)

GENERAL RULE OF LAW: A district court may order a state to bear the cost of compensatory or remedial educational programs for schoolchildren who have been subjected to past acts of de jure segregation.

PROCEDURE SUMMARY:

Plaintiff: Bradley (P), a class representative of parents and students

Defendant: Milliken (D), the Governor of Michigan (State) (D)

U.S. District Court Decision: Ordered the State (D) to bear the cost of certain compensatory and remedial education programs

U.S. Court of Appeals Decision: Affirmed

U.S. Supreme Court Decision: Affirmed

FACTS: In *Milliken I,* the Court reversed a district court's order calling for the implementation of a multi-district desegregation plan when de jure segregation had only been shown in one district. On remand, the district court limited the order, requiring that only the Detroit school district take desegregation measures. The order required the implementation of certain compensatory and remedial educational programs for schoolchildren who had suffered from the district's past acts of de jure segregation. The order also required the State (D) and local district to bear the cost of the programs. The court of appeals affirmed the order. The State (D) thereafter challenged, as a violation of the Eleventh Amendment, the order that it bear a portion of the cost. The U.S. Supreme Court granted review.

ISSUE: Does a district court order requiring a state to bear the cost of certain education programs for students who have been subject to past acts of de jure segregation violate the Eleventh Amendment?

HOLDING AND DECISION: (Burger, C. J.) No. A district court order requiring a state to bear the cost of certain education programs for students who have been subject to past acts of de jure segregation does not violate the Eleventh Amendment. The district court was authorized to provide prospective equitable relief, even though such relief requires State (D) expenditures. This does not violate the Eleventh Amendment's prohibition of awarding money damages against the state based upon the prior state official's conduct. This case fits squarely within *Edelman v. Jordan* (1974), a suit alleging that the state had improperly withheld disability benefits from a class of plaintiffs.[3] In that case, the Court held that the payment of state funds to ensure future compliance with federal law was a proper remedy and not a violation of the Eleventh Amendment. The remedy at issue in this case does no more than ensure future compliance with federal law, which, in this case, is the Constitution's mandate that the state eliminate all vestiges of state-maintained school segregation. Affirmed.

COMMENT: As a result of *Milliken II,* states have more closely monitored the activities of local school districts in an effort to save the state from having to share financial responsibility for the effect of activities found

to be intentionally segregative. It should be noted that the costs to remedy past segregation can be extensive. These costs that the state must pay usually come from the general fund or from funds that would support education programs throughout the state. This reduced funding has generated significant complaint. The costs in the Kansas City case, for example, quickly passed $100 million. Even more surprising is that the cost of the Cleveland case has been variously estimated as between $300 million and $500 million.

Discussion Questions

1. What is the difference between de jure and de facto desegregation?
2. You are investigating a school district for intentional acts of segregation. What types of policies and actions would you look for to use as evidence to support your case?
3. In *Milliken*, the state of Michigan contended that the court's ruling violated the Eleventh Amendment and required that the state pay a portion of the desegregation costs. What evidence is necessary for the federal government to order a state to absorb costs for past segregative actions of state officials?

PLESSY V. FERGUSON 163 U.S. 537, 16 S. CT. 1138 (1896)

GENERAL RULE OF LAW: Separate but equal accommodations for the races on a train car did not violate the Thirteenth or Fourteenth Amendments because state law made it a crime for a black to refuse to leave a train car for whites, and state legislatures were given wide discretion in promoting peace and good order.

PROCEDURE SUMMARY:

Plaintiff: Homer A. Plessy (P)

Defendant: Hon. John H. Ferguson, district court judge (D)

State Trial Court Decision: Held Plessy (P) guilty of violating the 1890 Louisiana state law

State Supreme Court: Affirmed

U.S. Supreme Court: Affirmed, upholding the separate but equal doctrine

FACTS: On June 7, 1892, Homer A. Plessy (P), a citizen of the United States, was ejected from a Louisiana passenger train after he refused to move from the seat he purchased in a coach for white passengers to a seat in a coach designated for nonwhite passengers. Plessy (P) was arrested and prosecuted under a Louisiana law passed in 1890 that required passenger trains to provide separate but equal coaches for whites and blacks. Plessy (P) argued that he was entitled to be treated as part of the white race, with all the rights and privileges afforded to whites. Plessy (P) considered himself white, as he was 7/8 Caucasian blood and 1/8 African blood. The district court judge (D) found that the Louisiana law was constitutional because the passenger train remained within Louisiana's borders, even though a previous court decision

had found the law unconstitutional for passenger trains traveling out of Louisiana to other states. The Louisiana Supreme Court affirmed, and Plessy (P) appealed to the U.S. Supreme Court.

ISSUE: Does a Louisiana state law that requires separate but equal coaches for blacks and whites on passenger trains violate the Thirteenth or Fourteenth Amendments of the U.S. Constitution?

HOLDING AND DECISION: (Brown, J.) No. The law does not violate the Thirteenth Amendment, which abolished slavery, because the Thirteenth Amendment applies to slavery, and slavery is not at issue in this case. Further, the Louisiana state law allowing "separate but equal" racial accommodations also does not violate the Fourteenth Amendment because the Fourteenth Amendment was intended to ensure equality among the races, but not to abolish or ignore distinctions between the races. Separating races is a valid exercise of police power. While state police power is subject to a reasonableness standard that requires acts to comply with established usages, customs, and traditions and to promote public peace and good order, a law separating races in public transportation is not unreasonable. The decision of the lower court is affirmed.

COMMENTS: The Supreme Court did not rule on whether Plessy (P) should be considered white or black. Rather, the issue involved whether a state law could establish distinctions between the races. The affirmative action by the Supreme Court allowed separation as long as there was equality in provision of the service. Some have argued that this decision allowed the formal state support of the Jim Crow laws, which many Southern states had informally practiced after the Civil War and Reconstruction. This famous decision, which was not overturned until the 1954 *Brown v. Board of Education* case, established the doctrine that operated to allow individual states to discriminate in many aspects of our society, from public accommodations to schools to restaurants. The only dissenting justice was Justice Harlan. His grandson was to serve on the *Brown* court, which overturned this infamous decision. The elder Harlan made the famous statements that became the essence of the 1954 decision when he stated that "our constitution is colorblind" and that the separation of the races was a "badge of servitude."

Discussion Questions

1. Can this case be described as moving private discrimination to state-sanctioned discrimination? Why?
2. Although this decision may offend us today, can you imagine how it might have reflected the prevailing attitudes of Americans in 1896?
3. Do you think that our society is moving toward a conservative social posture similar to the attitudes reflected by this decision? Why or why not?

WASHINGTON V. SEATTLE SCHOOL DISTRICT NO. 1 458 U.S. 457, 102 S. CT. 3187 (1982)

GENERAL RULE OF LAW: A state initiative that removes decision-making power over a particular issue from the local school board merely because of the racial nature of the issue, thereby placing a substantial and unique burden on racial minorities, is unconstitutional.

PROCEDURE SUMMARY:

Plaintiff: Seattle School District No.1 (District) (P)

Defendant: State of Washington (State) (D)

U.S. District Court Decision: Held for the District (P), enjoining enforcement of the initiative

U.S. Court of Appeals Decision: Affirmed

U.S. Supreme Court Decision: Affirmed

FACTS: In 1978, the District (P) enacted a voluntary desegregation plan for its schools that made extensive use of mandatory busing. Subsequently, a statewide initiative was drafted to terminate the use of mandatory busing to correct racial imbalances. With only a few exceptions, the initiative prohibited school districts such as the District (P) from requiring a student to attend any school other than one nearest or next nearest to his home. After the initiative passed, the District (P) filed suit against the State (D) to enjoin enforcement of the initiative, alleging that it violated the equal protection clause of the Fourteenth Amendment. The district court agreed and permanently enjoined enforcement of the initiative, which the court of appeals affirmed. The State (D) appealed to the U.S. Supreme Court.

ISSUE: May a state, by initiative, remove the decision-making power over a particular issue from the local school board merely because of the racial nature of the issue?

HOLDING AND DECISION: (Blackmun, J.) No. A state may not, by initiative, remove the decision-making power over a particular issue from the local school board merely because of the racial nature of the issue. Such action imposes substantial and unique burdens on racial minorities in violation of the equal protection clause of the Fourteenth Amendment. A government may allocate power among its parts by any general principle, but not by use of impermissible criteria. Allocating this power solely because of the racial nature of the subject matter is an impermissible criterion. Under the initiative, nonintegrative busing is still permissible, but integrative busing is not. This is an irrational and unjustifiable racial distinction, and the law is clear that unjustified distinctions based on race are impermissible. Affirmed.

COMMENT: The scope of this decision is limited. The state could have changed the busing scheme if control over the issue had previously been handled at the state level. Additionally, even if the matter was previously handled by local officials, the state could have asserted control over the entire matter. All that is prohibited is the state's seizing control of one issue in a particular matter because of that issue's racial implications. However, the dissenting judge thought this result bizarre given that the district could have canceled the busing plan anytime. In the same session, the Supreme Court, in *Crawford v. Bd. of Education of Los Angeles* (1982), upheld California's Proposition I, which limited the more extensive California state constitutional equal protection clause (which barred de facto as well as de jure segregation) so that California's equal protection clause provisions mirrored those of the Fourteenth Amendment of the U.S. Constitution.[4] Looking at both *Crawford* and *Washington v. Seattle,* the Supreme Court seemed to send the message that the minimum guarantee for all Americans was that found in the Fourteenth Amendment. A state could withdraw some additional protections provided in a state constitution but could not adopt a state law that inhibited a guaranteed Fourteenth Amendment right.

NOTES

1. Alexander v. Holmes County Board of Education, 396 U.S. 19, 90 S. Ct. 29 (1969).
2. City of Richmond v. J. A. Croson, 488 U.S. 469, 109 S. Ct. 706 (1989).
3. Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347 (1974).
4. Crawford v. Bd. of Education of Los Angeles, 458 U.S. 527, 102 S. Ct. 3211 (1982).

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Church–State Interaction

AGOSTINI V. FELTON
117 S. CT. 1997 (1997)

GENERAL RULE OF LAW: Under certain circumstances, public school teachers may provide remedial education to parochial students on parochial school grounds without violating the establishment clause of the First Amendment.

PROCEDURE SUMMARY:

Plaintiffs: The New York City Board of Education (headed by its Chancellor, Betty Louise Felton) and parents of disadvantaged parochial school students (P)

Defendants: Rachel Agostini (D) and five other federal taxpayers (D)

U.S. District Court Decision: Denied plaintiffs' request for relief from injunction issued in *Aguilar v. Felton*

U.S. Court of Appeals Decision: Affirmed denial of relief

FACTS: The New York City Board of Education (the Board) (P), a local educational agency (LEA) under Title I of the federal Elementary and Secondary Education Act of 1965 (the Act), 20 U.S.C., §§ 6301 et seq., was required to provide "full educational opportunity" to every school-age child, regardless of his or her economic background, under the terms of the Act. Title I channeled federal funds, through the states, to LEAs, which in turn used the funds to provide remedial education, guidance, and job counseling to eligible children. The intended goal was to assist these children in meeting state student performance standards.

LEAs were not prohibited from providing services to children enrolled in private schools within its jurisdiction; however, the provision of services under such circumstances was subject to several restrictions. Services were required to be provided on a per-pupil, rather than schoolwide, basis. Additionally, the services were required to be "secular, neutral and nonideological in nature, and to be provided through public employees or others who were independent of private schools/religious institutions." Finally, each LEA was required to retain complete control over funds as well as title to all educational materials.

Within the jurisdiction of the Board (P), 10% of the total number of students eligible for services under the Act attended private schools; 90% of those private schools were secular in nature. Originally, the Board arranged to bus Title I–eligible students to public schools for afterschool remedial education. When that program failed for logistical reasons, the Board then moved the afterschool instruction directly onto private school campuses. The remedial instructors were all public employees, as contemplated by the Act, and were specifically admonished not to introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools.

AGUILAR V. FELTON: In 1978, six federal taxpayers sued the Board in federal district court, asserting that the Board's Title I program violated the establishment clause of the First Amendment. They sought an injunction prohibiting the Board from pursuing its remedial education plan (placing public employees in private religious schools).

The district court permitted the parents of several Title I–eligible parochial students to join the Board as defendants in the lawsuit and thereafter denied the plaintiffs' request for an injunction. The federal Second Circuit Court of Appeals overturned the district court's decision.

The U.S. Supreme Court, in *Aguilar v. Felton* (1985), affirmed the federal appellate (circuit) court, holding that the Board's Title I program necessitated an "excessive entanglement of church and state in the administration of [Title I] benefits."[1] The Court then remanded the case to the district court, which promptly enjoined the Board from using public funds for any program that authorized public school teachers and counselors to provide services on the premises of sectarian schools.

In response to the injunction, the Board modified its program so that it could continue to serve Title I–eligible private school students. It once again provided instruction at public schools (as it had originally but unsuccessfully) as well as at leased sites and in vans it converted into classrooms in the vicinity of the sectarian schools. Computer-aided instruction was offered on private school premises because this program did not require public employees to be physically present at the sites.

Between the 1986–87 and 1993–94 school years, the Board spent approximately $93 million complying with the Act, as modified under the injunction issued in *Aguilar v. Felton*. These funds were deducted from the entire grant of money available under Title I of the Act, before any of it was passed on to Title I–eligible students throughout the United States. The *Aguilar* costs thus reduced the amount of funds provided to all LEAs for remedial education. In plain terms, 20,000 disadvantaged children from New York City and 183,000 disadvantaged children nationwide experienced a decline in Title I services.

AGOSTINI V. FELTON: In late 1995, the Board and a new group of parents of disadvantaged parochial school students (P) filed a motion in federal district court seeking relief from the Supreme Court's *Aguilar* decision, claiming that the Court's decisional law had changed to the point that what once had been determined to be illegal was now legal. Both the district court and the Second Circuit Court of Appeals, while recognizing that establishment clause decisional law had indeed changed over the years, nevertheless upheld the denial of the motion for relief.

ISSUE: Is the *Aguilar* decision, which held that permitting public school teachers to provide remedial education to disadvantaged parochial school students on the grounds of their private schools has the improper effect of advancing a religion with public funds, still valid law?

HOLDING AND DECISION: No. The *Aguilar* decision is no longer valid law. Permitting public school teachers to provide remedial education to disadvantaged parochial school students in the case's context is no longer seen to have the improper effect of advancing a religion.

Implicit in the decision to overturn *Aguilar* are the following points:

1. The general principles used to evaluate whether government aid violates the establishment clause have *not* changed since *Aguilar* was decided. The Court continues to ask whether the government acted with the purpose of advancing or inhibiting religion, just as it continues to explore whether government aid has the "effect" of advancing or inhibiting religion.

2. However, what *has* changed is the Court's understanding of the criteria used in assessing whether government aid to religion has an impermissible effect of advancing religion. Cases decided by the Court after *Aguilar* have modified its approach to assessing establishment cases in three significant respects:
   a. First, the presumption (developed in *Ball* and *Meek)* that placement of public employees on parochial school grounds "inevitably results in the impermissible effect of state-sponsored indoctrination [of a religion]" is abandoned. Put another way, no longer will it be presumed that any public employee who works on the premises of a religious school inculcates religion in his or her work. Here, the Court cites the *Zobrest v. Catalina Foothills School District* case for its holding "expressly disavowing the notion that 'the establishment clause [laid] down [an] absolute bar to the placing of a public employee in a sectarian school.'" In *Zobrest,* the Court refused to presume that a publicly employed interpreter for the deaf would be pressured by pervasively parochial surroundings to inculcate religion by adding to or subtracting from the lectures being translated. Instead, it decided that in the absence of evidence to the contrary, the interpreter would dutifully discharge his or her duties as a full-time public employee by accurately translating what was said.
   b. Second, no longer will it be presumed (as it was in *Ball)* that all government aid that directly aids the educational function of religious schools is invalid. Specifically relying on its 1986 holding in *Witters v. Washington Dept. of Servs. for Blind,* in which the establishment clause was found not to bar a state from issuing a vocational tuition grant to a blind person who wished to use her grant to attend a Christian college, where the tuition grants in question were "made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited," the Supreme Court reasoned that the Title I funding that "benefited" the parochial schools in *Agostini* must be viewed in the same light: The funding was an incidental benefit to parochial schools that came about only because disadvantaged students happened to attend parochial schools within the Board's jurisdiction, just as funding indirectly benefiting the Christian college at issue in *Witters* came about merely because a recipient of the funding wished to attend that particular college.[2] In each case, the indirect funding benefit to parochial institutions came about through the "genuinely independent" and private choices of individuals. (Remember, none of the Title I funds at issue in *Agostini* were disbursed directly to parochial schools.)
   c. Aside from looking at the criteria by which an aid program identifies its beneficiaries in order to determine whether the state is responsible for subsidizing religion, it is also necessary to look

at whether the criteria by which a program identifies its beneficiaries creates a financial incentive to undertake religious indoctrination. Such an incentive cannot be present if aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion and is made available to religious and secular beneficiaries on a nondiscriminatory basis. Applying such reasoning to the NYC Board's Title I program, it is apparent that remedial services to disadvantaged students are allocated on the basis of criteria that neither favor nor disfavor religion. All children who meet the program's eligibility requirements may avail themselves of services, no matter where they go to school or what their religious beliefs may be.

3. Finally, *Aguilar's* conclusion that the NYC Title I program resulted in an excessive entanglement between church and state is no longer valid law. The *Aguilar* court had specifically noted that the NYC program (1) required pervasive monitoring by public employees to insure no governmental inculcation of religion, (2) required administrative cooperation between the Board and parochial schools, and (3) potentially increased the risk of political divisiveness. Under the current understanding of the establishment clause, the last two considerations do not, by themselves, create an "excessive" entanglement anymore, given that they are present wherever Title I services may be offered, in both parochial and nonparochial school settings. The assumption underlying the first consideration has been undermined; after *Zobrest,* the Court will no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment.

COMMENT: The Court summarized its majority decision with the following: "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." This decision has already been applauded by those commentators who decried the fact that the *Aguilar* injunction had essentially forced the Board to spend upwards of $100 million to rent vans for use as classrooms—merely to avoid the appearance of public teachers setting foot in religious schools. Others who believe in the strict separation of church and state have yet to weigh in, but it is likely that a few, at least, will see this decision as eroding the principle underlying the establishment clause (prohibiting the government from establishing a religion) while giving only a minor nod to those favoring the free exercise clause (guaranteeing the free exercise of religion to all).

School administrators will see the decision as beneficial, but it remains to be seen—and given the somewhat confusing nature of this opinion, certainly cannot be predicted—whether this decision signals a continuing relaxation of strict establishment clause criteria.

Discussion Questions

1. How could LEA's administrators logistically and accurately maintain that by employing public employees, services would remain secular, neutral, and nonideological at private/religious school settings?
2. LEA's public employees work at religious schools in order to carry out the directives of the program. Could this violate an employee's religious rights or beliefs? If an employee were a Muslim

and he or she had to provide services at a Catholic school, would that conflict with the public employee's religious beliefs, and could that employee request to be placed at a different school?

3. Apart from the legal analysis, was there a logistical, practical, and/or financial concern that influenced the change in the Court's position?

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1 V. ALLEN 392 U.S. 236, 88 S. CT. 1923 (1968)

GENERAL RULE OF LAW: A state may permit school authorities to lend textbooks for use in parochial schools.

PROCEDURE SUMMARY:

Plaintiff: New York Central School District No.1 Board of Education (P)

Defendant: Allen, New York Commissioner of Education (D)

U.S. District Court Decision: Held for Board of Education (P), finding state law unconstitutional

U.S. Court of Appeals Decision: Reversed, finding state law constitutional

U.S. Supreme Court Decision: Affirmed, upholding court of appeals decision

FACTS: New York enacted a law requiring local school authorities to loan textbooks to students attending private parochial schools. The express purpose of the law was the "furtherance of the educational opportunities available to the young." The New York Board of Education of Central School District No. 1 (P) brought an action against Allen (D), the New York Commissioner of Education. The Board (P) sought a declaration that the law violated the First Amendment's establishment clause separation of church and state. The U.S. District Court held the law tended to establish religion, in violation of the First Amendment. The court of appeals reversed, holding the law was neutral with respect to religion, as it benefited public and private school students equally. The U.S. Supreme Court granted the Board's (P) petition for review.

ISSUE: May a state permit school authorities to lend textbooks for use in parochial schools?

HOLDING AND DECISION: (White, J.) Yes. A state may permit school authorities to lend textbooks for use in parochial schools. A law will withstand establishment clause attack if it has a secular purpose and tends neither to advance nor hinder religion. The law in question meets this test. The law applies equally to religious and nonreligious school students. The recipient of the public benefits

here are the students, not churches or schools. Considering the extent to which sectarian schools provide secular education, this Court is not prepared to say that the processes of secular and religious training are so intertwined that benefiting the former at a religious school necessarily advances religion. Affirmed.

DISSENT: (Black, J.) The law here allows tax dollars to be used to advance religious purposes, in clear violation of the First Amendment.

COMMENT: In this case, the Court relied on *Everson v. Board of Education* (1947), which held that New Jersey could use tax revenues to pay bus fares to parochial schools as part of a program that also paid fares for students "attending public and other schools."[3] In his dissent, Justice Douglas warned of the possibility that in the future, parochial school authorities might select books that further sectarian/religious teachings. The law providing for the state-subsidized loan of secular textbooks to both public and private school students was held to be constitutional. The rationale was that the books were loaned as part of a general program for furthering the secular education of all students. The books were not, in fact, used to teach religion; therefore, the program did not establish a religion. Furthermore, the state aid went to parents and students rather than to the religious schools directly, another indication that it did not establish a religion.

Discussion Questions

1. What did the Court mean when it said that it "is not prepared to say that the processes of secular and religious training are so intertwined that benefiting the former at a religious school necessarily advances religion"?
2. Why is it important that the state aid went to students and parents?
3. What is meant by the concept of "child benefit" regarding constitutionality of state aid to religious schools?

BOARD OF EDUCATION OF KIRYAS JOEL VILLAGE SCHOOL DISTRICT V. LOUIS GRUMET ET AL. 512 U.S. 687 114 S. CT. 2481 (1994)

GENERAL RULE OF LAW: The establishment clause prohibits states and the federal government from passing laws that advance or hinder religion. The *Lemon* three-prong test remains the method of determining whether or not there has been an excessive entanglement of government and religion.

PROCEDURE SUMMARY:

Plaintiffs: Louis Grumet, et al. (including the Board of Education of Monroe-Woodbury Central School District and the Attorney General of New York) (P)

Defendant: Board of Education of Kiryas Joel Village School District (D)

State Supreme Court for Albany County Decision: Granted summary judgment for plaintiffs, finding that the statute at issue failed to meet each of the three prongs of the *Lemon* test

State Appellate Division Decision: Affirmed on the ground that the New York state law (Chapter 748) had the primary effect of advancing religion, in violation of both constitutions

U.S. Supreme Court Decision: Affirmed

FACTS: The Village of Kiryas Joel in Orange County, New York, is a religious enclave of the Satmar Hasidim, practitioners of a strict form of Judaism. The village was part of the Monroe-Woodbury Central School District until 1989, when a special state statute created a separate school district adhering to village lines, in order to serve this distinctive population.

The Satmar Hasidic sect is named for the town near the Hungarian and Romanian border where it was formed by Grand Rebbe Joel Teitelbaum. After World War II, the grand rebbe and most of his surviving followers moved to the Williamsburg section of Brooklyn, New York. In the mid-1970s, the Satmars purchased an undeveloped subdivision in the town of Monroe and formed the community that became the village of Kiryas Joel. The proposed boundaries of Kiryas Joel were drawn to include, and were restricted to, the 320 acres owned and inhabited entirely by Satmars. The village, incorporated in 1977, had a population of about 8,500.

The residents of Kiryas Joel are vigorously religious people who make few concessions to the modern world and who go to great lengths to avoid assimilation. They interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and English-language publications; and dress in distinctive ways that include head coverings and special garments for boys and modest dresses for girls. Children are educated in private religious schools. Most boys attend the United Talmudic Academy, where they receive a thorough grounding in the Torah and limited exposure to secular subjects. Most girls attend Bais Rochel, an affiliated school with a curriculum designed to prepare girls for their roles as wives and mothers.

These schools do not offer any distinctive services to handicapped children, who are entitled under state and federal law to special education services even when enrolled in private schools. Starting in 1984, the Monroe-Woodbury Central School District provided special services for the handicapped children of Kiryas Joel at an annex to Bais Rochel; one year later, however, the district ended this arrangement in response to *Aguilar v. Felton* (1985) and *School Dist. of Grand Rapids v. Ball* (1985).[4] Children from Kiryas Joel who needed special education (including the deaf, the mentally retarded, and others suffering from a range of physical, mental, or emotional disorders) had to attend public schools outside the village. Families of these children found this arrangement highly unsatisfactory.

By 1991, only one child from Kiryas Joel was attending Monroe-Woodbury's public schools. The village's other handicapped children either received privately funded special services or no services whatsoever. It was then that the New York legislature passed the statute at issue in this litigation, which

created within the boundaries of the Village of Kiryas Joel a separate school district that was to "have and enjoy all the powers and duties of a union-free school district." Governor Mario Cuomo recognized that the residents of the new school district were all members of the same religious sect, yet stated that the statute was a good faith effort to solve the unique problem associated with providing special education services to handicapped children in the village.

Lewis Grumet, the Monroe-Woodbury Central School District, and state's Attorney General filed suit in state court to challenge the state law as violating the First Amendment. The U.S. Supreme Court eventually held that the legislative action violated the Establishment Clause of the U.S. Constitution.

ISSUE: May a state create a separate school district permitting handicapped children in a religious community to receive state and federal financial assistance in their own schools rather than in their community's public schools?

HOLDING AND DECISION: (Souter, J.) No. The New York statute violates the establishment clause of the First Amendment, binding on the states through the Fourteenth Amendment. A state may not delegate its civic authority to a group chosen according to religious criteria. Authority over public schools belongs to the state and may not be delegated to a local school district created by the state in order to grant political control to a religious group. Because this unusual act is tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires governmental impartiality toward religion, it violates the prohibition against the government's establishment of religion.

The statute also fails the test of neutrality. It delegates power to an electorate defined by common religious beliefs and practices, a form of religious favoritism. For this reason, it crosses the line from a permissible accommodation of a religion to an impermissible establishment of a religion.

COMMENT: It is undisputed that those who negotiated the village boundaries under New York's general village incorporation statute drew them so as to exclude all but Satmars. Further, the New York legislature was well aware that the village remained exclusively Satmar in 1989, when it adopted Chapter 748, creating the special district. Interestingly, early in the development of public education in New York, the state rejected highly localized school districts in New York City when they were promoted as a way to allow separate schooling for Roman Catholic children.

This ruling does not foreclose providing special education services. There are several alternatives for providing bilingual and bicultural special education to Satmar children. Such services can be offered to village children through the Monroe-Woodbury Central School District. Since the Satmars do not claim that separatism is religiously mandated, their children may receive bilingual and bicultural instruction at a public school already run by the Monroe-Woodbury district, or Monroe-Woodbury can provide a separate program of bilingual and bicultural education at a neutral site near one of the village's parochial schools. The Court made it clear that local officials would not run afoul of the establishment clause so long as the handicapped program was administered in accordance with neutral principles that did not accord special treatment to Satmars.

Justices Scalia, Rehnquist, and Thomas dissented. In a scathing dissent, Scalia pointed out that groups of citizens who happen to share the same religious views are already invested with political power, that *Kiryas Joel* is a special case requiring special measures, and that it is improper to restrict the New York state legislature's ability and desire to accommodate a special situation. Scalia also indicated that

Lemon's three-prong test should be ignored (clearly, the *Lemon* test is under serious attack). He relied instead on *Larkin v. Grendel's Den Inc.* (1982) (upholding a Massachusetts statute that grants religious bodies veto power over applications for liquor licenses).[5]

Discussion Questions

1. Why did the state create a separate school district for this small group of highly religious Hasidic Jews?
2. How equitable is it to create a school district for students with special needs who attend a private or nonpublic school? Does creating a separate school district address the issue?
3. Should handicapped students at a private or nonpublic school receive public funds? Should the IDEIA funds follow the student?

COUNTY OF ALLEGHENY V. ACLU, GREATER PITTSBURGH CHAPTER 492 U.S. 573, 109 S. CT. 3086 (1989)

GENERAL RULE OF LAW: A state practice is permissible when it involves religion but does not primarily advance or inhibit religion.

PROCEDURE SUMMARY:

Plaintiff: American Civil Liberties Union (ACLU) (P)

Defendant: County of Allegheny (County) (D)

U.S. District Court Decision: Held for County (D), finding displays constitutional

U.S. Court of Appeals Decision: Reversed, holding practices violated the establishment clause

U.S. Supreme Court Decision: Reversed as to the constitutionality of the crèche; affirmed as to the menorah

FACTS: The County (D) set up two displays in or around public property. The first, a crèche depicting the Christian nativity scene with a banner reading "Glory to God in the Highest" in Latin, was placed on the main staircase in the County (D) courthouse. The second was an 18-foot-tall menorah placed outside County (D) buildings and next to a 45-foot-tall Christmas tree. The ACLU (D) filed suit to enjoin permanently both displays. It contended that the displays violated the establishment clause. The district court denied the injunction, finding the displays constitutional. The court of appeals reversed, holding that the displays were impermissible governmental endorsements of Christianity and Judaism. The U.S. Supreme Court granted review.

ISSUE: Is a state practice permissible when it involves religion but does not primarily advance or inhibit religion?

HOLDING AND DECISION: (Blackmun, J.) Yes. Under the establishment clause, a state practice that touches upon religion must not in its principal or primary effect advance or inhibit religion. This clause, at the very least, prohibits the government from appearing to take a side on a religious question or belief. The words contained in the banner atop the crèche display clearly endorsed a patently Christian message. Here, the reasonable observer would believe that the County (D) was endorsing a particular message because the display was in the most notable part of the courthouse and not near any other display or symbols. Additionally, nothing in the display itself detracted from the particular message. Though government may recognize Christmas as a cultural phenomenon, it may not observe it as a Christian holy day, as the crèche display at issue does. On the other hand, the menorah display was permissible. Displaying it outside public buildings alongside the Christmas tree did not endorse either Christianity or Judaism; rather, it simply recognized cultural diversity and a season that has attained secular status. Reversed and affirmed.

COMMENT: The first nativity scene case before the Court was *Lynch v. Donnelly* (1984).[6] There, the Court found the display permissible. In distinguishing *Allegheny* from *Lynch,* the Court placed particular weight on the fact that the display in *Allegheny*, unlike in *Lynch*, was in the most beautiful and prominent location in the courthouse and was not near other displays. Thus, it appears that so long as a religious display is but a part of a larger display celebrating the cultural diversity of a secular holiday season, it will be found constitutional.

Discussion Questions

1. Would members of a science club be permitted to erect a display of a Christmas tree, gifts, and decorative Christmas lights in a public school building? Why or why not?
2. Would members of a Fellowship of Christian Athletes group be permitted to erect the same display, along with a sign that read "Donated by the Fellowship of Christian Athletes?"
3. What effect does the *Allegheny* case have on a school band's performance of traditional religious songs at a Christmas concert?
4. Why does the Court allow one type of religious display when another religious display is held to be unconstitutional?

EPPERSON V. STATE OF ARKANSAS
393 U.S. 97, 89 S. CT. 266 (1968)

GENERAL RULE OF LAW: States may not forbid the teaching in public schools of theories, such as Darwinian evolution, which conflict with certain religions.

PROCEDURE SUMMARY:

Plaintiff: Epperson (P), a high school teacher

Defendants: State of Arkansas (D); Little Rock, Arkansas School District (D)

State Trial Court Decision: Held for Epperson (P), finding state law unconstitutional

State Supreme Court Decision: Reversed

U.S. Supreme Court Decision: Reversed (trial court decision reinstated)

FACTS: In 1928, Arkansas enacted an "anti-evolution" law that prohibited teaching Darwin's theory of evolution in its public schools and universities. Teachers who taught evolution could be convicted of a misdemeanor. There was no record of a prosecution in Arkansas under the statute. Despite the law, a high school in Little Rock, Arkansas, upon the advice of the biology faculty, adopted a textbook that described Darwin's theory. Susan Epperson (P) was then hired to teach biology. She wanted to use the textbook but was worried about being fired for using it, so she brought a constitutional challenge to the Arkansas "monkey law." The trial court held that the law interfered with the First Amendment right to freedom of speech, which included the freedoms to learn and to teach. The Arkansas Supreme Court, however, reversed and ruled that the law was constitutional without deciding whether the word "teaching," as used in the law, meant only explaining the theory of evolution as opposed to actually arguing that evolution was the only valid theory of human creation.

ISSUE: May states forbid the teaching in public schools of theories, such as Darwinian evolution, that conflict with certain religions?

HOLDING AND DECISION: (Fortas, J.) No. States may not forbid the teaching in public schools of theories, such as Darwinian evolution, that conflict with certain religions. The First Amendment protects freedom of speech and inquiry and prohibits states from promoting specific religions. Thus, states may not require that teaching and learning be tailored to the principles of any particular religious sect or dogma. Arkansas's "monkey law" exists solely because the theory of evolution contradicts the ideas of creation as set forth in the Bible's book of Genesis. But Arkansas cannot demand that Genesis be the exclusive source of doctrine as to the origin of humans; to do so violates the First Amendment. To limit science instruction to only an anti-evolution theory "hinders the quest for knowledge, restrict[s] the freedom to learn, and restrain[s] the freedom to teach." Therefore, Arkansas's anti-evolution statute is unconstitutional. Reversed.

COMMENT: The U.S. Supreme Court based its decision here on the First Amendment's prohibition of the state establishment of religion. Technically, the First Amendment alone does not directly apply to actions taken by the states, so the court also had to use the Fourteenth Amendment's due process clause to apply the First Amendment to the states. Here, the establishment clause was offended because the Arkansas anti-evolution statute was not neutral toward religion. Rather, it aided religions (such as Christianity) that accept the Bible as a guide to church doctrine and that believe that Genesis provides the only acceptable explanation for human creation.

Discussion Questions

1. The First Amendment makes two statements about religion. What are these guiding principles?
2. What would the court say if a teacher only taught Darwin's theory of evolution and refused to teach any other theories?
3. Why is this case important to the teaching of evolution in today's schools?

ILLINOIS EX REL. MCCOLLUM V. BOARD OF ED., S.D. 71, CHAMPAIGN COUNTY, ILL. 333 U.S. 203, 68 S. CT. 461 (1948)

GENERAL RULE OF LAW: A school may not permit the teaching of religious doctrine on public school premises during school hours.

PROCEDURE SUMMARY:

Plaintiff: McCollum (P), a taxpayer, resident, and parent of a public school student

Defendant: Board of Education of School District No. 71, Champaign County, Illinois (D)

State Trial Court Decision: Held in favor of Board of Education (D), upholding the state program

State Supreme Court Decision: Affirmed

U.S. Supreme Court Decision: Reversed

FACTS: The Board of Education of School District No. 71, Champaign County, Illinois (D), instituted a program whereby representatives of certain religious groups would be permitted to provide religious instruction, during school hours, on public school campuses. Attendance by students was voluntary. McCollum (P), an Illinois resident and parent of a public school student, brought an action in state court, seeking a declaration that this practice was a violation of the First Amendment's separation of church and state. The state trial court upheld the practice, and the state Supreme Court affirmed. The U.S. Supreme Court granted review.

ISSUE: May a school permit the teaching of religious doctrine on public school premises during school hours?

HOLDING AND DECISION: (Black, J.) No. A school may not permit the teaching of religious doctrine on public school premises during school hours. The First Amendment rests on the premises that both religion and government work best when left free from the other within their respective spheres. The program at issue here is, beyond all question, an example of the utilization of established and tax-supported public schools to aid religious groups in the spreading of their faith. This falls squarely within the First Amendment's prohibition of the state's using its resources to establish religion. Reversed.

COMMENT: The state's action offered sectarian groups "an invaluable aid in that it helped to provide pupils with their religious classes through use of the state's compulsory public school machinery," thus aiding one or more religions or preferring one over another. Thus, a program that permitted religious instruction during school time and excused public school students from their secular course work in order to attend the religious classes was declared unconstitutional, based on the First Amendment prohibition against state establishment of religion. The court found that allowing public school classrooms to be used for religious instruction as well as providing state support of religious class attendance (because of the state compulsory attendance law) was unconstitutional because it violated the establishment clause.

Discussion Questions

1. Why was the use of public school classrooms such a major concern?
2. What is meant by those who felt that if this statute had been supported it would give the "indicia" of state support to a religious group?
3. What might be a logical next step for those who want to provide religious instruction during school time?

LEE V. WEISMAN 112 S. CT. 2649 (1992)

GENERAL RULE OF LAW: The state may not invite clergy to perform invocation and benediction services at public secondary school graduation ceremonies.

PROCEDURE SUMMARY:

Plaintiff: Weisman (P), father of a public secondary school graduate

Defendant: Lee (D), a secondary school principal

U.S. District Court Decision: Held for Weisman (P), that the practice violated the establishment clause and should be permanently enjoined

U.S. Court of Appeals Decision: Affirmed

U.S. Supreme Court Decision: Affirmed

FACTS: The City of Providence permitted school principals to invite members of the clergy to perform invocations and benedictions at public school graduation ceremonies. Lee (D), a principal, invited a rabbi to perform such services at the graduation of Weisman's (P) daughter. Lee (D) provided the rabbi with a National Conference of Christians and Jews pamphlet of guidelines for composing public prayers. Lee (D) also advised the rabbi that the prayer must be nonsectarian. Weisman (P) brought

suit to permanently enjoin the practice, contending it violated the establishment clause. The district court held for Weisman (P) and issued a permanent injunction. The court of appeals affirmed. The U.S. Supreme Court granted review.

ISSUE: May the state invite clergy to perform invocation and benediction services at public secondary school graduation ceremonies?

HOLDING AND DECISION: (Kennedy, J.) No. Inviting clergy to perform invocation and benediction services at public secondary school graduation ceremonies violates the establishment clause. Lee's (D) decision that the service be performed and his choice of the religious participant are both attributable to the state and amount to a state decree that prayer occur. Lee's (D) choice of a rabbi clearly creates the potential for divisiveness in a school setting where students are pressured or coerced into being present and no real alternative to participation in the graduation ceremony exists. The state, through Lee's (D) distribution of the pamphlet to the rabbi, also directed and controlled the content of the prayer. This attempt to make the prayer nonsectarian failed. It is well established that the state may not provide for official prayers that purport not to prefer one religion over another. Such action essentially amounts to the creation of a state religion, which the establishment clause clearly forbids. Affirmed.

COMMENT: The Court places great reliance on the fact that the ceremony takes place in a school setting. It sees the danger of coercion and pressure upon children and adolescents as much greater than such danger with respect to adults. Thus, the Court is less willing to tolerate any state activity that creates such a danger in the school setting. Further compounding the problem for the Court is that in the graduation setting, the student is forced to either acquiesce or protest the activity because the option of not attending the ceremony is not a real, viable alternative. The absence of applying the tripartite *Lemon* provisions while applying a psychological coercion test is an example of the pressure being applied to the still-constitutional *Lemon* provisions.

Discussion Questions

1. Should principals of public middle and high schools be permitted to invite clergy to offer invocation and benediction prayers as part of the school's formal graduation ceremonies?
2. How does the practice of including invocations and benedictions, even so-called nonsectarian ones, in a public school graduation create an identification of government power with religious practices, endorse religion, and/or violate the establishment clause?
3. In what ways does First Amendment protection of speech differ from the protection afforded worship and conscience in religious matters?
4. How does the school district's supervision and control of a middle and/or high school graduation ceremony place public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction?

LEMON V. KURTZMAN; EARLY V. DICENSO
403 U.S. 602, 91 S. CT. 2105 (1971)

GENERAL RULE OF LAW: A state may not enact a system of assistance to parochial schools.

PROCEDURE SUMMARY:

Plaintiffs: Various individual taxpayers/citizens of Rhode Island and Pennsylvania

Defendants: Various state officials responsible for executing the educational assistance laws

U.S. District Court Decision: Action dismissed in Pennsylvania; motion to dismiss denied in Rhode Island

U.S. Court of Appeals Decision: Certiorari taken directly to Supreme Court; no court of appeals decision

U.S. Supreme Court Decision: Finding both programs unconstitutional, the court held for the plaintiffs

FACTS: Rhode Island enacted an educational assistance program aimed at aiding private education, including parochial schools. The law provided for supplemental teacher salaries. Pennsylvania enacted a statute with a similar goal. It consisted mainly of aiding schools in the purchase of supplies and textbooks in secular subjects. In the case of both states, the vast majority of schools subject to the programs were religious, with church-affiliated personnel often providing instruction. Several citizens of each state brought actions in U.S. district courts in their respective states, seeking a declaration that the programs violated the First Amendment's separation of church and state. The district court in Pennsylvania dismissed the action filed there; the court in Rhode Island held the law of that state unconstitutional. The U.S. Supreme Court granted a direct petition for certiorari.

ISSUE: May a state enact a system of assistance to parochial schools?

HOLDING AND DECISION: (Burger, C. J.) No. A state may not enact a system of assistance to parochial schools. The First Amendment not only prohibits the passing of a law establishing religion, but it also prohibits the passing of a law even respecting such establishment. Therefore, to not violate the First Amendment, a law must (1) have a secular purpose, (2) neither advance nor inhibit religion, and (3) not excessively entangle church and state. Respecting the Rhode Island law, it cannot be disputed that parochial schools constitute an integral part of the church's sweeping mission. A state cannot assume that a church-affiliated teacher will not indoctrinate pupils in his or her religious beliefs, even if the subject matter is secular. To supplement such a teacher's salary constitutes an unacceptable entanglement. As to the Pennsylvania law, the requirement that books and supplies be used for secular subjects necessarily implies surveillance and control. Such surveillance and control is precisely the kind of entanglement the First Amendment prohibits. In view of this, the programs must be held to violate the First Amendment. The Rhode Island ruling is affirmed; the Pennsylvania ruling is reversed.

COMMENT: The separation of church and state aspect of the First Amendment has always been one of the more problematic areas of constitutional law. On the one hand, a state cannot establish religion; on the other hand, it cannot abridge the right to worship. These two mandates are often at odds, and the Court has often had difficulty reconciling them. This particular case is one of the more important ones dealing with church and state. Prior to this case, there was very little interaction permitted between the government and parochial schools. The three-part test has been the standard for establishment clause decisions since 1971. The excessive entanglement test (*Lemon* test) states that laws must (1) be secular in purpose, (2) neither further nor impede religion, and (3) not result in a high degree of involvement between government and religious institutions. Though Pennsylvania and Rhode Island were found to be in violation of the establishment clause, the *Lemon* test opened the door to other types of government assistance to parochial schools. The *Lemon* test specifically describes how a law must be written in order to be constitutional. Therefore, any new programs of assistance could be written in a way that would comply with the *Lemon* test.

Discussion Questions

1. In *Lemon,* Pennsylvania and Rhode Island were found to be in violation of the establishment clause of the U.S. Constitution. What does the establishment clause say about government and religion?
2. Describe the three-part test established in *Lemon*.
3. How does the excessive entanglement test described in *Lemon* open the door for other types of government financial aid to parochial schools?

MITCHELL V. HELMS 530 U.S. 793 (2000)

GENERAL RULE OF LAW: A federal aid program does not violate the establishment clause if it determines eligibility for aid neutrally, allocates aid based on the private choices of the parents of schoolchildren, provides aid that has a permissible content, and does not define its recipients by reference to religion.

PROCEDURE SUMMARY:

Plaintiffs: Intervenors Guy and Jan Mitchell, along with parents of parochial school students (P)

Defendants: Mary Helms, mother of a public school student, along with other parents of public school students (D)

U.S. District Court Decision: 1990, Held for Helms, et al. (D); 1997, reversed and held for Mitchell, et al. (P)

U.S. Court of Appeals Decision: Reversed and held for Helms, et al. (D)

FACTS: Under Chapter 2 of the Education Consolidation and Improvement Act of 1981, federal funds are distributed to state (SEA) and local (LEA) educational agencies that, in turn, lend educational materials and equipment to both public and (nonprofit) private elementary and secondary schools. Chapter 2

provides that certain restrictions must be placed on the aid made available to private schools. Most important, the services, materials, and equipment provided to private schools must be "secular, neutral, and nonideological." The amount of Chapter 2 aid to be distributed to each private school is determined by the number of children enrolled in the school and must generally be equal to the amount distributed to the children in the public schools. Chapter 2 also requires that the aid supplement, and not supplant, the funds that are made available through nonfederal sources. Further, the private schools may not acquire control of the government funds or title to the borrowed items.

To acquire the materials and equipment, a private school submits an application to the LEA detailing the items the school needs and how these items will be used. If approved, the LEA purchases the requested items from that particular school's allocated funds and then lends them to the schoo1. Of the 46 private schools that received Chapter 2 aid in Jefferson Parish, Louisiana, 34 were religiously affiliated. The funds were used primarily for nonrecurring expenses, such as library books, computers, computer software, laboratory equipment, and cassette recordings.

Mary Helms, a parent of public school students in Jefferson Parish, filed suit in 1985 in the United States District Court for the Eastern District of Louisiana, alleging that Chapter 2, as applied in Jefferson Parish, violated the First Amendment's establishment clause. In 1990, the district court granted summary judgment in favor of Helms. Relying on the second part of the three-part test in *Lemon* v. *Kurtzman* (1971), the district court held that Chapter 2 violated the establishment clause because the program had the primary effect of advancing religion. The court found this effect was created because the materials and equipment loaned to the Catholic schools constituted direct aid and because the Catholic schools were "pervasively sectarian." Two years later, after the judge who made this ruling retired, a different judge reviewed the case and, based on intervening case law, reversed the decision. Then, in 1998, on appeal to the United States Court of Appeals for the Fifth Circuit, the district court's holding was reversed again. The United States Supreme Court granted certiorari.

ISSUE: Can government funds be used to provide educational and instructional materials to religious schools without violating the establishment clause of the First Amendment?

HOLDING AND DECISION: (Thomas, J.) Yes, federal aid programs that distribute funds to state and local educational agencies that, in turn, purchase educational and instructional materials and then lend these materials to local public and private schools may do so without violating the establishment clause. The establishment clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." The Court acknowledged that for over 50 years, it has struggled to apply these words to situations in which the government aids religious schools. The Court relied on the standards set out in *Lemon* and *Agostini v. Felton* to guide it through this latest evaluation of government aid to private schools. According to the Court's holding in *Lemon,* to be constitutionally valid, a statute must first have a secular purpose; second, its primary effect must not advance nor inhibit religion; and third, it must not create an excessive entanglement between government and religion. However, without overturning *Lemon,* the Court adjusted this standard in *Agostini,* a case the Court decided while the appeal for this case was pending in the Fifth Circuit. This modification resulted in an evaluation of only the first two prongs. Further, in *Agostini,* the Court assigned three revised criteria for determining the effect of a statute: whether the aid (1) resulted in governmental indoctrination, (2) defamed its recipients by reference to religion, or (3) created an excessive entanglement.

Because neither the respondents nor the Fifth Circuit questioned the district court's holding that Chapter 2 has a secular purpose, the Court needed only to address the effect prong. Further, since neither the respondents nor the Fifth Circuit challenged the district court's holding that Chapter 2, as applied by Jefferson Parish, did not cause excessive entanglement between government and religion, that criterion under the effect prong was not evaluated. Based on the facts of this particular case, the Court needed to focus only on the first two criteria: whether Chapter 2 aid resulted in religious indoctrination by the government and whether it defined its recipients by reference to religion.

The first inquiry is whether government aid to religious schools results in governmental indoctrination of religion. Here, the Court focused on neutrality as the guiding principle in distinguishing between indoctrination that is attributable to the state and indoctrination that is not. To safeguard against governmental indoctrination, the aid must be distributed to a broad range of groups without regard to their religion. Additionally, neutrality is assured when the government aid that is distributed to religious institutions "does so only as a result of the genuinely independent and private choices of individuals . . . as opposed to the unmediated will of government." For instance, in *Zobrest* v. *Catalina Foothills School District* (1993), the government program being challenged was one that distributed benefits neutrally to any child qualifying as "special needs" under the statute, without regard to the sectarian or nonsectarian nature of the school the child attended.[7] Because the statute assured them that the government aid would be provided no matter where the child went to school, the parents had the freedom to choose their child's school. Therefore, if the government aid followed the child to a sectarian school, it was because the parents chose to send their child there and not because of any government action.

The second inquiry was whether the recipients of the government aid were defined by reference to religion. Here, the Court focused on whether or not the criteria for allocating aid "create a financial incentive to undertake religious indoctrination." Relying on the neutrality principle and the private choices of individuals, the Court made clear that such an incentive is not present if the aid is allocated on a neutral basis, using secular criteria that neither favors nor disfavors religion, and is made available to all schools, whether secular or religious. The Court added that just because an aid program reduces the cost of securing a religious education does not mean that the program creates an incentive for the parents to choose such an education for their children.

The Court rejected the respondents' argument that aid to religious schools must not be divertible to religious use. The Court found that as long as the government aid is suitable for use in the public schools, it would be suitable in private schools. Furthermore, the issue is not about divertibility of aid, it is whether the aid itself has an impermissible content. Regardless, as the Court points out, Chapter 2 satisfies the criteria because it explicitly bars any aid that is not "secular, neutral, or nonideological."

Applying the relevant *Agostini* criteria to the facts of the case, the Court found that Chapter 2 does not result in governmental indoctrination because it determines aid based on neutral, secular criteria and on the private choices of parents of schoolchildren, and it does not provide aid with an impermissible content. Nor does Chapter 2 define its recipients by reference to religion. Aid under Chapter 2 is based on the per capita number of students in each school. Allocations to students in private schools must be equal to the expenditures made to children enrolled in the public schools. Therefore, no improper incentive is created. Chapter 2 makes a broad spectrum of schools eligible for its aid without regard to religion. Thus, Chapter 2 is neutral with regard to religion. Additionally, it is the students and their parents who, through their choice of schools, determine who receives Chapter 2 aid. Finally, Chapter 2 satisfies the first prong

in *Agostini* because it provides to religious schools aid that has a permissible content. The statute specifically requires that Chapter 2 aid be "secular, neutral, and nonideological." In conclusion, the Court found that Chapter 2 was not a law respecting an establishment of religion. Therefore, Jefferson Parish need not exclude religious schools from its Chapter 2 program.

DISSENT: (Souter, J.) The Dissent, too, criticizes the plurality's reliance on neutrality as a sole test of constitutionality and claims this reliance will all but eliminate any inquiry into a statute's effect. The Dissent believes that the substantive principle behind the scrutiny of government aid to religious institutions is that there is no public aid to religion or the support of religious missions of any institution. Chapter 2, as applied in Jefferson Parish, violated the establishment clause because the aid involved was divertible to religious indoctrination, and substantial evidence of actual diversion existed. Any use of public funds to promote religious doctrines violates the establishment clause.

COMMENTS: Establishment clause jurisprudence is an area in which the Court has been particularly active in recent years, as it continues to struggle to apply the words "Congress shall make no law respecting an establishment of religion" to situations in which government gives aid to religious schools. However, this case provides no bright line rule to apply to future situations. In fact, the case revealed how badly divided the Supreme Court is when it comes to government funding of religious institutions. In future school aid establishment clause challenges, no doubt there will be great debate over whether diversion and divertibility are proper issues in an establishment clause inquiry. Additionally, a majority of the Court—the concurring justices together with the dissenting justices—agreed that neutrality is not the sole determinant in analyzing whether federal aid may be distributed to religious institutions. Undoubtedly, however, the neutrality principle will take on increasing importance in any establishment clause challenges in the future, although not likely as the sole criteria in any analysis.

Discussion Questions

1. Imagine that the *Lemon* and *Agostini* tests do not exist. Create a test that courts can use to determine when public money can be diverted to private schools (religious or nonreligious).
2. How does this case give a clue to the changing attitude of the Court toward the *Lemon* tests?
3. Do you think that the *Lemon* provisions are going to be overturned or altered in the near future?

MUELLER V. ALLEN 463 U.S. 388, 103 S. CT. 3062 (1983)

GENERAL RULE OF LAW: A state may provide aid to parochial schools if provision promotes a secular legislative purpose, does not principally or primarily advance or inhibit religion, and does not foster excessive government entanglement with religion.

PROCEDURE SUMMARY:

Plaintiff: Mueller, a Minnesota taxpayer (P)

Defendant: Allen, Commissioner of the Minnesota Department of Revenue (D)

U.S. District Court Decision: Granted Allen's (D) motion for summary judgment, holding statute constitutional both facially and as applied

U.S. Court of Appeals Decision: Affirmed

U.S. Supreme Court Decision: Affirmed

FACTS: Minnesota enacted a statute that provided to parents a tax deduction for tuition, textbook, and transportation expenses incurred to send their children to elementary and secondary school. Some parents took the deduction for expenses incurred to send their children to parochial schools. Mueller (P) filed suit, alleging the statute violated the establishment clause by providing financial assistance to parochial institutions. The district court granted Allen's (D) motion for summary judgment and upheld the statute. The court of appeals affirmed. The U.S. Supreme Court granted review.

ISSUE: To be valid, must state aid provided to parochial schools promote a secular legislative purpose, not principally or primarily advance or inhibit religion, and not foster excessive government entanglement with religion?

HOLDING AND DECISION: (Rehnquist, J.) Yes. State aid provided to parochial schools must serve a secular legislative purpose and not principally or primarily advance, inhibit, or foster excessive government entanglement with religion. The state here clearly has a secular purpose. An educated populace is essential to a community. Assisting citizens in defraying the cost of educating that populace serves this purpose. The statute's primary effect is not the advancement of sectarian aims. The deduction is available to all parents, whether their children attend public, private, or sectarian schools, unlike the case of *Committee for Public Ed. v. Nyquist* (1973), where the tax relief was limited to parents of nonpublic schoolchildren, upon which Mueller (P) relies.[8] Thus, any effect from the statute is the result of the choices of private individuals and not of the state or parochial schools. Further, any unequal effect of the statute is balanced by the benefit of a reduced burden on the public school system gained by all. Finally, the state's determining which books are or are not secular does not result in excessive entanglement of church and state. Affirmed.

COMMENT: The holding in *Mueller* is narrow. The decision nevertheless shows a greater tolerance by the Court than in years past for programs that assist parents of parochial school students. It seems that as long as the benefits are at least theoretically available to parents of public school children, a tax relief program will be upheld, even though the primary beneficiaries are the parents of parochial school students. This theoretical possibility clearly distinguishes the *Mueller* opinion from *Nyquist,* in which a program benefiting only parents of nonpublic schoolchildren was struck down. The excessive entanglement test has three tenets to help decide whether a particular government action can withstand the establishment clause challenge. The three tenets of the establishment clause are (1) the action must have a nonreligious or secular purpose; (2) viewed in its totality, the action must not further or impede religious practice; and (3) the action must not result in a high degree of involvement between government and

religion. U. S. Supreme Court Justice Rehnquist affirmed in this case. He stated that an educated populace is essential to a community. Assisting citizens to defray the cost of educating their children serves the entire populace, as long as the tax deduction is available to all parents whether their children attend public or private school.

Discussion Questions

1. Should state aid provided to parochial schools promote a secular legislative purpose?
2. Should parents who choose to send their children to parochial schools be entitled to receive tax relief benefits?
3. Should a state enact a system for the primary purpose of providing assistance to parochial schoolchildren?

RESNICK V. EAST BRUNSWICK TOWNSHIP BOARD OF EDUCATION 77 N.J. 88, 389 A.2D 944 (1978)

GENERAL RULE OF LAW: A religious group's temporary use of public school facilities at a rental rate reflecting the costs incurred by the school for such use does not violate the establishment clause.

PROCEDURE SUMMARY:

Plaintiff: Resnick, a high school student (P)

Defendant: East Brunswick Township Board of Education (Board) (D)

State Superior Court Decision: Held for Resnick (P)

State Court of Appeal Decision: Affirmed

State Supreme Court Decision: Reversed

FACTS: The Board (D) allowed a number of local groups, including various religious groups, to use its school facilities during nonschool hours. These groups were charged a rental fee that approximated a portion of the cost of janitorial services for maintenance of the facilities. Resnick (P) filed suit to enjoin use of the facilities by the religious groups, alleging the use of the facilities by religious groups violated the establishment clause of both federal and state constitutions. The superior court agreed, holding such use unconstitutional. The state court of appeal affirmed. The Board (D) appealed.

ISSUE: Does a religious group's temporary use of public school facilities at a rental rate reflecting the costs incurred by the school violate the establishment clause?

HOLDING AND DECISION: (Pashman, J.) No. A religious group's temporary use of public school facilities at a rental rate reflecting the costs incurred by the school does not violate the establishment clause. The

processing by government employees of the applications submitted by religious groups does not amount to the kind of excessive entanglement of church and state prohibited by the establishment clause. Furthermore, when, as here, the establishment clause and the free exercise clause of the Constitution confront one another, the free exercise clause must take priority. The First Amendment requires strict neutrality with respect to religion. The policy at issue does not violate that neutrality. Reversed.

COMMENT: The rationale for the decision is that if one noncurriculum-related group or activity is allowed use of the facilities, it would violate the neutrality requirement not to allow another noncurriculum-related group or activity simply because it has religious affiliations. This rationale is affirmed by recent federal legislation enacted to guarantee equal access to student religious groups. For example, if co-curricular groups such as the "Key Club" are allowed to use the school facility before and after school hours, then a student religious group (e.g., a prayer group) would be entitled to equal access.

Discussion Questions

1. Is it now a common practice to allow religious groups to use school facilities? What about a church service in a school room?
2. Is the rental fee the major factor for the ruling allowing a church group to use a school facility?
3. Are there any circumstances in which the principal can donate the use of the facilities to a religious group without challenging the excessive entanglement of church and state as stated in the establishment clause?

ROSENBERGER ET AL. V. RECTOR AND VISITORS OF UNIVERSITY OF VIRGINIA ET AL. 515 U.S. 819, 115 S. CT. 2510 (1995)

GENERAL RULE OF LAW: A public entity may not discriminate based on the viewpoints of private persons whose speech it otherwise subsidizes.

PROCEDURE SUMMARY:

Plaintiff: Ronald Rosenberger, an undergraduate (P)

Defendants: Rector (D) and visitors of University of Virginia (D), et al.

U.S. District Court Decision: Granted summary judgment for the university

U.S. Court of Appeals Decision: Held that the university's denial of third-party payment constituted viewpoint discrimination, in violation of the free speech clause of the First Amendment, yet concluded that the discrimination was justified in order to comply with the establishment clause of the same amendment

FACTS: The University of Virginia (D), a state instrumentality, had a practice of authorizing payments from its student activities fund (SAF) to outside contractors to cover the printing costs of a variety of publications issued by university student groups (designated as contracted independent organizations or CIOs). Student activity funds (SAF) were derived from mandatory student fees and were intended to support a broad range of extracurricular student activities related to the university's educational purpose.

CIOs were required to include in their dealings with third parties and in all written materials a disclaimer stating that they were independent of the university and that the university was not responsible for them. The university withheld authorization for payments to a printer on behalf of the plaintiffs, a CIO known as Wide Awake Productions (WAP), solely because WAP's student newspaper, *Wide Awake: A Christian Perspective at the University of Virginia,* "primarily promoted or manifested a particular belief in or about a deity, or an ultimate reality" in contravention of the university's SAF guidelines.

The SAF guidelines recognize 11 categories of student groups that may seek payment of SAF funds to third-party contractors insofar as the specified groups bear some relation to the educational purpose of the university. One of these categories comprises student news, information, opinion, entertainment, communications, and media groups. The guidelines also specify, however, that the costs of certain activities of CIOs that are otherwise eligible for funding will not be reimbursed by the SAF. Student activities that are excluded from SAF support include "religious activities." A religious activity is defined as any activity that primarily promotes or manifests a particular belief in or about a deity or an ultimate reality.

WAP was formed by petitioner Ronald Rosenberger and other undergraduates in 1990 in order "to publish a magazine of philosophical and religious expression . . . [t]o provide a unifying focus for Christians of multicultural backgrounds." WAP acquired CIO status soon after it was organized. This was (and is) important because if WAP had been a religious organization, as defined by SAF guidelines, it would not have been accorded CIO status.

As defined by the guidelines, a religious organization is an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity. The university has never contended that WAP is a religious organization.

ISSUE: Does a university's refusal to authorize payment of the printing costs of a student group's publication solely on the basis of religious editorial viewpoint violate the group's rights to freedom of speech and press?

HOLDING AND DECISION: Yes. The guideline invoked to deny SAF support, both in its terms and as applied to these plaintiffs/petitioners, constitutes a denial of their right of free speech. It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.[9] The university's SAF guidelines violate the principles governing speech in limited public forums. In determining whether a state is acting within its power to preserve the limits it has set for such a forum so that the exclusion of a class of speech is legitimate, the Supreme Court has observed a distinction between content discrimination (i.e., discrimination against speech because of its substantive content or subject matter) that may be permissible if it preserves the limited forum's purposes, and viewpoint discrimination (i.e., discrimination based on the speaker's specific motivating ideology, opinion, or perspective) that is presumed impermissible when directed against speech otherwise within the forum's limitations. The most recent and most apposite case in this area is *Lamb's Chapel v. Center Moriches Union Free School Dist.* (1993),

in which the Supreme Court held that permitting school property to be used for the presentation of all views on an issue except those dealing with it from a religious standpoint constitutes prohibited viewpoint discrimination.[10] Here, as in that case, the state's actions are properly interpreted as unconstitutional viewpoint discrimination rather than permissible line-drawing based on content. By the very terms of the SAF prohibition, the university does not exclude religion as a subject matter, but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.

The denial of SAF support to the petitioners is not excused by the necessity of complying with the establishment clause. The governmental program at issue is neutral toward religion. Such neutrality is a significant factor in upholding programs in the face of establishment clause attacks, and the guarantee of neutrality is not offended where, as here, the government follows neutral criteria and evenhanded policies to extend benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.[11]

Furthermore, there was no suggestion that the university created the SAF program to advance religion or aid a religious cause. The SAF's purpose was to open a forum for speech and to support various student enterprises (including the publication of newspapers), in recognition of the diversity and creativity within the student population. The SAF guidelines had a separate classification for, and did not make third-party payments on behalf of, religious organizations. WAP did not seek a subsidy because of its Christian editorial viewpoint; rather, it sought funding under SAF guidelines as a student communications group. Neutrality was also apparent in the fact that the university took pains to disassociate itself from the private speech involved in this case. The program's neutrality distinguished the student fees here from a tax levied for the direct support of a church or group of churches, which would violate the establishment clause.

COMMENT: The university's attempt to escape the consequences of *Lamb's Chapel,* by urging that this case involved the provision of funds rather than access to facilities, was not supportable. Although the university may regulate the content of expression when it is itself the speaker, or when it enlists private entities to convey its own message, the university may not discriminate based on the viewpoint of private persons whose speech it subsidizes.[12] Its argument that the scarcity of public money could justify otherwise impermissible viewpoint discrimination among private speakers was simply wrong.

Vital First Amendment speech principles are at stake. The guideline at issue has a vast potential reach, as seen in its use of the term "promotes." Such term includes any writing advocating a philosophic position that rests upon a belief (or nonbelief) in a deity or ultimate reality. The term "manifests," which is also used, brings within the prohibition any writing resting upon a premise presupposing the existence (or nonexistence) of a deity or ultimate reality. It is not difficult to see that few renowned thinkers' writings would be accepted under these limitations, save perhaps for those whose writings disclaimed all connection to their ultimate philosophy.

Further, there is no potential conflict with the establishment clause because no direct monetary payments are made to sectarian institutions. No SAF funds flow into WAP's coffers. Further, a public institution does not run afoul of the establishment clause when it grants access to its facilities on a *religion-neutral* basis and to a wide spectrum of student groups, even if some of those groups might use the facilities for devotional exercises.[13] There is no difference between using funds to operate a facility to which students have access and paying a third-party contractor to operate the facility on its behalf.

Here, the university provides printing services to a broad spectrum of student newspapers. Imagine if the university attempted to avoid a constitutional violation by scrutinizing the content of all student speech to ensure that it contained no religious message. Such censorship would be far more inconsistent with the establishment clause's dictates than providing secular printing services on a religion-blind basis.

The university's denial of WAP's request for third-party payments in the present case is based upon viewpoint discrimination, not unlike the discrimination perpetrated by the school district authorities in *Lamb's Chapel* (which the Supreme Court ruled was invalid). Just as the *Lamb's Chapel* school district authorities pointed to the religious views of the group in question in support of their rationale for excluding the group's message, so, in this case, the university justified its denial of SAF funds to WAP on the ground that the contents of the Wide Awake Publication revealed an avowed religious perspective.

There would be a great danger to liberty if government were granted the power to examine publications to determine whether or not they are based on some ultimate idea. Another significant First Amendment concern pertains to the danger posed to free speech by the chilling of individual thought and expression. Such danger is especially real in the university setting, where any state action is viewed against a background and tradition of thought and experiment, in keeping with the definition of a university as a center of intellectual and philosophic traditions.

This case presented a conflict between two bedrock principles of constitutional law: that government should not discriminate against religious speech and that government should not act to advance religion. Before the Court was a line of previous Supreme Court cases that supported each position. The decision of the Court did not exhibit a preference for either of the two conflicting positions, given that the Court held that the financing of WAP's publication from SAF funds did not violate the establishment clause. This decision will certainly delight religious activists who believe that it may eliminate a significant constitutional impediment to government-subsidized vouchers for parochial school education. Additionally, it will cause concern among civil libertarians who fear that it may further erode the wall between church and state.

Discussion Questions

1. Does a university's refusal to authorize payment of the printing costs of a student group's publication solely on the basis of a religious editorial's viewpoint violate the group's right to freedom of speech and press?
2. What reason did the university give for refusing to pay the printing costs?
3. What is meant by content discrimination? Does it apply in this case?

SANTA FE INDEP. SCHOOL DISTRICT V. DOE 120 S. CT. 2266 (2000)

GENERAL RULE OF LAW: Student-led prayer prior to school football games violates the establishment clause of the U.S. Constitution because it is public speech, authorized by a government policy, taking place on government property at government-sponsored school-related events.

PROCEDURE SUMMARY:

Plaintiffs: Jane Doe, and students of Santa Fe Independent School District (P)

Defendant: Santa Fe Independent School District (D)

U.S. District Court Decision: Held for the students (P), that the school's policy of student-led prayer prior to school football games violated the establishment clause of the First Amendment. The court enjoined the school's policy until modifications were made

U.S. Court of Appeals Decision: Affirmed the lower court's ruling, but held that even with modification, the policy was unconstitutional

U.S. Supreme Court Decision: Affirmed

FACTS: Prior to 1995, a student elected as Santa Fe High School's student council chaplain delivered a prayer over the public address system before each home varsity football game. Mormon and Catholic students and alumni and their mothers (P) filed a suit challenging this practice and others under the establishment clause of the First Amendment. The district court entered an order modifying the policy to permit only nonsectarian, nonproselytizing prayer. The Fifth Circuit held that even as modified by the district court, the football prayer policy was invalid.

ISSUE: Does student-led prayer prior to school football games violate the establishment clause of the First Amendment?

HOLDING AND DECISION: (Stevens, J.) Yes. A school district's policy permitting student-led, student-initiated prayer at football games violates the establishment clause of the First Amendment. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way that establishes a state religion or religious faith, or tends to do so. In cases involving state participation in a religious activity, one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools. Regardless of whether one considers a sporting event an appropriate occasion for solemnity, the use of an invocation to foster such solemnity is impermissible when, in actuality, it constitutes prayer sponsored by the school. School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents that they are outsiders and not full members of the political community. It also sends an accompanying message to adherents that they are insiders and favored members of the political community. The delivery of such a message, over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer, is not properly characterized as private speech. Indeed, the common purpose of the religion clauses is to secure religious liberty. Thus, nothing in the U.S. Constitution as interpreted by the Supreme Court prohibits any public school student from voluntarily praying at any time before, during, or after the school day.

COMMENT: This case deals with the difficult issue of whether student-led prayer is an acceptable alternative. Proponents take the position that when it is a student-led religious activity, there is little, or no, government involvement and it thereby avoids the First Amendment concerns. This case took a different position, holding that student-led prayer prior to school football games violated the establishment clause of the U.S. Constitution because it is public speech, authorized by a government policy, taking place on government property at a government-sponsored school-related event. This case continues the contentious issue of dealing with prayer in schools and at school-related events.

Discussion Questions

1. Would an optional prayer ceremony before the game still violate the establishment clause of the First Amendment?
2. How would you handle a nonsectarian prayer if your school chose to initiate a student-led prayer before games?
3. Does the mere mention of God in a prayer violate the establishment clause of the First Amendment?
4. If the student-led prayer had been before or after school, rather than at a school-sponsored football game, would the result have been different?

SCHOOL DIST. OF ABINGTON TOWNSHIP V. SCHEMPP; MURRAY V. CURLETI 374 U.S. 203, 83 S. CT. 1560 (1963)

GENERAL RULE OF LAW: A public school may not begin its class day with readings from religious texts.

PROCEDURE SUMMARY:

Plaintiffs: Parents (P) of two children in Pennsylvania; parents and a child (P) in Maryland

Defendants: School administrators in Pennsylvania and Maryland (D)

State Trial Court Decisions: Judgment for Schempp (P), a parent in Pennsylvania; for Curleti (D), a school official in Maryland

State Appellate Court Decisions: Affirmed in both cases

U.S. Supreme Court Decisions: Affirmed as to the Pennsylvania action; reversed as to the Maryland action

FACTS: School districts in both Pennsylvania and Maryland had a similar practice of beginning each school day with a recitation of several verses from the Bible. These were read without comment. In Pennsylvania, Schempp (P), a parent of a child enrolled in school, brought an action to stop the practice, contending it violated the First Amendment. In Maryland, Murray (P), another such parent, brought a similar action. The Pennsylvania trial court held the practice unconstitutional; the Maryland trial court held to the contrary. The appellate courts in both states affirmed.

ISSUE: May a public school begin its class day with readings from religious texts?

HOLDING AND DECISION: (Clark, J.) No. A public school may not begin its class day with readings from religious texts. The First Amendment clearly prohibits state authorities from advancing religion. The place

of the Bible as an instrument of religion cannot be disputed. Therefore, to read passages from this or any other religious text to a captive audience amounts to the advancement of religion. The government is under a command to be strictly neutral with respect to religion, and the practices at issue here clearly are not. Affirmed as to the Schempp case; reversed as to Murray.

COMMENT: The Court advanced the following test to illustrate the effect of the statute: When the primary effect of an enactment advances or inhibits religion, the legislative enactment exceeds the scope of legislative power under the Constitution. Even when attendance is not compulsory, it is unconstitutional to promote Bible reading or the recitation of prayers on school grounds. The First Amendment's establishment clause (made applicable to the states by the Fourteenth Amendment) requires that the state remain neutral toward religion and forbids the state to "establish" a religion. The Pennsylvania law, which required a prayer at the beginning of the school day, was held to be an impermissible establishment of religion, whether or not students were required to participate.

Discussion Questions

1. Why doesn't allowing students not to participate satisfy the neutrality concern?
2. Do you think school districts allow Bible readings today?
3. Would you support a "moment of silence" at the beginning of the school day?

SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS V. BALL 473 U.S. 373 (1985)

GENERAL RULE OF LAW: State aid to nonpublic, religious schools violates the establishment clause of the First Amendment when it has the primary or principal effect of advancing a particular religion or religion generally, or when it unduly entangles government in religious matters.

PROCEDURE SUMMARY:

Plaintiffs: Ball (P), and other taxpayers (P)

Defendant: Grand Rapids School District (School District) (D)

U.S. District Court Decision: Held for plaintiffs

U.S. Court of Appeals Decision: Affirmed

U.S. Supreme Court Decision: Affirmed

FACTS: Grand Rapids School District (D) adopted two programs, the "Shared Time" and "Community Education" programs, providing classes to nonpublic school students that were held at nonpublic schools and funded by tax revenue. The programs were taught by public school teachers in classrooms that were leased in the nonpublic schools. The "Shared Time" program classes were offered during the school day, in order to supplement core curriculum courses. The "Community Education" program held voluntary classes

after regular school hours, some of which were also offered in the public schools. Forty of the 41 schools participating in the programs had religious affiliations. Six taxpayers (P) commenced suit against the School District (D) and state officials (D), claiming the programs violated the establishment clause of the First Amendment. The district court held in favor of the taxpayers (P), and issued an injunction prohibiting the School District (D) from further operating the programs. The court of appeals affirmed. The school district (D) appealed.

ISSUE: Does state aid to nonpublic, religious schools violate the establishment clause of the First Amendment when it has the primary or principal effect of advancing a particular religion or religion generally, or when it unduly entangles government in religious matters?

HOLDING AND DECISION: (Brennan, J.) Yes. State aid to nonpublic, religious schools violates the establishment clause of the First Amendment when it has the primary or principal effect of advancing a particular religion or religion generally, or when it unduly entangles government in religious matters. The establishment clause prohibits government sponsorship or financial support of, or active involvement in, religious activities. It also prohibits the passing of legislation benefiting a particular religion or religion in general, or the levying of taxes to support religious activities or institutions. In determining whether a violation of the establishment clause has occurred, the Court follows the three-part test set forth in *Lemon*. First, the challenged statute must have a secular purpose. Second, its principal or primary effect must neither advance nor inhibit religion. Third, the statute must not promote excessive entanglement between the government and religion. The first prong was satisfied here, as both the district court and court of appeals found that the purpose of the programs was secular. Next, the Court must determine whether the programs' primary or principal effect was the advancement or inhibition of religion. This requires an examination of the institutions in which the programs were offered. Forty of the 41 schools participating in the programs were religiously affiliated. Here, the Court found that the programs impermissibly advanced religion in several ways. First, there was a risk that the teachers may unintentionally advance particular religious beliefs at the public's expense. Moreover, the programs may symbolically link the state and religion, causing the children and the general public to perceive that the government endorses the particular religion operating the school. Last, the programs may directly promote religion by providing the religious institution with a subsidy for teaching its secular classes. Affirmed.

CONCURRENCE: (O'Connor, J.) The Shared Time program does not impermissibly advance religion and should be upheld. The fact that 13 of the Shared Time program instructors formerly were employed by parochial schools did not increase the risk that the program would be perceived as advancing religion at the public's expense. The Community Education program, however, impermissibly had the effect of advancing religion because the classes were taught mainly by full-time employees of the parochial schools to students who attended their regular classes, and they were operated under the parochial school's supervision.

DISSENT: (Rehnquist, J.) The record here did not demonstrate any evidence that the programs attempted religious inculcation of the students.

COMMENT: The Court has held that the state may not impose taxes for the purpose of supporting religious activities or institutions. Likewise, it has held that attempts to make payments from public funds

directly to religious educational institutions are unconstitutional. The Court has distinguished between two types of programs in which public money is utilized to fund secular activities that would otherwise be funded by the religious school itself. Where the government uses primarily secular means to accomplish a primarily secular goal, the aid granted is indirect and does not have the primary effect of advancing religion. In contrast, if the aid has the primary effect of directly and substantially advancing the religious enterprise, it is impermissible even if the government is acting for a secular purpose. While the mere possibility of subsidization does not render a program unconstitutional, the Court must determine whether, in the particular case, the effect of the subsidy is "direct and substantial." The programs in this case, which provided the religious institutions with teachers and instructional materials, were held to be the equivalent of a direct subsidy and thus had the impermissible effect of advancing religion in violation of the establishment clause.

Discussion Questions

1. What was the main reason that the Court failed to support this program?
2. How important is it that 40 of the 41 participating schools were religiously affiliated?
3. What is the significance of the fact that these programs were "subsidized"?

U.S. V. BD. OF EDUC. OF SCHOOL D. OF PHILADELPHIA 911 F.2D 882 (3RD CIR. 1990)

GENERAL RULE OF LAW: Preservation of an atmosphere of religious neutrality in the public school system is a compelling state interest justifying statutes prohibiting teachers from wearing religious garb while teaching.

PROCEDURE SUMMARY:

Plaintiff: United States of America (P)

Defendant: Board of Education for the School District of Philadelphia; Commonwealth of Pennsylvania (D)

U.S. District Court for the Western Dist. of Pennsylvania Decision: Judgment for the United States (P) and against school board, but for Commonwealth of Pennsylvania regarding the constitutionality of the Pennsylvania Garb Statute

U.S. Court of Appeals Decision: Reversed holding against school board and affirmed constitutionality of Garb Statute

FACTS: Alima Delores Reardon became a devout Muslim in 1982. She had been teaching as a substitute teacher in the Philadelphia School District since 1970. Upon embracing her religion, she followed the practice of covering her head and neck and wearing specific clothing. While teaching, she wore "a head scarf which covered her head, neck, and bosom, leaving her face visible, and a long loose dress which covered

her arms to her wrists." Near the end of 1984, on three separate occasions, she was told by school principals that pursuant to Pennsylvania Garb Statute, P.L. 282, she could not teach in religious clothing. Reardon was given the opportunity to return home to change, but she refused each time. Reardon filed charges of discrimination with the Equal Employment Opportunity Commission based on violations of Title VII of the Civil Rights Act of 1964.

ISSUE: May schools restrict teachers' right to wear religious apparel while performing their teaching duties?

DECISION AND HOLDING: Yes. While the Pennsylvania Garb Statue may have constituted a burden on Reardon's free exercise rights, when properly construed, the statute was actually upholding states' interests in preserving the appearance of religious neutrality in public schools. The school board was upholding this law and would have been in violation of the law had it not done so.

COMMENTS: The U.S. Court of Appeals reversed the lower court's judgment against the Board of Education while agreeing with the judgment in favor of the Commonwealth of Pennsylvania. One reason for this was that to take a contract position would impose an undue hardship, requiring the accommodation of Ms. Reardon and others similarly situated. Title VII of the Civil Rights Act of 1964 was also at issue because the state law failed to allow for a "reasonable accommodation." Title VII provides, in part, that an employer must "reasonably accommodate to an employee's . . . religious observances or practice without undue hardship on the conduct of the employer's business." The balancing of interests or equities called for an analysis of whether reasonably accommodating the employee's religious practice was stronger than the violation of the establishment clause of the First Amendment. In this case, the preservation of an atmosphere of religious neutrality in the public schools is a compelling state interest justifying statutes prohibiting teachers from wearing religious garb while teaching in the public schools.

Discussion Questions

1. In the balancing of the equities, the teacher's free exercise rights were not given as much consideration as preserving the state's appearance of neutrality. Do you agree with this position?
2. Would this decision require a principal to prevent a nun from teaching while wearing an informal habit?
3. May a Christian wear a cross around his or her neck?

ZORACH V. CLAUSON 343 U.S. 306, 72 S. CT. 679 (1952)

GENERAL RULE OF LAW: A city may permit schoolchildren to attend off-campus religious instruction during school hours.

PROCEDURE SUMMARY:

Plaintiffs: Zorach (P) and other New York taxpayer-residents (P)

Defendants: Clauson (D) and other city officials overseeing New York's educational system (D)

State Trial Court Decision: Held for Clauson (D)

State Court of Appeals Decision: Affirmed

U.S. Supreme Court Decision: Affirmed

FACTS: New York City instituted a program whereby schoolchildren in its public school system could, if their parents so chose, attend off-campus religious instruction during school hours. The administrative and financial aspects of the program were borne by the participating religious groups. Zorach (P), a citizen of New York, brought an action in state court against Clauson (D) and other education officials, seeking a declaration that the program violated the First Amendment's separation of church and state. Zorach (P) also argued that a "released time" program "coerces" students to attend the religious instruction because the public school helped monitor students released and because normal classroom activities halted. The trial court sustained the program, and the New York Court of Appeals affirmed. The U.S. Supreme Court granted review.

ISSUE: May a city permit schoolchildren to attend off-campus religious instruction during school hours?

HOLDING AND DECISION: (Douglas, J.) Yes. A city may permit schoolchildren to attend off-campus religious instruction during school hours. In no way can the program at issue be construed to violate the First Amendment's free exercise clause because no compulsion occurs. Students are free to attend or not attend, as they and their parents choose. Neither does the program violate the establishment clause because state resources are not utilized. Since neither clause has been violated, the program withstands First Amendment scrutiny. Affirmed.

COMMENT: The court relied heavily on the fact that the record did not contain any evidence of actual coercion on the part of teachers to implement the program. On the other hand, a dissenting justice suggested that operation of the program itself constituted pressure and coercion upon students and parents to persuade attendance. Taxpayers who challenged this released time religious instruction program, whereby public school students were permitted (with parental permission) to leave the school building during school hours in order to go to religious centers for instruction, claimed that this policy was, in essence, no different than the one declared unconstitutional in *McCollum v. Board of Education* (1948).[14] The court disagreed, given that this program required no state financial support. The released time policy was not counter to First Amendment prohibitions because it did not create or establish a religion, nor did it deny the free exercise of religion.

Discussion Questions

1. Why is coercion by teachers such a concern?
2. How would many teachers feel about a program that releases students from school during regular school hours (regardless of their religious concerns)?

3. Isn't there some support for religion merely because schools must provide monitoring services to children who exercise the release time opportunity?

NOTES

1. Aguilar v. Felton, 473 U.S. 402, 413 (1985), at 414.
2. Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481, 487 (1986).
3. Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504 (1947).
4. Aguilar v. Felton, 473 U.S. 402 (1985); School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985).
5. Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).
6. Lynch v. Donnelly, 465 U.S. 668, 104 S. Ct. 1355 (1984).
7. Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993).
8. Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).
9. See Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 46 (1983).
10. Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141 (1993).
11. Board of Ed. of Kiryas Joel v. Grumet, 114 S. Ct. 2481 (1994).
12. See Regan v. Taxation with Representation of Wash., 461 U.S. 540, 548 (1983).
13. See, e.g., Widmar v. Vincent, 454 U.S. 263 (1981).
14. McCollum v. Board of Education, 333 U.S. 203 (1948).

4

School Attendance

ALLEN V. CASPER
622 N.E.2D 367 (OHIO APP. 8 DIST. 1993)

GENERAL RULE OF LAW: Since contracts for private education have unique qualities, they are to be construed in a manner that leaves a school board broad discretion to meet its educational and doctrinal responsibilities.

PROCEDURE SUMMARY:

Plaintiffs: James and Jane Allen (P)

Defendants: L. J. Casper (D), statutory agent, Bethlehem Baptist Church, Michael Staub (D), and Reverend Edward Hlad (D)

Common Pleas Court Decision: Summary judgment granted to defendants

State Court of Appeals Decision: Affirmed

FACTS: The Bethlehem Christian School is a privately operated institution located in Orange Village, Ohio. Kristen Allen, age 8, and Chad Allen, age 10, the children of the appellant parents James and Jane Allen (P), were enrolled as students at this school. As part of the application process, the Allens were provided with a copy of the school's admission policies, stating, "The school reserves the right to refuse admittance, suspend, or expel any student who does not cooperate with policies established in this book. The high standard and biblical principals that our school holds apply to after school hours as well. If any parent or student refuses to follow those standards, then they place their privilege of attending B.C.S. in jeopardy." After a series of events involving Kristen Allen, a disagreement arose between the Allens (P) and the administration that could not be resolved. In a letter dated November 27, 1990, the Allens (P) were asked to voluntarily withdraw their children from the school and were told that if they failed to do so, the children would be dismissed on December 3, 1990. The parties do not dispute the following events that led up to the children's dismissal. In September 1990, Kristen informed her mother (P) that while she was playing on the playground at school, two male kindergarten students accosted her. The next day, Mrs. Allen (P) telephoned Michael Staub (D), the school administrator, informing him

of the incident. Mr. Staub (D) indicated that he would speak to the children concerning this matter, and that if such an incident occurred again, he would punish the children in accordance with the school's policy of administering corporal punishment. Mrs. Allen (P) did not ask for any further information regarding this incident. In October, Kristen told her mother (P) that one of the boys involved in the first incident accosted her again in a similar fashion. The Allens (P) went to the school again to meet with Mr. Staub (D) and suggested the boy should be physically punished. Staub (D) telephoned the boy's parents and arranged a meeting with them, and with their consent, Staub (D) paddled the boy. Mrs. Allen (P) demanded to know the outcome. Staub (D) assured her that everything was handled according to school policy. Unsatisfied with this response, the Allens (P) decided to meet with Rev. Hlad (D), though he had no responsibility for the day-to-day running of the school. Kristen told her mother (P) of another incident when a classmate spit on her as they were leaving the school. Mrs. Allen (P) confronted the teacher in charge of the classroom. According to the teacher, it was an accident because the boy had a dental malformation. Mrs. Allen (P), again unsatisfied with the response, demanded to speak with Mr. Staub, ultimately calling him "un-Christian" and accusing him of "working with the devil." Mr. Staub (D) contacted Rev. Hlad (D), explaining that no agreement was in sight as to matters involving Kristen. Therefore, Rev. Hlad (D) decided that a working relationship between the school administration and the Allens (P) was not possible and ultimately asked the Allens (P) to withdraw their children from the school and refunded their tuition.

ISSUE: Did the Bethlehem Christian Academy unconstitutionally expel the Allen children?

HOLDING AND DECISION: No. Contract law, not the law of due process, generally governs the issue of expulsion from a private school. In this situation, the Allens (P) failed to adduce any evidence of a violation of contractual right. They also failed to present any facts showing a clear abuse of discretion on the part of Bethlehem Christian School (D), Michael Staub (D), or Rev. Hlad (D). In fact, the evidence suggests that the defendants acted within their proper discretion in removing the Allen children. The record showed that Mr. Staub (D) responded promptly and fairly to Mrs. Allen's (P) requests and all parties involved. The Allens (P) understood that their children could be removed from the Bethlehem Christian School based upon their failure to comply with the admission policies and the terms of the school handbook.

COMMENT: Absent a clear abuse of discretion by private or public school authorities in the enforcement of policies and regulations, courts will not interfere in these matters. Here, the Court of Appeals held that school officials did not violate the parents' contractual rights and acted within their discretion when they expelled the two students based on the parents' failure to comply with admission policies and terms of the school handbook. Contract law governs in private school expulsion actions. Only if a substantial connection exists between a private school and the state or federal government would the legal concept of due process apply. Such a connection would create the "color of the state," requiring due process similar to those in the public sector.

Discussion Questions

1. Even though it's called contract law, doesn't the wording of these contracts often follow due process guidelines? Why or why not?
2. Does allowing contract law to supersede due process law in private education violate the equal protection clause of the Constitution? Why or why not?
3. What significance does the decision in this case have for private schools that are continually taken to court or for those who are in the process of establishing a private school?

BEESON V. KIOWA COUNTY SCHOOL DIST. 567 P.2D 801 (COLO. APP. 1977)

GENERAL RULE OF LAW: A school board policy that discriminates against those who seek the fundamental right to create a marriage violates the equal protection clause of the Fourteenth Amendment.

PROCEDURE SUMMARY:

Plaintiff: Beeson, a married high school student who is a minor (P)

Defendant: Kiowa County School District (Board) (D)

State Court Decision: Held in favor of Kiowa County School District (D)

State Court of Appeals Decision: Reversed and remanded

FACTS: Beeson (P) attended the local high school in Kiowa County. In her freshman year, she was a "star player" on the varsity basketball team. She (P) married the following summer and became a parent in her sophomore year. Beeson (P) did not seek a position on the basketball team until her senior year. She was allowed to practice with the team but was prohibited from interscholastic competition due to the Board's (D) policy, which prohibited married students from participating in extracurricular activities. Beeson (P) contended that the Board's (D) policy violated her right to marry, her fundamental right to obtain an education, and deprived her of any possibility of obtaining a college athletic scholarship. The Board (D) felt that the policy was just because it would discourage teenagers from marrying, encourage married students to fulfill their basic education and family obligations, discourage unwanted pregnancies, and protect the Board (D) from potential lawsuits involving injuries to pregnant women. The local district court found for the Board (D). Beeson (P) appealed.

ISSUE: Is a school board policy that prohibits married students from participating in extracurricular activities in violation of the equal protection clause of the Fourteenth Amendment?

HOLDING AND DECISION: Yes. A school board policy that prohibits married students from participating in extracurricular activities violates the equal protection clause of the Fourteenth Amendment. Such a policy is invalid because it does not provide for equal protection under the law. The state court of appeals reversed the holding of the lower court, finding that marriage was a fundamental right, and the reasons given by the school board in support of its policy did not establish a compelling state interest to justify a violation of a fundamental right.[1]

COMMENT: The right to marriage is a fundamental right, and there is no qualification between minors and those of legal age—all marriages are equal in the "eyes of the law." Exclusion from a school program, even if it is extracurricular, on the grounds of marital status is, therefore, unconstitutional. The school must provide equal access for all students, both married and unmarried. Interestingly, the courts did not recognize the extracurricular activities as a property or liberty interest to Beeson (P). This position is consistent with the findings in *Palmer v. Merluzzi,* (1989).[2] The school also argued that married students participating in

extracurricular activities tended to promote a lack of discipline among the other students and that they were not reliable because of their family responsibilities. This argument, even if provable, did not seem sufficient justification for discrimination against the fundamental right to marry.

Discussion Questions

1. Is this issue of a married student participating in extracurricular activities a problem in today's schools?
2. Why do you think that the court used a fundamental rights analysis as opposed to arguing that the right to marry was a property or a liberty interest?
3. What were the school board's arguments? What do you think of them?

MARTINEZ V. BYNUM 461 U.S. 321, 103 S. CT. 1838 (1983)

GENERAL RULE OF LAW: In order to meet a state's residency requirement for attendance in a district's public school system, a student must physically reside in the district and intend to live there indefinitely.

PROCEDURE SUMMARY:

Plaintiffs: Martinez, a student; his sister, acting as his legal custodian (P)

Defendant: Bynum, superintendent of McAllen, Texas, school district (D)

State Trial Court Decision: Held for Bynum

State Court of Appeals Decision: Affirmed

U.S. Supreme Court Decision: Affirmed

FACTS: Martinez (P) was an American citizen whose parents lived in Mexico but whose sister (P) lived in Texas. Martinez (P) went to live with his sister (P) for the sole reason of attending public school in the district in which she lived, McAllen. Martinez's sister (P) did not become his legal guardian but acted merely as his custodian. Texas law required McAllen to admit Martinez (P) to its school system tuition-free only if his parent or guardian resided in the school district; because his sister (P) was not his guardian, the state attempted to charge him tuition for attendance. Martinez (P) filed suit against the school district, represented by Bynum (D), the superintendent, in Texas state court, alleging that the statute violated the equal protection clause. Both the Texas trial court and court of appeals found against him, and he appealed to the United States Supreme Court.

ISSUE: In order to comply with a state's residency requirement for attendance in a district's public school system, must the student physically reside in the district and intend to live there indefinitely?

HOLDING AND DECISION: (Powell, J.) Yes. In order to meet a state's residency requirement for attendance in a particular district's public school system, a student must physically reside in the district and intend to live there indefinitely. This is called a "bona fide" residence requirement as opposed to a "durational" requirement, which requires a student to have actually resided in a district for a certain period of time before he is allowed to attend school tuition-free. Texas has a substantial state interest in ensuring that services provided for its residents are enjoyed only by its residents. If there were no residency requirements, planning and operation of the schools would suffer significantly. Here, Martinez (P) moved to the district only to attend school there; his parents remained his legal guardians, and he had no other reason for being in Texas other than to go to school. Therefore, he violated the residency statute. Affirmed.

COMMENT: A practical concern influenced the Supreme Court's decision in this case. It was plainly worried that a contrary decision would encourage an influx of illegal aliens who wanted to take advantage of free public education. It served to limit the broad scope of an earlier decision, *Plyer v. Doe* (1982), in which the Supreme Court had held that illegal aliens per se could not be denied access to public education in Texas.[3] State cases have held that school districts may investigate why a child's custodian has changed for the purpose of determining whether the child's parent is trying to do an "end run" around a school district's boundary requirements.[4] Furthermore, states have held that student athletic associations may deny participation to a student who appears to have changed residence merely to play for a different team.[5]

Discussion Questions

1. In light of the court's decision, should districts be required to educate children of illegal aliens?
2. Should children of illegal aliens have the same special educational benefits as children of citizens and does the equal protection clause apply?
3. Does residency in a district override human rights?

TRACHTMAN V. ANKER 563 F.2D 512 (2ND CIR. 1977); *CERT. DEN.*, 435 U.S. 925, 98 S. CT. 1491 (1978)

GENERAL RULE OF LAW: School officials may prohibit student speech without violating the First Amendment if they have reasonable cause to believe the speech will result in significant psychological harm to some of the school's students.

PROCEDURE SUMMARY:

Plaintiffs: Trachtman, a high school senior and editor of the school newspaper, and his father, a child psychologist (P)

Defendant: Anker, chancellor of New York City Public Schools (D)

U.S. District Court Decision: Held for Trachtman (P)

U.S. Court of Appeals Decision: Reversed

FACTS: Trachtman (P) was a senior at Stuyvesant High in Manhattan and editor of the Stuyvesant High school newspaper. His father was a child psychologist at New York University. Together they prepared a questionnaire to be distributed randomly among Stuyvesant students and to be answered confidentially. This questionnaire delved into the sexual knowledge, behavior, and attitudes of Stuyvesant students and addressed such issues as premarital sex, masturbation, and homosexuality. The results would be published in the school newspaper. Stuyvesant's principal prohibited distribution of the questionnaire because he reasonably believed some students would suffer psychological harm from filling it out. The Trachtmans (P) sued the school and school district, represented by Anker (D), the chancellor, in federal court, alleging that the ban infringed the Trachtmans' (P) First Amendment rights. The district court held that distribution could constitutionally be denied only if the school could prove a strong possibility of psychological harm; it further held that such harm had been proved with regard to 13- and 14-year-olds, but not with regard to older children. Therefore, the questionnaire could be distributed to juniors and seniors, as long as support counseling was available. Trachtman (P) and Anker (D) appealed.

ISSUE: May school officials prohibit student speech without violating the First Amendment if they have reasonable cause to believe the speech will result in significant psychological harm to some of the school's students?

HOLDING AND DECISION: (Lumbard, C. J.) Yes. School officials may prohibit student speech without violating the First Amendment if they have reasonable cause to believe that the speech will result in significant psychological harm to some of the school's students. Such authorities are sufficiently experienced and knowledgeable about these matters, which have been entrusted to them by the community, and although they bear the burden for showing a rational basis for decisions to prohibit otherwise protected speech, they do not have to wait until actual harm occurs before prohibiting potentially harmful speech. Here, students in all grades might be psychologically unprepared for the sensitive issues Trachtman's (P) questionnaire raises, and Stuyvesant officials acted reasonably in preventing its distribution. Reversed.

COMMENT: Some schools have addressed the problem raised in this case by establishing Human Subjects Review committees. Outside (or internal) researchers who desire to test, evaluate, or question students must clear their research proposals with the committee, which consists of a panel of educators and psychologists who have studied the effects of particular types of information on adolescents. However, it should be noted that this case promoted a strong dissent from Circuit Judge Mansfield, who noted that the questionnaire had not been shown to raise a danger of disruption—the traditional type of "substantive evil" that had justified a prior restraint on speech. He also persuasively observed that students at Stuyvesant were just as likely to be disturbed by the publication of sexually oriented surveys in newspapers of wide circulation, such as the *New York Times,* the distribution of which Stuyvesant High officials had no control over. It should also be noted that at trial in the federal district court, even Trachtman's (P) father, the child psychologist at NYU who was also a co-plaintiff with his son, conceded that there was some possibility of psychological harm to Stuyvesant students from distribution of the survey.

Discussion Questions

1. Did the school limit the Tractmans' freedom of speech guaranteed by the First Amendment? Why was the school allowed to do this?
2. Who has the power to censor in a school, and when is it justified to exercise that power?
3. What ramifications does this case exert on future cases dealing with a student's right to freedom of speech?

WARREN V. NATIONAL ASSN. OF SECONDARY SCH. PRINCIPALS 375 F. SUPP. 1043 (1974)

GENERAL RULE OF LAW: Due process requirements of the Fourteenth Amendment mandate, at a minimum, that the defendant be afforded an opportunity to be heard before a fair and impartial tribunal composed of neutral and detached persons.

PROCEDURE SUMMARY:

Plaintiffs: Weldon Robert Warren (P), a senior in high school and member of the National Honor Society, and his parents (P).

Defendants: Principal Gardner (D) and faculty council members of the National Honor Society (D)

U.S. District Court Decision: A permanent injunction is granted in favor of plaintiff

FACTS: Weldon (P), a senior at Taboka High School, was a member of the National Honor Society, salutatorian of the senior class, and quarterback of the high school football team. One evening, Weldon (P) and several classmates went to Pizza Hut where one of the defendants, Kitchens (D), observed Weldon (P) order and consume an alcoholic beverage. The principal, Gardner (D), and the football coach were informed. There was no rule of conduct shown that states that a National Honor Society member is not permitted to drink. The four-member faculty council of the National Honor Society, which consisted of three faculty members and the school principal, did not give Weldon (P) notice of the hearing at which his dismissal from the society was to be considered, nor did it provide him with written notice of the charges against him, inform him that he could present witnesses on his behalf, or tell him that he was entitled to representation by an attorney. He was subsequently dismissed from the society. Weldon (P) and his parents (P) commenced suit, claiming a violation of Weldon's (P) Fourteenth Amendment rights under 42 U.S.C. § 1983. The court imposed a temporary restraining order prohibiting the council from taking further action with respect to Weldon's (P) dismissal.

ISSUE: Do the due process requirements of the Fourteenth Amendment mandate, at a minimum, that the defendant be afforded an opportunity to be heard before a fair and impartial tribunal composed of neutral and detached persons?

HOLDING AND DECISION: (Woodward, J.) Yes. Due process requirements of the Fourteenth Amendment mandate, at a minimum, that the defendant be afforded an opportunity to be heard before a fair and impartial

tribunal composed of neutral and detached persons. School disciplinary proceedings are not bound to the same due process requirements as are the courts. First, it must be determined whether the faculty council was acting under "color of state law," thereby permitting Weldon (P) to state a cause of action under Section 1983. Because the actions of the faculty council in the present case were "materially entwined" with the operation of a public school system, they constituted state action for purposes of Section 1983. Next, it must be determined whether the council afforded Weldon (P) procedural due process. An essential element of due process is the opportunity to be heard before a fair and impartial tribunal composed of neutral and detached persons. Here, the council failed to possess the requisite neutrality. Kitchens (D), who served both as the accusatory witness and as a judge in the proceedings, was clearly not an unbiased judge. Furthermore, the council did not follow the procedural rules provided in the National Honor Society constitution. An organization may establish its own procedural rules so long as they provide the constitutional minimum and the organization's own rules provide added safeguards. Here, Weldon (P) was denied both his rights under the federal Constitution and those afforded him by the constitution of the National Honor Society. Last, it must be determined whether Weldon (P) was deprived of his Fourteenth Amendment rights to "life, liberty, or property." The injury to Weldon's (P) reputation and integrity constituted a deprivation of his liberty rights under the Constitution. A permanent injunction is entered requiring all defendants to remove from Weldon's (P) record any mention of his dismissal from the National Honor Society.

COMMENT: The council (D) deprived Weldon (P) not only of his Fourteenth Amendment due process rights, but also of his rights under the constitution of the National Honor Society. The society's constitution had conflicting rules as to the procedure for dismissal of a member. The constitution provided that dismissal was governed by the faculty or the faculty council, to be composed of four faculty members and the school principal. It also provided that dismissal was to be accomplished by majority vote of the faculty, upon recommendation by the faculty council. Here, the faculty council consisted of only three faculty members and the principal. Moreover, Weldon's (P) dismissal was never subjected to a vote of the entire school faculty.

Discussion Questions

1. Why is the requisite neutrality vital in this case?
2. How do the National Honor Society's rules and the school's application of those rules conflict with basic due process?
3. How does due process equate with the Fourteenth Amendment rights in this case?

NOTES

1. Loving v. Virginia, 388 U.S. 1 (1942).
2. Palmer v. Merluzzi, 868 F.2d 90 (3rd Cir. 1989).
3. Plyer v. Doe, 457 U.S. 202, 102 S. Ct. 2382 (1982).
4. Matter of Curry, 113 Mich. App. 821, 318 N.W.2d 567 (1982).
5. Pennsylvania Interscholastic Athletic Assn. v. Greater Johnstown School Dist., 76 Pa. Cmwlth. 65, 463 A.2d 1198 (1983).

5

Student Conduct and Discipline

BISHOP V. COLAW
450 F.2D 1069 (8TH CIR. 1971)

GENERAL RULE OF LAW: A public high school dress code regulating male students' hair length and style is invalid and unenforceable, unless it is necessary to accomplish the school's institutional mission.

PROCEDURE SUMMARY:

Plaintiffs: Stephen Bishop, a high school student, and his parents (P)

Defendants: Colaw, a physical education teacher (D), school administration (D), and other teachers of the school (D)

U.S. District Court Decision: Held in favor of defendants

U.S. Court of Appeals Decision: Reversed and remanded

FACTS: St. Charles High School administration (D) adopted a dress code in the 1969–1970 school year, which included hair length regulations. The hair length regulations prohibited students from wearing their hair below their collar and required their eyebrows and ears to be visible. Sideburns were not permitted to be worn below the ear lobe. In September, Colaw (D), a physical education teacher, objected to Bishop's (P) hairstyle because it did not conform with the school's regulations. Bishop's (P) hair was trimmed in accordance with the rules. In November, Colaw (D) again objected to Bishop's (P) hair length, and Bishop (P) was again required to trim his hair. In January, a math teacher objected to Bishop's (P) hair length, and it was trimmed. In February, however, Bishop (P) and his parents (P) refused to comply with further demands for Bishop (P) to trim his hair. Bishop (P) was suspended. He (P) and his parents (P) commenced suit against the teachers (D) and school administration (D). The district court held in favor of the school (D) and the Bishops (P) appealed.

ISSUE: Is a public high school dress code regulating male students' hair length and style invalid and unenforceable unless it is necessary to accomplish the school's institutional mission?

HOLDING AND DECISION: (Bright, J.) Yes. A public high school dress code regulating male students' hair length and style is invalid and unenforceable unless it is necessary to accomplish the school's institutional mission. Bishop (P) possessed a constitutionally protected right to control his personal appearance while attending public high school. The right to control one's person is an additional right entitled to protection under the due process clause of the Fourteenth Amendment. That right is not absolute, however. The court must weigh the individual's interest in personal freedom against the competing interests asserted. Here, the court must consider the necessity of infringing upon Bishop's (P) right to govern his appearance against St. Charles's interest in accomplishing its educational mission. School administrators (D) believed that long hair was a disruption to the educational process. Testimony was presented that the male students with long hair tended to be more disruptive, that long hair created a sanitation problem, that the long hair created a safety problem in certain classes, and that students with longer hair received poorer grades. Moreover, the school (D) contended that without the regulations, the school would be divided into two factions, which would interfere with the school's operation. The record lacked evidence that the hair regulations were necessary to prevent disruptions at the high school. Furthermore, the behavioral problems existed even though all the other students were in compliance with the hair length regulation. The school (D) erroneously presumed that such disruptions would occur in the absence of the hair regulations, without any evidence to sustain that presumption. The school (D) failed to show a rational relationship between the regulation and the justifications asserted or that the problems could not be solved through less restrictive means. Reversed and remanded.

CONCURRENCE: (Aldrich, J.) School hair length policies seem to reflect the administration's dislike for long hair. There is no evidence that hair length relates to a student's obedience or performance or that shortening the length of a student's hair will remove his or her undesirable traits.

CONCURRENCE: (Lay, J.) The state's regulation of an individual's personal liberty to control his appearance presents a justiciable issue. Furthermore, there is no rational relationship between an individual's hair length and his achievement.

COMMENT: In the 1970s, the federal courts were confronted with cases challenging the validity of grooming regulations such as the one here. While the courts generally held that the hair length regulations were invalid and unconstitutional, they disagreed as to the classification and origin of the underlying interest; however, they recognized the existence of rights, such as the right to control one's appearance, other than those expressly stated in the Constitution.

Discussion Questions

1. With all the law cases involving school dress codes and the resulting confusion created by varying decisions by different judges at all levels, should lawmakers step in to help resolve this issue? Why or why not?
2. What significance do decisions like the one in this case have for school dress codes and their enforcement?
3. When a precedent can't be agreed upon by any one court or several courts, how can a school system develop a dress code that can prevent litigation problems?

C. J. V. SCHOOL BOARD OF BROWARD COUNTY 438 SO.2D 87 (1983)

GENERAL RULE OF LAW: A school rule that requires a student's expulsion must be narrowly construed.

PROCEDURE SUMMARY:

Plaintiff: C. J., a 13-year-old high school student (P)

Defendant: School Board of Broward County, Florida (School Board) (D)

State Court of Appeals Decision: Held for C. J. (P), on direct appeal to the court

FACTS: A 13-year-old girl, C. J. (P), received a commemorative pocket knife from her father as a present to give to her boyfriend. C. J. (P) had a friend who wanted to see the knife before she moved away from town, so C. J. (P) brought the knife to the bus stop. Unfortunately, the bus came before C. J. (P) could bring the knife back home. Because she did not want to miss school, she brought the knife with her. The knife was still wrapped and enclosed in a gift box. At school, C. J. (P) was using the girls' bathroom when some of her friends were caught smoking. C. J.'s (P) purse was also checked and the knife found. Broward County's School Board (D) had promulgated a rule requiring automatic expulsion for possession of a weapon on campus. Thus, C. J. (P) was barred from returning to high school for one year. C. J. (P) appealed her expulsion by the School Board (D) directly to the Florida Court of Appeals.

ISSUE: Must a school rule that requires a student's expulsion be narrowly construed?

HOLDING AND DECISION: (Glickenstein, J.) Yes. A school rule that requires a student's expulsion must be narrowly construed. A sentence of banishment from the local educational system is an extreme penalty. Therefore, school boards must be careful in imposing this disciplinary action so that only prohibited conduct is punished, dotting the "i's" and crossing the "t's." Here, the School Board (D) did not meet this high standard. The knife remained wrapped at school and was difficult to open, and it was designed as a keepsake, not a weapon. The school rule, on the other hand, was implemented to protect against weapons. Thus, C. J. did not violate the narrowly defined spirit of the rule. Reversed.

COMMENT: Here, the rule promulgated by the school was not, in itself, unconstitutional. Rather, because the sanction was severe, the court found that the rule had been unconstitutionally applied. In fact, the school board's policy is really not very controversial given the existence on most states' law books of criminal statutes against possession of weapons. However, it remains an interesting application of the rule that often arises in cases involving searches of student lockers (i.e., that due process requires analyzing both the student's reasonable expectation of "liberty" and his or her property right in a public school). When the penalty is severe, the protection provided a plaintiff/student should be heightened. Expulsion is the most severe penalty that a school board can issue. Therefore, the protection from arbitrary and unfair enforcement must be maximized. In this situation, the school policy is constitutional. The violation was in the rule's application.

Discussion Questions

1. If the court agreed with the validity of the rule, why did the court rule against the Broward County School Board?
2. How would you rewrite the rule of automatic expulsion for a student carrying a weapon on campus to make it narrowly construed?
3. What disciplinary action would you apply instead of expulsion?

DAVENPORT V. RANDOLPH COUNTY BD. OF ED. 730 F.2D 1395 (1984)

GENERAL RULE OF LAW: Grooming regulations in a high school setting are constitutionally valid.

PROCEDURE SUMMARY:

Plaintiffs: Jonathon Davenport (P) and Lazar O'Neal (P), two African American high school students

Defendant: Randolph County Board of Education (Board of Education) (D)

U.S. District Court Decision: Dismissed

U.S. Court of Appeals Decision: Affirmed

FACTS: Davenport (P) and O'Neal (P), two African American high school students, were prohibited from participating in the school's athletics program unless they complied with the coach's "clean shaven" policy. The "clean shaven" policy prohibited students participating in athletics from wearing beards, mustaches extending below the comers of their mouths, or sideburns extending below their earlobes. Davenport (P) was suspended from the basketball team and both students (P) were prohibited from participating on the football team because of their refusal to abide by the grooming policy. Both students' fathers supported their sons' decision not to shave because they had experienced skin problems from shaving. The Board of Education (D) first upheld the students' (P) decisions not to shave and later reversed that holding. The students (P) commenced suit under 42 U.S.C. § 1983 and the Fourteenth Amendment, seeking a declaratory judgment and an injunction prohibiting the Board of Education (D) from refusing to allow the students (P) to participate in the high school's athletics program. The district court dismissed. The students (P) appealed.

ISSUE: Are grooming regulations in a high school setting constitutionally valid?

HOLDING AND DECISION: (Kravitch, J.) Yes. Grooming regulations in a high school setting are constitutionally valid. The students claimed the "clean shaven" policy was unconstitutional because it was arbitrary and unreasonable to require 14- and 15-year-olds to shave in order to participate in high school athletics. Such grooming policies, however, have been upheld as a reasonable means of furthering a school's

interests in "teaching hygiene, instilling discipline, asserting authority, and compelling uniformity." Here the policy was found to have been adopted with the objective of presenting the school in the most favorable light. The district court also found no evidence of discriminatory motivation in enacting the policy. The students (P) also contended that the policy deprived them of property without due process of law because their ineligibility for athletics reduced their chances of receiving athletics scholarships to college. Courts have held that the privilege of participating in interscholastic activities is not entitled to due process protection. The "clean shaven" policy was within the Board of Education's (D) authority to regulate grooming. The students (P) failed to demonstrate unique circumstances rendering enforcement of the policy arbitrary or unreasonable. Affirmed.

COMMENT: The students (P) attempted to demonstrate the grooming policy was arbitrary and unreasonable as applied to them because shaving would cause them skin problems. While the district court recognized that African Americans are prone to skin problems from shaving, no evidence was offered to show that these two students (P), who were African American, would suffer in particular from such a condition. Although the per se rule of constitutional validity does not apply if a grooming policy is arbitrarily or discriminatorily applied, in the absence of medical evidence, the court in this case declined to hold whether enforcement of the policy in this context was a violation of the students' (P) constitutional rights.

Discussion Questions

1. If medical records were used to confirm the boys' skin problems caused by shaving, would the court rule that the policy was a violation of their constitutional rights?
2. Would length of hair and other grooming issues be considered using the same analysis?
3. What kind of grooming regulations are in effect for girls? Could this be a form of discrimination?

EISNER V. STAMFORD BOARD OF EDUCATION 440 F.2D 803 (2ND CIR. 1971)

GENERAL RULE OF LAW: Schools do not violate the First Amendment rights of students by requiring prior approval of distribution of a student publication on school grounds, as long as the period of review is brief and the procedure for approval is clearly specified.

PROCEDURE SUMMARY:

Plaintiffs: Eisner (P) and other Connecticut Rippowam high school students (P)

Defendants: Stamford, Connecticut Board of Education (D) and Rippowam High School administrators and officials (D)

U.S. District Court Decision: Held for Eisner (P)

U.S. Court of Appeals Decision: Affirmed in part, reversed in part, and remanded

FACTS: Connecticut high school students, including Eisner (P), mimeographed an independent newspaper that they wanted to distribute on campus. However, the school administration had adopted a policy that required prior approval of distribution, but the policy did not specify the amount of time review would take or to whom the newspaper should be submitted for review. Eisner (P) and the other students sued the Stamford Board of Education (D) and Rippowam High School officials (D) in federal court, alleging that the policy violated their free speech rights. The district court agreed with the students and issued an injunction prohibiting the high school from enforcing the policy. Stamford Board of Education (D) and the Rippowam High officials (D) appealed.

ISSUE: Do schools violate the First Amendment rights of their students by requiring prior approval of distribution of student publications on school grounds, so long as the period of review is brief and the procedure for approval is clearly specified?

HOLDING AND DECISION: (Kaufman, C. J.) No. Schools do not violate the First Amendment rights of their students by requiring prior approval of distribution on school grounds of a student publication, but they must keep the amount of time for review brief and must specify the procedure for submission. Further, schools may constitutionally prohibit distribution of material that, in their judgment, will interfere with the proper and orderly operation and discipline of the school or will cause violence or disorder or will constitute an invasion of the rights of others. They should, however, specify the types of disruptions and distractions and the degree that would justify censorship. Here, the Stamford Board of Education (D) policy does not penalize the students for not obtaining prior approval; if it did, its vagueness as to the time for, and process of, review would invalidate it completely. However, it nevertheless should specify the process of submission in detail. Affirmed in part, reversed in part, and remanded.

COMMENT: It is important to distinguish between a school newspaper published as part of the school curriculum, such as a journalism class requirement, and a newspaper published without school support. The first category of publication is subject to the legitimate prior restraint of the teacher's right to set class content, whereas the second category is subject only to the constitutionally permissible restraints outlined in this case. The reason the court here required further specificity in the Stamford Board of Education (D) policy was the potential "chilling effect" an ambiguous policy would have on student speech; if students didn't know how long it would take to get their flier out to fellow students, or which teacher would have final say over whether the flier got out at all, they might not exercise the initiative to prepare the flier in the first place.

Discussion Questions

1. To what extent and under what circumstances would a board of education intend to permit school authorities to suppress criticism of their (the board's or school's) policies and practices?
2. What amount of time would be fitting and appropriate for an expeditious review of students' written work before it is distributed to other students?
3. What exactly is meant by the word "distributing" when used in the board policy?

GOETZ V. ANSELL
477 F.2D 636 (2ND CIR. 1973)

GENERAL RULE OF LAW: The state may not compel students to participate in the pledge of allegiance by requiring them either to say it or to stand while it is being said.

PROCEDURE SUMMARY:

Plaintiff: Goetz, a senior high school honor student and class president (P)

Defendant: Ansell, president of North Colonie School District Board of Education (D)

U.S. District Court Decision: Held for Ansell (D)

U.S. Court of Appeals Decision: Reversed

FACTS: Goetz (P), a senior high school honor student and president of his class, refused to participate in the pledge of allegiance. The president of the school board, Ansell (D), gave Goetz (P) the option of either leaving the classroom or standing silently during the recitation of the pledge. Goetz (P), contending that he had a First Amendment right to stay quietly seated, sued Ansell (D) in federal district court, alleging that Ansell (D) was violating his right of free speech under the First Amendment. The district court did not reach the merits of Goetz's (P) case, preferring to dismiss it because Goetz (P) had not gone first to the board of education for a hearing or to the New York Commissioner of Education. Goetz (P) appealed this dismissal to the Second Circuit Court of Appeals and the appellate court allowed a review on the merits of the issue.

ISSUE: May the state compel students to participate in the pledge of allegiance by requiring them either to say it or to stand while it is being said?

HOLDING AND DECISION: (Feinberg, J.) No. A state may not, consistent with the First Amendment of the Constitution, compel a student to stand during recitation of the pledge of allegiance or make the student utter its words. Standing is part of the pledge as much as saying it and is a gesture of acceptance and respect. Thus, boards of education must allow silent, nondisruptive expressions of belief, such as sitting down. Nor can boards of education compel students to leave the classroom while the pledge is being said, as this could be interpreted by other students as punishment for nonparticipation and could subject the student to reproach and contempt among his classmates. Goetz (P), by sitting silently during the pledge, was legitimately asserting his First Amendment rights, and Ansell (D) had no basis for asking him to leave the room or stand during its recitation.

COMMENT: In reaching this decision, the Second Circuit heavily emphasized that Goetz's (P) refusal to stand did not disrupt or interfere with the rights of other students to say the pledge. Obviously, if Goetz (P) had been disruptive, Ansell's (D) command to leave the room would have rested on stronger ground because Goetz (P) would then be interfering with the First Amendment freedoms of others. Although not addressed in this decision, Goetz's (P) claim had a legitimate basis in another aspect of the First Amendment: the right to free exercise of religion. Because the pledge explicitly refers to "one nation under

God," Ansell's (D) directive that Goetz (P) stand could have also signaled acquiescence in belief in a deity or supernatural being.

Discussion Questions

1. Why would Goetz's leaving the room not have resolved the issued from the plaintiff's perspective?
2. If the case had been argued using freedom of religion rather than speech, would the decision have been different?
3. Why is Goetz's request to sit silently during the pledge considered a legitimate exercise of free speech?

GUZICK V. DREBUS
431 F.2D 594 (6TH CIR. 1970)

GENERAL RULE OF LAW: A school may constitutionally adopt a policy that prohibits students from wearing items that bear a message unrelated to school activities, but only if that policy applies to all types of noneducational speech without singling out any particular message and if the school has a history of disruption caused by the wearing of such items.

PROCEDURE SUMMARY:

Plaintiff: Guzick, a high school student (P)

Defendant: Drebus, principal of Shaw High in East Cleveland, Ohio (D)

U.S. District Court Decision: Held for Drebus (D)

U.S. Court of Appeals Decision: Affirmed

FACTS: Guzick (P), a student at Shaw High School in East Cleveland, Ohio, wore a button that advertised a future demonstration in Chicago against the Vietnam War. Drebus (D), the school principal, called Guzick (P) into his office and requested that he remove the button before returning to class. Drebus (D) cited a long-standing school policy prohibiting wearing any items that communicated a message unrelated to school activities, such as football games, plays, and so on. This rule had its origin in the days when fraternities "rushed" high schools and rivalries caused fights, but during the 1960s, the rule gained new vitality as a way of forbidding "Black Power" or white supremacist messages, which—in a school that had been recently integrated—were considered incendiary. Guzick (P) refused to remove his button and was suspended indefinitely. Guzick (P), through his father, filed suit in federal district court against Drebus (D) and Shaw High on First Amendment grounds. The court dismissed Guzick's (P) complaint, and he appealed.

ISSUE: May a school constitutionally adopt a policy that prohibits students from wearing items that bear messages unrelated to school activities?

HOLDING AND DECISION: (O'Sullivan, J.) Yes. A school may, consistent with the First Amendment, adopt a policy that prohibits wearing items that bear messages unrelated to school activities. However, such a policy passes constitutional muster only when it applies to all types of noneducational speech without singling out any particular message and only when the school has suffered a history of disruption caused by the wearing of such items. Here, Shaw High School has had a history of racial conflict, and the policy applies to all types of scarves, buttons, badges, and other apparel that bear any message unrelated to classroom or extracurricular activities at school. Because the button worn by Guzick (P) had no relevance to what was being considered or taught at Shaw High, it had no place in the classroom. Affirmed.

COMMENT: The court here was careful to distinguish this case from the famous case of *Tinker v. Des Moines Independent School District* (1969), in which a ban against the wearing of black arm bands in protest of the Vietnam War was held to violate students' First Amendment rights.[1] In *Tinker,* unlike here, the school had previously allowed the wearing of buttons relating to national political campaigns and had even allowed the wearing of Nazi symbols. Thus, it had an implied, if not explicit, policy of allowing clothing with messages unrelated to course content or extracurricular endeavors, and its policy against the black arm bands had a "chilling effect" of singling out a particular political message. It must be noted, however, that the court's position here that buttons such as that worn by Guzick (P) have "no relevance to what is being considered or taught" in the classroom is somewhat illogical, given that school—even at the high school level and particularly in classes such as civics or history—attempts to promote and develop critical thinking and discussion.

Discussion Questions

1. How does the *Guzick v. Drebus* case differ from the *Tinker v. Des Moines* case?
2. If schools are supposed to promote and develop individuals who can think for themselves and learn ideas from others, why are they trying to prohibit students from wearing items that communicate messages?
3. Should the ban on wearing items that communicate a message unrelated to school activities be a policy for all schools?

INGRAHAM V. WRIGHT 430 U.S. 651, 97 S. CT. 1401 (1977)

GENERAL RULE OF LAW: The disciplinary use of corporal punishment in public schools is not barred by the cruel and unusual punishment clause of the Eighth Amendment.

PROCEDURE SUMMARY:

Plaintiffs: Ingraham and other parents of children in Dade County, Florida, public school system (P)

Defendant: Wright, principal of Drew High School, Dade County (D)

U.S. District Court Decision: Held for Wright (D)

U.S. Court of Appeals Decision: Affirmed

U.S. Supreme Court Decision: Affirmed

FACTS: Children enrolled in Drew High School in Dade County, Florida, were subjected to paddling or corporal punishment as a means of maintaining student discipline. In a class action suit filed in federal district court, Ingraham (P) and other parents alleged that paddling violated the students' Eighth Amendment right to be free from cruel and unusual punishment and violated due process. The district court found that the paddling in Dade County schools was not particularly severe and that Florida's common law actions for battery were sufficient to protect the children against excessive force. Its dismissal of Ingraham's (P) action was affirmed by the court of appeals, and Ingraham (P) appealed to the U.S. Supreme Court.

ISSUE: Is the disciplinary use of corporal punishment in public schools barred by the "cruel and unusual punishment" clause of the Eighth Amendment?

HOLDING AND DECISION: (Powell, J.) No. The Eighth Amendment's prohibition against "cruel and unusual punishment" does not apply to school paddling. The Eighth Amendment, which also prohibits excessive fines and bail, was designed to protect those charged with crimes and was intended to limit the discretion of law enforcement agencies in inflicting bodily injury. Public schools are relatively open and subject to scrutiny, and traditional common law remedies are available to those subjected to excessive force. These afford adequate protection to children who might be disciplined through paddling. Further, the risk of violation of children's substantive rights is low enough that prospective procedural safeguards are unnecessary; thus, paddling does not offend the children's due process rights. Affirmed.

COMMENT: Justice White, in a dissenting opinion, would have extended the Eighth Amendment's ban on inhumane punishment to corporal punishment. He also would have accorded children greater due process rights, such as a discussion in advance, perhaps informally, between the student and disciplinarian concerning the reasons for and against paddling. Justice White noted quite persuasively that corporal punishment, once inflicted, is final and irreparable; precautions such as an informal "hearing" are a small burden given this reality. Some states, such as Pennsylvania, found Justice White's argument convincing and limited or prohibited paddling. Today's growing concern with child abuse must also be considered. In a corporal punishment situation, it is entirely likely that a child abuse charge will be filed (in those states where child abuse is not a specific crime, a specific criminal charge would be substituted). Even more likely would be an action through an area human services division that would take prompt investigatory action, regardless of the criminal nature of the activity.

Discussion Questions

1. Did the actions of the defendant school district violate the cruel and unusual punishment clause of the Eighth Amendment? If so, how? If not, why not?
2. Do school officials have the right to inflict corporal punishment? If so, when is it justifiable to use it?
3. Absent the Eighth Amendment claim, what recourse do parents have if they believe that their child is receiving excessive corporal punishment?

MASSIE V. HENRY
455 F.2D 779 (4TH CIR. 1972)

GENERAL RULE OF LAW: The constitutional right of students under the due process clause "to be secure in one's person" allows students to be free to govern their personal appearance.

PROCEDURE SUMMARY:

Plaintiff: Massie, a male high school student with long hair (P)

Defendant: Henry, Chairman of the Tuscola County, North Carolina School Board (D)

U.S. District Court Decision: Held for Henry (D)

U.S. Court of Appeals Decision: Reversed

FACTS: A faculty-parent committee of the Tuscola County, North Carolina School Board adopted a "guideline" that students at Tuscola High were required to conform to certain hair and sideburn lengths. This "guideline" was adopted as a rule by the school principal, on grounds of school safety and prevention of disruption. The only reason given for safety was a welding instructor's opinion that sparks might catch the "hippie" students' hair on fire. The only reason given for disruption was that some short-haired students had teased or had a fist-fight with the long-haired students. Massie (P), one such long-haired student, sued Henry (D), the chairman of the school board, for invasion of his constitutional right to govern his personal appearance as guaranteed by the due process clause. The federal district court dismissed Massie's (P) claim, as well as his request for an injunction preventing enforcement of the rule against long hair. Massie (P) appealed to the Fourth Circuit Court of Appeals.

ISSUE: Does the constitutional right of students under the due process clause "to be secure in one's person" allow them to be free to govern their personal appearance?

HOLDING AND DECISION: (Winter, C. J.) Yes. The constitutional right of students under the due process clause "to be secure in one's person" allows them the right to be free to govern their personal appearance. Although such personal freedoms are not absolute and may yield when they intrude on the freedom of others, a school, in defending rules that restrict the way a person may govern his or her appearance, must prove that they are necessary to establish discipline or to assure safety. Here, Massie (P) could have worn a hairnet or protective cap in shop to ward off errant sparks from Bunsen burners. Further, the fact that one or two long-haired students had been beaten up by one or two short-haired students does not prove that the long hair itself was the cause of the disputes. Reversed.

COMMENT: The court here discounted evidence of fights between students with differing hair lengths largely because it is illogical to punish one group of students (those with long hair) for the failure of another group (those with short hair) to exert self-control and to refrain from violence. Although cases in the First, Seventh, and Eighth Courts of Appeal reach the same decision as the Fourth here, the Fifth, Sixth, Ninth, and Tenth Circuit Courts have reached contrary results. These latter courts have focused primarily on the argument that the right to select the length of one's hair is too insubstantial to warrant federal court consideration.[2]

Typically, when there is such a wide gulf between the courts of appeal, the U.S. Supreme Court has granted certiorari to resolve the discrepancy, but this has not been the case in these "hair length" cases.

Discussion Questions

1. Does the due process clause allow students to be free in the selection of their personal appearance?
2. Do school boards have the right to require that students conform to their guidelines in regard to personal appearance?
3. What relevance does the *Massie* decision have for school boards when writing dress code policy?

TATE V. BD. OF ED. OF JONESBORO, ARK. SPECIAL EDUCATION DISTRICT 453 F.2D 975 (8TH CIR. 1972)

GENERAL RULE OF LAW: School officials may enforce reasonable regulations to prevent disorderly or disruptive conduct during school sessions, even if those regulations infringe First Amendment rights of the students.

PROCEDURE SUMMARY:

Plaintiffs: Tate and others, parents of two suspended students (P)

Defendant: Jonesboro, Arkansas Special School District Board of Education (D)

U.S. District Court Decision: Held for Jonesboro Board of Education (D); dismissed complaint for lack of federal question

U.S. Court of Appeals Decision: Affirmed

FACTS: At Jonesboro High in Arkansas, the Civil War song "Dixie" was played during pep rallies. After some students asserted that "Dixie" was racially offensive, school officials took it off the rally program but restored it after other students and parents said they missed it and a schoolwide vote came out in favor of hearing it. At the next rally after the vote, Jonesboro High officials warned the dissenting students that "Dixie" would be played and that they could attend a separate function in the school auditorium. Some dissenters elected to do so, but approximately 25 others went to the principle rally and walked out in protest when the band played "Dixie." The school suspended these students for five days but then reduced the suspension to three days and allowed them to make up schoolwork missed so that their grades would not suffer. The students rejected an opportunity to meet with the principal to discuss their conduct. Tate (P) and others, parents of two suspended students, sued the Jonesboro Board of Education (D) in federal court, alleging that their children had a First Amendment right to walk out of a rally in protest of a racially offensive song. The court dismissed the complaint, and Tate (P) appealed to the Eighth Circuit.

ISSUE: May school officials enforce reasonable regulations to prevent disorderly or disruptive conduct during school sessions, even if those regulations infringe the First Amendment rights of the students?

HOLDING AND DECISION: (Mehaffy, C. J.) Yes. School officials may enforce reasonable regulations to prevent disorderly or disruptive conduct during school sessions even if those regulations infringe the First Amendment rights of the students. In order to further the goals of education, school administrators must quell student unrest, and they have inherent authority to maintain order. Here, the students' walkout during the playing of "Dixie" was not symbolic action protected by the First Amendment; only "pure speech"—"aggressive action or group demonstrations"—is protected by the First Amendment. Further, there is nothing inherently offensive or racist about the song "Dixie," given its history of use in both the North and South and its having been composed by a Northerner. Finally, Jonesboro (D) school officials accorded their suspended students due process by giving them an opportunity for an informal hearing and to make up missed schoolwork. Affirmed.

COMMENT: Paradoxically, the court here (in other sections of its opinion) praises the Jonesboro School District (D) for previous successes in integration yet ignores the segregational effect of playing "Dixie" at rallies; students who protested the rendition of "Dixie" (who were largely African American) were relegated to a separate convocation in the school auditorium. Further, the court slants its lengthy and gratuitous history of the composition and performance of "Dixie" in such a way as to ignore its obvious political symbolism as the military anthem of the Confederate soldiers. The students' walkout, which was done quietly, truly then could be considered a form of political expression and was not designed to be disruptive. Although the school had tried to create other options, these options were largely unpalatable because they were reminiscent of previous "separate but equal" accommodations. Although courts often strain to reach the delicate balance between students' free speech rights and a school's interest in order and discipline, here the court's emphasis on prevention of disruption seems largely a smoke screen for a more insidious rationale.

Discussion Questions

1. Can a school enforce reasonable regulations to prevent disorderly or disruptive conduct during school sessions, even though such regulations infringe on the First Amendment rights of students?
2. Is a peaceful, quiet walkout protected by the free speech clause?
3. To what extent are a student's civil rights protected in a school setting?

TIBBS V. BD. OF ED. OF THE TOWNSHIP OF FRANKLIN 276 A.2D 165 (NJ SUPER. CT. 1971)

GENERAL RULE OF LAW: Witnesses must be identified in person or via cross-examination to satisfy the accused's due process rights, despite the witness's fear of retaliation.

PROCEDURE SUMMARY:

Plaintiffs: Tibbs, a high school student, et al. (P)

Defendant: Board of Education of the Township of Franklin (School Board) (D)

State Superior Court, Appellate Division Decision: Held for plaintiff and directed for re-admittance of appellants

FACTS: On October 7, 1970, two sisters who attended Franklin High School were assaulted on their way home by a group consisting of all or mostly girls. The two sisters reported to their school's guidance office that they were pushed, struck with sticks, kicked, and had their possessions, such as a pair of glasses, stolen or broken. Both girls sustained minor injuries. The sisters, although able to recount what had happened to them, were either unable or afraid to give the names of their attackers. However, a number of student witnesses volunteered statements identifying the attackers to school authorities. These witnesses were assured that they would not be identified. The assailants were called in for an interview and generally denied any participation. Nonetheless, after the informal hearings, 5 of the 10 students had their suspensions lifted, while the other 5, including Tibbs (P), were expelled. Tibbs's lawyer argued that the expulsion must be reversed due to the school's failure to identify the witnesses to his client and have them come forth for testimony and cross-examination. Hence, Tibbs' attorney refused to supply any defensive testimony for his client. The School Board (D) voted Tibbs (P) guilty and upheld the suspension.

ISSUE: Can expulsions of high school students based on physical assault charges upon other students be set aside when witnesses do not appear at the hearing to testify against the expelled students?

HOLDING AND DECISION: Yes. Due to the failure of the School Board (D) to produce the necessary witnesses to the assault for testimony and cross-examination, the expulsion must be reversed.

COMMENT: Over the past century, the development of the law concerning appropriate procedures in school and college student disciplinary proceedings has been uneven. Originally, due process was not recognized in school discipline cases. The concept of in loco parentis provided school administrators with protection in secondary school situations. Over time, the court has moved from this position to requiring the provision of due process. Nevertheless, the cases have been split. Several cases have been in support of the accused, stating that at the least, the statements of witnesses must be accompanied by names and signatures so that each can be appropriately identified and addressed if necessary. This meets the minimal due process requirement. Whether witnesses must be available for cross-examination could be overlooked if at least names are provided. However, other cases have come down that held the administrators have a right to deny such identification as appropriate, to not "undermine [the] entire disciplinary machinery of the school system."[3] The main conflict herein is whether the witnesses, fearful of retaliation, have the right to withhold their names, or whether the accused has the right to have witnesses named for the purposes of the record, reliability, and cross-examination.

Discussion Questions

1. Do you agree with the court's ruling? Why or why not?
2. What are the potential problems and benefits for school administrators in such cases?
3. Do you think that anonymity would cause students to come forward more readily?
4. Do you think anonymity could increase the number of falsified stories?

VERNONIA SCHOOL DISTRICT V. ACTON
515 U.S. 646 (1995)

GENERAL RULE OF LAW: The Fourth Amendment does not protect students from all subjective expectations of privacy and/or suspicionless student searches if they wish to participate in the school's interscholastic athletic program.

PROCEDURE SUMMARY:

Plaintiff: James Acton, a student at Vernonia School District High School (P)

Defendant: Vernonia School District (D)

U.S. District Court Decision: Held that in order to participate in interscholastic athletic programs, the student is required to submit to a physical exam and a drug test. The drug test can be part of this process without a violation of the student's constitutional rights

U.S. Court of Appeals Decision: Affirmed

U.S. Supreme Court Decision: Affirmed

FACTS: James Acton (P) signed up to play football. He was denied participation in the sport due to the fact that his parents refused to sign the participation consent form. Vernonia schools had a board requirement that in order to participate in school interscholastic athletic programs, students had to submit to random, suspicionless urinalysis testing for amphetamines, cocaine, and marijuana, or be excluded from participation in those activities. Vernonia teachers and administrators had observed a sharp increase in drug use, and students had begun to speak out about their attraction to the drug culture, and to boast about it, and student referrals in Vernonia schools had more than doubled in just 3–4 years. The district court found that athletes were the leaders in the drug culture. At trial, expert testimony established the deleterious effects of drugs on memory, motivation, reaction, judgment, coordination, and performance, thus making a case for a need for drug testing among student athletes. The court also stated that the athlete's expectations of privacy are different than that of the general student population, in that he agrees to submit to a physical in order to participate in sports. Further, a student's Fourth Amendment rights are different in public schools than elsewhere, and a "reasonableness" inquiry cannot disregard the school's custodial and tutelary responsibility for children.

The U.S. Supreme Court upheld the lower court's decision that the school district's policy was not a violation of the athletes' Fourth Amendment rights, which prohibits unreasonable searches and seizures.

ISSUE: Does a school district policy to perform suspicionless student searches (i.e., random drug tests) before a student can participate in interscholastic activities violate a student's Fourth Amendment protection from unreasonable searches and seizures?

HOLDING AND DECISION: (Scalia, J.) No. The Supreme Court upheld a school requirement that in order to participate in interscholastic athletic programs students must submit to random, suspicionless urinalysis

testing for amphetamines, cocaine, and marijuana, or be excluded from participation in those activities. The Court focused on the differences between athletes and all others who make up the general student population. The facts of the case showed that athletes were more prone to using illicit drugs than other students were. The risk that drug-using athletes, moreover, could seriously injure themselves during competition raises the stakes for that group of students. Furthermore, the Court pointed out that athletes have already given up most of their privacy in order to participate in sports, where communal undressing and open showers are the norm and an expectation of all those who participate in interscholastic activities.

The Court reaffirmed that "such special" needs exist in the public school context, and this justifies suspicionless drug testing of students. The court considered the following: (1) the nature of the privacy interest at issue; (2) the character of the intrusion involved; and (3) the nature and immediacy of the government concern at issue, and the efficacy of the chosen means for meeting it. Balancing these factors, the Court held that the policy was "reasonable and hence constitutional."

COMMENT: When this controversial case was issued, the question was in which direction would future Court decisions go in limiting or increasing the rights of students. Obviously, there were other, less intrusive options that schools could take. Respondents argued that drug testing of students when there was a suspicion of drug use was a better option. However, the Court ruled that Vernonia had adopted a policy that was "reasonable" and thus was constitutional. In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002), the Court answered this question, holding that students who participate in any extracurricular activities can be subjected to suspicionless drug testing as a condition of participation.[4] It appears that this is another example of the Supreme Court attempting to provide school people with a greater opportunity to regulate student behavior that is growing more and more difficult in light of gangs, drugs, violence, and societal conditions. From a legal perspective, the reasonableness of the school district's policy and practice will be the key to determine the outcomes of future court cases impacting schools and students.

Discussion Questions

1. How broad of an exception does *Vernonia* carve from the Court's requirement of individualized suspicion prior to a valid student search?
2. What other alternatives could the school district have considered instead of random drug testing?
3. Where do you see the Court moving in regard to student rights? How viable is the *Tinker* doctrine in light of this and other cases?

NOTES

1. Tinker v. Des Moines Independent School District, 393 U.S. 503, 89 S. Ct. 733 (1969).
2. See, e.g., Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir. 1968) *cert. den.* 393 U.S. 856 (male students with "Beatle-type" haircuts excluded from the school).
3. Mando v. Wesleyville School District, 81 Pa. Dist. & Co.R. 125 (C.P. 1952).
4. Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 122 S. Ct. 2559 (2002).

6

Student Records

FAY V. SOUTH COLONIE CENTRAL SCHOOL DISTRICT 802 F.2D 21 (2ND CIR. 1986)

GENERAL RULE OF LAW: Family Educational Rights and Privacy Act (FERPA) itself does not give rise to private causes of action, but does create an interest protected by Section 1983.

PROCEDURE SUMMARY:

Plaintiffs: Robert E. Fay (Parent) and his children, Theresa and Thomas Fay (P)

Defendant: South Colonie School District, Superintendent Thomas P. Mitchell, (School Officials) and New York Commissioner of Education (D)

State Commissioner of Education Decision: Held for school district (D), finding that compliance with 'plaintiff's request would impose an unreasonable burden on the school district

U.S. District Court Decision: Held for Parent (P) in part by granting nominal damages, but dismissed (P)'s constitutional claim.

U.S. Court of Appeals Decision: Remanded Parent's (P) claim under FERPA, refused to decide due process claim, and held that a school district is not entitled to Eleventh Amendment immunity

FACTS: Parent (P) brought action following School Officials' (D) refusal to permit him access to his children's school records. Parent (P) and his ex-wife had joint legal custody of their two children. Specifically, Parent (P) requested standardized test results, accident reports, notifications about school functions, and even cafeteria menus. In response to Parent's (P) request, the Superintendent indicated that the school would provide information to individuals determined by the courts to have a legal right to it. Correspondence between Parent (P) and the Superintendent continued, and eventually the school began to send educational records to Parent (P), but not school-related notifications. Parent (P) challenged the continued refusal of the School Officials (D) to the Commissioner of Education of New York. The commission determined that complying with Parent's (P) requests would place an unreasonable burden on the school

district. Parent (P) appealed to the Trial Court, and the Trial Court found School Officials (D) liable under Section 1983 for denying Parent (P) access to the school records. The Trial Court awarded nominal damages on this claim and dismissed all other claims brought by Parent (P). On appeal, the Court of Appeals dismissed the constitutional due process claims brought by Parent (P), although for different reasons than the Trial Court. The Court of Appeals held that the Eleventh Amendment immunity did not apply to the School Officials (D) and, thus, Parent (P) could receive compensatory damages in an amount to be determined by the Trial Court on remand.

ISSUE: Does a parent have a right to compel school officials to provide his child's school records?

HOLDING AND DECISION: (Meskill, J.) Yes. Parent (P) has a common law right to compel School Officials (D) to provide his son's school records. No constitutional, legislative, or administrative permission is necessary in order for Parent (P) to have the right to the school records. Moreover, his right to the records was not prohibited constitutionally, legislatively, or administratively.

COMMENT: This is a case that can cause some confusion. It is not that FERPA does not create a right to allow a parent to compel school officials to provide the school records of his or her child. It was simply not necessary to deal with this issue because the common law provides this parental guarantee. The concern in this somewhat older case revolved around the rights of a divorced parent. Today, this is a far more common problem. It is almost commonplace for today's school officials to provide the noncustodial parent with access to all school records as well as visitations on "parent" nights and related activities.

Discussion Questions

1. Why didn't the court rule on this case by applying the provisions of FERPA?
2. How does your school deal with the rights of noncustodial parents?
3. Were the type of school records that this parent requested more extensive than is reasonable? Is there any limit to what a parent can request?

VAN ALLEN V. MCCLEARY
211 N.Y.S.2D 501 (N.Y. SUP. CT. 1961)

GENERAL RULE OF LAW: A parent has the right to compel school officials to submit his son's school records, even without constitutional, legislative, or administrative permission, so long as a constitutional, legislative, or administrative prohibition does not exist.

PROCEDURE SUMMARY:

Plaintiff: Edward J. Van Allen (Parent) (P)

Defendant: Edward J. McCleary (superintendent), Frederick C. Carver (president of Board of Education), and other members of the Board of Education (School Officials) (D)

State Trial Court Decision, Part I: Held for Parent (P)

State Trial Court Decision, Part II: Petition to compel production of son's school records granted

FACTS: Edward J. Van Allen brought proceeding to compel the School Officials (D) to provide his son's school records for inspection.

ISSUE: Does a parent have a right to compel school officials to provide his child's school records?

HOLDING AND DECISION: (Brennan, J.) Yes. Parent (P) has a common law right to compel School Officials (D) to provide his son's school records. No constitutional, legislative, or administrative permission is necessary in order for Parent (P) to have a right to the school records. Moreover, his right to the records was not prohibited constitutionally, legislatively, or administratively.

COMMENT: The decision in this case was based on the common law, which required a school district to provide parents with the school records of their child. This meant that the legal tradition was that a parent was to be allowed access to school records. This tradition was codified by FERPA, which established a legislative right for parents to secure school records.

Discussion Questions

1. How extensive was this decision? Would it have required a school district in your state to share a student's records with parents?
2. Why would a school district not want to share information in a student's records?
3. Does a legislative enactment have greater weight than a common law ruling?

7

English Language Learners

CASTANEDA V. PICKARD (CASTANEDA II) (UNPUBLISHED)

GENERAL RULE OF LAW: If examination of the history of racial discrimination of a school district reveals that it has remedied any such history for a sufficient time period, then benign school district practices that do not further desegregate the school will not be considered a vestige of discrimination.

PROCEDURE SUMMARY:

Plaintiffs: Mexican American children and their parents (P)

Defendant: Raymondville, Texas Independent School District (School District) (D)

State Trial Court Decision: Held for (D)

State Court of Appeals Decision: Affirmed in part and reversed in part, and remanded

U.S. District Court Decision: Affirmed on remand that (D) implemented an adequate bilingual education program and its ability grouping and teacher hiring was not discriminatory

FACTS: Mexican American students and their parents (P), in a community composed of approximately 77% Mexican Americans and nearly all of the remaining 23% "Anglos," brought suit against the School District (D), asserting that (1) its ability grouping system for classroom assignments used criteria that unlawfully segregated and racially discriminated against them; (2) the School District (D) discriminated against Mexican American faculty and administrators when making hiring and promotion decisions; and (3) the School District (D) prevented Mexican American students (P) from equal participation in educational programs by failing to implement adequate bilingual programs to help them to overcome language barriers. The Fifth Circuit Court of Appeals held that the School District's (D) bilingual education program was adequate under Title VI, but remanded the remaining issues to the district court.

ISSUE: Whether School District (D) discriminated against Mexican Americans in the past and, if so, whether all indications of such past discrimination had been erased.

HOLDING AND DECISION: (O'Conor, J.) All the vestiges of discrimination have been erased in the district. School District (D) "has been a unitary system for a sufficient period of time" to erase any trace of past discrimination. Further, School District's (D) ability grouping and teacher hiring approaches were not discriminatory.

COMMENTS: The unpublished decision of the United States District Court for the Southern District of Texas in Castaneda II was affirmed by the Fifth Circuit Court of Appeals in *Castaneda v. Pickard* (1986).[1] Because this federal district court case was upheld by its appellate jurisdiction, its application is limited to those states served by that appellate court. Because of the important implications of the decision, many believe that this issue will continue to surface in various jurisdictions until it is eventually considered by the U.S. Supreme Court.

Discussion Questions

1. With the growing population of Mexican American and other non-English-speaking minority group students, will this issue be of greater concern to minority groups? Why?
2. If you had to argue the position of the defendants, what would be your main arguments?
3. The issue related to nondiscriminatory hiring practices is a complicated one. Should we allow unqualified teachers who speak the appropriate language to be hired to help meet the needs of these non-English speakers?

SERNA V. PORTALES MUNICIPAL SCHOOLS 499 F.2D 1147 (10TH CIR. 1974)

GENERAL RULE OF LAW: Federally funded schools violate students' right to equal protection of the laws as guaranteed by the Fourteenth Amendment and violate their statutory rights under Title IV of the 1964 Civil Rights Act when adequate special education, bilingual services, and ethnic representation are not provided.

PROCEDURE SUMMARY:

Plaintiffs: Spanish-surnamed American students (P)

Defendant: Portales Municipal Schools (D)

U.S. District Court Decision: Held for plaintiff (P)

U.S. Court of Appeals Decision: Affirmed

FACTS: The city of Portales, New Mexico, has a substantial number of Spanish-surnamed residents. Accordingly, a sizeable minority of students attending the Portales schools were Spanish surnamed. Evidence indicated that many of these children knew very little English when they entered school. They spoke Spanish at home and grew up in a Spanish culture totally alien to the school environment in which

they were educated. The result was a lower achievement level than their Anglo-American counterparts, and a higher percentage of dropouts. Portales Municipal Schools (D) failed to provide bilingual instruction that took into account the particular special education needs of the Mexican American students; failed to hire any teachers of Mexican American descent; failed to structure a curriculum that reflected the historical contributions of people of Mexican American descent; and failed to hire and employ any administrators of Mexican descent.

ISSUE: Does the absence of a bilingual program and bilingual representation in the schools or in the curriculum violate students' right to equal protection?

HOLDING AND DECISION: Yes. The court found that in the Portales schools, Spanish-surnamed students did not have an equal educational opportunity, and thus there was a violation of their constitutional right to equal protection. The school district was order to reassess and enlarge its program directed to the specialized needs of its Spanish-surnamed students and also to establish and operate effective programs at the schools in which bilingual programs did not exist.

COMMENT: This is an early case on the issues that are very prominent today concerning the educational services that should be provided to Spanish-surnamed students. Although this case had application in only a limited jurisdiction, the principles that it espoused were persuasive in many other jurisdictions facing similar issues. As we consider education in the next 25 years, it is clear that public education must develop effective strategies to deal with these issues. In 1971, only a few school districts in a few states had significant populations of Spanish-surnamed students. By 2025, almost every urban school district will have a significant, if not majority, population of Spanish-surnamed students. How we deal with these concerns may be the single best measure of educational progress.

Discussion Questions

1. Should other minorities in the district receive special education and other services similar to those of the Spanish-surnamed students?
2. Do you think that the lack of representation of their culture caused Spanish-surnamed students to have a sense of alienation resulting in frustration, higher dropout rates, and lower performance on achievement tests?
3. How could the curriculum be restructured to accommodate all minorities represented in the schools?
4. What should a school system do to ensure that all minorities are represented in the teaching and administrative ranks?

NOTE

1. Castaneda v. Pickard, 781 F.2d 456 (5th Cir. 1986).

8

Education of Students With Disabilities

BEVIN H. V. WRIGHT
666 F. SUPP. 71 (W.D. PA. 1987)

GENERAL RULE OF LAW: The Education for All Handicapped Children Act does not require that school districts provide private duty nursing services to handicapped children in order to enable the children to attend school.

PROCEDURE SUMMARY:

Plaintiff: Bevin H., a minor, by her parents Michael and Elizabeth H. (P)

Defendants: Wright, Acting Secretary of Education of Pennsylvania and the Pittsburgh School District (D)

U.S. District Court Decision: Held for Wright (D)

FACTS: Bevin (P) was a 7-year-old child with multiple physical and mental disabilities, which required her to breathe through a tracheostomy tube and to be fed and medicated through a gastrostomy tube. When Bevin began school, the Pittsburgh School District (D) agreed to admit her in a special curriculum for handicapped children with the stipulation that Bevin's parents bear the cost of the nursing services and related equipment that she required in order to attend school. The nursing services Bevin required were extensive, including having a nurse accompany her to and from school as well as throughout the school day. The nurse was responsible for the care and cleaning of the tracheostomy and gastrostomy tube, chest physical therapy, suctioning of the mucous from the lungs, and administering a continual supply of oxygen. If a mucous plug formed in her tracheostomy tube, it had to be cleared within 30 seconds in order to prevent serious injury. Because of this, a nurse needed to be with Bevin every moment of the school day.

An individualized education plan (IEP) was developed for Bevin and agreed to by her parents as the most appropriate and least restrictive educational plan for Bevin. Bevin was placed in a classroom with

six other handicapped children who all had a tracheostomy but who did not require the extensive nursing attention that Bevin required. They were each able to care for and clear their tubes without assistance. A teacher and two aides conducted the class, but there was no nurse assigned to the class.

The parents' health insurance paid for the cost of the nursing service. However, the insurance coverage had a limit of $500,000. With the prospect of exhausting Bevin's medical coverage, Bevin's parents requested that the school district assume the costs of Bevin's nursing services while Bevin was in school. When the school district refused, the parents instituted administrative proceedings. The hearing officer ruled in favor of Bevin's parents. Pennsylvania Secretary of Education (D) reversed the hearing officer, and Bevin's parents filed this action pursuant to the Act, 20 U.S.C. § 1415(e)(2).

ISSUE: Does the Education for All Handicapped Children Act require school districts to provide private duty nursing services to a handicapped child to enable the child to attend school?

HOLDING AND DECISION: (Weber, D. J.) No. When the nursing services that are required in order to enable a handicapped child to attend school are so extensive that private duty nursing services are needed, the school district is not required to provide such services. The Education for All Handicapped Children Act (EAHCA) provides funding to assist states in educating physically and mentally handicapped children. In order to receive federal assistance, the states must comply with various statutory and regulatory requirements in fulfilling the Act's purpose of providing "free appropriate education" to all handicapped children. The EAHCA defines a free appropriate education as special education and related services that are to be provided to a handicapped child without charge to the parents. "Related services" are further defined as transportation, and such development, corrective, and other supportive services (including pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

The EAHCA states that medical services, with the exception of those performed for diagnosis or evaluation, are not included in "related services." In determining whether the nursing care Bevin (P) required was a medical service and therefore not the obligation of the school district, the court looked to other courts that had addressed the subject of nursing services. The court found that when the other courts had decided the school districts were responsible for providing nursing services, the students involved only required intermittent nursing care that left the attending nurse free to care for other students at the same time. The extensive care that Bevin (P) required distinguished her case from the others previously addressed. The court described the services required by Bevin (P) as varied, intensive, and expensive and requiring the constant undivided attention of a nurse. Because of the extensive services Bevin (P) required, a school nurse, or other qualified individual with responsibility for other children within the school, could not safely care for Bevin (P).

The court also considered the standard of reasonableness that was set forth in the prior cases and determined that the school district is only required to make accommodations that are within reason. After a careful review of the nature and extent of the services required by the child and the impact on the school district, the court found that the nursing services required to enable Bevin (P) to attend school were more like that of a private duty nurse and "more in the nature of medical services." The court further found that these services were beyond the capabilities of a school nurse. Moreover, the court found that to place the burden of the services that Bevin (P) required on the school district "in the guise of 'related services'" would be inconsistent with the spirit of the EAHCA and the regulations.

COMMENT: The court noted that although all children are entitled to an education that is tailored to their individual needs, the district is not required to "provide the best possible education without regard to expense." Although no alternative educational programs were presented, the court stated that the EAHCA's requirements are not restricted to applications in a classroom setting and indicated that a non-classroom setting may have been the appropriate setting for Bevin.

Discussion Questions

1. Nursing services are often paid for by school districts. Why was this not the case here?
2. Why did the extensiveness of the nursing services result in their not being considered a "related service"?
3. Do you agree with this decision? Why or why not?

BROOKHART V. ILLINOIS STATE BOARD OF EDUCATION 697 F.2D 179 (7TH CIR. 1983)

GENERAL RULE OF LAW: A school district may require students with disabilities to pass a minimal competency test in order to receive a diploma as long as sufficient and timely notice of the requirement is given.

PROCEDURE SUMMARY:

Plaintiffs: Deborah Brookhart and 13 other handicapped elementary and secondary students (P)

Defendants: Illinois State Board of Education and the Peoria School District (D)

U.S. District Courts Decision: Held in favor of defendants

U.S. Court of Appeals Decision: Reversed

FACTS: In 1978, the Peoria School District (D) instituted a requirement that all students eligible for graduation in the spring of 1980 pass a Minimal Competency Test (M.C.T.) in order to receive a high school diploma. The test, which was given each semester, contained three parts: reading, language arts, and mathematics. In order to receive a diploma, a student had to score 70% on each part. Students who did not pass all parts of the test but who otherwise qualified to graduate received a Certificate of Completion and were permitted to continue to take the M.C.T. until they passed all three parts or until their 21st birthday. The school district (D) notified the students of the additional requirement 18 months prior to graduation. Fourteen handicapped elementary and secondary students (P) brought suit, claiming that the denial of diplomas violated state and federal statutes as well as the due process and equal protection clauses of the Fourteenth Amendment. A hearing was held before the Illinois State Board of Education, which found for the plaintiffs and ordered the school district (D) to issue diplomas to the plaintiffs. The school district appealed to the District Court, which held that there were no due process violations and reversed the order directing the school district to issue diplomas.

ISSUE: May school districts require students with disabilities to pass a minimal competency test in order to receive a diploma?

HOLDING AND DECISION: (Cummings, J.) Yes. School districts have the authority to impose reasonable additional standards for receiving a diploma, including minimal competency tests. A school district has the right to ensure the value of its diploma by requiring graduating students to attain minimal skills. Courts will not interfere with such educational policies unless it is necessary to protect individual statutory or constitutional rights. The students (P) claim that the denial of diplomas violates the Education for All Handicapped Children Act (EAHCA) because it denies an individual handicapped student a "free and appropriate public education." However, the "intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."[1] The EAHCA mandates access to the specialized and individualized educational services for handicapped children, but it does not require specific results from these services. The students (P) argue further that the imposition of the test violates the act and the corresponding regulation's mandate that "no single procedure shall be the sole criterion for determining an appropriate educational program for a child." This argument must fail because the M.C.T. is not the only graduation requirement. Graduating students must also earn 17 credits and complete state requirements, such as a constitution test and a consumer education course, in order to receive a diploma.

The students (P) also claim that the M.C.T. constitutes unlawful discrimination under § 504 of the Rehabilitation Act of 1973: "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." However, the court found no grounds on which the students (P) could argue that the content of the M.C.T. was discriminatory because the handicapped students could not pass the test.

Section 504 does not require a substantial modification of standards in order to allow handicapped students to pass. Rather, a student who is characterized as "otherwise qualified" is able to meet the requirements without modifications to the exam. If a student is not able to learn because of his handicaps, he is not an individual who is qualified in spite of his handicap. On the other hand, if an otherwise qualified student is unable to exhibit the degree of learning he possesses solely because of the test format or environment, then the student would be the object of discrimination solely on the basis of disability. In that instance, reasonable administrative modifications must be employed in order to minimize the discriminatory effects.

As to the students' (P) final argument, that the school district (D) failed to provide adequate notice of the M.C.T. requirement, the court agreed. According to Illinois state law, the students (P) had a right to receive a diploma if they met the requirements that were in place prior to the date on which the M.C.T. was imposed, which included completion of 17 course credits and fulfillment of the state's graduation requirements. By changing the diploma requirement, the school district (D) deprived the students of this right without due process. Therefore, the students (P) had a liberty interest sufficient to invoke the procedural protections of the due process clause. The record showed that although the students (P) were given notice a year before graduation, they were not exposed to as much as 90% of the materials that they were to be tested on. The record further showed that the students' individualized education plan (IEP) and the material to be tested were significantly different and that the students' programs were not developed to meet the goal of passing the M.C.T., but were focused on addressing the individual education needs. Because the students (P) and their parents only knew about the M.C.T. for 18 months prior to the date the

students were to graduate, they were not able to incorporate the M.C.T. into the IEPs over a period of years. The court held that in light of the students' (P) lack of exposure to a significant portion of the material on the M.C.T., 18 months was inadequate notice to enable the students to prepare properly for the test. The court ordered the school district (D) to issue high school diplomas to the 11 students who had satisfied the other graduation requirements.

COMMENT: The court of appeals agreed with the school district that the proper remedy for a violation of this kind would be to require the school district to provide free, remedial special education classes to ensure that the students are exposed to the material that is tested on the M.C.T. The court said that in the future, handicapped students should enroll in these courses. However, the court found that it would be unrealistic to assume that the present 11 students would not experience undue hardship and ordered the school district to award high school diplomas to the 11 plaintiffs who satisfied the remaining graduation requirements.

CLYDE V. PUYALLUP SCHOOL DISTRICT NO. 3 35 F.3D 196 (9TH CIR. 1994)

GENERAL RULE OF LAW: Schools can temporarily remove a handicapped student from a mainstream placement only if the child poses an immediate threat to the safety of himself or others.

PROCEDURE SUMMARY:

Plaintiffs: Clyde and Sheila K., parents of Ryan K., a handicapped child (P)

Defendant: Puyallup School District No. 3 (D)

U.S. District Court Decision: Held for the Puyallup School District (D)

U.S. Court of Appeals Decision: Affirmed

FACTS: Ryan K. is a 15-year-old student who has both Tourette's Syndrome and ADHD. Ryan received special education services while being "mainstreamed" in the Puyallup School District (D) as a student at Ballou Junior High School between mid-January and mid-March of 1992. Ryan frequently disrupted his classes by calling other students names and using profanity. Ryan also insulted teachers with vulgar comments and offended female students by using sexually explicit language. Additionally, Ryan would not follow directions and often battered classroom furniture. Ryan was suspended for one day for punching a fellow student in the face; he received a second suspension for pushing another student's head into a door. Finally, in March 1992, after assaulting a school staff member, Ryan was removed from school under an emergency expulsion order.

School officials, along with Ryan's parents, Clyde K. and Sheila K. (P), agreed that it was no longer safe for Ryan to remain at Ballou. Ryan's teachers and school administrators decided to place the boy temporarily in an off-campus, self-contained program called Students Temporarily Away From Regular School (STARS). On March 17, 1992, Ryan's parents (P) were notified that he would be placed in STARS temporarily

until he could be safely reintegrated into regular school programs. Ryan's parents (P) initially agreed with the placement, but 10 days later, after having second thoughts, requested a due process hearing in connection with the placement. On April 6, they formally rejected the placement at STARS until the individualized educational plan (IEP) could be drafted on Ryan's behalf. When efforts to draft the IEP failed, Ryan's parents (P) insisted that he be readmitted to Ballou.

ISSUE: Does a school district violate IDEA procedural requirements if it fails to draft a new IEP before attempting to temporarily remove a disabled child to an off-campus, self-contained facility, even though the parents initially agreed upon the new placement?

HOLDING AND DECISION: No. The school did not violate the IDEA's procedural requirements when it failed to grant a new IEP plan hearing before attempting to remove a disabled student to an off-campus program. In this case, the parents had initially agreed with the school's recommended placement *and* its determination that Ryan's current IEP could be implemented in the off-campus program. If the parents had not agreed to this off-campus placement, the holding may have been different.

Additionally, Ryan's parents also alleged various other procedural violations of the IDEA. On March 11, 1992, at the request of Ryan's doctor, the school district hired an aide to observe Ryan's behavior. Ryan's parents argued that this hiring constituted a change in Ryan's IEP. The district court ruled that the hiring did not change Ryan's educational program because the aide merely observed Ryan's behavior and did not provide educational services or any other type of assistance.

Ryan's parents also contended that the district court erred when it held that STARS was Ryan's "stay put" placement under 20 U.S.C., § 1415(e)(3). According to that statute, a child shall remain "in the then current educational placement" (the "stay put" placement pending any hearings pertaining to his or her IEP). Because Ryan's parents requested a due process hearing on March 27 — after Ryan had been placed at STARS with his parents' consent—STARS had already become the "stay put" placement under Section 1415(e)(3).

Finally, Ryan's parents contended that the district court erred in concluding that STARS was the least restrictive environment in which Ryan could be educated satisfactorily. They believed that Ryan could be educated in a mainstream environment if provided with a personal classroom aide. The courts have fashioned a four-part test to determine whether a disabled student's placement represents the "least restrictive environment."[2] The following four factors must be considered: (1) the academic benefits of placement in a mainstream setting with any supplementary aides and services that might be appropriate; (2) the nonacademic benefits of mainstream placement such as language and behavior models provided by nondisabled students; (3) the negative effects the student's presence may have on the teacher and other students in the mainstream environment; and (4) the cost of educating the student in a mainstream environment.

Upon considering the facts of this case in light of these factors, the *Clyde* court found that as of March, 1992, (1) Ryan no longer received any academic benefit from learning, and his academic achievement had declined during the 1991–1992 school year; (2) Ryan derived only minimal nonacademic benefits from Ballou (indeed, his doctor thought that Ryan had few friends and was socially isolated at Ballou); and (3) Ryan's presence in classes at Ballou had an overwhelming negative effect on both teachers and students. Ryan had displayed dangerously aggressive behaviors. Not only did he taunt other students and staff members with name-calling and profanity, he also directed sexually explicit remarks to female students. Public officials had an especially compelling duty to prevent such behavior.

COMMENT: The case is important because it was one of the first to deal with the combined disorders of Tourette's Syndrome and ADHD. It also clarified the duty of school officials to provide a free and appropriate education—even if it means changing a disabled student's placement because of behavioral problems that prevent both him and other students around him from learning. Although every case is decided on its specific facts, we nonetheless can draw some inferences concerning actions that may be taken in similar circumstances. Disruptive behavior that impairs to a significant degree the education of others suggests that a mainstream placement may no longer be appropriate. Clearly, schools have a statutory duty to ensure that disabled students receive an appropriate education, but they are not required to, nor should they, avoid taking action when a disabled student's behavioral problems prevent the student and those around him or her from learning.

The controversy surrounding ADHD in the classroom will continue to escalate. Each problem that presents itself to a school district will have to be handled on a case-by-case basis. Unfortunately (or fortunately, depending on how you look at the issue), a court of law is usually not the best venue in which to resolve IDEA problems. Here, the Puyallup School District sustained legal expenses of more than $100,000—a hefty sum of money in times of shrinking education budgets. Due process is a guaranteed right, but Ryan's experience is a poignant reminder that parents and school officials (and, of course, disabled children) are better served when differences are resolved though good faith compromise and cooperation rather than through an expensive and contentious process such as litigation.

Discussion Questions

1. If a child is acting in a dangerous manner and an IEP team cannot be assembled quickly, can a school official have law enforcement remove the child as a danger?
2. What is the four-part test that should be used to determine the "least restrictive environment"? Why is a court of law the nest place to make educational decisions for a child?

DELLMUTH, ACTING SECRETARY OF EDUCATION OF PENNSYLVANIA V. MUTH 491 U.S. 223, 109 S. CT. 2397 (1989)

GENERAL RULE OF LAW: The states' Eleventh Amendment immunity from suit in federal court may be abrogated by Congress only when the intention to do so is made unmistakably clear in a particular act.

PROCEDURE SUMMARY:

Plaintiff: Muth, the parent of a disabled child (P)

Defendant: Dellmuth, Acting Secretary of Education of Pennsylvania (D)

U.S. District Court Decision: Held for Muth (P), awarding damages for Dellmuth's (D) violation of the Act

U.S. Court of Appeals Decision: Affirmed

U.S. Supreme Court Decision: Reversed and remanded

FACTS: Congress passed the Education for All Handicapped Children Act to ensure that handicapped children received a free public education appropriate to their needs. It provided that parents of such children could challenge the appropriateness of their child's individualized education plan (IEP) in an administrative hearing followed by judicial review. Muth (P) challenged his child's IEP. While the proceedings were pending, Muth (P) placed the child in private school. The IEP was then revised and found appropriate in the administrative proceedings. Muth (P) filed suit, challenging both the appropriateness of the IEP and the validity of the administrative proceedings and seeking reimbursement for the child's private school tuition and attorney fees. The district court found that the states' Eleventh Amendment immunity was abrogated by the Act and entitled Muth (P) to damages because of the delay caused by the flaws in the administrative proceedings. The court of appeals affirmed, and Dellmuth (D) appealed.

ISSUE: May the states' Eleventh Amendment immunity from suit in federal court be abrogated by Congress only when its intention to do so is made unmistakably clear in a particular act?

HOLDING AND DECISION: (Kennedy, J.) Yes. Congress may abrogate the states' immunity only by making its intention unmistakably clear in the language of the statute. The Education for All Handicapped Children Act does not abrogate the states' Eleventh Amendment immunity from suit in federal court. The Act's preamble and judicial review provision and the 1986 amendment to the Rehabilitation Act evidence no such intention here. The Act makes no reference to the Eleventh Amendment or the states' sovereign immunity. The preamble has nothing to do with states' immunity. The 1986 amendment to the Rehabilitation Act did not clearly indicate whether Congress intended to abrogate states' immunity in 1975 when the Education for All Handicapped Children Act was adopted. The judicial review provision makes no mention of state immunity or abrogation, and abrogation is not "necessary" to achieve the Act's goals. The statutory language of the Act does not evince an unmistakably clear intention to abrogate the states' immunity from suit. Thus, Muth's (P) attempt to collect tuition is barred by the Eleventh Amendment. Reversed and remanded.

COMMENT: Dellmuth followed *Atascadero State Hospital v. Scanlon* (1985), in which the Court established that the states' immunity could only be abrogated by congressional intent made unmistakably clear by the language of a statute.[3] However, four dissenting justices were of the opinion that the majority was improperly applying the unmistakably clear test and that the history and language of the Act satisfied the test if properly applied, and, thus, state immunity was abrogated. For the dissenting justices, the 1986 amendment to the Rehabilitation Act providing that a state shall not be immune under the Eleventh Amendment for violations of that Act or any other federal statute prohibiting discrimination by recipients of federal assistance made clear once and for all the requisite congressional intent.

Discussion Questions

1. In *Dellmuth v. Muth,* the term "abrogate" is used throughout the case. What does "abrogate" mean?
2. Does the Education for All Handicapped Children Act take away the states' Eleventh Amendment immunity from suit in federal court?
3. Does this case have an impact on future special education cases?

DICK-FRIEDMAN EX REL. FRIEDMAN V. BOARD OF EDUCATION OF WEST BLOOMFIELD 427 F. SUPP.2D 768 (E.D. MICH. 2006)

GENERAL RULE OF LAW: Procedural safeguards provided by the IDEIA to allow parental involvement in the development of their child's IEP does not give parents the final decision-making authority on the child's classroom placement, and the court will defer to the school board's decision as long as it complies with the IDEIA.

PROCEDURE SUMMARY:

Plaintiff: Parent of a student with Down Syndrome (P)

Defendant: Board of Education of West Bloomfield School District and its director of Special Services (Board) (D)

Due Process Hearing Decision: Held in favor of Board (D)

Administrative Appeal Decision: Affirmed

State Trial Court Decision: Affirmed the decision of the due process hearing

FACTS: The Individuals With Disabilities Education Improvement Act (IDEIA) requires that school districts provide students with a "free appropriate public education" (FAPE) in the least restrictive environment. The student, Danny, was fully included in general education classes through elementary school. When he reached middle school, however, an Individualized Educational Plan (IEP) meeting was held, which recommended that he spend approximately half of his day in a segregated special education classroom to learn language arts, math, science, and social studies and the other half of the day in a general education classroom to learn elective courses for the purpose of socialization. At the time of the initial meeting, his mother agreed to the IEP; however, Ms. Friedman (P) saw Danny regress and felt he should be fully included in the general education classroom so he could learn from his non-disabled peers. Under IDEIA, a parent who disagrees with an IEP may challenge it at a due process hearing. Ms. Friedman (P) pursued a due process hearing and the local hearing officer determined that the IEP offered by the school district offered Danny a FAPE in the least restrictive environment, as required under IDEIA. On administrative appeal, the decision of the due process hearing was affirmed, finding that Danny would not benefit academically from taking the core courses in the general education classroom. Ms. Friedman (P) then filed suit in the United States District Court, Eastern District of Michigan.

ISSUE: Did the IEP provided by the school board meet the requirements of IDEIA?

HOLDING AND DECISION: (Battani, J.) Yes. In order for an IEP to comply with IDEIA, it must follow the procedures set out in IDEIA and be reasonably calculated to enable the child to receive educational benefits. Here, the Board (D) followed procedure by considering a wide variety of education options, as well

as Ms. Friedman's (P) concerns and potential negative consequences, to come up with an IEP that would benefit Danny. The IEP must also allow Danny to learn in the least restrictive environment appropriate, meaning that he should be included in regular education classes as much as is appropriate. Numerous school officials testified to the need for the placement specified in Danny's IEP for his academic success, and the court will defer to the Board's (D) decision. In Michigan, the IEP must also be designed to develop the student's maximum potential. This does not mean that the Board (D) was required to create an IEP that would fully include him in the general education classroom simply because his mother felt this was best. There are three factors that the Sixth Circuit looks at to determine whether an exception to the mainstreaming requirement exists: (1) whether the disabled student would benefit from inclusion in a general education classroom, (2) whether the benefits of a special education classroom outweigh the benefits of a general education classroom, and (3) whether the disabled child is disruptive in the general education classroom. The evidence presented at the due process hearing established that the benefits of Danny learning in a special education classroom far outweighed the benefits of learning in a general education classroom. The IEP did not violate the IDEIA.

COMMENTS: This case involves an issue of growing concern in dealing with children with disabilities: "inclusion." Although not formally developed in IDEIA, it has become the standard that most state programs serving children with disabilities must address. Just how much "inclusion" is appropriate for a child? That is, when should a child with a disability be placed in a regular classroom? Of course, this is a decision of the IEP team, but it has generated great concern and debate. And the debate will become even more intense because IDEIA has not clearly addressed this issue. To make a just decision regarding mainstreaming, schools must determine how much the child would benefit from being included with general education students. A second concern is whether the special education classroom might provide a better educational climate. Finally, there must be an analysis as to how disruptive placement in the general education classroom would be for regular students.

Discussion Questions

1. What is inclusion? How does it relate to the least restrictive alternative? How does it relate to mainstreaming?
2. Why would a parent challenge an IEP team decision regarding the extent that a child with a disability should be mainstreamed?
3. In reviewing an inclusion decision, what are the three factors that must be considered?

DOE V. DOLTON ELEMENTARY SCHOOL DISTRICT NO. 148 694 F. SUPP. 440 (N.D. ILL. 1988)

GENERAL RULE OF LAW: No otherwise qualified handicapped individual shall be excluded from participation in any program that receives federal assistance solely because he or she is handicapped.

PROCEDURE SUMMARY:

Plaintiffs: John and Mary Doe, as parents and guardians of Student No. 9387 (P)

Defendant: Dolton Elementary School District No. 148 (School District) (D)

State Trial Court Decision: Injunction issued prohibiting the School District (D) from excluding Student No. 9387 (P) from attending full-time curricular and extracurricular activities

FACTS: Student No. 9387 (Doe) was enrolled in Dolton Elementary School District No. 148, Cook County, Illinois (D). By 12 years of age, Doe (P) had undergone open-heart surgery on three occasions. In July 1986, he was diagnosed as infected with the human immunodeficiency virus (HIV), commonly referred to as the AIDS virus. Doe's (P) doctors concluded that he had contracted the virus through blood transfusions during one of his operations. By October 1987, at the time the underlying lawsuit was filed, Doe's (P) condition had deteriorated to what was then referred to as AIDS Related Complex (just short of full-blown AIDS).

On September 28, 1987, soon after being informed that Doe (P) was infected with the AIDS virus, the Board of Education of the School District excluded him from attending the school's regular education classes and all extracurricular activities. On October 8, 1987, Doe's (P) family filed an eight-count complaint alleging various federal and state constitutional and statutory violations.

Subsequently, a motion for a preliminary injunction was filed in which it was asserted that (1) the School District (D), as a recipient of federal aid, had violated Section 504 of the Federal Rehabilitation Act of 1973, and (2) it had violated Doe's (P) right to an "equal education in the free schools of the State of Illinois" pursuant to the Illinois state school code. By late October 1987, the School District (D) received the written medical reports of its physicians. In the reports, the physicians concluded that there was no known medical reason for excluding Doe (P) from school, given his condition at that time. On January 15, 1988, the School District's (D) clinical psychologist evaluated Doe (P). The psychologist indicated that Doe (P) was capable of regular classroom attendance and that his exclusion from the classroom was contributing to a loss of self-esteem.

ISSUE: Can a school district exclude a person with a contagious disease, such as Acquired Immune Deficiency Syndrome (AIDS), from participating in curricular and extracurricular activities at a public school?

HOLDING AND DECISION: No. A school district may not exclude a student with a contagious disease, such as AIDS, from attending full-time curriculum and extracurricular activities at a public school. Section 706 of the Rehabilitation Act of 1973 states, "No otherwise qualified handicapped individual in the United States, as defined in Section 706(7), shall solely by reason of his handicap be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." Additionally, Sections 10–20.12 of the Illinois School Code guarantees a student's right to an equal education in the free schools of that state.

The court found that the plaintiffs had met their burden and ordered the following: (1) that a preliminary injunction be issued prohibiting the School District (D) from excluding Doe (P) from attending full-time curricular and extracurricular activities commencing with the Autumn 1988 term; (2) that the School District (D) follow the U.S. Centers for Disease Control guidelines for the regulation and care of students afflicted with AIDS; (3) that Doe (P) not engage in any contact sports sponsored by the school in either

its curricular or extracurricular programs; (4) that Doe (P) have monthly medical examinations performed by his own physician and that monthly reports of those examinations be filed under seal with the clerk of the court and sent to the appropriate School District (D) personnel and Doe's (P) attorneys, so long as Doe (P) is willing, eligible, and able to attend school; (5) that Doe (P) have weekly preliminary medical examinations performed by the School District's (D) nurse; 6) that Doe's (P) parents immediately report any open lesion or illness to appropriate School District (D) personnel; (7) that the school faculty and staff be informed of Doe's (P) identity, but keep that identity strictly confidential; (8) that the School District (D) inform and educate school staff and faculty regarding AIDS, including its etiology and known routes and risks of transmission; and (9) that copies of the court's order be distributed to all teachers and staff.

Clearly, Doe (P) presented evidence that feelings of inferiority were already evident and that irreparable harm, in an emotional and social sense, had already occurred (and would continue to occur if he were not allowed to return to a regular classroom environment). Therefore, the plaintiffs had met the burden of proving irreparable injury and the inadequacy of their remedies at law, as required by any party seeking injunctive relief.

COMMENT: Because Doe was diagnosed with AIDS, he became subject to Section 706 of the federal Rehabilitation Act (the Act). In *School Bd. of Nassau County, Florida v. Arline* (1987), the Supreme Court held that a person with a contagious disease is considered a "handicapped person" under Section 504 of the Act.[4] Section 706 defines a handicapped individual as any person who has a physical impairment that substantially limits one or more of his or her major life activities, has a record of such an impairment, or is regarded as having such an impairment. Because Doe was considered handicapped, the school district could not exclude him from a program or activity that received federal financial assistance.

Additionally, in *Chalk v. United States District Court Central District of California* (1988), it was held that an AIDS sufferer is, or is likely to be, considered handicapped under the Act.[5] The court in *Chalk* stated that the district court was in the best position, guided by qualified medical opinion, to determine what reasonable procedures could be implemented to ensure that plaintiff Chalk's continued presence in the classroom would not significantly increase the risk of transmission to others.

Such is also the case here. In granting injunctive relief, the court was cognizant of public safety concerns, given that AIDS is a fatal, communicable disease for which a cure has not been found. Each case must be decided according to its particular facts. Based on the facts presented here, the court determined that any "public hysteria" from Doe's reentry into the school population neither justified nor supported his exclusion from school. Nevertheless, orders of the court were carefully and specifically drawn so that procedures would be implemented to ensure that any potential risk of harm to Doe's classmates and teachers would be virtually eliminated. Therefore, the granting of a preliminary injunction did not disserve the public interest.

Discussion Questions

1. Can a school district exclude a person with a contagious disease, such as AIDS, from participating in curricular or extracurricular activities at a public school?
2. Does the Americans with Disabilities Act (ADA) protect an individual with a contagious disease such as AIDS?
3. How does the school district protect others from a contagious disease while providing for the educational needs of the student with the disease?

GRUBE V. BETHLEHEM AREA SCHOOL DISTRICT 550 F. SUPP. 418 (1982)

GENERAL RULE OF LAW: Section 504 of the Rehabilitation Act of 1973 states, "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

PROCEDURE SUMMARY:

Plaintiff: Richard William Grube, a minor, by his father Richard Wallace Grube (P)

Defendant: Bethlehem Area School District (D)

U.S. District Court Decision: Held for Grube (P)

FACTS: Richard William Grube (P) was a vigorous, athletically inclined high school student whose only physical problem was the absence of his right kidney, which had been removed when he was 2 years old as a result of a congenital malformation. Grube (P) was selected for the varsity football team in his senior year. He had played football for three years and was a member of the wrestling team. After the school physician concluded that it was "highly risky" for Grube (P) to play football, he was informed that because of his condition, he was ineligible to play, even though no substantial adjustments to the program were necessary to accommodate him. Grube (P) and his father agreed to sign a written release accepting all legal and financial responsibility in the event of an injury. Furthermore, because of a minor injury the previous season, Grube (P) obtained a specially designed protective "flack jacket." Grube (P), a collegiate-caliber athlete, was depending on a scholarship in order to attend college because his family lacked financial means. The Grubes (P) requested a preliminary injunction prohibiting the Bethlehem Area School District (D) from precluding Richard from participating as a member of the high school football team on the same terms and conditions as the other team members.

ISSUE: May school officials exclude a handicapped student solely on the basis of the handicap from participating in an extracurricular activity on the same terms and conditions as applied to all other members of the team?

HOLDING AND DECISION: No. Under Section 504 of the Rehabilitation Act of 1973, school officials cannot exclude a handicapped student solely by reason of handicap from participation in an extracurricular activity. In *Southeastern Community College v. Davis,* 42 U.S. 397, 406, 99 S. Ct. 2361, 2367, 60 L.Ed.2d 980 (1979), the Supreme Court interpreted Section 504 as follows:

Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped persons or to make substantial modifications to their programs to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," indicating only that the mere possession of a handicap is not permissible ground for assuming an inability to function in a particular context.[6]

As a recipient of federal funds, Bethlehem Area School District (D) was subject to the requirements of Section 504. Despite Grube's (P) handicap, physicians stated that harm to Grube (P) was no greater than that possible for any football player. The Grubes (P) demonstrated the possibility of irreparable harm by showing that a college scholarship for Grube (P) may depend upon whether he was allowed to play football in his senior year. There was no substantial justification to prohibit Grube (P) from playing varsity football. Therefore, the motion was granted and the Bethlehem Area School District (D) was enjoined from excluding Grube (P) from the Freedom High School football team on the same conditions and terms as the other players.

COMMENT: This case establishes that students cannot be prohibited from participating in extracurricular activities based solely on a handicap, even if the school district believes that they should not be allowed to participate. It would appear that some of the in loco parentis power of a school district to make decisions for students is usurped. However, according to *Poole v. South Plainfield Board of Education* (1980), the purpose of Section 504 is "to permit handicapped individuals to live life as fully as they are able, without paternalistic authorities deciding that certain activities are too risky for them."[7] In this case, the handicapped individual, his parents, and a qualified physician decided that playing football did not present a risk. It should be remembered that a well-intended decision of school authorities in an equal protection complaint will usually be upheld. A handicapped student's desire to participate in athletics demands the balancing of both the student's and the school system's interests. While a student may want the most balanced, comprehensive education possible, the school has the duty to protect the physical well-being of the student. Here, the handicap issue prevailed in a situation in which the school's interests would have been controlling.

Discussion Questions

1. Who will be held liable if the handicapped student sustains a severe or fatal injury while participating in sports?
2. Can the courts step in and make a rule on a case that is not directly related to the education of the handicapped student?
3. Does the athletic program have to make any special accommodations for Grube to try to protect him?
4. Is the coach required to play the student if he is concerned for his safety?

HURRY V. JONES
734 F.2D 879 (1ST CIR. 1984)

GENERAL RULE OF LAW: Transportation is considered a "related service" within the Education for All Handicapped Children Act 's definition of a "free and appropriate public education," and the failure to provide transportation can lead to parental reimbursement for out-of-pocket expenses and the reasonable value of the parents' time and effort.

PROCEDURE SUMMARY:

Plaintiffs: George Hurry, along with his father and mother (P)

Defendant: Providence, Rhode Island Dept. of Education (D)

U.S. District Court Decision: Held for Hurrys (P)

U.S. Court of Appeals Decision: Affirmed in part and reversed in part

FACTS: George Hurry (George) (P) has cerebral palsy, mental retardation, and spastic quadriplegia, and he uses a wheelchair. Over the years, George attended various special education programs, and the City of Providence provided him with door-to-door bus transportation to and from school. However, by January of 1976, George had reached a weight of 160 pounds, and the bus drivers felt they could no longer safely carry him up and down the 12 steep concrete steps that led from the street to his front door. George's parents (P) took over the responsibility of transporting George to and from school in their van. Because Mrs. Hurry could not lift George or carry him up the steps without her husband's help, George had to wait in the van for several hours each day until his father came home from work. George often missed school when the weather was too hot or too cold for him to wait in the van, and he began to complain of pain in his legs from sitting for long periods in the van. In December of 1977, Mr. and Mrs. Hurry stopped transporting George to school.

The Hurrys (P) discussed their transportation problem with the Providence School Department (D), but the parties were unable to reach a resolution. However, by October 29, 1979, the parties had agreed on an individualized education plan (IEP) for George, which provided him with transportation to and from school. Nevertheless, the Hurrys decided to pursue claims for damages for the period during which they transported George to and from school themselves and for the period during which he did not attend school at all.

ISSUE: Do the remedies available under the Education for All Handicapped Children Act include compensation for the expenditure of time and effort and unjust enrichment?

HOLDING AND DECISION: (Coffin, J.) Yes and No. The court found that the Hurrys (P) were entitled not only to reimbursement for out-of-pocket expenses but also to the reasonable value of their time and effort. However, the court failed to expand the remedies available under the Education for All Handicapped Children Act (EAHCA) to include equitable relief. The EAHCA requires any state receiving federal assistance in the education of the handicapped to assure "all handicapped children a free appropriate education." Further, the act provides that aggrieved parties may bring a civil action and that the court hearing such an action may grant "such relief as the court determines is appropriate." The Rhode Island Board of Regents for Education's regulations to implement the EAHCA provided that handicapped children are to be given "door to door" transportation from the "street level entrance of dwelling."

The district court granted three separate damage awards to the Hurrys (P) pursuant to the EAHCA. First, it reimbursed Mr. and Mrs. Hurry (P) $1,150.00 for their out-of-pocket expenses for driving George to school. Second, the court awarded the Hurrys (P) $4,600.00 for their time and effort in driving George to and from school. Third, the court awarded George (P) $8,796.00 for the period during which he did not attend school at all. This award represented "the amount Defendants were not required to expend" on George's education.

The court, relying on an expansive view of reimbursement under the EAHCA, determined that the district court was correct in finding that the Hurrys (P) are entitled to reimbursement under the EAHCA for

the interim transportation services they provided until the parties agreed on an appropriate IEP for George. Further, the court found that the reimbursement available under the EAHCA is not limited to out-of-pocket expenses and that compensation may include the expenditure of time and effort. The court found the district court's award of $4,600.00 to be well within any reasonable estimate of fair reimbursement.

In the court's consideration of the award of $8,796.00 to George to compensate him for the period during which he was not able to attend school, the court found that to expand the EAHCA damage remedy to include equitable damages would be improper because the school did not benefit financially from the absence of one student. Further, to allow monetary damages to parents would be to provide the parents with an incentive to keep the child home rather than make an interim provision for his education. *The decision of the district court awarding the Hurrys $5,750.00 as reimbursement for transportation expenses and time and effort is affirmed. The decision awarding George Hurry $8,796.00 under the EAHCA is reversed.*

COMMENT: The district court also awarded George $5,000.00 as compensation for the physical and emotional hardships he endured during the transportation dispute. This claim was based on Section 504 of the Rehabilitation Act of 1973. The court of appeals determined that it is the EAHCA and the state and federal regulations promulgated under that act, not the Rehabilitation Act, that requires the department of education to provide George with door-to-door transportation. The court held that this action was properly brought under the EAHCA, and that plaintiffs may not avoid the EAHCA's limitations by seeking damages under the more general provisions of the Rehabilitation Act.

Discussion Questions

1. What was the court's rationale for awarding recovery for interim transportation services, for out-of-pocket expenses, and for the parents' time and effort?
2. Why was the $8,796.00 not awarded?
3. What do you think is meant by equitable relief? (Think about rewarding the parents for not sending their child to school.)

KRUELLE V. NEW CASTLE SCHOOL DISTRICT 642 F.2D 687 (3RD CIR. 1981)

GENERAL RULE OF LAW: Under the Education for All Handicapped Children Act, schools are required to provide a comprehensive range of services to accommodate a handicapped child's educational needs, including residential placement.

PROCEDURE SUMMARY:

Plaintiffs: Reverend and Mrs. Carl H. Kruelle (on behalf or their son, Paul) (P)

Defendants: New Castle County School District (NCCSD), Delaware State Board of Education, and other local and state school authorities (D)

U.S. District Court Decision: Held for Kruelle (P)

U.S. Court of Appeals Decision: Affirmed

FACTS: Paul Kruelle (P) is a 13-year-old boy who is profoundly retarded and suffers from cerebral palsy. He has an IQ below 30 and cannot walk, dress, or eat without assistance. He is not toilet trained, and he cannot speak. Along with Paul's physical challenges, he also has emotional problems that result in choking and self-induced vomiting when he is under stress. Between 1973 and 1977, Paul attended a public school in a mixed class with the trainable mentally retarded in Pennsylvania. By 1977, Paul's behavior had so deteriorated that he was vomiting and having frequent temper tantrums during school hours. Based on the severity and increased frequency of the vomiting, school officials and Paul's parents agreed that 24-hour residential placement was needed. Paul was subsequently placed in a Community Living Arrangement Program for multiply handicapped children that consisted of a combination school program and group home.

The Kruelle family subsequently moved to Delaware, where Paul (P) was enrolled in the Meadowood School and placed in respite care. Although the teachers and the respite caregiver observed that Paul was making progress under this plan, the Kruelles objected that Paul was not in a residential facility and they withdrew him from Meadowood. Paul's parents were granted an impartial hearing as required under the Education for All Handicapped Children Act (the Education Act). After the district hearing officer determined that the individualized education plan (IEP) proposed by Meadowood was appropriate within the meaning of the Education Act and that residential placement was "too restrictive," the parents appealed to the state educational agency. The state review officer agreed with the district hearing officer and found that the full-time services sought "were more in the nature of parenting than education." In October 1979, the Kruelles sought review of the administrative decision in district court. The district court found that Paul needed a greater degree of consistency and that the educational program provided by NCCSD was not a free appropriate education within the meaning of the Education Act.

ISSUE: Does the Education for All Handicapped Children Act require residential placement when full-time placement is necessary to implement a handicapped child's individualized education plan (IEP)?

HOLDING AND DECISION: (Adams, J.) Yes. When residential placement is needed in order for a handicapped child to benefit educationally from instruction, it must be provided by the school district at no cost to the parents. The Education Act provides a free appropriate education for every handicapped child "regardless of the severity of their handicap." Although the Education Act does not specifically mandate what should constitute each IEP, the Act does define what qualifies as a free appropriate public education (FAPE) and defines component parts of the Act relative to "special education" and "related services." Special education refers to "specially designed instruction at no cost to parents or guardians, to meet the unique needs of a handicapped child, including . . . instruction in institutions." Related services include any supportive services that may be needed to assist a handicapped child to benefit from special education. Regulations promulgated under the Act explicitly provide that if placement in a residential program is necessary in order to provide special education and related services to a handicapped child, the program must be at no cost to the child's parent.

The parties agreed that Paul needed full-time assistance beyond what is available in any day school program and that the Education Act provides for residential placement in certain situations. Thus, the focus was on whether Paul's need for full-time placement should be considered necessary for educational purposes, or whether the residential placement is a response to medical, social, or emotional problems that are separate from the learning process. In *North v. District of Columbia Board of Education* (1979), the court

was presented with nearly identical facts and the court addressed the same issue.[8] In *North,* the court found that the educational, social, emotional, and medical problems were so intertwined that it was virtually impossible for the court to separate them. Ultimately, the court determined that the unseverability of such needs served as the basis for holding that services are a necessary prerequisite for learning.

Before ordering residential placement, a court should weigh the mainstreaming policy included in the Education Act, which specifies placement of the child in the least restrictive environment. The district court's calculations resulted in it's finding that the past attempts to provide Paul in-home care and after-school instruction had been unsuccessful and had caused Paul to regress. Once a court concludes that residential placement is the only rational option, the question of "least restrictive" is resolved. It is only when alternatives actually exist that the court must address the issue of which option is least restrictive. If day school does not provide an appropriate education, it is not an option. Because of the combination of his physical and mental handicaps, Paul requires full-time care in order to learn. Affirmed.

COMMENT: The court found the trial court's decision—that Paul required more continuous care than the six-hour day provided by the Meadowood program—was supported by their reasoning in *Battle v. Commonwealth of Pennsylvania* (1980).[9] In *Battle*, the court held that the 180-school-day rule that is appropriate for nonhandicapped children cannot be presumed to satisfy the needs of the handicapped. The *Battle* court explained that the concept of education is necessarily broad with respect to persons with severe disability, so "where basic self-help and social skills such as toilet training, dressing, feeding, and communication are lacking, formal education begins at that point."

The court also determined that the Education Act places the burden for insuring an appropriate education for handicapped children on the State Board of Education. Thus, it is the State Board of Education's responsibility to insure that these children receive a proper evaluation and that an appropriate plan is implemented. The delegation of duties from state to regional and local levels is left up to the individual state's discretion. The Education for All Handicapped Children Act of 1975 (the Education Act or EAHCA) is now titled the Individuals With Disabilities Education Act (IDEA).

Discussion Questions

1. What is the difference between respite care and residential care?
2. Why did the court agree that full-time residential care was most appropriate?
3. Do you agree with this decision? Why or why not?

MAX M. V. ILLINOIS STATE BOARD OF EDUCATION 629 F. SUPP. 1504 (N.D. ILL. 1986)

GENERAL RULE OF LAW: (1) The Education for All Handicapped Children Act requires a school district to provide a handicapped child with recommended psychotherapy in order to enable the child to benefit from a free and appropriate education. (2) Parents are entitled to reimbursement for sums expended for a child's private psychotherapy when a school district fails to comply with the Education for All Handicapped Children Act.

PROCEDURE SUMMARY:

Plaintiffs: Max M., a handicapped child, and his parents (P)

Defendants: State defendants include Illinois State Board of Education (D) and several individual representatives of the board; Local defendants include the New Trier High School District and Board of Education (D)

U.S. District Court Decision: Plaintiffs' motion for reconsideration is granted and both parties' motions for summary judgment are granted in part and denied in part

FACTS: The Education for All Handicapped Children Act (EAHCA) is a federal statute that provides federal funds to participating states in order to assist them in providing educational and other related services to handicapped children. States receiving such funds are required to establish procedures that enable handicapped children and their parents to protect their right to a "free and appropriate public education." Max M. (P) is a handicapped child within the meaning of the EAHCA. Max suffers from anxiety, disorganization, and has difficulty writing. In his freshman year at New Trier West (D), a public high school in Northfield, Illinois, Max was referred to the Special Education department for evaluation. He was examined by Dr. Traisman, a consultant for New Trier, who recommended long-term "intensive psychotherapy." Dr Traisman based this recommendation on his finding that although Max was a bright child, he possessed a very poor self-image and that before Max's learning disabilities could be addressed, his self-image needed to be strengthened through long-term "intensive psychotherapy."

The school district followed Dr. Traisman's recommendation when preparing an individualized education plan (IEP) for Max to begin in his sophomore year. Although not specifically stated in the IEP, Max was offered two psychotherapy sessions a week with a New Trier social worker. Max, however, failed to attend these therapy sessions on a regular basis. By the end of Max's sophomore year, his academic and social behavior had seriously deteriorated and New Trier recommended that Max attend Central Campus Learning Center (CCLC), an off-campus facility designed for emotionally disturbed and behavior-disordered students. The summer after his sophomore year, Max began receiving psychotherapy from Dr. Robert Rosenfeld, a psychiatrist. Dr. Rosenfeld also served as an adviser to Max's parents with regard to Max's junior year placement and accompanied them when they met with New Trier to prepare an IEP for Max. The IEP was prepared with the understanding that if the CCLC placement did not work out for Max, the parents could initiate a due process hearing. However, because of the modifications in the regular CCLC program, Max experienced tremendous academic improvement, and by the end of the second semester at CCLC, Max was receiving all A's and B's.

During Max's junior and senior years, Dr Rosenfeld continued to provide private psychotherapy for Max but at Max's parents' expense. Due to the parents' financial constraints, the number of sessions was reduced from two times per week to one time per week. At the end of Max's senior year, New Trier sent Max's parents written notification that he had earned more than the required credits to graduate and informed them that Max's graduation marked a change in special education status. Max's parents then filed a request for a due process hearing. The parents were forced to discontinue Max's psychotherapy with Dr. Rosenfeld in order to fund the due process hearing. In October 1981, a due process hearing was conducted. Both the hearing officer and a subsequent opinion by the Illinois State Board of Education found that the school district had denied Max an appropriate education with related services because it failed to provide Max with intensive psychotherapy as recommended by the school district's psychologist.

ISSUE: (1) Does the Education for All Handicapped Children Act require a school district to provide recommended psychotherapy to a handicapped child in order to enable the child to benefit from a free and appropriate education? (2) Must the school district reimburse parents for their expenditures on private psychotherapy if a school district fails to provide recommended psychotherapy to a handicapped child?

HOLDING AND DECISION: (Bua, J.) Yes. The Education for All Handicapped Children Act (EAHCA) requires a school district to provide recommended psychotherapy if it will enable a child to benefit educationally and to receive a free and appropriate education. If a school district fails to provide recommended therapy, the school district will be required to reimburse the child's parents for their financial expenses in providing private psychotherapy. In deciding whether this requirement exists, a court must first determine whether the child was receiving a free and appropriate education under the EAHCA. In *Hudson District of Board of Education v. Rowley* (1982), the court developed a two-part standard to be utilized when determining whether a school district has met its obligations under the EAHCA.[10] In *Rowley*, the court determined that the EAHCA's requirement that the state provide a "free and appropriate public education" is met when a school district provides access to specialized instruction and related services that are designed to meet the unique needs of the handicapped child and the child benefits educationally from that instruction. This means that the student is entitled to instruction that provides an educational benefit, but it does not necessarily mean the student is guaranteed a particular level of educational benefit. In addition to the substantive requirement of the "free and appropriate education," the court also discussed compliance with the EAHCA's procedural requirements. States' compliance with EAHCA's procedures reflects Congress's intent to ensure parental involvement and creates a check on the substantive contact of the proposed program.

Applying the *Rowley* criteria to Max M.'s situation, the court found that although proper legal notice was never sent to Max's parents (P), they did have actual notice of their right to seek a due process hearing. The parents (P) were notified by Dr. Rosenfeld during Max's junior year of their right to seek review, and the school district (D) informed them they were entitled to review if the CCLC placement proved unsatisfactory. Additionally, the evidence showed that the parents (P) were involved with and approved Max's IEPs for his sophomore, junior, and senior years, thus reflecting the basic policy concern of the EAHCA' notice provision that the parents be involved in ensuring that proper educational and related services are provided to their child. Therefore, the court found no reason to hold that a free and appropriate education was denied Max (P) based solely on the school district's (D) procedural violations.

As to the substantive criteria of *Rowley,* the court found that the school district failed to provide Max (P) with intensive psychotherapy during his junior and senior year, thus depriving Max (P) of a free and appropriate education. The EAHCA is interpreted to include psychotherapy as a related service that is to be provided the child by the school district. The record showed that the school psychologist, Dr. Traisman, recommended intensive psychotherapy for Max. Yet, the facts are undisputed that the school district (D) provided no such therapy for Max after his sophomore year. Because of this, Max's parents were forced to bear the financial burden of private psychotherapy from Dr. Rosenfeld at a cost of $8,855.

This conclusion required the court to further determine the appropriate relief. The court based this part of its decision on the Supreme Court's decision in *Burlington School Committee v. Department of Education* (1985).[11] *Burlington* eliminated the requirement that parents must prove exceptional circumstances as a prerequisite to reimbursement. However, the court did not agree with the parents' (P) argument that the *Burlington* decision eliminated the reimbursement limitations under the EAHCA, specifically that services provided by a licensed physician are limited to diagnosis and evaluation. The court, relying on the plain language of the statute, found that a school district is only required to provide the minimum

level of health care personnel that is recognized as legally and professionally competent to perform the EAHCA required service. A school district's liability should, therefore, be computed from the amount that such qualified personnel would normally and reasonably charge for the EAHCA services. The school district has the burden of presenting the court with the normal and reasonable charge. Since the New Trier High School District (D) failed to present any evidence that the services could have been provided at a lower cost by New Trier personnel, the court ordered defendants to reimburse plaintiffs for the full amount of $8,855 with interest and costs.

COMMENT: This case was before this court on four prior occasions addressing plaintiffs' claims under EAHCA, including the claim for compensatory remedial educational services from all the defendants for the deprivation of Max's EAHCA benefits while he attended New Trier and an injunction to revoke Max's diploma and reinstate his eligibility under EAHCA. The court concluded that aside from the issue of psychotherapy, the school district provided Max with a free and appropriate education within *Rowley*'s guidelines. Once the defendants reimburse Max's parents for the private psychotherapy Max received during his junior and senior years, Max will have received a free and appropriate education with related service. Furthermore, with the reimbursement, Max's graduation was appropriate; therefore, Max is not entitled to further education at the public's expense. Even though there may have been other programs that would have provided a better education, the school district was only required to provide a program that would allow Max to benefit educationally. The school district did that.

Discussion Questions

1. Did Max need psychotherapy in order to successfully implement his IEP?
2. Why is psychotherapy a related service?
3. Why did the court select *Rowley* as the basis for its analysis in this case?

S-1 V. TURLINGTON
635 F.2D 342, 347 (5TH CIR. 1981)

GENERAL RULE OF LAW: An intellectually retarded child may not be expelled without a hearing to determine whether the basis for expulsion is related to the disability.

PROCEDURE SUMMARY:

Plaintiffs: S-1 and eight other anonymous high school students (P)

Defendants: Turlington and various other school officials (D)

U.S. District Trial Court Decision: Held for the students (P)

U.S. Court of Appeals Decision: Affirmed

FACTS: Nine students at a high school in Hendry, Florida, suffered from moderate to mild mental retardation. In separate actions, these students were expelled for various acts of misbehavior. Only one student, S-1 (P), was afforded a hearing to determine whether his handicap was related to his offense; the others made no such request. In S-1's (P) case, Turlington (D) had determined that because he was not seriously disturbed, his handicap could not be related to his conduct. A suit was brought in district court, contending that S-1 (P) had been denied his rights under the Education for All Handicapped Children Act (EAHCA) and seeking an injunction mandating readmission. The district court issued the injunction, and Turlington (D) appealed.

ISSUE: May an intellectually retarded child be expelled without a hearing to determine whether the basis for expulsion is related to the disability?

HOLDING AND DECISION: (Hatchett, J.) No. An intellectually retarded child may not be expelled without a hearing to determine whether the basis for expulsion is related to the disability. Under the EAHCA, a handicapped student may not be expelled from school for conduct that results from the handicap itself. This is true whether the handicap is physical, emotional, or mental. From this, it follows that any expulsion of a handicapped student must be accompanied by a hearing to determine this issue. It is no defense that a hearing was not requested; the EAHCA and its implementing regulations place an independent obligation upon the school, whether or not a hearing is requested. Handicapped students and their parents will often not have sufficient sophistication to understand their right to a hearing. In this instance, eight of the nine students involved had no hearing, so their EAHCA rights were violated. With respect to S-1 (P), the authorities (D) apparently assumed that only a serious emotional handicap would invoke the EAHCA. This was an incorrect reading of the Act; any handicap, if it relates to the misconduct at issue, prevents expulsion. Consequently, a rehearing would be necessary before S-1 (P) could be legitimately expelled. Affirmed.

COMMENT: The EAHCA provides that certain procedural protections shall accompany any change in educational placement. Consequently, the district court and the court of appeals had to decide as a threshold matter whether expulsion was a change in placement for purposes of the Act, which was silent on the issue. Both courts decided this in the affirmative, noting that a school could circumvent a handicapped child's right to an education in the least restrictive environment if the Act were otherwise construed. The guarantees recognized in this circuit court decision were later established by the Supreme Court in *Honig v. Doe* (1988).[12] The key in any disciplinary action involving the expulsion of a handicapped student is that the hearing must be conducted by the individualized education plan (IEP) team. The IEP team must make the determination as to the relationship between the misconduct and the handicap.

Discussion Questions

1. Does suspension or expulsion constitute a change in a disabled child's educational program?
2. Is the degree of severity of a child's emotional disability a factor in determining whether a child is protected under the Education for All Handicapped Children Act ?
3. Whose responsibility is it to call for a hearing before the expulsion of a child with disabilities?

NOTES

1. Board of Educ. v. Rowley, 458 U.S. 173 (1982).
2. See, e.g., Sacramento City Unified School District v. Rachel H., 14 F.3d 198 (9th Cir. 1994).
3. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 105 S. Ct. 3142 (1985).
4. School Bd. of Nassau County, Florida v. Arline, 480 U.S. 273 (1987).
5. Chalk v. United States District Court Central District of California, 840 F.2d 701 (9th Cir. 1988).
6. Southeastern Community College v. Davis, 42 U.S. 397, 406, 99 S. Ct. 2361, 2367, 60 L.Ed.2d 980 (1979).
7. Poole v. South Plainfield Board of Education, 480 F. Supp. 948 (D. N.J. 1980).
8. North v. District of Columbia Board of Education, 471 F. Supp. 136 (D.D.C. 1979).
9. Battle v. Commonwealth of Pennsylvania, 629 F.2d 269 (3rd Cir.1980).
10. Hudson District of Board of Education v. Rowley, 458 U.S. 176, 203 (1982).
11. Burlington School Committee v. Department of Education, 471 U.S. 359 (1985).
12. Honig v. Doe, 484 U.S. 305, 108 S. Ct. 592 (1988).

9

Teachers' Rights and Concerns

BORING V. BUNCOMBE BOARD OF EDUCATION 136 F.3D 364 (4TH CIR. 1998)

GENERAL RULE OF LAW: The school board, as an arm of the state government, is empowered to oversee and respond to specific curriculum-related needs of the local district. School officials retain editorial control. Aspects of this case can logically be compared to the court's decision in *Hazelwood v. Kuhlmeier* (1988).[1]

PROCEDURE SUMMARY:

Plaintiff: Boring, a high school drama teacher (P)

Defendant: Buncombe Board of Education (D)

U.S. District Court Decision: Held for the Defendant

U.S. Court of Appeals Decision: Affirmed

FACTS: Boring (P), a drama teacher, chose the play *Independence* for her students to perform at a competition. The play portrays a dysfunctional family that includes a lesbian daughter and a daughter with an illegitimate child. The students' performance won honors at a regional competition. The principal learned of the script, objected to the play, and eventually only let students perform it with specific scenes deleted. Later, the principal alleged that Boring (P) failed to follow the school's "controversial materials" policy and transferred Boring (P) to a new school. The policy dealt with parental control over what material their children are exposed to at school. Boring (P) assumed the policy did not cover dramatic presentations and sued the Board of Education (D) on First Amendment grounds. She claimed that her transfer was a retaliatory action.

ISSUE: Does a public school teacher have a First Amendment right to participate in choosing the school curriculum?

HOLDING AND DECISION: (Widner, J,) No. The Fourth District Court of Appeals, by a 7–6 vote, held that the plaintiff's selection of the play as part of the school curriculum was not protected expression under the First Amendment. "Since plaintiff's dispute with the principal, superintendent of schools, and the school board is nothing more than an ordinary employment dispute, it does not constitute protected speech and has no First Amendment protection."

DISSENT: (Motz, J.) "School administrators must and do have final authority over curriculum decisions. But that authority is not wholly unfettered."

COMMENT: This case demonstrates the control local school boards retain in what students may be exposed to in the curriculum. As stated by the court, a teacher may not pick and choose additional subject matter to expose their students to if the school board or teaching manual expressly rejects such exposure. Although the First Amendment protects a citizen's right to expression, limitations are acceptable when that expression comes within the confines of school curriculum.

Discussion Questions

1. Discuss the issue of the balancing of equities (how a court must compare the rights of a plaintiff against the needs of the defendant). In this case, the equities involve a teacher's academic freedom balanced against the need for a school to control inappropriate teaching behavior or teaching subject matter that it considers inappropriate.
2. What are the implications of the court's dissenting opinion?
3. Under what other circumstances might an administrator face censorship issues? What factors should guide the administrator's decision?

DIKE V. SCHOOL BOARD OF ORANGE COUNTY, FLORIDA 650 F.2D 783 (5TH CIR. 1981)

GENERAL RULE OF LAW: Breast-feeding is entitled to constitutional protection against state infringement, in certain circumstances.

PROCEDURE SUMMARY:

Plaintiff: Dike, a school teacher (P)

Defendant: School Board of Orange County, Florida (Board) (D)

U.S. District Court Decision: Dismissed Dike's (P) complaint as frivolous

U.S. Court of Appeals Decision: Reversed

FACTS: Dike (P), an elementary school teacher employed by the Board (D), desired to breast-feed her child at all feedings. One feeding was necessary during the school day. She arranged to have the child brought to school during her lunch period, when she was free from all duties, so she could feed the child in a locked, private room. After three months, the school principal instructed Dike (P) to cease nursing the child at school. He cited a Board (D) directive prohibiting teachers from bringing their children to work for any reason. Dike (P) stopped nursing the child on campus. After observing the child's allergic reaction to formula and eventual refusal of a bottle, Dike (P) sought permission to nurse off campus. The Board (D) refused. Dike (P) thereafter filed suit under 42 U.S.C. § 1983, challenging the Board's (D) refusal to permit on-campus breast-feeding. The district court dismissed the complaint as frivolous.

ISSUE: Is breast-feeding entitled to constitutional protection from state infringement in certain circumstances?

HOLDING AND DECISION: (Godbold, C. J.) Yes. Breast-feeding is entitled to constitutional protection from state infringement in certain circumstances. Breast-feeding is one of those fundamental rights, like marriage, procreation, contraception, and abortion, protected under the Fourteenth Amendment's guarantee of liberty. The district court's dismissal for failure to state a claim was, therefore, clearly erroneous. Because breast-feeding is among those fundamental rights, the Board (D) must show that prohibiting Dike (P) from breast-feeding during her duty-free lunchtime furthers a compelling state interest and is narrowly tailored to promote that interest. Whether the Board's (D) legitimate interest in preventing disruption of the educational process satisfies this standard is a question of fact to be determined at trial. Reversed.

COMMENT: The problem in the *Dike* case is striking a balance between the state's legitimate interest in maintaining an appropriate educational environment and the personal privacy rights of the educators within that environment. Notwithstanding the result in *Dike* on remand, it would seem that her ability to breast-feed on campus should win this balance, given the recognized need to accommodate working mothers and the minimal effect that the breast-feeding routine would have on the educational environment. While courts have strongly supported teacher claims regarding personal privacy, courts have also recognized the school board's interest in maintaining an appropriate educational environment. This has sometimes constrained the personal freedoms of teachers. Often, the basis for the school's action is that teachers serve as role models and, therefore, need to conform to traditional community standards. Obviously, standards have changed. In the first third of the century, some school districts even prohibited teachers from dating and would remove a teacher who was married.

Discussion Questions

1. Was the problem in the *Dike* case the balance between the state's legitimate interest in maintaining an appropriate educational environment and the personal privacy rights of the educators within that environment?
2. Is breast-feeding a fundamental right, like marriage, procreation, and contraception, that is protected under the Fourteenth Amendment?
3. What significance will this case have on future educators in the workplace?

EAST HARTFORD ED. ASSN. V. BOARD OF ED. 562 F.2D 838 (2ND CIR. 1977)

GENERAL RULE OF LAW: Consistent with the U.S. Constitution, a school board may impose reasonable regulations governing the appearance of its teachers.

PROCEDURE SUMMARY:

Plaintiffs: Richard Brimley, a school teacher, and the East Hartford Education Association, a teachers' union (P)

Defendant: Town of East Hartford Board of Education (School District) (D)

U.S. District Court Decision: Granted summary judgment in favor of defendant

U.S. Court of Appeals Decision: Reversed and remanded

U.S. District Court Decision: Held for plaintiff

FACTS: Brimley (P), a public school teacher, was reprimanded for failure to wear a necktie while teaching his class. Brimley (P) and the teachers' union (P) sued the School District (D), seeking declaratory and injunctive relief and claiming that enforcement of the dress code violated his constitutional rights of free speech and privacy. The district court granted summary judgment for the school district (D). The court of appeals reversed and remanded. The court voted for a rehearing en banc.

ISSUE: May a school board impose reasonable regulations, consistent with the U.S. Constitution, governing the appearance of its teachers?

HOLDING AND DECISION: (Meskill, J.) Yes. A school board may impose reasonable regulations, consistent with the U.S. Constitution, governing the appearance of its teachers. The general rule is that federal courts may not review the daily operating decisions of school administrators, unless these decisions directly implicate constitutional rights. The court must balance the individual's interest in freedom of expression against the school district's interests in enforcing its dress code. When this balancing test was applied to the present case, the School District's (D) interests prevailed. Here, the controversy fails to directly involve Brimley's (P) constitutional rights, so the court declined to overturn the school's policy. Brimley (P) claimed that his refusal to wear a necktie constituted "symbolic speech" protected under the First Amendment. Specifically, Brimley (P) claimed that his manner of dress indicated that he was not a part of the establishment and that he was closer to the students in his values, thus making him a more effective teacher. Symbolic speech constitutes conduct that may be regulated. As that conduct becomes less like pure speech, then the required showing of the state's interest in regulating that conduct is lessened. Here, the expressive conduct is Brimley's (P) failure to wear a tie. The relationship between such conduct and the claimed expression is tenuous, thereby reducing the School District's (D) required showing. Moreover, Brimley (P) had alternative means of communicating his views to his students without violating the dress code. The School District's (D) enforcement of the dress code is rationally related to its

objective of promoting respect and discipline in the classroom. This is a decision for local school authorities, and not the courts, to make. The court may not overturn decisions of school officials, unless these officials are clearly outside the scope of their authority. Lastly, Brimley (P) claimed that the enforcement of the dress code violated his liberty rights under the Fourteenth Amendment. Courts have held that the state's interest in regulating the conduct of its employees differs significantly from its interest in regulating the speech of the general public. In such a case, the issue is whether the regulations imposed are so irrational as to be deemed arbitrary and constitute a deprivation of the individual's liberty interests. The disciplinary effect of Brimley's (P) failure to wear a tie does not conform to this standard and, therefore, the School District's (D) policy must be upheld.

DISSENT: (Oakes, J.) The majority erroneously trivializes Brimley's (P) expression and liberty interests and overemphasizes the School District's (D) interest in regulating the conduct of its employees.

COMMENT: In burdening a fundamental right, the state bears the burden of proof. When the challenged regulation does not discriminate against an insular minority or implicate a fundamental right, however, the policy is presumed constitutional. Courts have consistently held that an individual's right to select his own style of dress does not constitute a fundamental right under the Constitution. In order to be recognized as a constitutionally protected fundamental right, the conduct must implicate the individual's "most basic personal decisions."

Discussion Questions

1. What's the difference between "free speech" and Richard Brimley's claim of "symbolic speech" protected by the First Amendment?
2. What other way(s) could Brimley have communicated his views without violating the school dress code?
3. The court system does not intervene to resolve conflicts arising in the daily operation of school systems. What circumstance(s) would allow the court to intervene?

FISHER V. SNYDER
476 F.2D 375 (8TH CIR. 1973)

GENERAL RULE OF LAW: Dismissal of an untenured teacher is arbitrary and capricious when it is unrelated to either the education process or working relationships, or it is wholly without factual support.

PROCEDURE SUMMARY:

Plaintiff: Fisher, an untenured teacher (P)

Defendant: Snyder, a school board member (Board) (D)

U.S. District Court Decision: Held for Fisher (P), ordering her reinstatement

U.S. Court of Appeals Decision: Affirmed.

FACTS: From 1970 to 1972, Fisher (P), a middle-aged divorcee, was employed as a high school teacher in Tyron. Her son lived and taught in a neighboring town. Often, his friends, young ladies, men, and married couples, visited Tyron. They often stayed in the one-bedroom apartment in which Fisher (P) lived because hotel and motel accommodations were generally unavailable. One young man, to whom Fisher (P) referred as her second son, visited often. In the spring of 1972, he visited for a week, sitting in on classes in accordance with Fisher's (P) arrangements with the school administration. Fisher (P) was thereafter notified that her contract would not be renewed for the next year. At a hearing, the Board (D) dismissed Fisher (P) for allowing young men, unrelated to her, to stay with her. It claimed this was conduct unbecoming a teacher. In the Board's (D) view, her social behavior suggested a strong potential for sexual misconduct. Fisher (P) filed suit under 42 U.S.C. § 1983, arguing that the Board's (D) reasoning was constitutionally impermissible. The district court agreed and ordered her reinstated. The Board (D) appealed.

ISSUE: May an untenured teacher be dismissed for reasons unrelated either to the education process or working relationships within the institutions and wholly without factual support?

HOLDING AND DECISION: (Bright, J.) No. An untenured teacher may not be dismissed for reasons unrelated either to the education process or working relationships within the institutions, or wholly without factual support. The school board may legitimately inquire into the character and integrity of its teachers, but it may not dismiss them based on unsupported conclusions drawn from such inquiries. Fisher's (P) allowing guests to stay in her one-bedroom apartment because other accommodations were sparse or unavailable does not support the Board's (D) conclusions that there was a strong potential for sexual misconduct or social misbehavior not conducive to maintaining the school's integrity. Thus, the district court correctly found that the dismissal was arbitrary and capricious. Affirmed.

COMMENT: *Fisher* is important because it illustrates another important area in which a teacher's interest must be weighed against the school board's interest. In this case, the teacher's interest in personal privacy was at stake. *Fisher* shows that the state does have a legitimate interest in supporting an inquiry into a teacher's integrity and character, but that interest is limited. Allowing local school boards any greater discretion in such inquiry would present too great a risk of serious infringement of privacy and personal freedom. This is especially true granted the potential, most prevalent in small communities, for community-wide disapproval of certain lifestyles or living choices.

Discussion Questions

1. Does the school board have the right to judge a teacher's lifestyle or living choice?
2. Should school boards concern themselves with a teacher's personal privacy if it is unrelated to the education process?
3. On what grounds can a teacher be terminated or not renewed? How does a nonrenewal affect a teacher's chance for future employment?

FOWLER V. BOARD OF EDUCATION OF LINCOLN COUNTY 819 F.2D 657 (6TH CIR. 1987)

GENERAL RULE OF LAW: Conduct is protected by the First Amendment only if it is expressive or communicative in nature.

PROCEDURE SUMMARY:

Plaintiff: Jacqueline Fowler, a tenured teacher (P)

Defendant: Lincoln County School District (School District) (D)

U.S. District Court Decision: (1) Held for plaintiff in part, reinstated plaintiff to her former position, and awarded damages. (2) Held for defendant in part, upholding the Kentucky statute that made plaintiff's firing possible. Plaintiff appeals the second decision

U.S. Court of Appeals Decision: The judgment of the district court regarding the statute is vacated

FACTS: Fowler (P) was a tenured teacher at the Lincoln County School District (D) for 14 years. Fowler (P) showed her class an "R"-rated movie titled "Pink Floyd: The Wall," upon the request of her students. Fowler (P) did not preview the movie before showing it to her class, although she was aware that the film contained some nudity. She asked one of her students who had seen the film to show the movie and edit out any unsuitable parts. Students' testimony conflicted as to how much nudity was actually viewed. Fowler (P) testified that she left the classroom several times during the film. That afternoon, the principal asked Fowler (P) to give him the videotape. The superintendent and School District (D) viewed the film. They then commenced proceedings to terminate Fowler's (P) contract. Fowler (P) received notice of her termination and of a hearing. She appeared at the hearing with counsel in order to contest the charges. She claimed that she believed the film had educational value. The School District (D) voted for termination. Fowler (P) then initiated proceedings in the district court, claiming violations of her First and Fourteenth Amendment rights and challenging the constitutionality of the state statutes under which she was discharged. The district court found that her discharge violated the First Amendment, and it subsequently reinstated her and awarded damages. The district court, however, upheld the Kentucky statute under which she was discharged. The School District (D) appealed. Fowler (P) cross-appealed the judgment on the constitutional validity of the statute.

ISSUE: Is conduct protected by the First Amendment only if it is expressive or communicative in nature?

HOLDING AND DECISION: (Milburn, J.) Yes. Conduct is protected by the First Amendment only if it is expressive or communicative in nature. In order for a plaintiff to establish a prima facie case of a constitutional violation, he must show that he was engaged in a protected activity and that the activity substantially motivated his discharge. Then the burden shifts to the state to show by a preponderance of the evidence that the discharge would have occurred absent the employee's engaging in the protected activity. The issue here is whether Fowler's (P) showing of the film was a constitutionally protected activity. In making this determination, the court must balance the teacher's interest in freedom of expression

against the school's interest in maintaining order. While a teacher has First Amendment rights under certain circumstances, Fowler's (P) conduct in the present case was not entitled to such protection. In order for expressive conduct to be afforded First Amendment protection, the plaintiff must possess an intent to convey a particular message that has a great likelihood of being perceived by those to whom it was communicated. That was not the case here. Fowler (P) never viewed the movie prior to showing it in her class. Moreover, she left the classroom several times during the film. Such conduct cannot be said to evidence an intent to convey a particular message. Moreover, showing the movie in itself did not constitute a method of expression entitled to protection. The judgment of the district court was vacated, and the action was dismissed.

CONCURRENCE: (Peck, J.) While the district court properly applied the "mixed motive" standard in reviewing the constitutionality of the School District's (D) discharge of Fowler (P), it erred in finding that she would not have been terminated absent the constitutionally protected conduct of communicating a particular ideology to her classroom.

DISSENT: (Merritt, J.) The district court was correct in finding that the School District (D) failed to meet its burden of showing that Fowler (P) would have been discharged absent a constitutionally protected activity. On the contrary, the School District's (D) decision was made because it disliked the content of the film.

COMMENT: The court also rejected Fowler's (P) claim that the Kentucky statute under which she was discharged was unconstitutionally vague and overbroad. The statute proscribed termination for "conduct unbecoming a teacher." Fowler (P) contested this statute on the basis that it failed to provide her with notice that her conduct would result in disciplinary action. Courts have upheld the validity of such statutes as a basis for employee discharge. Furthermore, the court concluded that Fowler's (P) showing of the film constituted "conduct unbecoming a teacher" in violation of the statute.

Discussion Questions

1. What must a plaintiff show to establish a prima facie case of a constitutional violation?
2. What specific actions by the teacher did the court consider crucial in determining whether she was entitled to First Amendment protections?
3. What does the teacher need to show to gain First Amendment protection? Do you think that there is any conflict between the court's opinion and the goals of a school?

GELLER V. MARKHAM 635 F.2D 1027 (1980)

GENERAL RULE OF LAW: Evidence that an employer's facially neutral practice has a disparate impact upon members of the plaintiff's class establishes a prima facie case of discriminatory impact in actions instituted under the Age Discrimination in Employment Act of 1967 (ADEA).

PROCEDURE SUMMARY:

Plaintiff: Miriam Geller, 55-year-old teacher (P)

Defendant: Walter Markham, et al. (School Officials) (D)

U.S. District Court for the District of Connecticut: Held for plaintiff, awarding damages against School Officials but denying plaintiff equitable relief (plaintiff appealed and defendant cross-appealed)

U.S. Court of Appeals: Affirmed in part and reversed in part

FACTS: Miriam Geller (P), a 55-year-old, applied for a position as a teacher at Bugbee School in West Hartford, Connecticut, in August 1976. She was an experienced teacher, a tenured teacher in New Jersey, as well as a substitute teacher in Connecticut schools. She interviewed for a permanent position to fill a "sudden opening" in the Bugbee School on September 3, 1976, and was told she would begin teaching on September 7. Meanwhile, School Officials (D) continued to interview other candidates for the job. Ms. Geller (P) prepared the art room over the Labor Day weekend and taught school until September 17. At that time, she was replaced by a 25-year-old woman who had not applied for the job until September 10. Shortly thereafter, Ms. Geller (P) brought suit alleging violations of ADEA and pointing in particular to the "Sixth Step Policy" adopted by the West Hartford Board of Education. This cost-cutting policy was derived from a statement included by the previous Bugbee School superintendent in his budget report to the board. That policy read, "Except in special situations and to the extent possible, teachers needed in West Hartford next year will be recruited at levels below the sixth step of the salary schedule." The sixth step is the salary grade reached by teachers with more than five years' experience.

ISSUE: Is a prima facie case of discriminatory impact established in actions instituted under the Age Discrimination in Employment Act of 1976 by showing that an employer's facially neutral practice has a disparate impact upon members of the plaintiff's class?

HOLDING AND DECISION: Yes. The court held that statistical evidence presented by the plaintiff established disparate impact by proving that she was subjected to a facially neutral policy disproportionately disadvantaging her as a member of a protected class. In light of its decision to grant damages equal to one year's salary, the jury reached a factual conclusion that the plaintiff was deprived of only one year's employment by the defendant's discriminatory action, and thus, permanent reinstatement was unwarranted. The plaintiff was entitled to pension rights for that one year's employment that the plaintiff should have had.

COMMENT: Because this is a disparate impact case, rather than a disparate treatment case, it turned on the statistical evidence presented by the plaintiff with regard to teacher experience within the state. (With disparate treatment, proof of discriminatory motive is critical; proof of motive is not required to sustain a claim of disparate impact.) At trial, expert statistical testimony established that 92% of Connecticut teachers between 40 and 65 years of age (the protected age group under ADEA) have more than 5 years experience, while only 62% of teachers under 40 have taught more than five years. Largely on the strength of this expert statistical evidence, the court found that the defendant's "sixth step" policy was discriminatory as a matter of law. It found the case to be governed by the line of cases regulating facially neutral policies that have a discriminatory impact.[2] There exists a fine line between applying a policy ("sixth step") because an "experience/cost " criterion for hiring is necessary in view of declining enrollments and rising school costs and enacting a policy the intent of which may be to discriminate against more experienced teachers (in this case, a member of a class protected by ADEA). ADEA makes it unlawful to discriminate

against an employee or applicant on the basis of age, unless age is established as a bona fide occupational qualification (BFOQ). While this is hard to establish in education, it must be shown that the BFOQ is reasonably necessary to the normal operation of the school system or that the differentiation is based on reasonable factors other than age.

Discussion Questions

1. How does the disparate impact analysis differ from disparate treatment?
2. If the younger teacher had been hired initially, would there have been a court case?
3. Are age discrimination claims harder to prove than other employment claims? Why or why not?

GIVHAN V. WESTERN LINE CONSOLIDATED SCHOOL DISTRICT 439 U.S. 410 (1979)

GENERAL RULE OF LAW: First Amendment protections are not necessarily lost merely because the speech is privately spoken.

PROCEDURE SUMMARY:

Plaintiff: Bessie Givhan, junior high English teacher (P)

Defendant: Western Line Consolidated School District (School District) (D)

U.S. District Court Decision: For plaintiff, Givhan, holding that her First Amendment rights were violated

U.S. Court of Appeals Decision: Reversed, concluding that her private expressions were not protected under the First Amendment

U.S. Supreme Court Decision: Reversed and remanded for reconsideration

FACTS: At the end of the 1970–1971 school year, Bessie Givhan (P) was dismissed by the Western Line Consolidated School District (D) from her employment as a junior high English teacher. This Mississippi school district was then the subject of a desegregation order. To justify Givhan's (P) release, the school district (D) mentioned a series of private encounters between Givhan (P) and her principal. During these conversations, Givhan (P) allegedly made "petty and unreasonable demands" in a manner described as "insulting," "hostile," "loud," and "arrogant." The district court ruled that Givhan's (P) First Amendment rights had been violated and ordered her reinstatement. The court of appeals for the Fifth Circuit reversed, ruling that because Givhan (P) expressed her complaints and opinions privately to the principal, her expression was not protected under the First Amendment. This decision was based on the "strong implication . . . that private expression by a public employee is not constitutionally protected." The court of appeals also concluded there is no constitutional right to "press even 'good ideas' on an unwilling participant." The Supreme Court reversed.

ISSUE: Do public employees forfeit their First Amendment protection when they arrange to communicate privately with their employer, rather than to express their views publicly?

Holding and Decision: No. Public employees do not forfeit their First Amendment protection against government abridgement of freedom of speech when they speak privately rather than publicly. The lower court's reliance on *Pickering* (1968), *Perry v. Sinderman* (1972), and *Mt. Healthy City Bd. of Ed. v. Doyle* (1977) was incorrect. Merely because these cases arose in the context of a public employee's public expression, that is not the controlling issue for application in this case.

COMMENT: The misapplication of *Pickering* (1968), *Perry* (1972), and *Mt. Healthy* (1977) is key to understanding why teachers' private speech has the same protection as does their public speech. *Pickering* (1968) held that while free speech rights were not absolute, the determination was based on balancing "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[3] The appellate court did not apply this balancing test. *Perry* (1972) and *Mt. Healthy* (1977) were also misapplied. Further, a "captive audience" argument is not appropriate in that the principal opened his door to the teacher. He could hardly, therefore, be an "unwilling recipient" of her views. The *Mt. Healthy* (1977) argument was held to be inopportunely presented. While the teacher did engage in behavior that may have been inappropriate (e.g., "downgrading" white students' papers, walked out of a desegregation meeting and attempted to disrupt it by blowing car horns, threatened not to return to school under present conditions, and concealed a student's knife during a weapons shakedown), the defendants did not present this evidence because *Mt. Healthy* (1977) had not then been decided. This decision seems rational. Potentially, if the decision had been the opposite, anything teachers said in private to their administrator could lead to dismissa1, if such expression was an unpopular opinion.

Discussion Questions

1. If the teacher had spoken at a faculty meeting rather than in private to the principal, would the decision have been different?
2. Did the fact that the teacher's speech (and behavior) contradicted the position of the school district have an impact on the school district's action?
3. Does this result seem fair?

KNIGHT V. BOARD OF REGENTS OF UNIVERSITY OF STATE OF NEW YORK 269 F. SUPP. 339 (1967), AFFD 390 U.S. 36 (1968)

GENERAL RULE OF LAW: Schoolteachers may be required to swear to uphold their state and federal constitutions as well as observe professional standards of dedication and competence.

PROCEDURE SUMMARY:

Plaintiff: Knight, a professor at private Adelphi University in New York (P)

Defendant: Board of Regents of University of State of New York (D)

U.S. District Court Decision: Held for Board of Regents (D)

U.S. Supreme Court Decision: Affirmed

FACTS: Faculty members, including Knight (P), of Adelphi University, a private, nonprofit, tax-exempt college in New York, sued the Board of Regents of the University of State of New York (D) to enjoin the enforcement of a law that required them to take an oath. Under this oath, the teachers swore to uphold the constitutions of the United States and New York state and to adhere to professional standards of dedication and competence. Although the law had been on the books since 1934, Adelphi had not attempted to enforce it until 1966, at which time Knight (P) and 27 other professors refused to sign it. The U.S. District Court for the Southern District of New York upheld the oath requirements, and Knight (P) and the others appealed to the United States Supreme Court.

ISSUE: May schoolteachers be required to swear to uphold their state and federal constitutions as well as observe professional standards of dedication and competence?

HOLDING AND DECISION: (Tyler, J.) Yes. The First Amendment rights of school teachers in public or private tax-exempt schools are not violated by requiring them to swear an oath to uphold state and federal constitutions and to adhere to professional standards of dedication and competence. This case is significantly different from an earlier Supreme Court case, *West Virginia State Board of Education v. Barnette* (1943), which involved a requirement that schoolchildren salute the flag under penalty of suspension; here, there is no statutory penalty for refusing to swear the teacher's oath.[4] Nor does it resemble earlier cases that struck down "negative loyalty oaths" or "non-Communist" oaths, which were vague in their wording; the requirement here that teachers uphold standards of professional dedication as well as the state and federal constitutions is simple and clear. Affirmed.

COMMENT: As a result of this decision, schools can constitutionally require an oath to uphold professional standards as a condition of employment. Conceptually, this oath is not different from that required of legislators, lawyers, or doctors. It differs substantially from oaths that require statements adhering to or reflecting certain political beliefs; these types of oaths are typically held unconstitutional.[5] However, it is important to recognize that the decision here might have been different if the New York legislature had provided a sanction for refusing to sign the oath; the court specifically relied on this absence of a penalty (which had been present in the flag-salutation cases) in reaching its decision.

O'CONNOR V. ORTEGA
480 U.S. 709, 107 S. CT. 1492 (1987)

GENERAL RULE OF LAW: An employer's search of an employee's office must be reasonable in order to meet Fourth Amendment requirements.

PROCEDURE SUMMARY:

Plaintiff: Ortega, a physician at a state hospital (P)

Defendant: O'Connor, a physician and director of the state hospital (D)

U.S. District Court Decision: Held for O'Connor (D), granting his motion for summary judgment

U.S. Court of Appeals Decision: Affirmed in part; reversed in part; remanded

U.S. Supreme Court Decision: Reversed and remanded

FACTS: Ortega (P) trained physicians in the psychiatric residency program at a state hospital. The hospital, headed by O'Connor (D), placed Ortega (P) on administrative leave while it investigated allegations against him of program mismanagement, sexual harassment of a female hospital employee, and inappropriate disciplinary action against a resident. O'Connor (D) and other hospital officials, in an effort to secure state property and take inventory, searched Ortega's (P) office. During the search, the officials seized personal items from Ortega's (P) desk and file cabinets. A formal inventory of property found in the office was never made. Ortega (P) filed suit in federal district court under 42 U.S.C. § 1983, alleging that the search violated the Fourth Amendment. The district court granted summary judgment to O'Connor (D), holding that the search did not violate the Fourth Amendment and finding a reasonable need to secure state property in Ortega's (P) office. The court of appeals affirmed in part and reversed in part, concluding that the search violated the Fourth Amendment because Ortega (P) had a reasonable expectation of privacy in his office. It granted partial summary judgment for Ortega (P), finding the defendants liable for an unlawful search. The case was then remanded for determination of damages. The Supreme Court granted certiorari.

ISSUE: Must a government employer meet a standard of reasonableness when searching an employee's office?

HOLDING AND DECISION: (O'Connor, J.) Yes. Fourth Amendment rights are implicated only when the search infringes a reasonable expectation of privacy. A government employee does have a reasonable expectation of privacy in his office, even though government offices are frequently open to fellow employees, supervisors, and the general public. However, in the case of searches conducted by a public employer, the invasion of an employee's legitimate expectations of privacy must be balanced against the government's need for supervision, control, and the efficient operation of the workplace. Given the realities of the workplace, a warrant requirement would be unworkable for such searches. Therefore, in order to allow workplaces to operate efficiently, searches of employee offices for work-related, non-investigatory reasons, or for investigations of work-related misconduct, need not be based on probable cause. Such intrusions by public employers should be judged by a standard of reasonableness in light of the circumstances. In this case, it cannot be determined from the record whether O'Connor (D) satisfied this standard. Therefore, the case must be remanded to determine the justification for the search and seizure and to evaluate the reasonableness of both the inception and the scope of the intrusion. Reversed and remanded.

COMMENT: The real question is whether an employee with an expectation of privacy in his office can ever be fully protected from an employer's search under the Fourth Amendment. Because a case-by-case analysis is applied, the employee will never have a sense of security. The reasonableness standard is far too

flexible from an employee's perspective. Nevertheless, it clearly follows the line of reasoning established by the *New Jersey v. T.L.O.* (1985) case as well as those cases that have followed. Important education cases such as *Bethel School District v. Fraser* (1986), *Hazelwood School District v. Kuhlmeier* (1988) and *New Jersey v. T.L.O.* (1985) have also based their decisions on this expanding "reasonableness" analysis. While there is no certainty, a teacher in a public education setting has no protection from a reasonable search by administration. According to the facts in this case, it is possible that the teacher has an expectation of privacy for those items secured in a locked desk. However, the administration could search the desktop and other areas, looking for information needed to conduct the business of the school.

Discussion Questions

1. When searching an employee's office, must a government employer meet a standard of reasonableness?
2. What do you think "reasonableness" means?
3. Is searching a government employee's office a violation of the Fourth Amendment? If so, how?

SCHAFER V. BOARD OF PUBLIC ED. 903 F.2D 243 (3RD CIR. 1990)

GENERAL RULE OF LAW: Denial of childrearing leave on the basis of gender is prima facie discrimination.

PROCEDURE SUMMARY:

Plaintiff: Gerald Schafer, a male teacher employed by the Pittsburgh Board of Education (P)

Defendants: Pittsburgh Board of Education and Pittsburgh Federation of Teachers (D)

Administrative Action: Plaintiff not eligible for maternity leave

State Human Relations Commission Decision: Dismissed the complaint as untimely under state law and referred the defendant to the EEOC

Equal Employment Opportunity Commission Decision: Supported plaintiff's position

U.S. District Court Decision: Rendered summary judgment for Board and Unions (D)

U.S. Court of Appeals Decision: Affirmed denial of Shafer's (P) motion for summary judgment, but remanded for a determination of whether Schafer (P) was constructively discharged

FACTS: Since there was no paternity or family leave, Gerald Schafer (P), a male teacher, requested a one-year childrearing leave. This request was denied. After an unpaid three-month emergency leave, he resigned and later filed a sex discrimination charge with the Equal Employment Opportunity Commission (EEOC) based on Title VII of the Civil Rights Act of 1964. The Pittsburgh Federation of Teachers (D) was unable to help him because the collective bargaining agreement only provided leave for females. The Pennsylvania Human Relations Commission dismissed his complaint as untimely under state law, suggesting

that he pursue his complaint with the EEOC. Schafer (P) argued, among other things, that his dismissal amounted to constructive discharge. The district court granted summary judgment against Schafer (P). During the course of the litigation, the United States and the defendants entered into a consent agreement, and a decree was issued granting the board's male employees childrearing leave on the same basis as female employees.

ISSUE: Is a one-year childrearing leave policy that is not available to men prima facie evidence of sex discrimination?

HOLDING AND DECISION: Yes. The U.S. Court of Appeals ruled that a single-sex childrearing policy was prima facie evidence of discrimination. The district court's finding that Schafer (P) was constructively discharged was reversed. The Court of Appeals found that the Board's maternity policy was a parental care leave. The policy is not a medical leave because it extends to one year, well after the time a mother regains her ability to work. Therefore, the parental care leave can be applied equally to men.

COMMENT: This decision was followed by the Family and Medical Leave Act of 1993, which grants both men and women up to 12 weeks of job-protected leave. More relevant to today's law is the concept of constructive discharge. In *Johnson v. Shalala* (1993), the Fourth Circuit found that "complete failure to accommodate . . . might suffice as evidence to show the deliberateness necessary for constructive discharge."[6]

Discussion Questions

1. What significance did this case have in relation to the Family and Medical Leave Act of 1993?
2. Is a one-year childrearing leave policy that is not available to men sex discrimination under the Civil Rights Act of 1964?
3. Could failure to accommodate suffice as evidence of the deliberateness necessary for constructive discharge? What is constructive discharge?

WILSON V. CHANCELLOR
48 F. SUPP. 1358 (D. OR. 1976)

GENERAL RULE OF LAW: A teacher's teaching is an expression to which the First Amendment applies. The right of a teacher to freedom of expression is not absolute; it may be restricted, but only if the restrictions are reasonable in light of the special circumstances of the school environment.

PROCEDURE SUMMARY:

Plaintiffs: Dean R. Wilson and Vera Logue (P)

Defendants: Rose Chancellor, et al. (D)

U.S. District Court Decision: Held for the plaintiff

FACTS: Wilson (P) was a political science teacher from Molalla Union High School. He had invited a democrat, a republican, and a member of the John Birch Society to speak to his class. The last guest speaker was to be a communist. Wilson reported the invitation to the principal, who approved. The invitation was then discussed at the board of education meeting and approved. A couple of weeks later, the school board was given a petition signed by 800 community members requesting that they reverse their decision. In addition, several community members mentioned in letters to the local newspaper the possibility of voting down the next levy and voting out existing school board members. The board responded by reversing its decision and verbally banning all political speakers from the high school.

ISSUE: Does the policy of banning all political speakers from a high school violate a student's right to hear and a teacher's right to expression under the First Amendment?

HOLDING AND DECISION: Yes. The First Amendment exists to protect a broad range of interests and their ability to be expressed and heard. Not allowing the speaker into the classroom infringes upon the students' First Amendment rights. Although a teacher's academic freedom is not absolute, restrictions cannot be placed that limit the teacher's constitutional rights, unless such action advances a reasonable government interest. In this situation, allowing the guest speaker to come in to the classroom posed no potential danger for the students or staff.

COMMENT: This case is important because it does not give the school board the power to limit what the teacher does in the classroom merely based on community reaction. In this case, the board's only reason for the policy was to pacify angry taxpayers and voters. The board failed to show that the ban was reasonable or that outside speakers impair the educational process or are inappropriate in the high school curriculum. It should be recognized that there is a balancing of the equities operating here. On one side, you have the right of the students to hear and the teacher to express, and, on the other hand, you have the right of the board to foster a safe environment for all. If there had been disruptions in Wilson's class because of the previous guest speakers, the court may have arrived at a different decision. However, since there had been no problems and there was no way to predict any in the future, the board's action could not be justified. The order banning political speakers before they have a chance to speak constitutes a system of prior restraint, the invalidity of which is heavily presumed. They are only deemed valid if they include criteria to be followed by school personnel in determining whether to prohibit or allow the expression. Absent such criteria, or other procedural safeguards, the board's order results in an invalid prior restraint. This policy was also found to be a violation of the equal protection clause because it was only enacted to silence an unpopular political view. In addition, the order banned only political speakers from the high school and unlawfully discriminated against teachers of politically oriented subjects by forbidding only them from inviting outside speakers into their classrooms.

NOTES

1. Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).
2. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971).
3. Pickering v. Board of Education, 391 U.S. 563 at 568 (1968).
4. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178 (1943).
5. See, e.g., Connell v. Higginbotham, 403 U.S. 207, 91 S. Ct. 1772 (1971). (The state cannot summarily dismiss teachers who refuse to pledge that they do not believe in the overthrow of the government.)
6. Johnson v. Shalala, 991 F.2d 126 (4th Cir. 1993).

10

Teacher Certification, Licensure, and Contracts for Employment

AMADOR V. NEW MEXICO STATE BOARD OF EDUCATION 80 N.M. 336, 455 P.2D 840 (1969)

GENERAL RULE OF LAW: Incompatibility of state board of education membership and certification as a teacher is not grounds for suspension of a teaching certificate under a statute permitting suspension for good and just cause.

PROCEDURE SUMMARY:

Plaintiff: Amador, board member and school teacher (P)

Defendant: New Mexico State Board of Education (Board) (D)

State Trial Court Decision: Injunction issued prohibiting Board (D) from suspending Amador's (P) certificate

State Supreme Court Decision: Affirmed

FACTS: In 1962, the New Mexico State Board of Education (D) adopted a resolution requiring the suspension of the teaching certificate of any teacher elected to the Board (D). In November 1966, Amador (P), a certified teacher, was elected to the Board (D) and was subsequently served with an order to show cause why his teaching certificate should not be suspended. Amador (P) sought, and the trial court granted, an injunction prohibiting the Board (D) from suspending his certificate. The Board (D) appealed, contending that the incompatibility of Board (D) membership and certification was grounds for suspending Amador's (P) certification pursuant to a statute permitting suspension for good cause.

ISSUE: Is incompatibility of board membership and teacher certification grounds for suspension of a teaching certificate under a statute permitting suspension for good and just cause?

HOLDING AND DECISION: (Noble, C. J.) No. Incompatibility of board membership and teacher certification is not grounds for suspension of a teaching certificate under a statute permitting suspension for good and just cause. The right to practice a profession or vocation is a property right. If a statute permits revocation or suspension of such a right, the suspension or revocation may only be for those reasons specifically provided by the statute. The statute that the Board (D) relied upon allows certificate suspension for "good and just" cause for the purpose of insuring high quality public education. The suspension of Amador's (P) certificate because he became a member of the Board (D) would not promote or serve this purpose. Therefore, no "good and just" cause within the meaning of the statute existed. Affirmed.

COMMENT: In *Amador,* incompatibility of the two positions was not "good and just" cause within the meaning of the statute. It could be argued, however, that the positions were not even incompatible but were, to some degree, complementary; being certified may give a board member greater ability to consider more options and factors before making a decision. Most courts follow the rule of *Amador* and will not intervene in a certification revocation matter unless the revocation is on grounds other than those expressly permitted by statute or certain mandatory procedures were not followed. In addition, the plaintiff is usually required to exhaust all administrative remedies before coming to court. This case needs to be distinguished from cases involving practicing educators serving on state school boards. In this case, there was no conflict. Amador (P) would not fill both posts simultaneously. Thus, there was no incompatibility in his holding two state positions at the same time.

Discussion Questions

1. Is there "good and just cause" for suspension of a teacher's license based on the incompatibility of serving on the state board and holding a license to teach?
2. Are there any arguments that Amador's having a teaching license makes him a potentially better school board member?
3. Is the right to practice a profession or vocation a property right? If so, why? If not, why not?

AMBACH V. NORWICK 441 U.S. 68 (1979)

GENERAL RULE OF LAW: A state statute that requires public school teachers to be U.S. citizens or applicants for citizenship before they can be certified is constitutional.

PROCEDURE SUMMARY:

Plaintiff: Ambach, New York Commissioner of Education (P)

Defendants: Norwick, a British alien, and Dachinger, a Finnish subject, who wished to obtain teaching certificates in the state of New York (D)

U.S. District Court Decision: Held for plaintiff

U.S. Court of Appeals Decision: Reversed

U.S. Supreme Court Decision: Reversed

FACTS: Norwick (D), who was born in Scotland, had resided in the United States since 1965. She was married to a United States citizen. Dachinger (D) was a Finnish subject who came to the United States in 1966 and was also married to a U.S. citizen. Norwick and Dachinger (D) met all the educational requirements New York set for certification as a public school teacher, but they refused to seek United States citizenship. Norwick (D) applied in 1973 for a teaching certificate covering nursery school through sixth grade while Dachinger (D) sought a certificate covering the same grades in 1975. Both applications were denied because of the appellees' failure to meet the requirements of New York Education Law 3001, which required citizenship, or the manifestation of an intention to apply for citizenship. The district court held that the law did not discriminate against aliens in violation of the equal protection clause of the Fourteenth Amendment. The court of appeals reversed, saying the law did violate the equal protection clause. The plaintiff appealed to the United States Supreme Court, which reversed the appellate court's decision.

ISSUE: Can a state forbid issuing a teaching certificate to an applicant who is not a United States citizen?

HOLDING AND DECISION: (Powell, J.) Yes. The Supreme Court held that the State of New York had the right to make citizenship a requirement for a teaching certificate. The Supreme Court, applying the rational basis test in scrutinizing this New York law, determined that the aliens (Norwick and Dachinger) had chosen to classify themselves by rejecting an open invitation to apply for United States citizenship.

COMMENT: The Supreme Court determined that public school teaching constituted a government function wherein teachers had a responsibility to teach and to emulate the basis of representative government. Accordingly, the Constitution requires only that a citizenship requirement bear a rational relationship to a legitimate state interest. The Court's decisions have been far from consistent when applied to aliens. Further, states have been granted greater latitude in limiting the rights of aliens. More recently, the more liberal rational basis test has been used rather than the strict scrutiny test requiring a compelling state interest. Of course, some state functions are so bound up with the operation of the state as a government entity that they permit the exclusion of aliens. In this case, Norwick and Dachinger (D) did offer to swear an oath of allegiance to the United States, but both New York and the Supreme Court agreed this would not meet the same requirement as citizenship. Teachers are in a unique position because of their influence in preparing students to become citizens of our country, and they must teach the values associated with it. Teachers are responsible for the presentation of material to students, including the basis of our government and the importance of citizenship, regardless of what subjects they teach. Thus, New York Education Law 3001 requiring citizenship was held to be constitutional. Nevertheless, statutes treating aliens differently cannot be applied in a discriminatory fashion while appearing to be nondiscriminatory.[1]

Discussion Questions

1. Why did the Court apply the rational basis test rather than the more protective strict scrutiny test when dealing with aliens?
2. Would the decision have been different if the applicants had agreed to become U.S. citizens sometime in the future?
3. Why would the Court uphold a citizenship requirement for teaching but allow an alien to become a lawyer?

CITY OF RICHMOND V. J. A. CROSON CO. 488 U.S. 469, 109 S. CT. 706 (1989)

GENERAL RULE OF LAW: A city may not adopt a preferential plan that is not justified by a compelling state interest or narrowly tailored to accomplish a remedial purpose.

PROCEDURE SUMMARY:

Plaintiff: J. A. Croson Co., a prime contractor (P)

Defendant: City of Richmond (City) (D)

U.S. District Court Decision: Held for City (D), upholding the plan

U.S. Court of Appeals Decision: Reversed

U.S. Supreme Court Decision: Affirmed

FACTS: The City (D) adopted a plan requiring prime contractors awarded municipal contracts to subcontract at least 30% of the dollar amount of the contract to minority business enterprises (MBEs). The plan, however, allowed the requirement to be waived if it was proved that a sufficient number of qualified MBEs were not able or willing to participate. The purpose of the plan was to remedy the effects of widespread racial discrimination in the local, state, and national construction industries. Croson (P), a prime contractor, unsuccessfully requested a waiver of the requirement. It then filed suit under 42 U.S.C. § 1983, alleging that the plan was unconstitutional under the Fourteenth Amendment's equal protection clause. The district court disagreed and upheld the plan. The court of appeals, however, reversed, applying strict scrutiny and finding that the plan was not justified by a compelling state interest or narrowly tailored to accomplish a remedial purpose.

ISSUE: May a city adopt a preferential plan that is not justified by a compelling state interest or narrowly tailored to accomplish a remedial purpose?

HOLDING AND DECISION: (O'Connor, J.) No. A city may not adopt a preferential plan that is not justified by a compelling state interest or narrowly tailored to accomplish a remedial purpose. The general claim that there has been past discrimination, on a national scale, in the construction industry cannot justify the use of a racial quota. The City (D) provided no evidence that there has been discrimination on the part of anyone in its own construction industry. Further, the City's (D) reliance on the disparity between the number of prime contracts awarded to minority businesses and the size of the City's (D) minority population is misplaced. The correct statistical inquiry is a comparison of the percentage of MBEs in the construction industry with the percentage of total City (D) construction dollars currently awarded to minority subcontractors. Affirmed.

COMMENT: *Croson* is another example of the Court's attempt to more closely tie remedial efforts to the actual discriminatory actions creating the need for the remedial efforts. After *Croson,* state and local entities may no longer simply rely on national findings and statistics indicating discrimination in a particular industry

or profession. It appears that this reasoning can be extended to schools and education, including the racial makeup of student body populations and the teaching staff. The case could be read to prohibit school boards from relying on national, or maybe even state, statistics in making decisions regarding remedial measures.

Discussion Questions

1. Is the desire to hire minorities to correct America's past history of discrimination enough to support an affirmative action plan?
2. What is the reason for closely tieing remedial efforts to the actual discrimination actions needing remediation?
3. Do you think that this is a good thing for us to do? Should we allow a more liberal affirmative action policy?

MARTIN V. WILKS 490 U.S. 755, 109 S. CT. 2180 (1989)

GENERAL RULE OF LAW: Employees are not precluded from challenging employment decisions made pursuant to consent decrees entered in proceedings to which they were not parties.

PROCEDURE SUMMARY:

Plaintiff: Wilks, a white firefighter (P)

Defendant: Jefferson County Personnel Board, represented by Martin (Board) (D)

U.S. District Court Decision: Held for Board (D), dismissing Wilks's (P) action on the ground that he was precluded from challenging the decisions made pursuant to the consent decrees

U.S. Court of Appeals Decision: Reversed

U.S. Supreme Court Decision: Affirmed

FACTS: After African American individuals filed suit against the Board (D), whose duties included the hiring of county firefighters, consent decrees were entered that included goals for hiring and promoting African American firefighters. Thereafter, Wilks (P), a white firefighter, filed suit against the Board (D), alleging that the Board's (D) promotional decisions pursuant to the decrees violated federal law by favoring less qualified African Americans and denying him promotion simply because of his race (i.e., "reverse discrimination"). The district court dismissed the action, holding that Wilks (P) was precluded from challenging promotion decisions made pursuant to the consent decrees because he was not a party to the proceedings in which the decrees were entered. The court of appeals reversed, and the U.S. Supreme Court granted review.

ISSUE: Are employees precluded from challenging employment decisions made pursuant to consent decrees entered in proceedings to which they were not parties?

HOLDING AND DECISION: (Rehnquist, C. J.) No. Employees are not precluded from challenging employment decisions made pursuant to consent decrees entered in proceedings to which they were not parties. One is not bound by a judgment in an action in which he is not designated as a party or to which he has not been made a party by service of process. Fed. R. Civ. P. 24, which governs intervention, is clearly permissive in nature. Nor under Fed. R. Civ. P. 19 is a person obligated to intervene in an action, unless a judgment rendered in the absence of that person could subject those who already are parties to a substantial risk of incurring inconsistent obligations. To preclude Wilks (P) now from collaterally attacking the consent decree, when he was neither joined as a party nor required to intervene in the original proceedings, is contrary to federal law. Affirmed.

COMMENT: The ruling is a victory for individuals making reverse discrimination claims like the plaintiff in *Martin*. In this convoluted case, a white male is challenging the decision in an earlier case that established racial quotas in hiring. The plaintiff, Wilks, argued reverse discrimination. Here, the issue was not whether racial quotas are right or wrong but whether an intervenor with no involvement in the initial case can assert a claim. The Court ruled that he could do this. *Martin* has clear implications in the school context. School desegregation consent decrees or employment plans providing similar hiring and promotion objectives could be challenged under the analysis of *Martin*. It seems likely that *Martin* would be extended, even though it was only a 5–4 decision, because two of the dissenting justices, Brennan and Marshall, have since left the Court and been replaced by more conservative justices.

Discussion Questions

1. Is it possible for a person to be deprived of his or her legal rights in a proceeding to which he or she is not a party?
2. Does *Martin v. Wilks* set a precedent for other reverse discrimination cases? If so, why?
3. Did the events that led to the action in *Martin v. Wilks* violate the equal protection clause of the Fourteenth Amendment? If so, how?

OKLAHOMA EX REL. THOMPSON V. EKBERG 613 P.2D 466 (1980)

GENERAL RULE OF LAW: School board members are not liable for damages for actions that violate state requirements if they could not have reasonably known the actions violated the requirements.

PROCEDURE SUMMARY:

Plaintiff: State ex rel. Thompson, the state for a group of taxpayers (Thompson) (P)

Defendant: Ekberg, a school board member (D)

State Trial Court Decision: Held for Ekberg (D), finding no liability in damages

State Supreme Court Decision: Affirmed

FACTS: A state statute required that principals in the state school system be certified, and, to be certified, they had to hold a master's degree. Ekberg (D), a member of a local school board, along with other board members, was seeking to hire a principal. After being told by state board of education representatives that the master's degree requirement would be waived, the state board hired Moxom, who did not hold a master's degree, as a principal for the 1974–1975 school term. After the term, Moxom obtained a master's degree. Thompson (P) and other taxpayers filed suit against Ekberg (D) and other board members, seeking damages for the hiring of Moxom in violation of the master's degree requirement. The trial court held for Ekberg (D), finding that he could not have reasonably known that the state board's waiver of the requirement was ineffective. Thompson (P) appealed.

ISSUE: Are school board members liable for actions that violate a state requirement if they could not have reasonably known the action violated the requirement?

HOLDING AND DECISION: (Simms, J.) No. School board members are not liable for actions that violate a state requirement if they could not have reasonably known the action violated the requirement. The state board of education lacked authority to waive the master's degree requirement. Though the statute grants the state board general authority over matters pertaining to the qualification of school officials, the statute's master's degree requirement is a specific exception to this general grant. There was no way the local board or Ekberg (D) could have reasonably known that the state board lacked authority to waive the master's degree requirement and that, consequently, Moxom was uncertified to be a principal. The statute under which Thompson (P) sought damages only allows damages when school board officials "knowingly" hire uncertified officials. This was not the case here. Affirmed.

COMMENT: Generally, school board members will not be held liable for actions that are later found to be unauthorized, if they act in good faith and without fraud. The clear rationale for not holding the board members in *Ekberg* liable is that they were found to be acting in good faith, especially because they had been informed by state officials that the action was proper. Some argue that the adoption of a harsher standard would hurt local school boards by deterring individuals from running for board positions for fear of liability for mistakes in judgment and chilling the decision-making autonomy of those who are serving as board members. It is common practice for state departments to issue temporary teaching certificates. These certificates are issued to teachers at the request of the district administrator based on the inability to find a teacher in a specific shortage area, such as bilingual education or vocational education. The difference in this case is that there was no shortage of certified personnel eligible to serve as principal. Therefore, to waive the master's degree requirement would violate the statute without a justifiable reason.

Discussion Questions

1. If the school board had known that they were violating a state statue, would there have been a different ruling? Why?
2. What is meant by "acting in good faith"?
3. How do temporary licenses help to avoid this type of problem?

PHELPS V. BD. OF EDUCATION OF TOWN OF WEST NEW YORK 300 U.S. 319, 57 S. CT. 483 (1937)

GENERAL RULE OF LAW: State laws that prohibit school boards from discharging tenured employees without good cause and from reducing salaries do not create contract rights to permanent employment or minimum pay.

PROCEDURE SUMMARY:

Plaintiffs: Phelps and other tenured employees (principals, teachers, clerks) of New Jersey public school system (P)

Defendant: West New York, New Jersey Board of Education (Board) (D)

State Trial Court Decision: Held for Board (D)

State Appellate Court Decision: Affirmed

U.S. Supreme Court Decision: Affirmed

FACTS: In the early 1900s, New Jersey enacted a tenure law that prohibited school boards from firing school employees who had served for at least three years. It also prohibited reducing the salary of tenured employees. During the Great Depression, however, New Jersey enacted another law that required school boards to re-determine employee salaries and authorized uniform salary reductions down to a prescribed minimum. It also forbade salary increases. The West New York Board of Education (D) reduced by up to 15% the salaries of its tenured principals, teachers, and clerks, within each class or grade. Phelps (P) and others sued the Board (D), alleging that it had breached the state's "contract" with them (as established by the tenure law) not to reduce their salaries and that it violated equal protection because of its unequal effect. Both the New Jersey trial court and court of appeals affirmed the commissioner's decision. Phelps (P) and the other tenured employees appealed.

ISSUE: Do state laws that prohibit school boards from discharging tenured employees without good cause and from reducing salaries create contract rights to permanent employment and minimum pay?

HOLDING AND DECISION: (Roberts, J.) No. State laws that prohibit school boards from discharging tenured employees without good cause and from reducing salaries do not create contract rights to permanent employment and minimum pay. Such laws are designed merely to regulate conduct of the board and may be rescinded by the legislature without affecting any contract rights in tenured employees. Here, New Jersey's law did not create contract rights in the West New York school system's tenured employees to not have their salaries reduced. It merely was a regulation of the Board's (D) power to set salaries and therefore did not constitute a binding promise made directly to the tenured employees.

COMMENT: In law, a contract is an agreement between two parties in which one offers to do or not to do something in exchange for the other's performance or nonperformance of something else. In the school teacher context, a contract typically consists of a teacher's educational and administrative services bargained in exchange for compensation. Acceptance of an offer occurs when the offeree agrees to the deal. The exchanged value is called "consideration." The offeror of the original contract was the Board. The state, which modified the statutory provisions, was not technically a party to that contract, so it cannot be said that it in any way breached this contract. The Court focused on this distinction to reach a practical result: The state wished to reduce salaries to compensate for Depression-decreased tax revenues. More typically, state statutes that refer to public school teacher contracts will be considered a part of the contract made between the school board and the teacher and thus not subject to change. In recent years, school boards in most states have been allowed to reduce salaries "across the board" as part of a planned reduction. Since this is such a drastic action, it is allowed only in the event of "financial exigency."

Discussion Questions

1. Should the creation of a legislative Act be considered a regulation of Board conduct or a binding contract with individual teachers?
2. Can state laws be rescinded?
3. Was this a fair decision? Why or why not?

UNIV. OF PENNSYLVANIA V. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 493 U.S. 182, 100 S. CT. 577 (1990)

GENERAL RULE OF LAW: Universities do not enjoy a special privilege requiring that peer review files need only be disclosed after a court finds particularized necessity for access to the files.

PROCEDURE SUMMARY:

Plaintiff: Equal Employment Opportunity Commission (EEOC) (P)

Defendant: University of Pennsylvania (University) (D)

U.S. District Court Decision: Held for the EEOC (P)

U.S. Court of Appeals Decision: Affirmed

U.S. Supreme Court Decision: Affirmed

FACTS: An associate professor filed a Title VII claim of racial discrimination with the EEOC (P) against the University (D) after the University (D) denied her tenure. In the course of investigating the claim, the EEOC (P) issued a subpoena to obtain the professor's tenure review file. The University (D) refused to produce a number of documents from the file and requested that the EEOC (P) modify the subpoena to exclude "confidential peer review information." The EEOC (P) denied the request and, upon the EEOC's (P) motion in federal district court, was granted an enforcement order, which the court of appeals affirmed. The University (D) sought review in the U.S. Supreme Court, claiming that its peer review materials enjoyed a special privilege requiring the EEOC (P) to show a particularized need, beyond mere relevance, to obtain the material.

ISSUE: Does university peer review material enjoy a special privilege requiring that a particularized need, beyond mere relevance, be established to compel release of the material?

HOLDING AND DECISION: (Blackmun, J.) No. University peer review material does not enjoy a special privilege requiring that a particularized need, beyond mere relevance, be established to compel release of the material. The University's (D) claim of privilege finds no basis in the common law under Fed. R. Evid. 501. To the contrary, Congress, by expressly extending Title VII's coverage to educational institutions, did not create a privilege for peer review materials. In fact, Congress afforded the EEOC (P) a broad right of access to any "relevant" evidence in EEOC (P) investigations. To go further than Congress and create such a privilege would place great obstacles before the EEOC (P) in its efforts to litigate these cases, give universities weapons to frustrate the EEOC's (P) efforts, and cause a wave of privilege claims by other employers. Furthermore, the claim finds no grounds in the First Amendment. The EEOC (P) is in no way attempting to control university speech in a content-based manner or mandate any criteria in selecting teachers other than those set forth under Title VII. Affirmed.

COMMENT: This case is likely to have a tremendous impact on the manner in which tenure decisions are made. Universities argue that denying the special privilege and requiring that peer review files be revealed will have a substantial chilling effect on professors' ability to evaluate tenure candidates honestly. The Court took another view, stating that making the files subject to revelation would, in fact, encourage them to ground their evaluations on relevant criteria, rather than bias or prejudice. Some argue the decision will finally expose the discriminatory practices believed to have long been prevalent in the tenure process.

Discussion Questions

1. What was the university's argument for not disclosing its peer review records, even when subpoenaed, unless there is a particularized need?
2. What was the rationale for the Court to hold for the plaintiff against the university?
3. What is meant by "particularized need"? Relevance?

NOTE

1. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886).

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Collective Bargaining

CITY OF MADISON V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION 429 U.S. 167, 97 S. CT. 421 (1976)

GENERAL RULE OF LAW: Teachers have the First Amendment right to comment on matters of public interest about the operation of the school in which they work.

PROCEDURE SUMMARY:

Plaintiff: Madison Teachers, Inc., a teachers' union (P)

Defendant: Wisconsin Employment Relations Commission (D)

State Supreme Court Decision: Held for Madison Teachers (P)

U.S. Supreme Court Decision: Reversed

FACTS: The Board of Education of Madison, Wisconsin, and Madison Teachers, Inc. (MTI) (P), the local teachers' union, were negotiating a collective bargaining agreement. One of MTI's (P) proposals for the agreement was a "fair share" clause, under which non-union teachers would be required to pay union dues to defray the costs of collective bargaining. At a meeting of the school board open to the general public, a non-union teacher made a brief statement in which he announced that he had conducted a survey of 80 teachers from 50 schools concerning the "fair share" clause, which he was presenting to the board. He also asked for "communication, not confrontation" on the issue. MTI (P) filed a complaint with the Wisconsin Employment Relations Commission (WERC) (D), which claimed that the board had committed an unfair labor practice by permitting the non-union teacher to engage in "negotiation" of a matter that was the subject of a pending collective bargaining agreement. WERC (D) disagreed and was affirmed by the Wisconsin Supreme Court, which held that the non-union teacher's First Amendment rights were properly limited, given that his speech constituted negotiation, which violated bargaining exclusivity under the state labor laws. MTI (P) appealed to the U.S. Supreme Court.

ISSUE: Do teachers have First Amendment rights to comment on matters of public interest about the operation of the school in which they work?

HOLDING AND DECISION: (Burger, C. J.) Yes. Teachers have the First Amendment right to comment on matters of public interest about the operation of the school in which they work. The non-union teacher here who spoke up at an open public meeting issued only a terse statement announcing the results of a survey and the need for communication, not confrontation. This hardly amounted to an attempt to bargain or negotiate, which was the exclusive province of union representatives with regard to the collective bargaining agreement with the school district. Further, a limitation on a teacher's free speech rights to matters not concerning collective bargaining would be unconstitutional because virtually any subject concerning the operation of the school system could be characterized as a potential subject of collective bargaining. Reversed.

COMMENT: Despite this decision, in other cases courts have ruled that teachers have relinquished First Amendment rights by submitting to the "collective contractual protectionism" afforded by membership in a union. For example, in *Cary v. Board of Education of Adams-Arapahoe School District* (1977), the federal district court in Colorado denied the claim of teachers that the school board denied them freedom of speech by specifically prescribing the books they could use in the classroom.[1] The court noted that the collective bargaining agreement the union had negotiated on behalf of the plaintiffs explicitly granted the school board the right to assign reading material.

Discussion Questions

1. Does a teacher have the right to speak out against an issue that is on the negotiation table?
2. What would constitute a "clear and present danger" that would justify limiting First Amendment rights?
3. What bearing does *Pickering v. Board of Education* (1968) have on this case?

NOTE

1. Cary v. Board of Education of Adams-Arapahoe School District, 427 F. Supp. 945 (D. Colo. 1977).

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Teacher Dismissal, Retirement, and Discrimination in Employment

BOARD OF REGENTS OF STATE COLLEGES V. ROTH 408 U.S. 564, 92 S. CT. 2701 (1972)

GENERAL RULE OF LAW: A non-tenured teacher has no right to a hearing before his contract is not renewed, unless nonrenewal infringes a liberty or property interest.

PROCEDURE SUMMARY:

Plaintiff: Roth, a non-tenured teacher (P)

Defendant: Board of Regents of State Colleges (Board) (D)

U.S. District Court Decision: Held for Roth (P), granting summary judgment

U.S. Court of Appeals Decision: Affirmed

U.S. Supreme Court Decision: Reversed and remanded

FACTS: Roth (P) was hired by the Board (D) as a non-tenured professor for a term of one year. At the end of the year, the Board (D) informed Roth (P) that he would not be rehired for the next year. Under a Wisconsin statute, a teacher could not receive tenure until after four years of year-to-year employment. Those acquiring tenure were then entitled to employment on condition of efficiency and good behavior. Roth (P) filed suit, alleging that the Board (D) violated his Fourteenth Amendment right to free speech by denying renewal of his contract because he criticized the school administration. He also claimed that the Board (D) violated his due process rights by failing to inform him of its reason for denial. The district court found for Roth (P) and granted summary judgment, which the court of appeals affirmed. The U.S. Supreme Court granted review.

ISSUE: Does a non-tenured teacher have a right to a hearing before a board decides not to renew his contract when nonrenewal infringes no property or liberty interest?

HOLDING AND DECISION: (Stewart, J.) No. A non-tenured teacher has no right to a hearing before a board decides not to renew his contract when nonrenewal infringes no property or liberty interest. Due process is only implicated when an action deprives a person of any of those interests encompassed by the Fourteenth Amendment's protection of liberty and property. Under Wisconsin law, only tenured teachers are entitled to continued employment. Thus, Roth (P) had no property interest in his employment and no property right that could be infringed. Further, absent something preventing him from seeking other employment, such as charges against him, stigma, or disability, the denial of a hearing is not a violation of due process. The lower court, therefore, should not have granted summary judgment for Roth (P). Reversed and remanded.

COMMENT: The *Roth* opinion shows the Court's retreat from its previous expansion of the "entitlement" theory. Previously, the Court raised the level of the interest that teachers had in employment from mere privileges to full liberty or property entitlements. One of the benefits elevated to the level of a property interest was government employment, in certain instances. The test enunciated by the Court in *Roth* for when an individual has a Fourteenth Amendment property interest in government employment requires that such a property interest be (1) grounded in state law and (2) presently enjoyed by the individual. As Roth (P) failed the first requirement, there was no need for the Court to consider whether he met the second requirement. If the Board (D) had barred Roth (P) from employment at other state universities or imposed a stigma on him that would hurt Roth's (P) future employment, the Court would have reached a different decision. However, this did not happen here. Therefore, if a non-tenured teacher has a limited contract, this limited, or term, contract provides a guarantee of employment for only the length of the contract term. If a teacher is terminated during that term, then procedural due process protections do attach. Here, because no life, liberty, or property interest was impaired, the Fourteenth Amendment due process mandate was not implicated. Because Roth (P) was a non-tenured teacher, he did not have to be rehired at the end of the academic year. Furthermore, as long as there were no employer statements that would damage his reputation or freedom to seek other employment, there was no protected "liberty" interest. Thus, as long as the employment contract (or state law or university policy) does not contain language that would create an entitlement or an expectation of continuing employment, a teacher would have no protected "property" interest in continued employment.

Discussion Questions

1. Explain the difference, in terms of due process rights, between a non-tenured and tenured teaching employee.

2. Roth alleged that his nonrenewal was based on negative comments that he made to the college administration—a violation of his First Amendment rights. Roth also contended that his Fourteenth Amendment due process rights were violated because he was not given reasons or a hearing regarding his nonrenewal. Do you agree? Explain what additional rights Roth would be entitled to if the university sought to terminate his contact before the end of the school year.

3. In *Roth* and a similar case, *Perry v. Sinderman* (1972), both parties claimed that their due process rights were violated. When a school decides not to renew a non-tenured teacher's contract, do you think it is prudent for schools and universities to state reasons and grant the teacher a hearing, even though these accommodations are not required?

BORING V. BUNCOMBE BOARD OF EDUCATION 136 F.3D 364 (4TH CIR. 1998)

GENERAL RULE OF LAW: The school board, as an arm of the state government, is empowered to oversee and respond to specific curriculum-related needs of the local district. School officials retain editorial control. Aspects of this case can logically be compared to the court's decision in *Hazelwood v. Kuhlmeier* (1988).[1]

PROCEDURE SUMMARY:

Plaintiff: Boring, a high school drama teacher (P)

Defendant: Buncombe Board of Education (D)

U.S. District Court Decision: Held for the Defendant

U.S. Court of Appeals Decision: Affirmed

FACTS: Boring (P), a drama teacher, chose the play *Independence* for her students to perform at a competition. The play portrays a dysfunctional family that includes a lesbian daughter and a daughter with an illegitimate child. The students' performance won honors at a regional competition. The principal learned of the script, objected to the play, and eventually only let students perform it with specific scenes deleted. Later, the principal alleged that Boring (P) failed to follow the school's "controversial materials" policy and transferred Boring (P) to a new school. The policy dealt with parental control over what material their children are exposed to at school. Boring (P) assumed the policy did not cover dramatic presentations and sued the Board of Education (D) on First Amendment grounds. She claimed that her transfer was a retaliatory action.

ISSUE: Does a public school teacher have a First Amendment right to participate in choosing the school curriculum?

HOLDING AND DECISION: (Widner, J,) No. The Fourth District Court of Appeals, by a 7–6 vote, held that the plaintiff's selection of the play as part of the school curriculum was not protected expression under the First Amendment. "Since plaintiff's dispute with the principal, superintendent of schools, and the school board is nothing more than an ordinary employment dispute, it does not constitute protected speech and has no First Amendment protection."

DISSENT: (Motz, J.) "School administrators must and do have final authority over curriculum decisions. But that authority is not wholly unfettered."

COMMENT: This case demonstrates the control local school boards retain in what students may be exposed to in the curriculum. As stated by the court, a teacher may not pick and choose additional subject matter to expose their students to if the school board or teaching manual expressly rejects such exposure. Although the First Amendment protects a citizen's right to expression, limitations are acceptable when that expression comes within the confines of school curriculum.

Discussion Questions

1. Discuss the issue of the balancing of equities (how a court must compare the rights of a plaintiff against the needs of the defendant). In this case, the equities involve a teacher's academic freedom balanced against the need for a school to control inappropriate teaching behavior or teaching subject matter that it considers inappropriate.
2. What are the implications of the court's dissenting opinion?
3. Under what other circumstances might an administrator face censorship issues? What factors should guide the administrator's decision?

CLARKE V. SHORELINE SCHOOL DISTRICT NO. 412, KING COUNTY 729 P.2D 793 (WASH. 1986)

GENERAL RULE OF LAW: "Sufficient cause" for a teacher's discharge exists when the teacher's deficiency is irremediable and materially and substantially affects the teacher's performance.

PROCEDURE SUMMARY:

Plaintiff: Clarke, a nonrenewed schoolteacher (P)

Defendant: Shoreline School District No. 412 (School District) (D)

State Human Rights Commission Decision: Held for School District (D)

State Superior Court Decision: Held for the School District (D)

State Court of Appeals Decision: Transferred case to Supreme Court

State Supreme Court Decision: Affirmed

FACTS: Appellant Robert Clarke (P), a teacher of severely mentally retarded children in the Shoreline School District (D), was discharged from employment after serving a period of probation. Clarke (P) was legally blind and wore bilateral hearing aids for his hearing impairment. His loss of eyesight eventually impaired his ability to carry out teaching duties. Clarke (P) was dismissed only after extensive classroom observation and evaluations conducted by his supervisor. Clarke (P) attended a conference with the Director of Pupil Services and a member of the State Services for the Blind to discuss his performance. To remedy the teaching deficiencies and the vision handicap, Clarke (P) was given four possible alternative courses of action, none of which he chose. After being placed on probation for the 1976–1977 school year, Clarke (P) filed a complaint with the State Human Rights Commission stating that the School District (D) was not making an effort to accommodate his handicap. In a settlement agreement, he was granted a medical leave of absence for the purpose of "rehabilitation" and "retraining," allowing him to return in the fall. Clarke (P) returned with minimal rehabilitation and no retraining. His condition worsened, putting the safety of his students in jeopardy. Clarke (P) was then dismissed and his contract not renewed. There were no available

positions for which Clarke (P) was qualified, and the School District (D) was under no obligation to create a job specifically for him. Clarke (P) claimed he was discharged because of his handicap, which is in violation of the Washington Law Against Discrimination, RCW 49.60.180. Furthermore, the School District (D) failed to comply with the statutory requirements pertaining to teacher probation. In an administrative hearing, the hearing officer found that the School District (D) discharged Clarke (P) for sufficient cause, a decision affirmed on appeal by the King County Superior Court. Clarke (P) appealed, and the Court of Appeals transferred the case to the State Supreme Court, which also affirmed the dismissal.

ISSUE: Can a teacher be dismissed for "sufficient cause" when the teacher's deficiency is irremediable and materially and substantially affects the teacher's performance?

HOLDING AND DECISION: Yes. The court held that the teacher's visual handicap and hearing impairment materially and substantially affected his performance as a teacher, and that the school district had sufficient cause to discharge Clarke (P) regardless of whether it complied with probation requirements in the statute. Additionally, the school district was not required to take affirmative steps to help a visually handicapped and hearing-impaired teacher find a position with the school district, unless he was otherwise qualified to fill the position.

COMMENT: Whether specific conduct, practices, or methods constitute sufficient cause for discharge is a question of mixed law and fact. Thus, the inferences drawn by a hearing officer from the raw facts and the interpretation of the statutory term are challengeable. A court would review such issues de novo, determining the correct law and applying it to the facts as found by the hearing officer. Whether a teacher's performance constitutes a hazard to the health and welfare of his students is an extremely difficult decision. School authorities should refrain from discharging a teacher as a matter of law, except in the most egregious cases, especially if the teaching deficiency is related to an irremediable handicap.

Discussion Questions

1. Do school districts have the right to dismiss a teacher because of a deficiency?
2. Does a school district have an obligation to create a position, when a position does not exist, for a teacher dismissed because of a disability?
3. What obligations does a teacher placed on leave have to fulfill a settlement agreement between the state Human Rights Commission, the school district, and the individual?

DIKE V. SCHOOL BOARD OF ORANGE COUNTY, FLORIDA 650 F.2D 783 (5TH CIR. 1981)

GENERAL RULE OF LAW: Breast-feeding is entitled to constitutional protection against state infringement, in certain circumstances.

PROCEDURE SUMMARY:

Plaintiff: Dike, a school teacher (P)

Defendant: School Board of Orange County, Florida (Board) (D)

U.S. District Court Decision: Dismissed Dike's (P) complaint as frivolous

U.S. Court of Appeals Decision: Reversed

FACTS: Dike (P), an elementary school teacher employed by the Board (D), desired to breast-feed her child at all feedings. One feeding was necessary during the school day. She arranged to have the child brought to school during her lunch period, when she was free from all duties, so she could feed the child in a locked, private room. After three months, the school principal instructed Dike (P) to cease nursing the child at school. He cited a Board (D) directive prohibiting teachers from bringing their children to work for any reason. Dike (P) stopped nursing the child on campus. After observing the child's allergic reaction to formula and eventual refusal of a bottle, Dike (P) sought permission to nurse off campus. The Board (D) refused. Dike (P) thereafter filed suit under 42 U.S.C. § 1983, challenging the Board's (D) refusal to permit on-campus breast-feeding. The district court dismissed the complaint as frivolous.

ISSUE: Is breast-feeding entitled to constitutional protection from state infringement in certain circumstances?

HOLDING AND DECISION: (Godbold, C. J.) Yes. Breast-feeding is entitled to constitutional protection from state infringement in certain circumstances. Breast-feeding is one of those fundamental rights, like marriage, procreation, contraception, and abortion, protected under the Fourteenth Amendment's guarantee of liberty. The district court's dismissal for failure to state a claim was, therefore, clearly erroneous. Because breast-feeding is among those fundamental rights, the Board (D) must show that prohibiting Dike (P) from breast-feeding during her duty-free lunchtime furthers a compelling state interest and is narrowly tailored to promote that interest. Whether the Board's (D) legitimate interest in preventing disruption of the educational process satisfies this standard is a question of fact to be determined at trial. Reversed.

COMMENT: The problem in the *Dike* case is striking a balance between the state's legitimate interest in maintaining an appropriate educational environment and the personal privacy rights of the educators within that environment. Notwithstanding the result in *Dike* on remand, it would seem that her ability to breast-feed on campus should win this balance, given the recognized need to accommodate working mothers and the minimal effect that the breast-feeding routine would have on the educational environment. While courts have strongly supported teacher claims regarding personal privacy, courts have also recognized the school board's interest in maintaining an appropriate educational environment. This has sometimes constrained the personal freedoms of teachers. Often, the basis for the school's action is that teachers serve as role models and, therefore, need to conform to traditional community standards. Obviously, standards have changed. In the first third of the century, some school districts even prohibited teachers from dating and would remove a teacher who was married.

Discussion Questions

1. Was the problem in the *Dike* case the balance between the state's legitimate interest in maintaining an appropriate educational environment and the personal privacy rights of the educators within that environment?

2. Is breast-feeding a fundamental right, like marriage, procreation, and contraception, that is protected under the Fourteenth Amendment?
3. What significance will this case have on future educators in the workplace?

DYKEMAN V. BOARD OF EDUCATION OF SCHOOL DISTRICT OF COLERIDGE 210 NEB. 596, 316 N.W.2D 69 (1982)

GENERAL RULE OF LAW: A school board may consider both educational and noneducational factors in determining whether to terminate a teacher pursuant to a reduction-in-force program.

PROCEDURE SUMMARY:

Plaintiff: Dykeman, a teacher (P)

Defendant: Board of Education of School District of Coleridge (Board) (D)

State District Court Decision: Held for the Board (D), dismissing Dykeman's (P) petition for review of the Board's (D) decision to terminate

State Supreme Court Decision: Affirmed

FACTS: Dykeman (P) had been employed by the Nebraska Board (D) as a business education teacher for six years. In 1980, the Board (D) determined that it needed to reduce its teaching staff and that one of the two high school business education teachers should be let go. Both teachers were tenured and had identical teaching certificate endorsements. In deciding between the two teachers, the Board (D) considered the contribution each made to the activities program, ultimately deciding to terminate Dykeman (P). Dykeman (P) thereafter petitioned the court for review of the decision, contending that under the statute permitting the reduction, it was improper for the Board (D) to consider the teachers' respective contributions to the activities program. The district court dismissed the petition, finding that the Board's (D) decision was neither arbitrary nor capricious. Dykeman (P) appealed.

ISSUE: May a school board consider noneducational as well as educational factors in determining whether to dismiss a teacher pursuant to a reduction-in-force program?

HOLDING AND DECISION: (Boslaugh, J.) Yes. A school board may consider noneducational as well as educational factors in determining whether to dismiss a teacher pursuant to a reduction-in-force program. Though the statute governing the reduction program did not specifically authorize consideration of a teacher's contribution to an activities program, neither did the statute prohibit it. Also, the decision was administrative, not quasi-judicial, and a school board's administrative decisions are only subject to limited review, absent statutory or contractual restrictions upon the decisions. Absent such restrictions, a school board is entitled to broad discretion, and its decisions may not be disturbed unless found to be arbitrary and capricious. The consideration of the activities program contributions was not, and Dykeman's (P) petition was properly dismissed. Affirmed.

COMMENT: In arguing that the board could not consider the contribution teachers made to the activities program, Dykeman relied on *Neal v. School Dist. of York* (1980).[2] In *Neal,* the court held that the provisions of the tenure law did not apply to coaching duties and noted that nothing in the law's language or legislative history indicated that the position of coach was intended to be covered by the law. The *Dykeman* court distinguished *Neal,* rejecting the application of the *Neal* argument by simply stating that nothing in that opinion addressed the question of consideration of activities program contributions. This decision provides the board with a good deal of discretion in actions such as this. As long as its actions are neither capricious nor wanton, they will usually be upheld as good-faith acts.

Discussion Questions

1. Why did the court allow the use of contributions in the activities program in light of a prior court decision holding that this was not appropriate?
2. Does this decision give more power to a local school board when a reduction in force is in progress?
3. Some state laws allow collective bargaining agreements to supersede state laws, such as those controlling reduction-in-force policies. Why would a school district be eager to implement a bargained policy regarding reduction in force?

EAST HARTFORD ED. ASSN. V. BOARD OF ED. 562 F.2D 838 (2ND CIR. 1977)

GENERAL RULE OF LAW: Consistent with the U.S. Constitution, a school board may impose reasonable regulations governing the appearance of its teachers.

PROCEDURE SUMMARY:

Plaintiffs: Richard Brimley, a school teacher, and the East Hartford Education Association, a teachers' union (P)

Defendant: Town of East Hartford Board of Education (School District) (D)

U.S. District Court Decision: Granted summary judgment in favor of defendant

U.S. Court of Appeals Decision: Reversed and remanded

U.S. District Court Decision: Held for plaintiff

FACTS: Brimley (P), a public school teacher, was reprimanded for failure to wear a necktie while teaching his class. Brimley (P) and the teachers' union (P) sued the School District (D), seeking declaratory and injunctive relief and claiming that enforcement of the dress code violated his constitutional rights of free speech and privacy. The district court granted summary judgment for the school district (D). The court of appeals reversed and remanded. The court voted for a rehearing en banc.

ISSUE: May a school board impose reasonable regulations, consistent with the U.S. Constitution, governing the appearance of its teachers?

HOLDING AND DECISION: (Meskill, J.) Yes. A school board may impose reasonable regulations, consistent with the U.S. Constitution, governing the appearance of its teachers. The general rule is that federal courts may not review the daily operating decisions of school administrators, unless these decisions directly implicate constitutional rights. The court must balance the individual's interest in freedom of expression against the school district's interests in enforcing its dress code. When this balancing test was applied to the present case, the School District's (D) interests prevailed. Here, the controversy fails to directly involve Brimley's (P) constitutional rights, so the court declined to overturn the school's policy. Brimley (P) claimed that his refusal to wear a necktie constituted "symbolic speech" protected under the First Amendment. Specifically, Brimley (P) claimed that his manner of dress indicated that he was not a part of the establishment and that he was closer to the students in his values, thus making him a more effective teacher. Symbolic speech constitutes conduct that may be regulated. As that conduct becomes less like pure speech, then the required showing of the state's interest in regulating that conduct is lessened. Here, the expressive conduct is Brimley's (P) failure to wear a tie. The relationship between such conduct and the claimed expression is tenuous, thereby reducing the School District's (D) required showing. Moreover, Brimley (P) had alternative means of communicating his views to his students without violating the dress code. The School District's (D) enforcement of the dress code is rationally related to its objective of promoting respect and discipline in the classroom. This is a decision for local school authorities, and not the courts, to make. The court may not overturn decisions of school officials, unless these officials are clearly outside the scope of their authority. Lastly, Brimley (P) claimed that the enforcement of the dress code violated his liberty rights under the Fourteenth Amendment. Courts have held that the state's interest in regulating the conduct of its employees differs significantly from its interest in regulating the speech of the general public. In such a case, the issue is whether the regulations imposed are so irrational as to be deemed arbitrary and constitute a deprivation of the individual's liberty interests. The disciplinary effect of Brimley's (P) failure to wear a tie does not conform to this standard and, therefore, the School District's (D) policy must be upheld.

DISSENT: (Oakes, J.) The majority erroneously trivializes Brimley's (P) expression and liberty interests and overemphasizes the School District's (D) interest in regulating the conduct of its employees.

COMMENT: In burdening a fundamental right, the state bears the burden of proof. When the challenged regulation does not discriminate against an insular minority or implicate a fundamental right, however, the policy is presumed constitutional. Courts have consistently held that an individual's right to select his own style of dress does not constitute a fundamental right under the Constitution. In order to be recognized as a constitutionally protected fundamental right, the conduct must implicate the individual's "most basic personal decisions."

Discussion Questions

1. What's the difference between "free speech" and Richard Brimley's claim of "symbolic speech" protected by the First Amendment?
2. What other way(s) could Brimley have communicated his views without violating the school dress code?
3. The court system does not intervene to resolve conflicts arising in the daily operation of school systems. What circumstance(s) would allow the court to intervene?

ERB V. IOWA STATE BOARD OF PUBLIC INSTRUCTION 216 N.W.2D 339 (1974)

GENERAL RULE OF LAW: A board of education's power to revoke teaching certificates is neither punitive nor intended to permit the exercise of personal moral judgment by members of the board.

PROCEDURE SUMMARY:

Plaintiff: Richard Alan Erb, a teacher (P)

Defendant: Iowa State Board of Public Instruction (School Board) (D)

Polk County District Court Decision: Held for Defendant

State Supreme Court Decision: Reversed

FACTS: Richard Erb (P) was a teacher with a spotless record. He was a military veteran, held a master's degree in fine arts, coached wrestling, assisted the football team, and served as senior class sponsor. He had a wife and two sons, and for seven years, he taught art at the Nishna Valley Community School. Robert M. Johnson, a farmer whose wife, Margaret, taught home economics in the Nishna Valley Community School, filed the complaint against Erb (P). Johnson had evidence that his wife was having an affair with Erb (P), which began and ended in the spring of 1970. Johnson told the Iowa State Board of Public Instruction (D) that his goal was to have Erb (P) removed from the school and not to have his teaching certificate revoked. Erb (P) offered to resign his position, but based on his spotless record, the School Board (D) voted unanimously not to accept his resignation. Erb (P) was retained for the following year. Johnson then filed a complaint to have Erb (P) removed from the school. At the hearing, Erb (P) brought 35 witnesses to vouch for his character and fitness to teach, but the Board (D) would not allow their testimony to be heard. Erb's (P) attorney was not allowed to cross-examine Johnson or those witnesses who did testify. After considering the evidence, the Board (D) voted 5 to 4 to revoke Erb's teaching certificate without making any findings of fact or conclusions of law. Erb (P) challenged, alleging that the Board (D) acted illegally in revoking his certificate. A writ of certiorari was issued. The trial court held that Erb's (P) adulterous affair was sufficient grounds for revocation of his certificate, and it annulled the writ. Erb (P) appealed.

ISSUE: Can a school board revoke a teacher's certificate for out-of-school conduct without sufficient evidence that the conduct renders the teacher morally unfit to teach?

HOLDING AND DECISION: No. The State Supreme Court of Iowa held that in order to revoke a certificate, the Board (D) must make findings of fact. These findings must be sufficient to enable a reviewing court to ascertain with reasonable certainty the factual basis and legal principle the Board (D) acted upon. The Iowa State Board of Public Instruction (D) made no such finding in this case. Since the Board (D) violated this precept, the court took it upon itself to evaluate the evidence against Erb (P). The court determined that there was not enough evidence to justify the revocation of Erb's (P) certificate. The Board (D), in failing to make findings of fact or conclusions of law, acted illegally in revoking Erb's (P) certificate. Reversed.

COMMENT: The standard, according to Iowa Code 260.23, is that "a certificate can be revoked only upon a showing before the board of a reasonable likelihood that the teacher's retention in the profession will

adversely affect the school community." Erb (P) apologized to his wife and family, and they forgave him, as did his students and the community at large. Thirty-five people were willing to testify in support of Erb's (P) character and fitness to teach. Even Johnson, the original complainant, stated his purpose was only to have Erb (P) removed from the school, not to have his certificate revoked. The overwhelming evidence was that Erb (P) still had the support and respect of the community. There was no indication that the affair with Mrs. Johnson was anything other than an isolated indiscretion in an otherwise spotless past, and the transgression was not likely to recur. Erb (P) did not attempt to justify his actions; instead, he sought to show that he regretted them and would not repeat his indiscretion. The affair itself was not a public affront to community mores; rather, it was made public only through considerable effort on the part of others. There was no evidence that the affair had, or was likely to have, an adverse effect on Erb's (P) relationship with the school administration, other teachers, the students, or the community at large. The Supreme Court of Iowa called the overwhelming community support "a remarkable testament to the ability of a community to understand, forgive, and reconcile." A contrary decision would have given the Board (D) the unfettered power to revoke the certificate of any teacher whose personal, private conduct offended the Board (D), rather than base its decisions on the actual effect of the teacher's action on teaching. Several decades ago, the court may have ruled differently. In fact, as late as 1976, the court upheld a school board's dismissal, in midterm, of a single female elementary school teacher who was openly living with a man. The rationale was that her conduct violated local mores and that her students were aware of the conduct and might emulate it.[3] *Sullivan,* of course, can be contrasted with *Fisher v. Snyder* (1973), which—using the same standard—supported the teacher whose supposed violation of local mores offended the school board.[4]

Discussion Questions

1. If the decision had gone the other way, what impact would it have had on teaching in Iowa?
2. What type of evidence can be used to show that a teacher's out-of-school conduct renders him morally unfit to teach?
3. How do you feel about a teacher who commits an adulterous act? Should he be allowed to continue to teach, or should there be consequences related to his responsibility as a public role model, especially for children?
4. Do you believe that the administration would have handled the case differently today?

FISHER V. SNYDER
476 F.2D 375 (8TH CIR. 1973)

GENERAL RULE OF LAW: Dismissal of an untenured teacher is arbitrary and capricious when it is unrelated to either the education process or working relationships, or it is wholly without factual support.

PROCEDURE SUMMARY:

Plaintiff: Fisher, an untenured teacher (P)

Defendant: Snyder, a school board member (Board) (D)

U.S. District Court Decision: Held for Fisher (P), ordering her reinstatement

U.S. Court of Appeals Decision: Affirmed

FACTS: From 1970 to 1972, Fisher (P), a middle-aged divorcee, was employed as a high school teacher in Tyron. Her son lived and taught in a neighboring town. Often, his friends, young ladies, men, and married couples, visited Tyron. They often stayed in the one-bedroom apartment in which Fisher (P) lived because hotel and motel accommodations were generally unavailable. One young man, to whom Fisher (P) referred as her second son, visited often. In the spring of 1972, he visited for a week, sitting in on classes in accordance with Fisher's (P) arrangements with the school administration. Fisher (P) was thereafter notified that her contract would not be renewed for the next year. At a hearing, the Board (D) dismissed Fisher (P) for allowing young men, unrelated to her, to stay with her. It claimed this was conduct unbecoming a teacher. In the Board's (D) view, her social behavior suggested a strong potential for sexual misconduct. Fisher (P) filed suit under 42 U.S.C. § 1983, arguing that the Board's (D) reasoning was constitutionally impermissible. The district court agreed and ordered her reinstated. The Board (D) appealed.

ISSUE: May an untenured teacher be dismissed for reasons unrelated either to the education process or working relationships within the institutions and wholly without factual support?

HOLDING AND DECISION: (Bright, J.) No. An untenured teacher may not be dismissed for reasons unrelated either to the education process or working relationships within the institutions, or wholly without factual support. The school board may legitimately inquire into the character and integrity of its teachers, but it may not dismiss them based on unsupported conclusions drawn from such inquiries. Fisher's (P) allowing guests to stay in her one-bedroom apartment because other accommodations were sparse or unavailable does not support the Board's (D) conclusions that there was a strong potential for sexual misconduct or social misbehavior not conducive to maintaining the school's integrity. Thus, the district court correctly found that the dismissal was arbitrary and capricious. Affirmed.

COMMENT: *Fisher* is important because it illustrates another important area in which a teacher's interest must be weighed against the school board's interest. In this case, the teacher's interest in personal privacy was at stake. *Fisher* shows that the state does have a legitimate interest in supporting an inquiry into a teacher's integrity and character, but that interest is limited. Allowing local school boards any greater discretion in such inquiry would present too great a risk of serious infringement of privacy and personal freedom. This is especially true granted the potential, most prevalent in small communities, for community-wide disapproval of certain lifestyles or living choices.

Discussion Questions

1. Does the school board have the right to judge a teacher's lifestyle or living choice?
2. Should school boards concern themselves with a teacher's personal privacy if it is unrelated to the education process?
3. On what grounds can a teacher be terminated or not renewed? How does a nonrenewal affect a teacher's chance for future employment?

FOWLER V. BOARD OF EDUCATION OF LINCOLN COUNTY 819 F.2D 657 (6TH CIR. 1987)

GENERAL RULE OF LAW: Conduct is protected by the First Amendment only if it is expressive or communicative in nature.

PROCEDURE SUMMARY:

Plaintiff: Jacqueline Fowler, a tenured teacher (P)

Defendant: Lincoln County School District (School District) (D)

U.S. District Court Decision: (1) Held for plaintiff in part, reinstated plaintiff to her former position, and awarded damages. (2) Held for defendant in part, upholding the Kentucky statute that made plaintiff's firing possible. Plaintiff appeals the second decision

U.S. Court of Appeals Decision: The judgment of the district court regarding the statute is vacated

FACTS: Fowler (P) was a tenured teacher at the Lincoln County School District (D) for 14 years. Fowler (P) showed her class an "R"-rated movie titled "Pink Floyd: The Wall," upon the request of her students. Fowler (P) did not preview the movie before showing it to her class, although she was aware that the film contained some nudity. She asked one of her students who had seen the film to show the movie and edit out any unsuitable parts. Students' testimony conflicted as to how much nudity was actually viewed. Fowler (P) testified that she left the classroom several times during the film. That afternoon, the principal asked Fowler (P) to give him the videotape. The superintendent and School District (D) viewed the film. They then commenced proceedings to terminate Fowler's (P) contract. Fowler (P) received notice of her termination and of a hearing. She appeared at the hearing with counsel in order to contest the charges. She claimed that she believed the film had educational value. The School District (D) voted for termination. Fowler (P) then initiated proceedings in the district court, claiming violations of her First and Fourteenth Amendment rights and challenging the constitutionality of the state statutes under which she was discharged. The district court found that her discharge violated the First Amendment, and it subsequently reinstated her and awarded damages. The district court, however, upheld the Kentucky statute under which she was discharged. The School District (D) appealed. Fowler (P) cross-appealed the judgment on the constitutional validity of the statute.

ISSUE: Is conduct protected by the First Amendment only if it is expressive or communicative in nature?

HOLDING AND DECISION: (Milburn, J.) Yes. Conduct is protected by the First Amendment only if it is expressive or communicative in nature. In order for a plaintiff to establish a prima facie case of a constitutional violation, he must show that he was engaged in a protected activity and that the activity substantially motivated his discharge. Then the burden shifts to the state to show by a preponderance of the evidence that the discharge would have occurred absent the employee's engaging in the protected activity. The issue here is whether Fowler's (P) showing of the film was a constitutionally protected activity. In making this determination, the court must balance the teacher's interest in freedom of expression

against the school's interest in maintaining order. While a teacher has First Amendment rights under certain circumstances, Fowler's (P) conduct in the present case was not entitled to such protection. In order for expressive conduct to be afforded First Amendment protection, the plaintiff must possess an intent to convey a particular message that has a great likelihood of being perceived by those to whom it was communicated. That was not the case here. Fowler (P) never viewed the movie prior to showing it in her class. Moreover, she left the classroom several times during the film. Such conduct cannot be said to evidence an intent to convey a particular message. Moreover, showing the movie in itself did not constitute a method of expression entitled to protection. The judgment of the district court was vacated, and the action was dismissed.

CONCURRENCE: (Peck, J.) While the district court properly applied the "mixed motive" standard in reviewing the constitutionality of the School District's (D) discharge of Fowler (P), it erred in finding that she would not have been terminated absent the constitutionally protected conduct of communicating a particular ideology to her classroom.

DISSENT: (Merritt, J.) The district court was correct in finding that the School District (D) failed to meet its burden of showing that Fowler (P) would have been discharged absent a constitutionally protected activity. On the contrary, the School District's (D) decision was made because it disliked the content of the film.

COMMENT: The court also rejected Fowler's (P) claim that the Kentucky statute under which she was discharged was unconstitutionally vague and overbroad. The statute proscribed termination for "conduct unbecoming a teacher." Fowler (P) contested this statute on the basis that it failed to provide her with notice that her conduct would result in disciplinary action. Courts have upheld the validity of such statutes as a basis for employee discharge. Furthermore, the court concluded that Fowler's (P) showing of the film constituted "conduct unbecoming a teacher" in violation of the statute.

Discussion Questions

1. What must a plaintiff show to establish a prima facie case of a constitutional violation?
2. What specific actions by the teacher did the court consider crucial in determining whether she was entitled to First Amendment protections?
3. What does the teacher need to show to gain First Amendment protection? Do you think that there is any conflict between the court's opinion and the goals of a school?

GILLETT V. UNIFIED SCHOOL DISTRICT NO. 276 605 P.2D 105 (1980)

GENERAL RULE OF LAW: A tenured teacher may be terminated or nonrenewed only if good cause is shown and it can be proven that the reasons for the termination or nonrenewal were not arbitrary,

irrational, unreasonable, or irrelevant to the school board's task of constructing and maintaining an efficient school system.

PROCEDURE SUMMARY:

Plaintiff: Jessie Mae Gillett, a tenured teacher (P)

Defendant: Unified School District No. 276, Jewell County, Kansas (School Board) (D)

County District Court Decision: Held for Gillett (P)

State Supreme Court Decision: Reversed and remanded with directions

FACTS: Jessie Mae Gillett (P) was a tenured teacher in the continuous employment of the Unified School District No. 276 (D) for seven years. On March 11, 1977, the School Board (D) delivered to Gillett (P) notice of nonrenewal of her contract for the following year (K.S.A. 1977 Supp. 72-5437 provides that written notice of intent to not renew a contract must be served on or before the 15th day of March). The reason given for nonrenewal was there were criminal charges of shoplifting pending against her. Gillett (P) immediately filed for a due process hearing. On May 5, 1977, the School Board (D) served Gillett (P) with the following list of supplemental reasons for nonrenewal: inability to properly handle school funds; excessive absences for allegedly being ill; improper use of sick leave; physical and mental instability; and loss of community, student, and school board respect for this teacher. Gillett (P) objected to the consideration of the supplemental reasons because she felt they were not served in a timely manner. The hearing committee overruled. On September 21, 1977, evidence was presented for both the original and supplemental reasons for nonrenewal. On January 24, 1978, the hearing committee recommended that the School Board (D) reverse its decision of nonrenewal because there was insufficient evidence to show the pending shoplifting charges had a harmful effect on the community, faculty, or students. The School Board (D) considered all the evidence presented and unanimously upheld its original decision to not renew Gillett's (P) contract. The School Board (D) gave no written reason for rejecting the committee's recommendation. The district court entered judgment in favor of Gillett (P), ordering her reinstated with back pay because the hearing committee should not have considered the supplemental reasons as they were filed after March 15, 1977. The School Board (D) appealed to the Supreme Court of Kansas.

ISSUE: Was there substantial evidence to establish good cause, thereby justifying the School Board's (D) nonrenewal of the teaching contract?

HOLDING AND DECISION: Yes. The Supreme Court of Kansas found that the evidence was not arbitrary, irrational, unreasonable, or irrelevant to the School Board's (D) objective of maintaining an efficient school system. The evidence constituted just cause for the nonrenewal of Gillett's (P) teaching contract. The Supreme Court of Kansas concluded that "if a teacher is afforded a full opportunity to dispute any supplemental reasons and has not been prejudiced in any way, supplemental reasons for nonrenewal of a teacher's contract may be considered by a hearing committee." As long as the School Board (D) was required to sustain its burden of proof and the teacher was given an opportunity to present evidence in her defense, the School Board (D) was permitted to serve supplemental reasons for nonrenewal after the statutory date. The court found it significant that given the opportunity, Geller (P) did not take the witness stand to testify in her own defense. In addition, no witnesses testified as to any contributions she made to the educational

program of the School Board (D). The court found just cause for her nonrenewal. The School Board's (D) action was in good faith, and it had sustained its burden of proof. Had Gillett (P) testified and explained her physical and mental condition and denied that she knowingly and with larcenous intent took items from the stores, the case might have been decided in her favor.

Discussion Questions

1. Why might Gillett have been victorious in her case if she had testified?
2. Burden of proof deals with who is first responsible to meet the burden. Here, the school board met its burden (according to the court). Did Gillett meet her burden? Why or why not?
3. Why did the court allow the late submission of reasons for dismissal to be used in the board's decision?

GOSNEY V. SONORA INDEPENDENT SCHOOL DIST. 603 F.2D 522 (5TH CIR. 1979)

GENERAL RULE OF LAW: An educator facing nonrenewal has no right to a hearing before his contract is not renewed, unless nonrenewal infringes a liberty or property interest.

PROCEDURE SUMMARY:

Plaintiffs: Billy C. Gosney, principal, and Mary Lynn Gosney, teacher (P)

Defendant: Sonora Independent School District (School District) (D)

U.S. District Court Decision: For defendant, holding that procedural due process had been provided and that substantive due process rights had not been violated

U.S. Court of Appeals Decision: Reversed and remanded

FACTS: Billy C. Gosney (P) was hired as a junior high school principal by the Sonora School District (D) in 1962. His wife, Mary Lynn (P), was hired as an elementary teacher in 1963. In 1974, the School District (D) decided not to renew their one-year contracts because it found them in violation of its policy of no outside employment by district employees. At that time, the Gosneys (P) had excellent records as educators in the School District (D). During their employment in the School District (D), the Gosneys (P) acquired a substantial cattle ranching business. The School District (D) knew of the Gosneys' (P) cattle business but did not base their nonrenewal decision on that activity. In May of 1974, they purchased and operated a retail dry goods store. At a February board meeting, the School District (D) had decided to rehire the Gosneys (P) for the 1974–1975 school year. It was after this decision that the School District (D) learned of the Gosneys' (P) dry goods store. On May 6 and 13, the School District (D), not yet having issued contracts to the Gosneys (P), reopened discussions on their contracts. The board invited Billy Gosney (P) to a meeting on the 20th of May to discuss the matter. At this meeting, he informed the board that neither he nor Mary Lynn Gosney (P) intended to relinquish ownership of the store because they had hired a manager

to run it and considered it an investment, not a business. The School District (D) voted not to renew either contract because of the board's policy of no outside employment. Mr. Gosney (P), in response, hired an attorney and requested another meeting with the School District (D), which was granted on June 24, 1974. At this meeting, Mr. Gosney (P) again stressed that the store was merely an investment and not an outside business. Unpersuaded, the School District (D) again voted not to renew Mr. Gosney's (P) contract but did offer Mrs. Gosney (P) a teaching contract for the 1974–1975 school year, which she refused. The Gosneys (P) brought suit for reinstatement and back pay. They alleged that the School District (D) had violated their Fourteenth Amendment right of procedural due process by depriving them of a property interest in continued employment without adequate notice and a hearing; to substantive due process by enforcing a rule against outside employment that bore no significance to a state interest in the educational system; and to equal protection by arbitrarily and selectively enforcing the outside employment rule against them. The district court found in favor of the School District (D), and the Gosneys (P) appealed.

ISSUE: Can a school district differentially apply a legal policy in order to not renew the teaching contract of one person while renewing the contract of another for essentially the same reason?

HOLDING AND DECISION: No. The appeals court did not base its reversal on due process grounds, but rather on the equal protection of the law guarantee. The court of appeals held that (1) Mrs. Gosney (P) suffered no injury because she was offered a contract; (2) Mr. Gosney (P) was provided adequate notice of nonrenewal and received a proper hearing; and (3) the School District (D) did not violate Mr. Gosney's (P) substantive due process rights by not allowing him outside employment. However, the no-outside-employment policy was arbitrarily and discriminatorily applied to him because the School District (D) allowed other teachers to engage in outside employment. Therefore, the School District (D) violated Gosney's (P) Fourteenth Amendment right to equal protection of the law because it allowed others to engage in outside employment. The court of appeals reversed and remanded for appropriate relief.

COMMENT: By offering Mrs. Gosney (P) employment for the 1974–1975 school year, the School District (D) did not violate any of her rights, and she was not due any compensation. The appellate court then concentrated on Mr. Gosney (P). The School District (D) went beyond what it needed to do to not renew Mr. Gosney's (P) contract. The School District (D) did not have to provide him with a hearing, nor did it need to state a reason for his nonrenewal. However, the School District (D) afforded him with several hearings, one with counsel, before deciding not to renew his contract. The School District (D) based its nonrenewal of Mr. Gosney's (P) principal contract on the outside employment at the dry goods store, not on his cattle business. At trial, the Gosneys (P) proved that other employees in the School District (D) were employed outside the school. One employee kept records for a physician, one collected tickets at a local drive-in theater, and many teachers owned or helped operate cattle ranches in the area. The board's policy of no outside employment was only applied once in its history, to Mr. Gosney (P). The appellate court did not find the policy of no outside employment unjust but faulted the School District (D) in the manner by which the policy was arbitrarily and discriminatorily enforced. A policy may, therefore, be valid on its face (as this one was) but can be discriminatorily applied. It is the discriminatory application that makes it unconstitutional. Another example is *Yick Wo v. Hopkins* (1886), in which a facially neutral statute requiring laundries to meet certain safety measures was, in fact, an attempt to limit laundries using wooden equipment, which only the Chinese operated.[5] Thus, a facially neutral statute was differentially applied, resulting in discrimination against a protected classification.

Discussion Questions

1. If no other teachers had been allowed to hold outside employment, would the decision of the court been different?
2. What is meant by "differential application" of a facially neutral policy? Does it apply here?
3. Do any teachers have outside employment?

KEEFE V. GEANAKOS
418 F.2D 359 (1ST CIR. 1969)

GENERAL RULE OF LAW: The propriety of a high school teacher speaking certain words in class depends on the circumstances of the utterance.

PROCEDURE SUMMARY:

Plaintiff: Keefe, a teacher (P)

Defendant: Geanakos, a school committee member (D)

U.S. District Court Decision: Temporary injunction for Keefe (P) denied

U.S. Court of Appeals Decision: Reversed

FACTS: Keefe (P), a tenured teacher, was head of the English department for grades 7 through 12 in the local school system and taught English part time. On the opening day of school, Keefe (P) assigned an article from the *Atlantic Monthly* magazine to his class. Keefe (P) described the article as a valuable discussion of "dissent, protest, radicalism, and revolt" but not as pornographic. The class discussed the article, including a particularly offensive vulgarity for a son who engages in an incestuous relationship with his mother, which appeared in the article. Keefe (P) was subsequently required to defend his use of the word at a school committee meeting. Keefe (P) gave an explanation and stated that he could not promise not to use the particular vulgarity again. He was thereafter suspended. A proposal that Keefe (P) be discharged was introduced, and a meeting to vote on the proposed dismissal was scheduled. Keefe (P) then sought a preliminary injunction to prevent Geanakos (D) from holding the meeting. The district court denied Keefe's (P) motion, and he appealed to the court of appeals.

ISSUE: Does the propriety of a high school teacher speaking certain words in class depend on the circumstances in which the words are spoken?

HOLDING AND DECISION: (Aldrich, C. J.) Yes. The propriety of a high school teacher speaking certain words in class depends on the circumstances in which the words are spoken. While the argument put forth by Geanakos (D), that what is said or read to students is not to be determined by adult obscenity standards, is correct, it does not follow that students must necessarily be protected from offensive language in the classroom. This issue is one of degree and circumstance. However, the evidence demonstrated that the

vulgarity was accessible to students elsewhere in the school. No less than five books in the school library contained the word in question. It would be irrational to hold, when students could be exposed to the word by obtaining one of these books from the library, that the students' teacher could not discuss the word in class. Temporary injunction granted; remanded for trial on the merits.

COMMENT: The court of appeals, by simply granting the temporary injunction and remanding for trial on the merits, did not expressly find Keefe's (P) use of the word proper. The tenor of the opinion, however, indicates that the court did at least implicitly approve of it. Thus, the case is a victory for advocates of academic freedom in the sense that an injunction only will be issued when there is a triable issue of fact and it appears that the party seeking the injunction is highly likely to win the case at trial. Academic freedom, however, like other freedoms, is not absolute. Generally, courts have held that this freedom does not protect conduct that is both offensive and unnecessary to the accomplishment of educational objectives. The inquiry is one of degree, considering the age and sophistication of the students, relevance of the educational purpose, and the context and manner of presentation.

Discussion Questions

1. If the law states that the propriety of speaking certain words in class depends on the circumstances of the utterance, then who decides and what criteria are used when determining the legitimacy of the circumstances of the utterance?
2. How does this ruling interplay with sexual harassment laws when deciding the comfort level of the listener? If the captive audience is a minor, does the comfort level reside solely with the listener or with the guardian also?
3. Was the deciding factor the availability of the word in the library through other texts, and if yes, then under what circumstances, if any, are our students protected from offensive language in the class?

KINGSVILLE INDEPENDENT SCHOOL DISTRICT V. COOPER 611 F.2D 1109 (5TH CIR. 1980)

GENERAL RULE OF LAW: An untenured teacher may not be discharged for classroom discussion unless the discussion clearly overbalanced the teacher's usefulness as an instructor.

PROCEDURE SUMMARY:

Plaintiff: Kingsville Independent School District (District) (P)

Defendant: Cooper, an untenured school teacher (D)

U.S. District Court Decision: Held for Cooper (D), awarding damages on her counterclaim for unjustified dismissal

U.S. Court of Appeals Decision: Affirmed

FACTS: In 1967, Cooper (D) was hired by the District (P) without tenure to teach high school. In 1971, Cooper (D) began using a teaching technique known as "Sunshine simulation," a role-play by which students re-created a period, in this case, American history of the post–Civil War Reconstruction period. The technique evoked strong feelings on racial issues. Several complaints were filed by parents, but few were for things other than the use of the Sunshine technique. Cooper (D) subsequently was told not to discuss "blacks in American history" or any controversial issues but never was prohibited from using the technique. The District (P) declined to renew Cooper's (D) contract for the next year, despite the recommendation of both the principal and superintendent that it be renewed. The District (P) thereafter sought declaratory judgment that the decision did not violate Cooper's (D) rights. Cooper (D) counterclaimed for back pay and reinstatement. The district court found for Cooper (D). The District (P) appealed, contending the district court's findings that the classroom discussions were protected and that the District's (P) refusal to renew Cooper's (D) contract was based primarily on these discussions were clearly erroneous.

ISSUE: May a district refuse to renew an untenured teacher's contract based on classroom discussions if the discussions do not clearly overbalance the teacher's usefulness as an instructor?

HOLDING AND DECISION: (Godbold, J.) No. An untenured teacher may not be discharged for classroom discussions unless the discussions clearly overbalance the teacher's usefulness as an instructor. Classroom discussion, which includes the Sunshine project at issue, is protected by the First Amendment. Thus, discussions must overbalance one's effectiveness as an instructor to be sustained. Here, they did not. The record showed that the other complaints filed against Cooper (D) were few and minimal. In fact, the District (P) renewed her contract in prior years, despite these other complaints. And though the lower court's findings of fact did not explicitly show that Cooper (D) would have been rehired despite the Sunshine project complaints, they were sufficient to support such an inference and were not clearly erroneous. Affirmed.

COMMENT: The classroom is viewed as an intellectual marketplace of ideas where the teacher should be able to investigate and experiment with new ideas. *Kingsville* is clearly a reinforcement of this notion. So long as the teaching method is related to a legitimate educational goal and does not significantly detract from the teacher's effectiveness as an instructor, despite complaints or parental disapproval of the method, the teacher, even untenured, cannot be dismissed simply because of his use of the method. It also illustrates that the right to an education does not necessarily guarantee a "comfortable" education.

Discussion Questions

1. How do the courts determine whether the teacher's classroom discussions have overbalanced the teacher's usefulness as an educator?
2. How has the decision in *Kingsville* affected the education field today?
3. Should teachers have autonomy over the type of instructional methods used in the classroom?

KNOX COUNTY BOARD OF EDUCATION V. WILLIS
405 S.W.2D 952 (1966)

GENERAL RULE OF LAW: A board has power to conduct a hearing, without specific rules governing the hearing, so long as it is orderly and fundamentally fair.

PROCEDURE SUMMARY:

Plaintiff: Willis, a teacher (P)

Defendant: Knox County Board of Education (Board) (D)

State Circuit Court Decision: Held for Willis (P), reversing the Board's (D) termination of Willis's (P) contract

State Court of Appeals Decision: Reversed

FACTS: Willis (P), a teacher employed by the Board (D), was charged with inefficiency, incompetence, and neglect of duty. At the hearing set to determine whether to terminate her contract, the Board (D) voted to terminate Willis's (P) contract. They found, based upon a supervisor's report, that she failed to maintain proper records and lacked control over her class. Willis (P) filed suit, alleging that the Board (D) did not have power to conduct the hearing because it lacked specific rules and regulations governing the hearing. The circuit court agreed and reversed the termination. The Board (D) appealed.

ISSUE: Does a board have power to conduct a termination hearing, without specific rules governing the hearing, so long as it is orderly and fundamentally fair?

HOLDING AND DECISION: (Clay, J.) Yes. A board has power to conduct a termination hearing, without specific rules governing the hearing, so long as the hearing is orderly and fundamentally fair. This allows for procedural flexibility, which is necessary because these hearings are usually conducted by laymen. Further, the statute authorizing the charges brought against Willis (P) adequately outlines the procedure required for a termination hearing. Nothing in the statute required the Board (D) to adopt supplementary rules, though it is permitted to do so under the statute. Reversed.

COMMENT: *Knox* illustrates the court's flexibility in ensuring that an individual has been afforded an opportunity to be heard, as required by the due process clause of the Fourteenth Amendment. As a rule, all that is required is "fundamental fairness." What constitutes fundamental fairness is difficult to state. However, it is clear that the more serious the potential deprivation, the more formal the procedure must be to satisfy the requirement. For instance, a professional license revocation proceeding is usually considered more serious than a proceeding to terminate employment; the former would prevent the subject from practicing his profession for life, while the latter would not prevent the subject from seeking employment in the same field afterward. Thus, the license revocation would require a more formal proceeding than the employment termination proceeding.

Discussion Questions

1. Although specific rules governing hearings are not required, do you think that it would be beneficial for a school to have them? Why?
2. What must a hearing be in order to pass the court's test?
3. What does a court look at when determining "fundamental fairness"?

O'CONNOR V. ORTEGA
480 U.S. 709, 107 S. CT. 1492 (1987)

GENERAL RULE OF LAW: An employer's search of an employee's office must be reasonable in order to meet Fourth Amendment requirements.

PROCEDURE SUMMARY:

Plaintiff: Ortega, a physician at a state hospital (P)

Defendant: O'Connor, a physician and director of the state hospital (D)

U.S. District Court Decision: Held for O'Connor (D), granting his motion for summary judgment

U.S. Court of Appeals Decision: Affirmed in part; reversed in part; remanded

U.S. Supreme Court Decision: Reversed and remanded

FACTS: Ortega (P) trained physicians in the psychiatric residency program at a state hospital. The hospital, headed by O'Connor (D), placed Ortega (P) on administrative leave while it investigated allegations against him of program mismanagement, sexual harassment of a female hospital employee, and inappropriate disciplinary action against a resident. O'Connor (D) and other hospital officials, in an effort to secure state property and take inventory, searched Ortega's (P) office. During the search, the officials seized personal items from Ortega's (P) desk and file cabinets. A formal inventory of property found in the office was never made. Ortega (P) filed suit in federal district court under 42 U.S.C. § 1983, alleging that the search violated the Fourth Amendment. The district court granted summary judgment to O'Connor (D), holding that the search did not violate the Fourth Amendment and finding a reasonable need to secure state property in Ortega's (P) office. The court of appeals affirmed in part and reversed in part, concluding that the search violated the Fourth Amendment because Ortega (P) had a reasonable expectation of privacy in his office. It granted partial summary judgment for Ortega (P), finding the defendants liable for an unlawful search. The case was then remanded for determination of damages. The Supreme Court granted certiorari.

ISSUE: Must a government employer meet a standard of reasonableness when searching an employee's office?

HOLDING AND DECISION: (O'Connor, J.) Yes. Fourth Amendment rights are implicated only when the search infringes a reasonable expectation of privacy. A government employee does have a reasonable expectation of privacy in his office, even though government offices are frequently open to fellow employees, supervisors,

and the general public. However, in the case of searches conducted by a public employer, the invasion of an employee's legitimate expectations of privacy must be balanced against the government's need for supervision, control, and the efficient operation of the workplace. Given the realities of the workplace, a warrant requirement would be unworkable for such searches. Therefore, in order to allow workplaces to operate efficiently, searches of employee offices for work-related, non-investigatory reasons, or for investigations of work-related misconduct, need not be based on probable cause. Such intrusions by public employers should be judged by a standard of reasonableness in light of the circumstances. In this case, it cannot be determined from the record whether O'Connor (D) satisfied this standard. Therefore, the case must be remanded to determine the justification for the search and seizure and to evaluate the reasonableness of both the inception and the scope of the intrusion. Reversed and remanded.

COMMENT: The real question is whether an employee with an expectation of privacy in his office can ever be fully protected from an employer's search under the Fourth Amendment. Because a case-by-case analysis is applied, the employee will never have a sense of security. The reasonableness standard is far too flexible from an employee's perspective. Nevertheless, it clearly follows the line of reasoning established by the *New Jersey v. T.L.O.* (1985) case as well as those cases that have followed. Important education cases such as *Bethel School District v. Fraser* (1986), *Hazelwood School District v. Kuhlmeier* (1988), and *New Jersey v. T.L.O.* (1985) have also based their decisions on this expanding "reasonableness" analysis. While there is no certainty, a teacher in a public education setting has no protection from a reasonable search by administration. According to the facts in this case, it is possible that the teacher has an expectation of privacy for those items secured in a locked desk. However, the administration could search the desktop and other areas, looking for information needed to conduct the business of the school.

Discussion Questions

1. When searching an employee's office, must a government employer meet a standard of reasonableness?
2. What do you think "reasonableness" means?
3. Is searching a government employee's office a violation of the Fourth Amendment? If so, how?

PALMER V. BOARD OF EDUCATION OF THE CITY OF CHICAGO 603 F.2D 1271 (7TH CIR. 1979)

GENERAL RULE OF LAW: An untenured public school teacher is not entitled to disregard a prescribed curriculum that conflicts with her religious principles.

PROCEDURE SUMMARY:

Plaintiff: Palmer, an untenured public school kindergarten teacher (P)

Defendant: Board of Education of the City of Chicago (Board) (D)

U.S. District Court Decision: Held for Board (D), granting its motion for summary judgment

U.S. Court of Appeals Decision: Affirmed

FACTS: Palmer (P) was hired by the Board (D) as a probationary public school kindergarten teacher. After being hired, but prior to the beginning of classes, Palmer (P) informed the principal that because of her religious beliefs she would be unable to teach subjects that related to love of country, the flag, and other patriotic matters—all topics required by the school's curriculum. The school attempted to accommodate Palmer (P) but could not. She was eventually dismissed without a hearing. Palmer (P) filed suit against the Board (D), seeking damages and reinstatement. She alleged that dismissal for failure to follow the prescribed curriculum violated her First Amendment right of religious freedom. The district court disagreed and granted summary judgment for the Board (D). Palmer (P) appealed.

ISSUE: May an untenured teacher be discharged for failing to follow a prescribed curriculum that conflicts with her religious beliefs?

HOLDING AND DECISION: (Wood, J.) Yes. An untenured teacher may be discharged for failing to follow a prescribed curriculum that conflicts with her religious beliefs. The state has a compelling interest in choosing, and having public teachers implement, a suitable curriculum to benefit citizens and society. Teachers may not disregard this curriculum simply because it may conflict with their religious beliefs. Nor do teachers have any constitutional right to supplant this curriculum with their views. Affirmed.

COMMENT: The key in *Palmer* is that although the teacher's religious beliefs were clearly protected by the First Amendment, she did not have the right to impose those beliefs on others, which was, in effect, the result of her refusal to teach the subjects. The state's compelling interest in providing a particular education to its citizenry as a whole overrode the teacher's perceived right to "opt out" of teaching those topics that violated individual religious beliefs. The dismissal here was sustained because no means of accommodating all of the competing interests was found. However, when there is a feasible way to accommodate the teacher's beliefs while providing the full curriculum, dismissal may be improper. This is especially true because under the 1972 Amendment to the Civil Rights Act of 1964, an employer may not discriminate against an individual on the basis of religion, unless the employer demonstrates that he is unable to reasonably accommodate an employee's religious observance or practice.

Discussion Questions

1. Why is it constitutional for an untenured teacher to be required to teach material that conflicts with her religious beliefs?
2. Is an untenured teacher allowed to teach her religious beliefs in addition to the required curriculum, under the protection of the First Amendment?
3. A teacher is not permitted to impose her religious beliefs on students. Is this the only limitation on a teacher's right of religious freedom?

PENASCO INDEPENDENT SCHOOL DISTRICT NO. 4 V. LUCERO 86 N.M. 683, 526 P.2D 825 (1974)

GENERAL RULE OF LAW: Absent grounds personal to a tenured teacher, a board must prove that no other position is available for which the teacher is qualified before it may refuse to reemploy the teacher.

PROCEDURE SUMMARY:

Plaintiff: Penasco Independent School District No. 4 (District) (P)

Defendant: Lucero, a tenured teacher (D)

State Court of Appeal Decision: Held for Lucero (D), affirming state board's reversal of the District's (P) findings

FACTS: Lucero (D) was a teacher who had been employed by the District (P) for eight years and had attained tenure. The following year, he worked as an elementary school counselor. At a termination hearing, the District (P) found cause to refuse to reemploy Lucero (D) because there was no longer funding to continue his position as elementary school counselor and because there was no other position available for which he was qualified. The state board of education reversed, finding insufficient evidence to support the latter finding. The District (P) appealed the reversal, contending there was sufficient evidence to support both findings.

ISSUE: May a board, absent grounds personal to the teacher, refuse to reemploy a tenured teacher without proof that there is no position available for which the teacher is qualified?

HOLDING AND DECISION: (Hendley, J.) No. Absent grounds personal to the teacher, a board may not refuse to reemploy a tenured teacher without proving that there is no position available for which the teacher is qualified. The District (P) asserted no such grounds and failed to prove that no other position for which Lucero (D) was qualified was available. He was just as qualified to teach a high school special education class as the non-tenured instructor the District (P) hired to teach the class. The District's (P) claim that it need not consider Lucero (D) for a high school teaching position because he had been an elementary school counselor the previous year fails for two reasons. First, the laws governing tenure do not distinguish between "teaching" and "counseling" positions and do not require that the teacher remain in one particular school to maintain tenure. Second, the District (P) did not allege that Lucero (D) lost tenure by serving as the elementary school counselor. Affirmed.

COMMENT: The *Penasco* decision illustrates the scope of the tenure right. It does not merely guarantee a teacher employment in a particular position subject to certain competency and performance standards. Rather, it places an affirmative obligation on the school board or district to find another position for the teacher if his usual or past position is eliminated. It seems that courts will view with skepticism a board's claim that there is no other position for a tenured teacher. Courts are especially skeptical when, as in *Penasco,* a non-tenured teacher with similar credentials is hired to perform a job that the tenured teacher appears just as qualified to perform. The guarantee of tenure is a right that courts are most hesitant to challenge. A teacher's tenure right will be withdrawn only when specific conditions are met (e.g., a general reduction in force), and then only when specified conditions—usually detailed in the state education code—are satisfied.

Discussion Questions

1. If evidence that no other position was available had been submitted to the court, do you think the result would have been different?
2. Why was Lucero's not being granted the high school teaching position not supported by the court?
3. Why are courts reluctant to challenge tenure?

SCHAFER V. BOARD OF PUBLIC ED. 903 F.2D 243 (3RD CIR. 1990)

GENERAL RULE OF LAW: Denial of childrearing leave on the basis of gender is prima facie discrimination.

PROCEDURE SUMMARY:

Plaintiff: Gerald Schafer, a male teacher employed by the Pittsburgh Board of Education (P)

Defendants: Pittsburgh Board of Education and Pittsburgh Federation of Teachers (D)

Administrative Action: Plaintiff not eligible for maternity leave

State Human Relations Commission Decision: Dismissed the complaint as untimely under state law and referred the defendant to the EEOC

Equal Employment Opportunity Commission Decision: Supported Plaintiff's position

U.S. District Court Decision: Rendered summary judgment for Board and Union (D)

U.S. Court of Appeals Decision: Affirmed denial of Shafer's (P) motion for summary judgment, but remanded for a determination of whether Schafer (P) was constructively discharged

FACTS: Since there was no paternity or family leave, Gerald Schafer (P), a male teacher, requested a one-year childrearing leave. This request was denied. After an unpaid three-month emergency leave, he resigned and later filed a sex discrimination charge with the Equal Employment Opportunity Commission (EEOC) based on Title VII of the Civil Rights Act of 1964. The Pittsburgh Federation of Teachers (D) was unable to help him because the collective bargaining agreement only provided leave for females. The Pennsylvania Human Relations Commission dismissed his complaint as untimely under state law, suggesting that he pursue his complaint with the EEOC. Schafer (P) argued, among other things, that his dismissal amounted to constructive discharge. The district court granted summary judgment against Schafer (P). During the course of the litigation, the United States and the defendants entered into a consent agreement, and a decree was issued granting the Board's male employees childrearing leave on the same basis as female employees.

ISSUE: Is a one-year childrearing leave policy that is not available to men prima facie evidence of sex discrimination?

HOLDING AND DECISION: Yes. The U.S. Court of Appeals ruled that a single-sex childrearing policy was prima facie evidence of discrimination. The district court's finding that Schafer (P) was constructively discharged was reversed. The Court of Appeals found that the Board's (D) maternity policy was a parental care leave. The policy is not a medical leave because it extends to one year, well after the time a mother regains her ability to work. Therefore, the parental care leave can be applied equally to men.

COMMENT: This decision was followed by the Family and Medical Leave Act of 1993, which grants both men and women up to 12 weeks of job-protected leave. More relevant to today's law is the concept of

constructive discharge. In *Johnson v. Shalala* (1993), the Fourth Circuit found that "complete failure to accommodate . . . might suffice as evidence to show the deliberateness necessary for constructive discharge."[6]

Discussion Questions

1. What significance did this case have in relation to the Family and Medical Leave Act of 1993?
2. Is a one-year childrearing leave policy that is not available to men sex discrimination under the Civil Rights Act of 1964?
3. Could failure to accommodate suffice as evidence of the deliberateness necessary for constructive discharge? What is constructive discharge?

STROMAN V. COLLETON COUNTY SCHOOL DISTRICT 981 F.2D 152 (4TH CIR. 1993)

GENERAL RULE OF LAW: Dismissal involves termination of a teacher under contract who is either tenured or probationary. The dismissal of a teacher requires observance of the dictates of procedural due process (fairness). A school board generally must be able to show good or justifiable cause in support of its decision to dismiss (good cause).

PROCEDURE SUMMARY:

Plaintiff: John W. Stroman, public school teacher, Colleton County, South Carolina (P)

Defendant: Colleton County School District (School District) (D)

U.S. District Court Decision: Held for the School District (D)

U.S. Court of Appeals Decision: Affirmed

FACTS: John W. Stroman (P) had been employed as a public school teacher in the Colleton County School District (D) for 10 years. The School District (D) announced in the spring of 1987 that due to a budgetary crisis, it would make a change in pay practices to teachers. Teachers would now be paid bi-weekly rather than in a lump sum for the summer months, which was the previous practice. Stroman (P) was dismissed for writing and circulating a letter to other teachers that complained about this change. The letter also criticized the School District (D) for budgetary mismanagement and encouraged teachers to engage in a "sick-out" during the week of final examinations to protest the School District's (D) actions. The School District's (D) superintendent, having received a copy of the letter, was concerned and called a meeting with Stroman (P). Stroman (P) admitted drafting and circulating the letter. He also told the superintendent that he felt mistreated as a result of the pay change. The superintendent gave Stroman (P) a letter of dismissal during their meeting, which stated, "the grounds for dismissal are that you have shown evident unfitness for teaching by proposing to abandon your duties during the week of June 1, 1987, and by inciting and

encouraging other teachers to leave their employment during the same week." Stroman (P) filed suit against the School District (D). He asserted that he was wrongfully dismissed because of his exercise of First Amendment–protected free speech. The district court concluded that any protected speech in the letter was not a substantial or motivating factor for Stroman's (P) dismissal, and the portion of the letter proposing a "sick-out" did not constitute speech protected by the First Amendment.

ISSUE: May a teacher be dismissed from a teaching position for writing and distributing a letter to other teachers that criticizes the school district's budgetary management and encourages teachers to participate in a "sick-out" during finals week?

HOLDING AND DECISION: Yes. The judgment of the district court was affirmed. Stroman's (P) letter was prompted by a personal grievance in response to a change in teacher pay practices. However, complaints in the letter alleging school officials' budgetary mismanagement might also be viewed as a First Amendment–protected complaint of a concerned citizen. Referring to *Connick v. Meyers* (1983), the court arrived at its decision by weighing the public's interest in the commentary against the state's dual interest as a provider of a public service and as an employer. It decided that any First Amendment–protected interest Stroman (P) had in this letter was outweighed by the public's interest in loyal teachers and effective education (here, the timely administration of exams). The School District's (D) employer interest in having its employees abide by reasonable polices adopted to control sick leave and maintain morale and effective operation of the schools was also considered.

COMMENT: As you can see, the teacher's threat to a "sick-out" during finals week may have been fatal to the First Amendment argument. The court acknowledges a First Amendment interest in the teacher's right to speak about budgetary mismanagement, but it quickly turns its focus to the reliability of teachers and their commitment to their jobs.

Discussion Questions

1. How are a teacher's First Amendment rights balanced against the interests of public schools?
2. What should a school district's expectation of employee loyalty and staff morale be when a teacher is punished for speaking out against the district's policy?
3. Does an administrator violate the First Amendment if she disciplines a teacher for speech that touches on a matter of public concern?

NOTES

1. Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).
2. Neal v. School Dist. of York, 205 Neb. 558, 288 N.W.2d 725 (1980).
3. See Sullivan v. Meade Independent School District No. 101, 530 F.2d 799 (1976).
4. Fisher v. Snyder, 476 F.2d 375 (8th Cir. 1973).
5. Yick Wo v. Hopkins, 118 U.S. 356 (1886).
6. Johnson v. Shalala, 991 F.2d 126 (4th Cir. 1993).

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Local School Boards and Contract Liability

ORACLE SCH. DIST. #2 V. MAMMOTH SCHOOL DISTRICT NO. 88, 130 ARIZ. APP. 41, 633 P.2D 450 (1981)

GENERAL RULE OF LAW: States may require school districts to admit students from other districts within the same county that do not have their own school facilities upon the payment in money (not in kind) of fees equal to the average cost of education for each student in the county.

PROCEDURE SUMMARY:

Plaintiff: Oracle School District (P)

Defendant: Mammoth School District (D)

State Trial Court Decision: Held for Mammoth School District (D)

State Appeals Court Decision: Affirmed

FACTS: Oracle (P) and Mammoth (D) were two school districts located in the same county in Arizona. When redistricting plans were drawn up, Oracle (P), which did not have its own high school, transferred land to Mammoth (D) in the exchange for the right to have students located in its district attend Mammoth's (D) high school free of charge. Oracle (P) nonetheless provided Mammoth (D) with the state aid it received for Oracle (P) students who attended Mammoth's (D) high schoo1. Although Mammoth (D) honored this agreement for over 20 years, it eventually demanded that Oracle (P) pay tuition for its students attending Mammoth High. Oracle (P) sued Mammoth (D) to enforce the redistricting agreement, but the trial court dismissed Oracle's (P) complaint. Oracle (P) appealed.

ISSUE: May states require school districts to admit students from other districts in the same county that do not have their own school facilities upon the payment in money (not in kind) of fees equal to the average cost of education for each student in the county?

HOLDING AND DECISION: (Birdsall, J.) Yes. States may require school districts to admit students from other districts in the same county that do not have their own school facilities, provided a payment in money (not in kind) is made of fees equal to the average cost of education for each student in the county. School districts may not circumvent the state statutory scheme, the purpose of which is to provide educational access to all students, by waving tuition and then threatening to withdraw waivers. Therefore, Mammoth's (D) agreement with Oracle (P) was unenforceable. Affirmed.

COMMENT: Oracle (P) here argued a "quasi-contract" theory known in the law as "promissory estoppel." Under this theory, Oracle (P) reasonably relied to its detriment on the promise of Mammoth (D) to allow Oracle's (P) students to attend Mammoth's (D) high school without having to pay tuition. Mammoth (D) also knowingly allowed Oracle (P) to rely on the promise and benefit from that reliance. However, the rule that estoppel cannot be invoked against a public agency is well established.[1] Here, the principle of promissory estoppel applied to make the original agreement unenforceable. Although this result appears to be unfair, it is based on basic contract law principles.

Discussion Questions

1. Absent the initial promises and transfer of land between the school districts, do you think that Mammoth would still be required to admit students from Oracle?
2. What is the "promissory estoppel" doctrine?
3. Why is it a common practice for school districts, especially small ones, to negotiate with adjoining districts to accept their high school-age students?

PHELPS V. BD. OF EDUCATION OF TOWN OF WEST NEW YORK 300 U.S. 319, 57 S. CT. 483 (1937)

GENERAL RULE OF LAW: State laws that prohibit school boards from discharging tenured employees without good cause and from reducing salaries do not create contract rights to permanent employment or minimum pay.

PROCEDURE SUMMARY:

Plaintiffs: Phelps and other tenured employees (principals, teachers, clerks) of New Jersey public school system (P)

Defendant: West New York, New Jersey Board of Education (Board) (D)

State Trial Court Decision: Held for Board (D)

State Appellate Court Decision: Affirmed

U.S. Supreme Court Decision: Affirmed

FACTS: In the early 1900s, New Jersey enacted a tenure law that prohibited school boards from firing school employees who had served for at least three years. It also prohibited reducing the salary of tenured employees. During the Great Depression, however, New Jersey enacted another law that required school boards to re-determine employee salaries and authorized uniform salary reductions down to a prescribed minimum. It also forbade salary increases. The West New York Board of Education (D) reduced by up to 15% the salaries of its tenured principals, teachers, and clerks, within each class or grade. Phelps (P) and others sued the Board (D), alleging that it had breached the state's "contract" with them (as established by the tenure law) not to reduce their salaries and that it violated equal protection because of its unequal effect. Both the New Jersey trial court and court of appeals affirmed the commissioner's decision. Phelps (P) and the other tenured employees appealed.

ISSUE: Do state laws that prohibit school boards from discharging tenured employees without good cause and from reducing salaries create contract rights to permanent employment and minimum pay?

HOLDING AND DECISION: (Roberts, J.) No. State laws that prohibit school boards from discharging tenured employees without good cause and from reducing salaries do not create contract rights to permanent employment and minimum pay. Such laws are designed merely to regulate conduct of the board and may be rescinded by the legislature without affecting any contract rights in tenured employees. Here, New Jersey's law did not create contract rights in the West New York school system's tenured employees to not have their salaries reduced. It merely was a regulation of the Board's (D) power to set salaries and therefore did not constitute a binding promise made directly to the tenured employees.

COMMENT: In law, a contract is an agreement between two parties in which one offers to do or not to do something in exchange for the other's performance or nonperformance of something else. In the schoolteacher context, a contract typically consists of a teacher's educational and administrative services bargained in exchange for compensation. Acceptance of an offer occurs when the offeree agrees to the deal. The exchanged value is called "consideration." The offeror of the original contract was the Board. The state, which modified the statutory provisions, was not technically a party to that contract, so it cannot be said that it in any way breached this contract. The Court focused on this distinction to reach a practical result: The state wished to reduce salaries to compensate for Depression-decreased tax revenues. More typically, state statutes that refer to public school teacher contracts will be considered a part of the contract made between the school board and the teacher and thus not subject to change. In recent years, school boards in most states have been allowed to reduce salaries "across the board" as part of a planned reduction. Since this is such a drastic action, it is allowed only in the event of "financial exigency."

Discussion Questions

1. Should the creation of a legislative act be considered a regulation of board conduct or a binding contract with individual teachers?
2. Can state laws be rescinded?
3. Was this a fair decision? Why or why not?

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION V. BRENTWOOD ACADEMY NO. 06-427. DECIDED 2007

GENERAL RULE OF LAW: Enforcing a rule that prohibits high school coaches from recruiting middle school athletes does not violate the First Amendment if the school made a voluntary decision to join the association.

PROCEDURE SUMMARY:

Plaintiff: Brentwood Academy, a private Tennessee high school (P)

Defendant: Tennessee Secondary School Athletic Association (TSSAA) (D)

U.S. District Court Decision: Held for Brentwood Academy (P)

U.S. Court of Appeals Decision: Upheld district court decision (after earlier remand by Supreme Court, which held that TSSAA was a state actor)

U.S. Supreme Court Decision: Reversed, for Tennessee Secondary School Athletic Association (D)

FACTS: The Tennessee Secondary School Athletic Association (TSSAA) is a not-for-profit membership corporation organized to regulate interscholastic sports among its members, which include 290 public and 55 private high schools in Tennessee. Brentwood Academy is one of those private schools. For over 50 years, the TSSAA had prohibited high schools from using "undue influence" in recruiting middle school students for their athletic programs. The Brentwood Academy head football coach sent a letter to a group of eighth-grade boys inviting them to attend spring practice sessions. Although the boys receiving these letters had signed letters of intent to attend Brentwood, they were not officially "enrolled" according to TSSAA rules, which required having "attended 3 days of school." All parties agreed that the coach's pre-enrollment solicitation letter violated the TSSAA anti-recruiting rule. TSSAA sanctioned Brentwood for its actions.

ISSUE: Does the enforcement of a rule prohibiting high school coaches from recruiting middle school athletes violate the First Amendment?

HOLDING AND DECISION: (Stevens, J.) No. The enforcement of a rule that prohibits high school coaches from recruiting middle school athletes is not a violation of the First Amendment. Brentwood Academy made a voluntary decision to join TSSAA and to abide by its anti-recruiting rule. The interests of an athletic association in enforcing its rules may warrant limiting the speech of its voluntary membership. TSSAA does not have unbounded authority to condition membership on its members relinquishing their constitutional rights. It can only impose those conditions that are necessary to manage an efficient and effective state-sponsored high school athletic league. That condition was necessary here.

COMMENT: This decision is important for all similarly situated athletic associations. Almost every state has a similar athletic association whose purpose is to regulate and provide order and balance to high school athletics in that state. This case reinforces the right of state associations to implement reasonable rules

and regulations to control member activities. Of course, these rules and regulations must be reasonable and not result in member schools relinquishing too many constitutional rights. While the First Amendment guarantees Brentwood's right to share truthful information about its athletic program and to persuade possible students about its athletic program, those rights are not absolute. By joining TSSAA, Brentwood Academy agreed to conform to the rules of the association, which included a long-standing anti-recruiting policy. The Court also felt that it was not necessary to provide empirical data because the TSSAA action was a commonsense conclusion: "Hard-sell tactics directed at middle school students could lead to exploitation, distort competition between high school teams, and foster an environment in which athletics are prized more highly than academics." This decision will provide some clarity in the arena of high school athletics, which can be called little else than a minefield of conflicting practices and ongoing controversy.

Discussion Questions

1. Why shouldn't fundamental free speech protections apply in a situation as simple as sending a letter to students inviting them to the spring practice at a school where they have already signed a letter-of-intent to enroll?
2. Is this coach trying to gain a competitive advantage? What about parochial schools that are not members? Can they recruit in this manner?
3. In this case, did the Supreme Court distinguish between the importance of the speech (a recruiting letter) and cases in which the free speech struck closer to the heart of First Amendment concerns?

NOTE

1. Public Improvements, Inc. v. Board of Education of the City of New York (P.S. 72, Bronx), 56 N.Y. 2d 850, 453 N.Y.S.2d 170, 438 N.E.2d 876 (1982).

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Tort Liability of School Districts, Officers, and Employees

BARTELL V. PALOS VERDES PENINSULA SCH. DIST. 83 CAL. APP.3D 492 (1978)

GENERAL RULE OF LAW: A school district does not owe a general duty to supervise all persons who utilize its playground or to secure the premises against persons who may enter and injure themselves therein.

PROCEDURE SUMMARY:

Plaintiffs: The Bartell family, on behalf of their dead son (P)

Defendant: Palos Verdes Peninsula School District (School District) (D)

State Trial Court Decision: Dismissed for failure to state a cause of action

State Appeals Court Decision: Affirmed

FACTS: The Bartells' (P) 12-year-old son and a friend gained access to a playground at Lunada Bay Elementary School through either an unlocked gate or hole in the fence. The boy sustained fatal injuries from playing a dangerous game while on school grounds. The Bartells (P) sought recovery from the School District (D) on the basis that (1) the School District (D) maintained a dangerous condition, and (2) the School District (D) negligently failed to supervise and maintain the school property or to notify parents of the dangerous condition. The trial court dismissed for failure to state a cause of action. The Bartells (P) appealed.

ISSUE: Does a school district owe a general duty to supervise all persons who utilize its playground or to secure the premises against persons who may enter and injure themselves therein?

HOLDING AND DECISION: (Fleming, J.) No. A school district does not owe a general duty to supervise all persons who utilize its playground or to secure the premises against persons who may enter and injure

themselves therein. A school district's duty to supervise its playground depends upon the existence of a special relationship between the school and its students. Here, the Bartells (P) did not claim that their son's presence on school grounds was in connection with a school activity, which qualifies as such a relationship. Whether a duty exists requires a consideration of several factors, including the risk of harm, burden on defendant, connection between the defendant's conduct and victim's injury, moral blame, and prevention of future harm. To impose the burden of around-the-clock supervision of its playground on the School District (D) would impose a severe financial burden. Furthermore, there exists no special circumstance imposing a duty upon the School District (D) to supervise and control activities unrelated to school functions. Affirmed.

COMMENT: Under California Government Code § 835, a public entity is liable for an injury caused by a dangerous condition on its property if the plaintiff can show that the property was in dangerous condition at the time of the injury; that the dangerous condition proximately caused the injury; that the type of injury sustained was reasonably foreseeable; and that either the dangerous condition was created by the negligence or wrongful act or omission of an employee of the public entity within the scope of his employment, or the public entity had actual or constructive notice of the condition and sufficient time in which to have taken measures to guard against it. The defect present on the property must create a substantial, and not minor, risk of injury. Liability for injury requires harmful conduct that is directly related to the physical defect. Here, the defect was not inherently dangerous. Although the School District (D) may have been aware that the grounds were being utilized for such dangerous games, the defect in the fence merely afforded children access to school property and did not create the dangerous condition. The Bartells' (P) son sustained injuries as the result of his own conduct and not due to the dangerous condition of the property. The Bartells (P) failed to demonstrate that a dangerous condition existed for which the School District (D) was liable.

Discussion Questions

1. Was the injury sustained by Bartell a direct result of a dangerous condition of the playground and reasonably foreseeable by the School District?
2. Was the Palos Verdes Peninsula School District required to notify parents of a potentially dangerous condition of its playground?
3. Does a school district owe a general duty of supervision to all who frequent its premises for their own purposes after school hours?

BROSNAN V. LIVONIA PUBLIC SCHOOLS
123 MICH. APP. 377, 333 N.W.2D 288 (1983)

GENERAL RULE OF LAW: A school district's administration and supervision of a speech therapy program is a governmental function, thereby entitling the school district to immunity from tort liability.

PROCEDURE SUMMARY:

Plaintiffs: The father and mother of Maureen Brosnan and Bridget (P)

Defendants: Livonia Public Schools, Livonia Board of Education, school principal, school psychologist, and school speech therapist (D)

State Trial Court Decision: Affirmed in part and reversed in part

FACTS: Maureen Brosnan (P) was given a speech evaluation test prior to entering kindergarten. She was diagnosed as having a "delayed articulation" problem and began receiving training and therapy. The therapy lasted for a period of two years, after which it was discovered that she instead suffered from a language impairment. Her parents, individually, and Bridget (P), as a next friend, brought suit against the school district (D), board of education (D), the school principal (D), school psychologist (D), and Thompson (D), the speech therapist, alleging they failed to use reasonable care in diagnosing Maureen (P). The trial court granted a motion for summary judgment and held the school system (D) and board of education (D) immune from liability under the doctrine of governmental immunity. The court did not hold the other defendants immune. The Brosnans (P) and individual defendants appealed. The appeals were consolidated.

ISSUE: Is a school district's administration and supervision of a speech therapy program a governmental function, thereby entitling the school district to immunity from tort liability?

HOLDING AND DECISION: (Riley, J.) Yes. A school district's administration and supervision of a speech therapy program is a governmental function, thereby entitling the school district to immunity from tort liability. Courts have held the operation of a public school to constitute a public function. State statute provides immunity from tort liability to governmental agencies engaged in the exercise or discharge of a governmental function. Three distinct tests exist for determining whether a particular activity constitutes a governmental function. First, under the "sui generis" test, the term "governmental function" has been defined to include those activities that are essential to governing. Under the "sui generis" test, those activities that can only be performed by a governmental agency are entitled to immunity. Second is the "common good of all" test, which requires the court to determine whether the activity is intended to promote the general public health and is exercised for the common good. Third, a variation of the "sui generis" test is whether the purpose, planning, and carrying out of the activity can be accomplished only by the government. In determining whether a particular activity constitutes a governmental function, the court must examine the particular activity engaged in and not the entity's general function. Under the various tests, the school district's (D) administration of speech therapy constitutes a governmental function. The examination, diagnosis, and treatment of students at a public school is clearly an activity for the common good. Furthermore, under the "sui generis" test, the government plays a significant role in providing education to the public. Thus, the board of education (D) and the school system (D) were properly entitled to governmental immunity. The trial court erred in denying the individual defendants' motion for summary judgment. Affirmed in part and reversed in part.

COMMENT: Jurisdictions are divided as to the proper test to be employed in determining whether a government employee is entitled to immunity for his or her actions. Some jurisdictions hold a public employee immune from tort liability if the action is discretionary and not ministerial. Others relieve an employee from liability if he or she is acting within the scope of his or her employment. Here, the court declined to resolve the issue of which test was proper, holding that under either, the individual defendants were entitled to governmental immunity.

Discussion Questions

1. What are the tests a jurisdiction might use when determining whether an employee is entitled to immunity?
2. Why is it important whether the administration of a speech therapy program is or is not a governmental function?
3. Why was the administration of the speech therapy program considered to be a governmental function?

CAREY V. PIPHUS
435 U.S. 247, 98 S. CT. 1042 (1978)

GENERAL RULE OF LAW: In the absence of proof of actual injury, a violation of procedural due process entitles a plaintiff to nominal damages only.

PROCEDURE SUMMARY:

Plaintiffs: Piphus and several other school students (P)

Defendants: Carey and various other Chicago school officials (D)

U.S. District Court Decision: Held for plaintiffs, but no damages were awarded

U.S. Court of Appeals Decision: Plaintiffs were entitled to recover substantial compensatory damages, absent proof of actual injury

U.S. Supreme Court Decision: Reversed

FACTS: In a pair of consolidated, unrelated cases, certain Chicago school district students were suspended. Piphus (P) was suspended for 20 days for smoking an "irregularly shaped cigarette." The principal smelled the odor of burning marijuana. Brisco (P) was suspended for 20 days for violating a school rule prohibiting male students from wearing earrings. The earring rule was based on its being a gang emblem. The plaintiff refused to remove the earring, stating that it was a symbol of black pride. In both cases, the Chicago Board of Education policy limited a suspended student's appeal to issues *not* related to guilt or innocence. The students filed actions under 42 U.S.C. § 1983, contending that they had been denied procedural due process. The Seventh Circuit Court of Appeals held that the students (P) were entitled to substantial compensatory damages, even if they were unable to show actual damages. The Supreme Court granted review.

ISSUE: Does a violation of procedural due process entitle a plaintiff to substantial compensatory damages, absent proof of actual injury?

HOLDING AND DECISION: (Powell, J.) No. In the absence of proof of actual injury, a violation of procedural due process entitles a plaintiff to nominal damages only. Section 1983 creates an action "at law."

From this, it can be concluded that the section incorporated common law rules regarding damages. One such rule is that for more than nominal damages to be awarded, proof of actual injury must be demonstrated; damages are not presumed. For this reason, damages may not be presumed for violations of procedural due process. Absent such proof, only nominal damages may be awarded. Reversed.

COMMENT: The common law does provide one exception to the general rule against damages absent actual injury, in actions for defamation. This exception is based on the notion that defamation almost certainly leads to actual damages, while at the same time presenting serious proof problems. The Court declined to find the present situation analogous to defamation per se, which can be defined as defamation likely to endure, such as writing that harms a person's business reputation. Therefore, a plaintiff whose constitutional rights have been violated must prove any damage claim. A victim is compensated for actual, proven detriment and denial caused by a denial of due process. The burden is on the shoulders of a plaintiff to prove injuries. Here, the plaintiff failed to prove any loss or injury needing compensation and therefore received only nominal damages.

Discussion Questions

1. Explain why the Fourteenth Amendment is important to this case.
2. In the Court's decision "it was held that, in the absence of proof of actual injury, the students were entitled to receive only nominal damages, not to exceed one dollar, from the school officials." Do you think this was fair? Why or why not?
3. Since the plaintiffs were denied a due process hearing, should the plaintiffs still carry the burden of proof? If so, what type of proof?

DAILEY V. LOS ANGELES UNIFIED SCHOOL DISTRICT 2 CAL.3D 741, 470 P.2D 360 (1970)

GENERAL RULE OF LAW: School personnel supervising the conduct of students must exercise the degree of care a person of ordinary prudence charged with comparable duties would exercise.

PROCEDURE SUMMARY:

Plaintiffs: Daileys, parents of a deceased high school student (P)

Defendant: Los Angeles Unified School District (District) (D)

State Trial Court Decision: Held for the District (D), finding no negligence on its part

State Supreme Court Decision: Reversed

FACTS: During recess, Michael Dailey, a 16-year-old student at Gardena High School, was "slap boxing" with another student in the boys' gymnasium. They "boxed" for 5 to 10 minutes. A crowd of approximately 30 students gathered to watch. Suddenly, after being slapped, Michael fell backward and fractured his skull on the pavement. The Daileys (P), Michael's parents, filed a wrongful death action for damages, alleging

that the District's (D) failure to supervise the students caused their son's death. The physical education department was responsible for supervising the gymnasium. The chairman of that department stated that he did not know he was to assign a teacher to supervise on any particular day, that there was no formal schedule of supervision times, and that supervision was left to whomever was in the gym office. At the time of the incident, the chairman was in the office playing bridge. The trial court granted the District's (D) motion for a directed verdict, and Dailey (P) appealed.

ISSUE: Are school personnel supervising the conduct of students required to exercise the degree of care a person of ordinary prudence charged with comparable duties would exercise?

HOLDING AND DECISION: (Sullivan, J.) Yes. School personnel supervising the conduct of students must exercise the degree of care a person of ordinary prudence charged with comparable duties would exercise. There is enough evidence here for a jury to find that the District (D) failed to meet this standard. The responsible department failed to develop a comprehensive schedule of supervising assignments. Those who did supervise were not informed of their specific duties. The person in the gym office at the time of the incident did not attempt to maximize his ability to oversee students' activities. From these facts, a jury could reasonably find that the school personnel failed to satisfy their duty of care, causing Michael's death. The directed verdict was therefore improper. Reversed.

COMMENT: *Dailey* illustrates one of many contexts in which courts are increasingly willing to impose a duty of care upon defendants to protect from harm those with whom they are in a special relationship. The duty may be imposed and the defendant found negligent even when, as here, an intervening negligent or intentional act appears to be the traditional "proximate" cause of the injury. Notice that the reversal did not mean that the Daileys (P) automatically won their case; the court, on appeal, simply found that a triable issue of fact existed, and since the jury, not the judge, is the trier of fact, the judge erred by not letting the jury decide whether the District (D) was negligent. Thus, the Daileys (P) won a new trial.

Discussion Questions

1. In the *Dailey v. Los Angeles Unified School District* case, was adequate supervision provided by the school employees? Why or why not?
2. What was the standard of care imposed upon the school personnel carrying out this duty to supervise?
3. Is negligent supervision still the proximate cause of Michael's death even though a third party (other student) was involved?

FAZZOLARI V. PORTLAND SCHOOL DISTRICT NO. 1J, 303 ORE. 1, 734 P.2D 1326 (1987)

GENERAL RULE OF LAW: A history of violence among students might call for extensive security measures within a school, while due care upon learning of occasional assaults at dispersed locations might be fully satisfied by precautionary warnings.

PROCEDURE SUMMARY:

Plaintiff: Tammy Fazzolari, student injured on school premises (P)

Defendant: Portland School District (School District) (D)

State Trial Court Decision: Granted the School District's (D) motion for directed verdict in their favor at the end of trial

State Appellate Court Division Decision: Reversed

State Supreme Court Decision: Affirmed and remanded to trial court

FACTS: On May 21, 1982, a 15-year-old high school student (P) was about to enter her school building a few minutes before 7:00 a.m. when an unknown assailant grabbed her from behind and dragged her to some nearby bushes, where he beat and raped her. In an action against the School District (D) to recover damages for her injuries, Tammy (P) claimed that school administrators were negligent in failing to provide proper supervision of students on the school's grounds during hours when the school was open to students, in failing to provide security personnel when district administrators knew of previous similar attacks and could have foreseen the danger of such attacks on students at Tammy's (P) school, in failing to warn students after similar attacks had been perpetrated in the area near the school, and in failing to trim or remove bushes offering concealment to an assailant. The state trial court let the case go forward but granted the School District's (D) motion for a directed verdict at the end of Tammy's (P) evidence. On her (P) appeal from the resulting judgment, the court of appeals reversed and remanded the case for a new trial. The state supreme court affirmed the decision of the court of appeals.

ISSUE: What safeguards does a school district need to take to ensure its students' safety in light of a recent attack on school premises?

HOLDING AND DECISION: (Linde, J.) A defendant can be expected to argue that no one could have foreseen exactly what happened to the plaintiff in this case, (i.e., that Tammy Fazzolari would be attacked on the schoolhouse steps and raped at 6:50 a.m. on May 21, 1982). A plaintiff's definition of what a responsible defendant should foresee can be expected to encompass all the animate and inanimate sources of injury in a dangerous world. But foresight does not demand either the precise mechanical imagination of a Rube Goldberg or a paranoid view of the universe. Here, there was evidence that a woman reportedly had been sexually assaulted on the school grounds 15 days before the attack on the plaintiff, and the plaintiff attempted to introduce evidence of various other kinds of attacks. Obviously, a school's responsibility for students' safety against assault is not limited to the risk of rape, and evidence of foreseeability will differ depending on whether the risk of injury is claimed to be specific to a school, or schools generally, or a neighborhood, or a class of potential victims such as women or particular ethnic groups. Also, the character and probability of the risk that is claimed to be foreseeable bears on the steps administrators reasonably should take to avert it. A history of violence among students might call for extensive security measures within a school, while due care upon learning of occasional assaults at dispersed locations might be fully satisfied by precautionary warnings. We think that a school principal's failure to take any precautions whatever, if that was unreasonable, is not an exercise of policy discretion, though a school board's choice between expenditures on security personnel or other types of safeguards might be.

COMMENT: This case speaks to a general propensity for violence of not just one student, but the student population generally. This violence and growing tendency to more and more school violence is an ongoing

concern. If the student population has a propensity for violent behaviors, a duty to take precautions will be imposed upon the school district. A school district may then, if appropriate measures are not taken, be liable to a student for injuries sustained as a result of an attack by other students. As the wave of school violence continues to grow, the duty of care level is raised, and school districts must take more aggressive steps to protect students as well as to limit their exposure.

Discussion Questions

1. Should a school limit the hours that students can report to campus?
2. What steps should a school take when presented with a situation such as the one described in this case?
3. Do you think that a verbal warning in such a case would be sufficient? As a principal, what precautions might you take when presented with the above situation?

JOHNSON V. PINKERTON ACADEMY 861 F.2D 335 (1ST CIR. 1988)

GENERAL RULE OF LAW: A private school does not constitute a "state actor" for purposes of 42 U.S.C. § 1983.

PROCEDURE SUMMARY:

Plaintiff: Kenneth Johnson, a teacher at the Academy (P)

Defendant: Pinkerton Academy, a private school (Academy) (D)

U.S. District Court Decision: Held in favor of defendant

U.S. Court of Appeals Decision: Affirmed

FACTS: Johnson (P) was hired as a teacher by the Academy (D) on a one-year, renewable contract. Johnson (P) agreed to abide by the Academy's (D) rules of conduct, which prohibited teachers from wearing beards. After many discussions with his classes, he decided to grow a beard as a means of asserting his civil rights and was terminated from his position. Johnson (P) commenced suit under 42 U.S.C. § 1983, seeking declaratory and injunctive relief and money damages. The district court held in favor of the Academy (D). Johnson (P) appealed.

ISSUE: Does a private school constitute a "state actor" for purposes of 42 U.S.C. § 1983?

HOLDING AND DECISION: (Aldrich, J.) No. A private school does not constitute a "state actor" for purposes of 42 U.S.C. § 1983. In asserting an action under Section 1983 against a private institution, the plaintiff must show that the state is responsible for the conduct to which the plaintiff objects. In determining whether a private school is a state actor, the court must determine whether the private entity is performing a function that is traditionally the exclusive prerogative of the state. An "exclusive function

of the state" means that the state could not delegate its responsibility for discharging that function. The education of children has not been traditionally a public function in the state of New Hampshire, even though state law requires children to attend school until they reach a certain age. Furthermore, the district court erred in construing a state statute as conferring upon the district a responsibility over the operation of private academies. The legislative history of the statute showed that it was intended to relieve districts from liability for the tuition of students who chose to attend schools without town contracts. The district court erred in its findings of state action. Dismissal affirmed.

COMMENT: On appeal, Johnson (P) also contended that the Academy (D) constituted a state actor due to its teachers' participation in a pension program pursuant to New Hampshire statute. The court held that the statute failed to demonstrate state control in respect of the defendant. Rather, it only served to relieve the defendant of its pension obligations.

Discussion Questions

1. What is the importance of a private school not being a state actor?
2. Private schools operate under the principles of contract law. What does this mean regarding employment and termination practices?
3. If a private school has a policy regarding dress and grooming, what impact does this have on a teaching employee of the school?

RALEIGH V. INDEPENDENT SCHOOL DISTRICT NO. 625 275 N.W.2D 572 (MINN. 1979)

GENERAL RULE OF LAW: A school district with knowledge of conditions that present foreseeable student misconduct has a duty to protect other students from that misconduct by exercising ordinary care.

PROCEDURE SUMMARY:

Plaintiff/Respondent: Cynthia Raleigh, high school student by her mother and natural guardian, Lauretta Raleigh (P)

Defendant/Appellant: Independent School District No. 625 (School District) (D)

Respondent: Orpheum-St. Paul Cinema Corp. (D)

State District Court Decision: Dismissed defendant theater and subsequently found school district negligent

State Supreme Court Decision: Affirmed

FACTS: Cynthia Raleigh (P), a white high school senior, was required to attend a school-sponsored showing of the documentary film "KING, A Filmed Record, Montgomery to Memphis," during Afro-American History Week. Attendance of students from Cynthia's (P) school and other high schools was required because of the high percentage of minority students enrolled in those schools. No parental consent was

obtained. It was known that the film contained scenes of racial violence. There was also racial tension in Cynthia's (P) school at the time. Cynthia (P) sat in the balcony where, during the film, obscene racial comments were made by blacks and whites. Cynthia (P) made no such remarks but testified there was a significant tension in the theater at the end of the movie. Although the school district dictated a student/teacher ratio of 35:1, this was not required at the showing. Further, the students were not assigned seats, nor supervised after the movie. As Cynthia (P) moved through the lobby toward the exit, she was pushed from one side, looked down at her wrist and saw blood, and then saw two black girls running away from her with her purse. A fellow student came to her aid and then went to find a teacher. Although no exact amount of time was given, Cynthia (P) said a teacher came to help "after a while." The teacher later testified that he saw nothing to make him concerned that trouble had or would occur as he watched the students move through the lobby. The trial court permitted evidence of a similar assault occurring in the theater's ladies room at the same time as the assault on Cynthia (P). The trial court dismissed Orpheum Theater (D) but not the School District (D). The jury returned a verdict for Cynthia (P). The School District (D) appealed.

ISSUE: Is a school district liable for a sudden, unanticipated misconduct of a student if there were foreseeable conditions existing under which such an act might occur?

HOLDING AND DECISION: Yes. The supreme court held that the jury was justified in finding the School District's (D) negligent supervision and organization of students at the school-sponsored showing of the documentary film caused the plaintiff's injuries. Furthermore, the trial court properly exercised its discretion in admitting evidence of a similar but unrelated incident that occurred at about the same time. The School District's (D) argument, that the slashing of Cynthia's (P) wrist was sudden and unanticipated, was not supported by the jury. The issue of whether an intervening event was the cause is an issue for a jury. In this case, the jury did not feel that the intervening event was controlling.

COMMENT: Knowing that the film shown contained violent racial scenes, and that there was at that time racial tension at the plaintiff's school, the School District (D) had knowledge of foreseeable misconduct. In the testimony given, there was no indication that students were seated according to their own schools or that teachers were strategically placed in the theater to monitor the students. In addition, there was no organized exit plan for the students after the showing of the film. The evidence permitted regarding the incident in the ladies room that occurred at about the same time that Cynthia Raleigh (P) was assaulted further demonstrates the lack of organization and supervision of students by the School District (D). Clearly, mandatory attendance in an off-campus activity such as a field trip or excursion, to include interscholastic activities such as athletics or debate, imposes upon the school a similar duty of care to prevent injury as if the students were on campus.

Discussion Questions

1. How important is the fact that the school could have anticipated (foreseen) some type of confrontation and difficulty at the assembly?
2. Would the school district have been supported—even if there had been violence—if there had been a reasonable safety plan and adequate supervision?
3. Is unremitting supervision necessary in this age of increasing school violence and student difficulties? How much supervision is required?

RUDD V. PULASKI COUNTY SPECIAL SCHOOL DISTRICT 341 ARK. 794, 20 S.W.3D 310 (2000)

GENERAL RULE OF LAW: A school district has no special relationship with a student that imposes a duty upon the school to protect him from violent acts by another student.

PROCEDURE SUMMARY:

Plaintiff: Joe Rudd, administrator of the estate of the victim, Earl Routt, deceased (P)

Defendant: Pulaski County Special School District (School District) (D)

State Trial Court Decision: Granted summary judgment in favor of School District (D)

State Appellate Court Division Decision: Summary judgment in favor of School District (D)

State Supreme Court Decision: Affirmed

FACTS: Earl Routt was a student at Jacksonville High School and regularly rode a school bus owned and operated by the appellee, Pulaski County Special School District (D). W. J., another student at Jacksonville High School, also rode the school bus. W. J. and the victim frequently had confrontations, and the bus driver had admonished both boys on previous occasions. While W. J. was enrolled as a student at Sylvan Hills Junior High School, his disciplinary record showed several offenses that included the following: expulsion from school for bringing a knife to school and assaulting another student with that knife on a school bus, an action which Sylvan Hills Junior High School Principal Sue Clark noted as a "substantial risk"; fighting in class; disorderly conduct; roughhousing in class; being a member of a gang that had violent initiation rites; and persistent disregard for school rules and authority. Ms. Clark testified in her deposition that the disciplinary records "do not follow a student from one school to another. . . . The disciplinary records are closed, terminated, resolved, and we just follow the records retention policy for those." These incidents occurred approximately seven months prior to the October shooting at Jacksonville High School. According to appellants, the records were kept in the ordinary course of business by officials of the school district that operates many schools, including those of Sylvan Hills and Jacksonville. On October 9, 1996, W. J. brought a handgun to Jacksonville High School and kept it in his locker. On the day of the shooting, another student advised one or more of his teachers that he overheard a conversation concerning W. J., a gun, and something that was going to happen after school. According to the other student, two searches occurred on that day, but neither search turned up a weapon. That afternoon, while riding on the school bus, W. J. pulled out the hidden handgun and fired it numerous times at the victim, who died as a result of the shooting.

ISSUE: Under the Arkansas Civil Rights Act, did the school have a special relationship with the victim, thereby imposing a duty upon the school to protect him from violent acts by another student?

HOLDING AND DECISION: (Thorton, J.) No. A custodial relationship exists between the government and felons in custody. The custodial relationship between the inmate and the state imposes a duty upon the state to protect third persons from injury inflicted by an inmate who escapes from custody; the failure to maintain such restraints may result in liability for injuries to third persons under the Arkansas Civil Rights

Act. The court must reject a broad view of "custody" based on state compulsory school attendance, as argued here by the plaintiff. That view would expand constitutional duties of care and protection to millions of schoolchildren. School officials would be subject to Section 1983 liability anytime a child skinned his knee on the playground or was beat up by the school bully, so long as the requisite "state of mind" was shown. More seriously, with the epidemic of deadly violence on many school campuses today, teachers would be constitutionally obliged to assume roles similar to policemen or even prison guards in protecting students from students. The precise contours of an affirmative duty to care and protect would be much more difficult to define in public schools. The district court concluded that no special relationship giving rise to a duty to protect against harm from private individuals existed by the state's action of putting the two students in contact with one another, despite the state's knowledge of W. J.'s violent propensities. Although the school district had knowledge of W. J.'s propensities during his previous academic year at Sylvan Hills Junior High School, appellants presented no evidence of similar behavior while W. J. was enrolled at Jacksonville High School. We conclude that no special relationship was shown to exist between the victim and the state that imposed a duty upon the state, under the provisions of the Arkansas Civil Rights Act, to protect the victim from harm.

COMMENT: As this case illustrates, absent a special relationship to the student, a school district has no duty to protect one student from the violent acts of another. There was no special duty imposed on the school district merely for putting two students together. One student choosing to act violently toward another did not implicate the school district as a responsible party. Even though a student may have shown a propensity to act violently in previous situations outside his conduct at school, a special relationship of the school district was not created.

Discussion Questions

1. If the court decided differently, how would this change the role of a teacher in schools?
2. Does the school have any duty to protect a student from another student's violent behavior?
3. If this incident happened during a school day, do you think that the verdict would be different?

RUPP V. BRYANT
417 SO.2D 658 (FLA. 1982)

GENERAL RULE OF LAW: Public officials or employees and the government entity under which they function may not be entitled to assert immunity from personal tort liability if they fail in their ministerial duties resulting in a tortious act.

PROCEDURE SUMMARY:

Plaintiff/Appellees: Glen Bryant, a high school student, and his father, Leroy Bryant (P)
Defendant/Appellants: Robert E. Rupp, high school teacher and club adviser; Ray R. Stasco, high school principal; and school board of Duval County (D)

Lower Court Decision: Dismissed for failure to state a cause of action

State District Court of Appeal Decision: Reversed, review granted

FACTS: While attending a meeting of the school-sanctioned Omega Club, Glenn Bryant (P), a student at Forest High School in Jacksonville, Florida, suffered a neck injury causing paralysis. The injury was allegedly the result of hazing activities, which were specifically prohibited by school board policy. There was no school official at the meeting when the injury occurred. Robert Rupp (D), high school teacher, had been assigned as faculty adviser to the club by Ray Stasco (D), the school principal. Rupp (D) had attended the first meeting of the club but had no knowledge of the second meeting at which the injury occurred. The Omega Club was reputed for conducting activities that violated school board policy. The Bryants (P) brought the suit for gross and reckless negligence on the part of Rupp (D), Stasco (D), and the school board (D). Due to the reputation that the Omega Club had for breaking school board policies, the Bryants (P) felt it was the responsibility of the defendants to closely supervise the Omega Club. The lower court dismissed the suit, citing a failure to show a cause of action. The District Court of Appeals reversed and a review was granted.

ISSUE: May a school board and its employees be granted retroactive immunity from charges of negligence, and of wanton and willful negligence, if no cause of action is found?

HOLDING AND DECISION: Affirmed in part, reversed in part. Rupp (D) and Stasco (D) were not entitled to assert immunity as public employees under the circumstances of the case. The legislature's attempt to shield them from personal tort liability by retroactive application of Section 768.28(9) Florida Statutes (1980), which states that no government employee may be held liable in tort unless such employee acted in bad faith or with malicious purpose, was unconstitutional because it violated due process. Thus, the Bryants (P) successfully stated a cause of action of negligence against all the defendants. The Bryants (P) failed to state a cause against Rupp (D) and Stasco (D) for wanton and willful negligence. The teacher (D) and principal (D) were found to be negligent in failing to supervise school club activities resulting in an injury during a hazing incident. The court held that the school had violated a duty of supervision that had been established by school board policy when the club adviser was appointed.

COMMENT: The defendants based their case for immunity on a legislative amendment passed in 1980, even though the Bryant (P) incident occurred in 1975. They argued that the amendment passed in 1980 retroactively gave them special immunity. The court decided that the defendants had a "special duty" to the plaintiff; the duty was ministerial as opposed to discretionary because it was school board policy to supervise the club, and the injury occurred in the course of the defendant's ministerial duty to Bryant (P). The court also ruled that to allow the 1980 amendment to retroactively apply to the 1975 injury would unconstitutionally deprive Bryant (P) of his right to recovery for the defendants' negligence. However, the court found that the facts could not support a charge of intentional or conscious indifference and therefore failed to state a case for exemplary damages. One justice dissented, arguing that the 1980 amendment was made to enable public employees to vigorously pursue their duties, free from the fear of negligence actions, while at the same time allowing redress through governmental assumption of liability to persons injured by the ordinary negligence of government employees. In regard to the negligent supervision issue, the court felt that the incident would not have occurred if the adviser had been present. The discretionary/ministerial distinction is interesting. Generally, the qualification of immunity is limited to discretionary acts. Discretionary acts are those decisions that leaders must make to govern, while ministerial acts are those

that do not involve governing, but merely following procedures. The focus is not on whether the actor was a public servant or a public employee. Immunity is determined based on the type of act.

Discussion Questions

1. What is the standard to which public employees are held to win immunity from personal tort liability?
2. What is meant by wanton and willful negligence?
3. Why would a government body want public employees to remain immune from lawsuits unless they acted with malice or in bad faith, even if they were negligent?

SKINNER V. VACAVILLE UNIFIED SCHOOL DISTRICT 37 CAL. APP.4TH 31, 43 CAL. RPTR.2D 384 (1995)

GENERAL RULE OF LAW: Statutes may impose an affirmative duty to inform faculty of a student's violent past to prevent injury to other students.

PROCEDURE SUMMARY:

Plaintiff: Tracy Rea Skinner, student injured (P)

Defendant: Vacaville Unified School District (D)

State Trial Court Decision: Trial court found in favor of the injured student (P)

State Appellate Court Division Decision: Reversed

FACTS: The incident occurred on October 2, 1990, during a volleyball game in a physical education class at Will C. Wood High School in Vacaville, California. A single teacher was responsible for supervision of play. During the first game, Carlos, a freshman member of Tracy's (P) team, angered his teammates by playing to lose. Another teammate recalled that Tracy (P) "asked him if he wasn't going to play right to not play at all." About 10 to 15 minutes into the period, the teams reported the score of their first game to the physical education teacher and switched sides. Soon thereafter, Carlos hit Tracy (P) twice on the jaw, breaking it in two places and inflicting severe and permanent injuries. She (P) was required to undergo reconstructive surgery and a prolonged and painful convalescence. At the time of trial, she also suffered from chronic facial pain and headaches as a result of the injury. Although school officials knew of his propensity for violence, none of the incidents appeared on Carlos's disciplinary record. Nevertheless, Carlos had previously been involved in three fights as well as bumping and pushing incidents, all of which resulted in physical injury. The vice principal, Geivett, said that he never made a point of warning teachers of Carlos's behavior, although he did discuss Carlos's behavior with certain teachers, particularly in connection with the Opportunity Program.

ISSUE: Does the school have a duty to warn every teacher of a student's past disciplinary problems to prevent harm to other students?

HOLDING AND DECISION: (Newsom, J.) No. California law has long imposed on school authorities a duty to supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary for their protection. The standard of care imposed upon school personnel in carrying out this duty to supervise is identical to that required in the performance of their other duties. This uniform standard to which they are held is that degree of care "which a person of ordinary prudence, charged with [comparable] duties, would exercise under the same circumstances." Education Code Section 49079 may impose on a school district a mandatory duty to inform teachers of a student's record of physical violence. The statute, first enacted in 1989, was greatly expanded by 1993 amendments. As it read in 1990, subdivision (a) of the statute provided, in pertinent part, "(a) A school district shall inform the teacher of every student who has caused, or who has attempted to cause, serious bodily injury or injury, as defined in paragraphs (5) and (6) of subdivision (e) of Section 243 of the Penal Code, to another person. The district shall provide the information to the teacher based on any written records that the district maintains or receives from a law enforcement agency regarding a student described in this section." Carlos had not inflicted physical injury on other students, but still had shown an inordinate tendency to engage in mutual combat that often led to injuries. Nevertheless, giving full latitude for a jury to draw all reasonable inferences from the evidence, we conclude that the evidence would support a finding that the school administrators breached their duty of care toward students under their supervision by failing to notify the physical education teacher of Carlos's record of fighting. It may be true that some knowledge of a student's potential for troublemaking can aid a teacher in maintaining order, but the teacher's opportunity to intervene in advance of fighting may still be limited, and advance knowledge of student propensities is only one of many factors that may enable him or her to forestall trouble. Where a claim of liability is premised on the administration's failure to inform a teacher of a student's disciplinary record, the finder of fact must engage in a difficult inquiry into whether the teacher's lack of this specific information was a substantial factor in bringing about the harmful conflict.

COMMENT: The court examined all the relevant legislation as it evolved over the past years. Education Code 49079 was greatly expanded to include greater specificity. As you saw in the case, these amendments were enacted in 1993. Surprising enough, these amendments were not the result of the Columbine shootings, which happened on April 20, 1999. Administrators need to pay close attention to the situations discussed above, which impose a duty upon school administrators to inform teachers and administrators of a student's propensity toward violence or violent behaviors.

Discussion Questions

1. Does your state have a law similar to California's?
2. If a student does not have a criminal record, but has assaulted students in the past, what steps should a school take?
3. Is this "type" of situation becoming more common? Why?

TANARI V. SCHOOL DIRECTORS OF DISTRICT NO. 502 69 ILL.2D 630, 14 ILL. DEC. 874, 373 N.E.2D 5 (1977)

GENERAL RULE OF LAW: A school employee injured during a school function need not show willful misconduct to maintain an action thereon.

PROCEDURE SUMMARY:

Plaintiff: Tanari, a school bus driver (P)

Defendant: Local school authorities (District) (D)

Trial Court Decision: Case dismissed

State Appeals Court Decision: Affirmed

State Supreme Court Decision: Reversed

FACTS: Tanari (P) had been a school bus driver for many years. For as long as she had been employed, she had been given free passes to attend local football games; this was not a part of her official compensation. During one game, she was injured by some students who were engaged in horseplay. She sued the District (D), contending negligent supervision. The trial court dismissed, holding that Tanari (P) could not show willful misconduct, a requisite for liability on the part of the District (D). The state appellate court affirmed, and the state supreme court accepted review.

ISSUE: Must a school employee injured during a school function show willful misconduct to maintain an action thereon?

HOLDING AND DECISION: (Underwood, J.) No. A school employee injured during a school function need not show willful misconduct to maintain an action thereon. Willful misconduct must be shown for a student to prevail against a school district. This is so because this standard exists for children to recover against parents, and a school district stands in the shoes of parents with respect to its students. However, this "in loco parentis" relationship does not exist with respect to school employees. As to them, regular rules of negligence apply. This being so, whether or not the District (D) was negligent was a question of fact for the jury. Reversed.

COMMENT: The court spent some time ascertaining the status of Tanari's (P) presence on school grounds. The District (D) contended that she was a licensee; the court concluded she was an invitee. At common law, these distinctions made a difference as to the level of care owed to another on one's property. An invitee is one who is invited onto land for a particular purpose, usually to the economic advantage of the possessor of the land. A licensee is one who is permitted to enter but whose entry provides no economic benefit

to the possessor. At common law, a possessor of land owed a greater duty of care to an invitee. In most states, the emerging tort standard of recovery in a negligence case depends upon whether the tortfeasor acted "reasonably" under the circumstances.

Discussion Questions

1. Explain why the courts hold differing rules of negligence for a school district's employees and for the students within the district.
2. What procedures should a school district have in place, or what steps should it take, to provide a safe environment during extracurricular activities, bus loading and unloading, and other instances when students are present on school grounds but not actively being instructed?
3. Explain what the phrase "in loco parentis" means and how it may be applied differently by a school administrator, depending on the situation.

TEXAS STATE TEACHERS ASSN. V. GARLAND INDEPENDENT SCHOOL DIST. 777 F.2D 1046 (5TH CIR. 1985)

GENERAL RULE OF LAW: A party prevailing on a significant issue in an action is a prevailing party under 42 U.S.C. § 1988 and, thus, is entitled to attorney fees.

PROCEDURE SUMMARY:

Plaintiff: Texas State Teachers Association (Union) (P)

Defendant: Garland Independent School District (District) (D)

U.S. District Court Decision: Held Union (P) did not prevail on the central issue of the action and, thus, was not a prevailing party entitled to attorney fees under 42 U.S.C. § 1988

U.S. Court of Appeals Decision: Affirmed

U.S. Supreme Court Decision: Reversed and remanded

FACTS: The Union (P) filed suit challenging several District (D) policies, and one in particular which limited the ability of the Union (P) to communicate with teachers concerning employee organization. The District (D) moved for summary judgment, which the court granted on most of the claims. The court of appeals reversed as to the limiting communications claim and affirmed as to the rest. The Union (P) then sought attorney fees under 42 U.S.C. § 1988, arguing that they were due based on the Union's (P) having prevailed on this issue. The district court held that the Union (P) was not a prevailing party under

Section 1988 because it had not prevailed on the central issue of the action. The court of appeals affirmed, indicating that the Union (P) had been successful only on significant secondary issues, not on the central issue. The U.S. Supreme Court granted review.

ISSUE: Is a party who prevails on a significant issue in an action a prevailing party under Section 1988 for purposes of qualifying to recover attorney fees?

HOLDING AND DECISION: (O'Connor, J.) Yes. A party who prevails on a significant issue in an action is a prevailing party under Section 1988 for purposes of qualifying to recover attorney fees. Under this standard, a party must show, at a minimum, a resolution of the action that materially altered the parties' legal relationship in a manner intended by Congress. The lower courts' "central issues" test is directly contrary to *Hensley v. Eckerhart* (1983), in which the Court did not establish a particular standard but indicated that the degree of a party's success is a critical factor in determining a reasonable fee.[1] That the prevailing party is entitled to recover attorney fees is a given; there is no question as to whether the party is entitled to a fee at all. The "central issues" test is also contrary to the clear legislative intent that fee awards be available to parties who only partially prevail in civil rights actions. Further, such a test too heavily relies on the subjective intent of the parties. Reversed and remanded.

COMMENT: This case is a substantial victory for plaintiffs in civil rights actions. Requiring success on significant issues, as opposed to success on the central issue, clearly gives greater incentive for plaintiffs to bring and attorneys to accept civil rights actions. Though this plaintiff was a teachers union, the rule established applies to other potential plaintiffs against school boards and districts, such as student groups or individual students. However, the rule of this case is not limited to cases involving suits brought against educational institutions. It should be noted that attorney fees are only recoverable where provided by law; attorney fees are otherwise not compensable, no matter how malicious the losing party's conduct may have been.

Discussion Questions

1. What is the standard to allow recovery of attorney fees? What is the reasoning behind establishing this standard?
2. Why is the central issues test, in this case, contrary to the legislative intent?
3. Why is this case a particularly important victory for plaintiffs in civil rights actions in terms of setting precedent?

NOTE

1. Hensley v. Eckerhart, 461 U.S. 424 (1983).

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Financing Public Schools and Use of Funds

RESNICK V. EAST BRUNSWICK TOWNSHIP BOARD OF EDUCATION 77 N.J. 88, 389 A.2D 944 (1978)

GENERAL RULE OF LAW: A religious group's temporary use of public school facilities at a rental rate reflecting the costs incurred by the school for such use does not violate the establishment clause.

PROCEDURE SUMMARY:

Plaintiff: Resnick, a high school student (P)

Defendant: East Brunswick Township Board of Education (Board) (D)

State Superior Court Decision: Held for Resnick (P)

State Court of Appeal Decision: Affirmed

State Supreme Court Decision: Reversed

FACTS: The Board (D) allowed a number of local groups, including various religious groups, to use its school facilities during non-school hours. These groups were charged a rental fee that approximated a portion of the cost of janitorial services for maintenance of the facilities. Resnick (P) filed suit to enjoin use of the facilities by the religious groups, alleging the use of the facilities by religious groups violated the establishment clause of both federal and state constitutions. The superior court agreed, holding such use unconstitutional. The state court of appeal affirmed. The Board (D) appealed.

ISSUE: Does a religious group's temporary use of public school facilities at a rental rate reflecting the costs incurred by the school violate the establishment clause?

HOLDING AND DECISION: (Pashman, J.) No. A religious group's temporary use of public school facilities at a rental rate reflecting the costs incurred by the school does not violate the establishment clause. The processing by government employees of the applications submitted by religious groups does not amount to the kind of excessive entanglement of church and state prohibited by the establishment clause. Furthermore, when, as here, the establishment clause and the free exercise clause of the Constitution confront one another, the free exercise clause must take priority. The First Amendment requires strict neutrality with respect to religion. The policy at issue does not violate that neutrality. Reversed.

COMMENT: The rationale for the decision is that if one noncurriculum-related group or activity is allowed use of the facilities, it would violate the neutrality requirement not to allow another noncurriculum-related group or activity simply because it has religious affiliations. This rationale is affirmed by recent federal legislation enacted to guarantee equal access to student religious groups. For example, if cocurricular groups such as the "Key Club" are allowed to use the school facility before and after school hours, then a student religious group (e.g., a prayer group) would be entitled to equal access.

Discussion Questions

1. Is it now a common practice to allow religious groups to use school facilities? What about a church service in a school room?
2. Is the rental fee the major factor for the ruling allowing a church group to use a school facility?
3. Are there any circumstances in which the principal can donate the use of the facilities to a religious group without challenging the excessive entanglement of church and state as stated in the establishment clause?

REVELL V. MAYOR OF ANNAPOLIS
81 MD. I, 31 A. 695 (1895)

GENERAL RULE OF LAW: States may confer authority to local school districts to issue bonds to finance school construction.

PROCEDURE SUMMARY:

Plaintiff: Revell, school commissioner of Anne Arundel County (P)

Defendant: City of Annapolis, Maryland (D)

State Trial Court Decision: Held for Annapolis (D)

State Court of Appeals Decision: Reversed

FACTS: A special Act of the 1894 Maryland legislature authorized and directed the school commissioner of Anne Arundel County, Revell (P), to issue bonds to finance the construction of schools. It also directed

the City of Annapolis (D) to issue bonds to help finance the schools. The City of Annapolis (D) refused to issue the bonds, and Revell (P) sued to enforce the state Act. Revell's (P) lawsuit was dismissed for failure to state a cause of action, and Revell (P) appealed.

ISSUE: May states confer authority to local school districts to issue bonds to finance school construction?

HOLDING AND DECISION: (Robinson, C. J.) Yes. States may confer, by statute, authority to local school districts to issue bonds to finance school construction. There is no difference between a state's direction to issue bonds for the support of school districts and levying a tax, nor does this direction depend in any way on the consent of the voters of the school district. Providing schools is an ordinary function of municipal government, and the state does not abuse its power by compelling a municipality to levy a tax or incur a debt for the public purpose of constructing schools. Nor does the incurring of debt constitute a taking of property from citizens without due process of law under the Fourteenth Amendment. Here, the State of Maryland acted within its authority by directing Annapolis (D) to issue a bond to finance schools within Anne Arundel County, and Annapolis (D) violated this statute by refusing to issue the bonds. Reversed.

COMMENT: Bonds that a state authorizes to be issued for a specific purpose (as here, the construction of schools) must be used only for that purpose. This requirement has been construed strictly by the courts; for instance, one court held that a bond issued to finance installation of a new roof could not be used to subsidize the purchase of other equipment for the same school.[1] Unfortunately, despite the widespread and common use of municipal or county bonds to finance school expenses, if a school district issues bonds in excess of its authority, the innocent purchaser of the bonds has no recourse and suffers the loss of the purchase price. Further, most states constitutionally limit the amount of debt a school district can legally incur, although, as in the corporate world, some school districts have evaded these restrictions through the use of "holding companies" or "local building authorities," in which debt capacity is pooled among several entities.

Discussion Questions

1. Why do you think that courts are unwilling to allow school districts to use school bonds for anything other than the specific purpose for which the bonds were issued?
2. What kind of mischief might occur if a school board could take funds that had been obtained from a bond issue to build a school facility and use them to pay for general expenses such as teachers' salaries?
3. What do you think is the difference between a bond issue and a tax levy?

NOTE

1. School District No.6., Chase County v. Robb, 150 Kan. 402 (1939).