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During the 1980s, educators will be forced to take on more responsibilities. Recent cases show the courts willing to abide by a "hands-off" policy as long as constitutional and/or statutory rights are not violated.

Current Issues in Public School Law

by Julie Underwood O'Hara

The phrase "legalization of education" is common. My understanding of that phrase is that it is a complaint made by educators that attorneys instead of educators are running our schools. Assuming that the phrase has been a valid assessment of the past, it appears that it is not going to continue to be true for the '80s. It seems we have entered a new era in education law, in both substance and approach. During this era educators will be forced to take on more responsibilities.

Education law during the late '60s and early '70s mainly involved philosophical issues. The courts were asked to address some basic social issues in our country. They accepted this task and discussed the concepts of equality and liberty, and officially recognized the constitutional rights of students as citizens of the United States. During this period individuals went to courts to solve perceived injustices. Education law was focused in the courts and involved litigation between and among teachers, students, administrators, and parents.

The next phase of education law was played out in a different arena. Throughout the '70s education experienced a wave of impact mainly from the U.S. Congress. Before this time federal involvement in education had been relatively minimal. But the same hand that started granting funds begin regulating. During this time we encountered The Lau regulations, The Buckley Amendment, Title IX, 94-142 and the more general type of regulation, such as OSHA. The legislation was primarily enacted to insure the rights which had earlier been delineated by the courts.

During the first two eras under discussion there were many important decisions made by noneducators. In the '60s the courts made many major policy decisions and in the '70s Congress and federal administrative agencies made equally as many implementation decisions. Now we are in the '80s. During this time what educational deci-

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sions will have to be made, who is going to make them and how will they work through the legal system?

It appears the major substance of education law in the 80s will be internal issues involving policies and the educational process: personnel management, testing, religion, handicapped students, and interpretation and application of rules. The early cases of this era indicate a change in tenor too. They indicate an increased willingness to allow the local districts autonomy on these issues unless there is a constitutional or statutory violation.

One example of internal issues is presented in a recent U.S. Supreme Court decision dealing with a student suspension, **Board of Education of Rogers v McCluskey.**¹ This case dealt with a due process issue in the suspension of two students for intoxication. There the Court held it was plain error for the lower court to substitute its construction of a board rule for the board's own interpretation.

(E)ven if The District Court's and the Court of Appeals' views (of the Board rule) struck us as clearly preferable to the Board's . . . the Board's interpretation of its regulations controls . . .²

The Court refused to second-guess the board in the area of interpreting its own policy.

In personnel management the most pressing and pervasive issue for local school districts is reduction in force. There have been several court decisions regarding the reassignment, demotion, and nonrenewal of school staff. These cases may give you some guidance in this area, unless, of course, your collective bargaining agreement contains controlling provisions. Then the agreement would, of course, control your local situation.

Courts have held that layoffs³ or reassignments⁴ of personnel can be an acceptable procedure during reductions in force. According to these cases a reassignment will be left to the district's discretion and can be carried out without due process procedures if it is not a demotion, i.e. if it is a move between co-equal positions. A transfer or a reassignment is a demotion when the employee receives less pay or has less responsibility, is moved to a job which requires less skill or is asked to teach a subject and grade for which he is not certified, or for which he has not had substantial experience.⁵ Districts often make reduction decisions according to seniority. The courts have accepted this when the seniority system was already in place and its use was not arbitrary or discriminatory.

There is a renewed insistence on the part of federal courts in this area that individuals seek remedies provided in state law.⁶ The courts increasingly look to appropriate state law and local policy as a basis for decisions. The courts are moving to a hands-off stance toward public school personnel decisions unless there has been a violation of constitutional or federal statutory law.

The United States Supreme Court in early 1983, handed down an interesting case which may have a bearing on personnel matters. It also exemplified a rather unexpected view of public schools. In this case, **Perry Education Association v Perry Local Education Association,**⁷ the members of a minority union filed suit against the district and the board members challenging the negotiated contractual provision which denied the minority union access to the school's mail system. The Supreme Court held that no first amendment rights were infringed upon because the school's mail system was not a public forum of expression.

In the area of curricular decisions, there are a number of major issues on the horizon. It appears there are crucial

questions to be faced by state and local districts in implementing performance evaluation policies. Most common recently have been testing issues. These testing issues really overlap personnel questions, since many states are now using teacher certification tests for licensing.

As we begin to use competency tests as a basis for decisions about individual students and teachers, we must be aware of the potential for misuse and resulting liability. For students, the possibilities exist whether the tests are used for classification practices, grade promotion, denial of a diploma or even eligibility for athletics. The thrust of the cases is that testing is acceptable if it is not really just a sham for racial or ethnic classification⁴ and if it is valid and reliable.⁵ As educators, we would hope our testing schemes could live up to these minimums.

Another issue on the education law forefront is religion. On the local level this involves issues such as prayer, silent meditation or other exercises with religious overtones in school. The larger picture entails accreditation or regulation of private schools, tuition tax benefits, and the proposed constitutional amendment concerning prayer in school.

Recently the United States Supreme Court in *Jaffree v Board of School Commissioners*¹⁰ reiterated the conclusion that "conducting prayers as part of school program is unconstitutional." However, other issues are not quite as clear. Two federal district courts, one in New Mexico¹¹ and one in Tennessee,¹² and the Massachusetts Supreme Court¹³ have ruled that a statute providing for a moment of silence for meditation or prayer for students is unconstitutional. The courts concluded the primary effect of the legislation was to encourage religion. However, there are a few similar cases in other courts pending. There is a possibility that other jurisdictions may come out differently on the issue.

The United States Supreme Court resolved a conflict in the districts in *Mueller v Allen*.¹⁴ The Court ruled on a Minnesota statute allowing all state taxpayers, in computing their state income tax, to deduct expenses incurred in providing "tuition, textbooks, and transportation" for their children attending elementary and secondary school under an establishment of religion claim. A statistical analysis presented as evidence showed that the statute in application primarily benefited parents whose children attended religious institutions. Moreover, state officials had to determine whether particular textbooks qualified for the tax deduction, and disallow deductions for textbooks used in teaching religious doctrines. Nonetheless, the Court distinguished previous decisions which found tuition tax benefits to private-school students violated the establishment clause and upheld the statute. This opinion will undoubtedly spur the many private aid plans across the country.

In the area of services for handicapped students, the United States Supreme Court gave us some guidance in *Board of Hendrick Hudson v Rowley*.¹⁵ Rowley was treated as a question of interpreting 94-142,¹⁶ the specifics being whether a deaf child who was progressing easily from grade to grade needed to be provided a sign language interpreter. The Court held that the school district was not required to provide that extra level of services which would allow the student to compete equally with non-handicapped students. Instead, the district need only provide a level of services which would allow the student to benefit from the educational process, and progress satisfactorily to satisfy the requirements of 94-142. The Court noted specifically that Congress had not imposed upon districts any specific substantive standards, each district

has discretion as long as there is beneficial personalized instruction developed in the IEP and carried out.

Finally, in the area of curriculum is the heated topic of censorship, book removal. Last year the Supreme Court handed down *Board of Education of Island Trees v Pico*.¹⁷ This case involved the removal of books from a school library. The Court held that local school boards may not remove books from library shelves simply because they dislike the ideas contained in those books and seek by their removal to "prescribe what shall be orthodox." Books may, however, be removed for other reasons. The Court recognized that boards should select what is suitable for students to read and study. The selection, however, should be based on educational considerations. The Court specifically recognized the local district's discretion in this and other matters and stated that federal courts should not ordinarily intervene in the resolution of conflicts which arise in the daily operation of schools. However, the district's discretion must be exercised in such a manner that individuals' rights are not infringed upon.

Thus, a new theme seems to emerge from the courts' decisions. The current cases have a common thread which is the idea that the courts are willing to abide by a "hands off" policy as long as constitutional and/or statutory rights are not violated. The ramification for local districts is that they will have more discretion, and should exercise that discretion wisely. The following guidelines have emerged from the courts:

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

Footnotes

1. 102 S.Ct. 3469 (1983)
2. 102 S.Ct. at 3472
3. E.g. California Teachers' Association v. Board of Trustees of Goleta Union School District, 132 Cal. App. 3d 32, 183 Cal. Rptr., 754 (Cal. Ct. App. 1982);
4. E.g. Sorlie v School District No. 2 (Mont. July 7, 1983)
5. E.g. Glanville v Hickory County Reorganized School District, 637 S.W. 2d 328 (Mo. App. 1982)
6. E.g. Elrod v Harrisonville Cass R-IX Schools, 555 F. Supp 107 (D.C. Mo., 1982)
7. 103 S. Ct. 948 (1983)
8. U.S. v Gadsden County School District, 572 F2d 1049 (5th Cir, 1978); Castaneda v Pickard, 648 F2d 989 (5th Cir, 1981)
9. Debra P. v Turlington, 564 F. Supp 177 (M.D. Fla., 1983)
10. 103 S. Ct. 842 (1983)
11. Duffy v Las Cruces Public Schools, 557 F. Supp. 1013 (D.C.N.M. 1983)
12. Beck v McElrath, 548 F. Supp. 1161 (D.C. Tenn. 1982)
13. Opinions of the Justices to the House of Representatives, 440 N.E. 2d 1159 (Mass. 1982); Kent v Commission of Education 402 N.E. 2d 1340 (Mass. 1980)
14. 103 S.Ct. 3062 (1983)
15. 102 S.Ct. 3034 (1982)
16. Education for All Handicapped Children Act of 1974, 20 U.S.C. §1401 et seq (1976)
17. 102 S.Ct. 2799 (1982)