AN ANALYSIS OF THE LITIGATIONS PERTAINING TO CERTAIN LEGAL RIGHTS AND RESPONSIBILITIES OF CLASSROOM TEACHERS

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CHAPTER I

DESCRIPTION OF THE STUDY

Introduction

In the past, most classroom teachers and administrators appeared to be indifferent to the legal principles that were applicable to schools. The sparcity of cases that appeared before the courts confirms that teachers usually conformed to the local custom and rule. Seldom did they question the source or the principle underlying these standards. Today, teachers are more likely to question these rules and ask for reasons behind these rules and school law.

> The law never is static: it is in a state of constant flux. In fact, if one word were all that was allowed to characterize the law since 1941, that word might well be 'change.' No quarter century in our nation's history, except perhaps the revolutionary period, can match the far-reaching transformation in the law which occurred between 1941 and 1966..., If there was a central theme throughout the period, it was the role of government in relation to each individual citizen. The role of law is to adjudicate between society--all of us--on the one hand, and each of us--as individuals--on the other. In 1941, the rule was simple: the greatest good to the greatest number. Whether that is still the rule in 1966 may be a subject for speculation.[1]

School administrators, teachers, and board of education members are becoming increasingly aware of the importance of a basic knowledge of the legal aspects of public school education. In this regard, Edward C.

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[1]Chester M. Nolte, "The Law: An Anchor or a Sail," American School Board Journal, CLIII (November, 1966), p. 48.

Bolmeier, a recognized authority in education and school law, makes the following statement:

> The growing importance of school law is reflected by the growing interest in school law.--Deep and broad interest in school abounds. School officials, school employees, and others connected with the public schools want at least to understand the basic elements of school law. There is considerable evidence of the growing interest in school law, particularly that which is based upon judicial decisions.[2]

Part of this awakening is caused by the college preparation for a career in education. The preparation of teachers today does not resemble the past preparation over most of the educational history. Today, teachers attend college longer, study more subjects, and are better informed than those of any other era.

Most states are requiring, or have plans for requiring, four years of college preparation for certification to teach. Some require five years of study for entrance into the field.

Another factor is the activities of the organized teaching profession. Teacher organizations have sponsored legislation for the benefit of the schools; some have lobbies in state legislatures; some have engaged in litigations to redress situations thought to be inequitable. Through the teacher-education institutions and teacher organizations, knowledge of the importance of school law and its many ramifications has spread to the rank and file of teachers in every school.

According to Remmlein, school-law courses of the past often were confined to a reading of publications issued by the state department of

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[2]Warren E. Gauerke, School Law (New York, 1965), Foreword by Edward C. Bolmeier.

education.[3] These courses did not explore judicial interpretations or study legal principles underlying either statutes or court decisions.

Even today, the graduate teacher is little prepared in the field of school law, which is of growing importance to him and his profession. The study of law, the set of principles which governs every social and individual action needs exploring today. As teachers demand more rights, work more closely together, and change roles, the knowledge of the law should be of increasing importance to each teacher in public elementary and secondary schools.

Knowledge of the law will advance the professional growth of teachers. Drury and Ray simply state that, "A knowledge of school law is basic to the education of any teacher; for the well prepared school administrator, it is indispensable."[4] Educators may differ regarding many aspects of teaching, but they share one common goal to obtain for teaching the recognition which it deserves as a significant profession, an objective which depends to a large extent upon the establishment of legal sanctions and controls surrounding the profession's members.

According to Nolte, in recent months, a growing awareness by the teaching profession of its new role of power has resulted in a proliferation of new legislation aimed at improving the professional autonomy of teachers.[5]

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[3]Madaline K. Remmlein, School Law (Danville, Illinois, 1950), p. vii.

[4]Robert L. Drury and Kenneth D. Ray, Principles of School Law (New York, 1965), p. v.

[5]Chester Nolte, "Teachers Seek Greater Independence Through Legislative Channels," American School Board Journal, CLII (March, 1966), p. 7.

This study is concerned with bringing together some selected legal aspects that are of particular significance to teachers today. The protection of the teacher as he performs his duty is of utmost importance to both the public and the profession.

Statement of the Problem

This study will attempt to identify some of the more significant problems related to teacher rights and responsibilities in the public schools that have come before the courts since 1941. More specifically, it shall be the purpose of this study to determine the extent to which the body of law is changing to determine what implications these changing patterns have for public school teachers.

Need for the Study

There are many reasons why teachers need a knowledge of school law, but the most compelling of these are the ones which follow: First, knowledge of school law will advance the professional growth of teachers.

> Teachers as a class are provided for in the constitution and statutes of the various states, but the rights and responsibilities of teachers as individuals are constantly being hammered out in legislative chambers and courtrooms. As teaching changes, the rights and responsibilities of the individual teacher change, both legislatively and judicially.[6]

Secondly, teachers will be better able to avoid involvement in needless litigations when they possess a thorough knowledge of school law. Many cases involving teachers could have been avoided had the teachers known their rights and responsibilities before the law.

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[6]Chester Nolte and John P. Lynn, School Law for Teachers (Danville, Illinois, 1963), p. 8.

"A teacher should be able to recognize the circumstances surrounding potential litigation in order to avoid unnecessary action."[7]

The body of school law that affects teachers' rights and responsibilities has grown until the analysis on any one question is a formidable task for any teacher. Gauerke states that, "An impressive mass of evidence has accumulated from court decisions regarding what can and cannot be done legally in the dozens of predicaments that daily confront school personnel and parents."[8]

Nolte states that,

> Teachers are more interested in their legal status than ever before because the era of collective bargaining, in the industrial sense, has arrived. The rules of collective bargaining are well understood in private industry, and a healthy respect for those rules usually produces a realistic agreement. Teachers want higher wages and better working conditions, and they intend to bargain in a manner familiar to the industrial union.[9]

Teachers today are asking for reasons behind laws and school board regulations. This is due partly to the organized teaching profession activities the past few years. Therefore, there is a need to acquaint classroom teachers with some of the legal rights and responsibilities of their positions. Although the teacher's position has become increasingly legalistic, amazingly little has been done to inform him of the legal rudiments of his position.

Now, there is a growing awareness that teachers must be

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[7] Ibid., p. 8.

[8] Warren E. Gauerke, Legal and Ethical Responsibilities of School Personnel (Englewood, N. J., 1959), p. 1.

[9] Chester M. Nolte, "Teachers Face Boards of Education Across the Bargaining Table--Legally," American School Board Journal (June, 1945), p. 11.

knowledgeable of the law if they are to effectively perform their professional duties. Because the teacher's role has been substantially extended into broader teaching responsibilities and administrative duties, new legal relationships are arising which impose a greater obligation on the teacher to possess at least a fundamental knowledge of school law. Furthermore, as an active member of a united profession, the teacher is increasingly involved in activities related to the evaluation and promulgation of laws governing the teaching profession. Consequently, the teacher is more conscious than ever before of a need to know the law as it affects him in his vocation.

Purpose of the Study

The purpose of this study is to analyze and determine the extent to which litigations by the courts that seem to be most controversial and urgent at this time are changing in the area of legal rights and responsibilities of teachers. Implications pertaining to courts' decisions and current reasoning of the courts will be discussed. From these court decisions, recommendations will be made regarding legal rights of teachers.

It is hoped that the information presented in this study will be of value to classroom teachers in making decisions regarding their legal rights. This study might be of help in avoiding some costly litigations that might arise regarding a teacher's legal rights.

Procedure

Innumerable situations exist in the public schools where certain types of regulations are considered to be reasonable and necessary and

some unreasonable and unnecessary by others.

Virtually, all of these situations are controversial and filled with potential litigations. American Jurisprudence states this principle in the following manner:

> ... They (the courts) will not consider whether regulations are wise or expedient, but merely whether they are a reasonable exercise of power and discretion of the board. The reasonableness of regulations is a question of law for the courts.[10]

The distinction between whether an issue questions the reasonableness or whether it questions the wisdom is sometimes extremely difficult for the courts to determine.

The decision of the courts to pass upon a matter or refuse to do so, based upon reasonableness, is not always a fundamental one. In commenting on this situation, Remmlein states:

> The lines of demarcation between reasonableness and wisdom is sometimes shadowy; the difference may be only a matter of terminology. The courts never violate the principle that they have jurisdiction to decide whether a rule is wise or unwise. Nevertheless, one court may refuse to review a rule which another court will pass upon, the one court basing its review of the issue on the question of the rule, while the other court refuses its consideration of the rule on the basis that the question is whether the rule is wise or unwise.[11]

Reasonableness is a changing concept. What was considered reasonable thirty years ago may be considered unreasonable today; an act considered reasonable in one part of the country may be considered unreasonable in another. It becomes necessary to analyze recent cases and decisions in an attempt to have clearer understanding of current thinking of the courts.

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[10] 47 American Jurisprudence, 326.

[11] Madeline K. Remmlein, The Law of Local Public School Administration (New York, 1953), p. 191.

Court decisions serve as precedents for consideration of subsequent cases. These judicial precedents constitute legal principles which can become an invaluable aid for teachers in dealing with problems of their rights. Remmlein states:

> When a court decision has established a principle, it is a precedent for subsequent decisions until overruled, but the precedent value of the decision applies only within the same jurisdiction. In other jurisdictions, the courts are free to make different or contrary decisions, although they are sometimes influenced by the weight of prevailing views in other courts.[12]

These two criteria, reasonableness and precedent, will be used to help acquire a clearer understanding of the current thinking of the courts.

In making this study, a method of approach similar to that used by members of the law profession in studying questions of law was adapted. In each area covered, pertinent positions of legal textbooks and encyclopedias were researched in order to obtain an outline of the problems presented. References made in these works that were applicable to teachers were noted for study and examination.

After determining the general outline and problems involved in each area to be covered, the American Digest System was used to cite court cases pertinent to the problems.

The National Reporter System was used to brief cases pertaining to the particular problem being studied. This includes all cases from all courts of records in all states and gives the actual opinion of the court in each.

After completing the foregoing steps, Shepard's Citations to cases

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[12]Ibid., p. 14.

was used to determine the present status of cited cases.

Scope of Study

The rights and responsibilities of teachers are so broad and general that one study could not begin to cover all the legal aspects pertaining to this area. This study is limited to the litigious aspects of certain specified areas that appear to be the most timely and significant in view of existing social conditions.

Major emphasis of the study will be placed on case law with Statutory law being only referred to in general terms. The study refers to those cases brought before the higher courts and reported in the National Reporter System.

More specifically, the study is concerned with (1) legal rights of teachers concerning contracts and salaries, certification, and leaves of absence; (2) academic freedom of teachers in classroom performance, libel and tort liability; and (3) the causes for dismissal of teachers.

The intent will be to summarize the cases and to examine and analyze the general principles of law gathered from the judicial interpretations. An attempt will be made to identify the implications of these principles for those employed as public school teachers.

CHAPTER II

LEGAL RIGHTS OF TEACHERS

The legal and ethical problems of school personnel today may seem to have little, if any, connection with the status and organization of the past. Today in the United States, school personnel enjoy the legal status they have and the professional favor of the general public at least in part because of the pioneers in education who met and solved problems that confronted them. They worked under conditions and with personnel quite different from those existing today.

In America, early interest in education and teaching included training for moral instruction as well as limited intellectual pursuits. Because education included more than mere knowledge, problems arose concerning the place of the school in cultivating religious sentiments and developing the physical fitness of children. Schools in America played a subordinate role in society. Only in rare instances did schools achieve a distinct place of their own. Education and religion were so closely related in daily living that there was little distinction between education and religious instruction.

Teaching in America is what it is today because of influences which have been molding it since the founding of the first school on the eastern coast. Practices, pertaining to education, were the basis for precedents for personnel practices which now are a part of firmly established educational philosophy.

The first action in America to provide public education was brought about by the Puritan influence. In 1642, the Commonwealth of Massachusetts passed an edict which made it mandatory that all children be taught to read. Five years later, the legislature of the colony passed a law requiring:

> (1) That every town having fifty householders should appoint a teacher of reading and writing, and provide for his wages in such manner as the town might determine; and
> (2) That every town having one-hundred householders must provide (Latin) grammar school to fit youth for the university, under a penalty of five pounds for failure to do so.[1]

Certification and Qualification

A teacher's certificate is a document indicating that the holder has met the legal qualifications to follow the teaching profession. In some aspects, it might be compared to any other professional's license. A lawyer or a physician, upon obtaining a license, is free to open an office or practice his profession. The holding of a teaching certificate does not in itself give the holder the right to demand a position.

Certification is a process of giving legal sanction to teach. It includes all types of licenses, whether permanent or temporary in character, whether short or long-term, and whether issued on the basis of several years of study or as a result of a few weeks or months of preparation or even on the basis of having passed an examination. It includes those of an emergency nature as well as those which meet the regular requirements.[2]

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[1]Elwood P. Cubberly, Public Education in the United States (Boston, 1919), p. 18.

[2]Albert J. Huggett and T. M. Stinnett, Professional Problems of Teachers (New York, 1956), p. 412.

The certificate to teach should be considered within its legal framework. Its nature is determined by the statutory details which govern its issuance. It is necessary for each state to determine how closely the provisions of the governing statute must be followed in order to assure the validity of the teaching certificate.

The teaching certificate is by nature a "limited" legal document issued by the state, which may be revoked under whatever conditions the state wishes to impose. The certificate is merely a license to teach in a given state, attesting to the fact that the holder possesses, at the time of issuance, the required qualifications. No absolute rights are conferred by the certificate upon the holder. Its continuing validity is often dependent upon successful, continuous employment. Teaching only intermittently, the certificate may be terminated according to rules laid down by the legislature or the state department of education. Upon its termination, the certificate is completely annulled and is subject to renewal only upon full compliance with certification standards in effect at the time of renewal.

In addition to professional qualifications, there are frequent personal standards which must be met in order to qualify for a certificate. Citizenship is one such requirement, although an exception may be made in some states for those teaching foreign languages or an exchange from a foreign country. For other teachers, declaration of intent to become a citizen will suffice under a few laws, but if a person does not follow through and become an American citizen within the specified time, the conditionally granted certificate is revoked.

Age is another requisite, eighteen being the most frequently mentioned minimum age for eligibility. An interesting case arose in

Kentucky concerning this aspect of certification.

This action was instituted by the appellee, Ivonell Slone, against the appellant, Floyd County Board of Education, and also Palmer Hall, Superintendent of Schools and Secretary of the Board of Education of Floyd County, to recover salary claimed to be due her for teaching school in Floyd County in the Fall of 1951. At the time she started teaching, she did not have a teaching certificate as required by KRS 161.020, nor was she eligible for such a certificate under KRS 161.040 because she was not eighteen years of age. She taught during the 1951-1952 school year both before and after she became eighteen years of age on November 18, 1951.

On October 2, 1951, Miss Slone was paid $143.03 for the sixteen days she taught in September. No further checks were issued until January 1, 1952, because of her statutory ineligibility. On January 1, 1952, she received checks for the fifth and sixth months of the school year, and from which had been deducted the $143.03 payment on October 2. Miss Slone was paid for the teaching she did after becoming eighteen and was issued a certificate. The court ruled that she was entitled to the salary for the time taught before she reached eighteen years of age.

The trial court's judgment was based on the proposition that, where parties to an illegal contract for services are not in equal fault and the transaction is only Malum Prohibitum, the innocent party may recover for value of the service actually rendered.

This ruling of the trial court, however, was reversed by the Court of Appeals, which held that the rule is valid only as to contracts between individuals; the case before the court was one involving payment by public agencies to employees. The court based its refusal to grant

the teacher's wages for the period between September 3 and November 18 on the grounds that:

> In the case at hand Miss Slone was ineligible for the office or position of teacher because she held no certificate and she failed to qualify for such a certificate under the provisions of KRS 161.040 during the period for which her salary was withheld. It follows that she taught as a volunteer and was entitled to no compensation during that period.[3]

Even though the board of education may wish to compensate a teacher who lacks a certificate, it cannot do so whenever a valid certificate is a prerequisite to an enforceable contract. In some instances, board members have been held personally liable for illegal payment of public monies to unauthorized persons. The board may accept the free services of the uncertified teacher, but it is clearly prohibited from paying public money to any teacher other than one who holds a valid teaching certificate.

The power of the state to control licensing of occupational groups is implied in the state's power to protect the health, morals, and general welfare of its people. The right to control education is one of the police powers of the state. Since public schools contribute to the betterment of society, educational legislation often reflects the hopes and aspirations of the legislative branch of government in exercising control over the health, morals, and the general welfare of the social order.

The need for the legislative intent to safeguard the welfare of children against unqualified, incompetent, and immoral teachers arises as society grows more complex, and the number of teachers grows.

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[3] Floyd County Board of Education v. Slone, 307 S. W. (2d) 912 (Kentucky, 1957).

The chief purpose of teacher certification is to make certain that only duly qualified persons come in contact with children. Certification also protects public monies, fulfilling the rule that public funds shall be paid only to persons licensed to teach. Certification also helps to maintain a school system designed to improve society, in that teachers must meet a minimum level of quality before the certificate will be issued. Furthermore, certification protects the profession of teaching by establishing criteria for membership in the profession. Thus, certification is seen as protecting (1) the child's right to an education under qualified persons, (2) the public fisc, (3) society, by establishing minimum standards for teachers, and (4) the profession of teaching.[4]

The courts have consistently ruled that states have plenary power over educational matters, including the formulation of certification standards, the examination of teachers, and the issuance of certificates. As long as these functions are performed in a reasonable manner, the court will not interfere. However, instances have often arisen in which persons seeking certificates, believed themselves qualified and have brought court action to force the issuance of a certificate.

A case appeared in the Supreme Court of New York in 1964.[5] Miss Cassandra Tripp had submitted papers of application for renewal of a substitute teacher's license to teach in the city schools. Among other things was the requirement of a "satisfactory" on the part of the examination titled "Physical and Medical test."

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[4] M. Chester Nolte and John R. Linn, School Law for Teachers (Danville, Illinois, 1963), p. 67.

[5] Tripp v. Board of Examiners, 255 N. Y. S. (2d) 526 (1965).

The petitioner had received a passing grade in the English and interview tests, and appeared on May 6, 1964, for her physical and medical examination. The test was conducted by two members of the medical staff of the Board of Education. The findings of the two doctors, in which a third member of the medical staff concurred, was that Miss Tripp was found "not fit" for service because of obesity. Such conclusion was based upon the results of the examination which showed that the petitioner was 22 years of age, weighed 243 pounds, and her height was 69 inches; the standard weight for her height was 174 pounds. The conclusion thus reached was that the petitioner was 69 pounds overweight and, therefore, not fit for service.

The court in ruling stated that since the petitioner with knowledge and understanding applied for and took the examination given by respondent as authorized and pursuant to its duty, she was bound by all the requirements and conditions relevant thereto. Upon her failure to receive the "satisfactory" rating on one phase of the test, the Board of Examiners had no alternative other than to certify to the Superintendent of Schools that petitioner's extension of validity of her license beyond June 30, 1964 be refused. Harsh as it may seem, the court is without authority to change the results. Under the circumstances, it cannot be said that the board in this case fixed standards which were unreasonable with respect to the physical fitness of candidates. The rule of law is that unless the standards applied by the appointing body are so clearly irrelevant and unreasonable as to palpably be arbitrary and improper, they are to be sustained.

In the certification of teachers and in establishing qualification for their employment, courts generally hold that they are without

authority to change the decisions of administrative bodies empowered by statute to make and enforce regulations and standards. On the other hand, however, where the decisions of the board of education or board of examiners are arbitrary, capricious, or contrary to statute, the courts will substitute their discretion for that of the board. This happened in a New York case.[6] Here, the court directed the Board of Examiners of the Board of Education of New York City to certify a partially blind music teacher as eligible for appointment as a regular teacher. The board had denied him a license to teach because he was classified as being legally blind and because he received an unsatisfactory rating in his physical and medical examination due to defective vision. The statutes prohibit disqualifying anyone "solely by reason of his or her blindness." The court held that the action of the board of examiners was arbitrary, capricious, and contrary to statues. This judgment was reversed by a three-to-two decision in the Appellate Division of the Supreme Court, which was later affirmed in the Court of Appeals of New York.[7] The key reasoning of the Appellate Division was based on the fact that the state education law provided that the New York City Board of Education may prescribe additional or higher qualifications beyond state minima for persons employed as teachers.

The court, in upholding the reasonableness of the New York City regulation on visual acuity, said:

> That the determination by the Board of Education with respect to vision requirement is reasonable and is clear when the multitude of duties of a New York City junior high school teacher is considered, e.g., maintaining classroom discipline

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[6] Chavich v. Board of Examiners, 252 N. Y. S. (2d) 718 (1964).

[7] Ibid., 258 N. Y. S. (2d) 677 (1965).

> in a class of approximately 30 children, age 12 to 15; preventing them from fighting or from throwing pencils or erasers at each other (of which there have been many instances resulting in tort actions against the board of education, involving serious injury to pupils); marking roll books, examinations or other written work; preventing cheating on examinations; writing on the blackboard; fire drills; going up and down stairs quickly in emergencies; use of textbooks; keeping the room clean; performing other administrative duties during non-teaching periods.
>
> Whether a blind teacher may satisfactorily perform classroom duties in a particular school may not be for the determination of the school principal or other supervisory officials, as the minority opinion suggests. The statute required the board of examiners to determine whether an applicant has the ability to perform satisfactorily the duties of a teacher. The board of education is concerned with the effective performance of duties by a teacher both inside and outside the classroom. Although many sympathies are with this petitioner because of his unfortunate affliction, it is my opinion that the refusal to certify petitioner as eligible for a teaching license was within the power of the board of examiners.

Revoking Certificate

State statutes may be silent as to the cause for which the state will revoke the certificate, or they may list the causes. In Oklahoma, the State Board of Education has the authority to revoke a teacher's certificate after notice and an opportunity for hearing before the state board of education for:

1. Knowingly and willfully violating any of the provisions of the State Aid Law.[8]

2. Willful violation of any rule or regulation of the State Board of Education, or of any Federal or State laws, or other proper causes, but only after sufficient hearing had been given before the State Board of Education.[9]

Can a teacher that has a lifetime teacher's certificate have his

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[8] 70 O. S. 1949 Supp. 18-7(5).

[9] 70 O. S. 1949 Supp. 2A-4(9).

license revoked? This question of law arose in Oklahoma. Mr. L. R. Stegall, prior to March 23, 1951, held a lifetime teacher's certificate and was engaged in teaching at the Burbank School in Osage County. On December 19, 1950, twenty complainants from the Burbank School District appeared before the State Board of Education and filed a written complaint with the board specifying twelve alleged violations of the Oklahoma laws by Mr. Stegall. The complaint requested a hearing thereon and at the conclusion of the hearing the State Board of Education recommended that the certificate of the teacher be revoked. The State Board of Education then proceeded with the hearing and at the conclusion thereof revoked the certificate.

After such revocation, the action was instituted in the district court, asking for a mandatory injunction to reinstate the certificate on the ground the action of the board was arbitrary, unwarranted, and contrary to and in excess of the jurisdiction and authority of the board.

The court in ruling cited an Ohio case which says:

> A license, such as held by appellant, is not a property right; it is not a contract, and the Legislature may impose new or additional burdens on the licensee and reserves the right to alter the license or to revoke or annul it even though the licensee has expended money in reliance thereon.[10]

No certified person ought to assume he is fully and forever qualified to teach and without need to periodically add to his existing body of knowledge and skills. Teaching methods and materials change making it imperative that in-service teachers seek personal and professional growth. The gradual disappearance of life certificates may be considered in support of the idea that states intend to require teachers to continue to grow in order to keep their certificates in force.

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[10] Hodge et al. v. Stegall, 206 Oklahoma 161 (1951).

The courts have consistently ruled that states have plenary power over educational matters, including the formulation of certification standards, the examination of teachers, and the issuance of certificates. As long as these are performed in a reasonable manner, the courts will not interfere.

Another legal principle that courts of law have consistently accepted is that the certificate is prima facie evidence of the competency of the teacher until such time as it has been proved to be otherwise. In cases where incompetency is given for non-renewal of certificate, it is not necessary for the teacher to prove his competency.[11]

In Oregon, an action was brought to require the state board of education to issue a five-year teacher's certificate to one who had earlier been convicted of burglary while holding the position of night policeman. The state board of education refused on the ground the applicant was lacking in good moral character. The testimony indicated that in 1953 the plaintiff was convicted of the charge of burglary, served eighteen months of a two-year sentence, and was paroled. In 1956, he entered East Oregon College of Education. In 1958, he was restored to full-citizenship rights. In 1960, he was granted a one-year license and he taught under this license while finishing his fourth year of college. The sole evidence regarding his character concerned the conviction mentioned. The court, ruling in favor of the board, stated:

> The power to decide such an issue was delegated by the legislature to the Board of Education, therefore, as previously pointed out, the courts are not permitted to substitute their

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[11] Pope v. Hackett, 156 Pac. (2d) 299 (Wyo., 1945).

> judgment for that of the Board where there is substantial evidence to support the agency.[12]

Since the state possesses the power to issue certificates, it follows that they also have the power to revoke them.[13] A license is, in its very nature, revocable. A person that holds a teaching certificate does so at the pleasure of the issuing agency.

Contracts and Salaries

Contracting is seldom a simple matter, but the particular laws governing the teacher's contract create significantly special problems. Many legal questions face the teacher. Must a contract be in writing? Can the rules and regulations of the board of education be changed and affect an existing contract? Is the school superintendent a proper party with whom to contract? These and other principles of law governing the teacher's rights and responsibilities in contracting is the concern here.

It is obviously impossible to understand the nature of the rights and responsibilities of teachers without an understanding of the legal nature of the organization for which they work, namely, the school district. This employer has characteristics not possessed by other employers. It is subject to a wide variety of obligations and restrictions entirely foreign to employers in private enterprise. Technically, it leads a precarious and uncertain existence, depends for its support

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[12] Application of Bay, 378 P. (24) 558 (Oreg., 1963).

[13] Marrs v. Matthews, 270 S. W. 586 (Texas, 1925).

on the whim of legislative bodies, and has not even an inherent right to life.[14]

The school district is a creation of the legislatures of the various states. The constitutions provide generally that the legislature shall provide for the establishment of a uniform and efficient system of public schools. These general constitutional provisions impose upon the respective legislatures the obligation for setting up and administering the public schools of the states. School districts, therefore, are agents of the state that are created by the legislature to carry out the constitutional mandate. It is clear that school districts are state and not local organizations.

Since local school districts are state agencies, it follows that members of the local boards of education are state officers rather than local officers. They have only such power as the legislature, by specific law, confers upon them, and those powers which are implied for the purpose of enabling the boards to carry out their legislative powers. Boards of education are accorded wide discretion of power in the discharge of their duties.[15] So-called local boards may employ teachers, purchase supplies, establish reasonable rules and regulations for the management of the school system. Local boards, being officials of the state, are subject to all the constitutional and legislative restrictions which have been placed upon them. Under statutes prescribing methods for appointment of school teachers and requiring the execution of a contract in writing on behalf of board, both a valid appointment

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[14]Robert R. Hamilton, Legal Rights and Liabilities of Teachers (Laramie, Wyoming, 1956), p. 1.

[15]Johnson v. Wert, 279 S. W. (2d) 274 (Ark., 1955).

and a contract are essential to entitle teachers to a position.[16]

The relationship between a teacher and the school authorities is created by contract. A contract may be defined as an agreement between two parties to do or not to do certain things. The teacher's contract of employment or contract of hire is an agreement whereby the services or labor of a teacher are stipulated to be given over a specific period of time for a certain salary and other benefits. From a valid teaching contract, reciprocal obligations arise which are recognized and enforceable under the law. One whose contractual rights are threatened or ignored may seek the aid of the courts to enforce the fulfillment of the employment agreement.

The rules of law governing the ordinary contracts of the business world also apply to contracts for the employment of teachers except to the extent that state constitutions or statutes regulate such contracts. As might be expected, most legal problems stem from the contract areas controlled by constitutional and statutory provisions. Teachers and boards of education have great difficulty keeping informed of statutory changes governing teaching contracts because statutes vary from state to state, are subject to frequent change, are often mandatory in nature, and usually cannot be waived. A violation of statutory provisions may void the contract of employment and abrogate the attempted contractual relationship entirely. Therefore, the teacher must learn the law governing contracts and act in accordance therewith.

In 1958, the National Education Association reviewed 715 court cases in which teachers were litigants between 1942 and 1957.

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[16] Iches v. Costlow, 193 Atl. 287 (Pa., 1937).

One-half of the cases were concerned with questions related to teachers' contracts and tenure rights.[17] The comparatively large number of cases involving the contractual relationship of teachers and boards of education make this one of the most significant legal problem areas confronting the public school teacher. Clearly, teachers do not comprehend the nature, value, and limitations of their contracts of employment. It is also apparent that the local boards that contract with teachers are sometimes unaware of their duties and legal limitations in contracting.

Elements of Valid Contract

Under the common law, all contracts possess certain essential elements upon which their validity depends. A valid contract, including the contract for teaching services, has five basic elements. The absence of any one element will render the contract null and of no effect. These five elements are as follows: (1) The contract must be between competent parties; (2) The contract must be based upon mutual assent; (3) The contract must contain a valid consideration; (4) The contract must contain rights and liabilities sufficiently defined to be enforceable; and (5) The contract must be of such a nature as not to be prohibited by statute or common law.[18]

Board Action Necessary to Validate Contracts

The board of education, although made up of individual members,

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[17] National Education Association, Plaintiffs and Defendants - School Teachers in Court (Washington, 1958), p. 58.

[18] Newton Edwards, The Courts and the Public Schools (Chicago, 1947), p. 171.

exists only as a legal unit and legally can act as a board. The several individual members of the board have no more authority to act on behalf of the district than does any other individual not a member of the board.

Authority to enter into contracts with teachers cannot legally be delegated to the superintendent or any other employee or official. The superintendent or individual member of the board may interview and recommend teachers to the full board, but the final action must be by the latter. It is sometimes said that there has been "no meeting of the minds". There is no valid contract until the board as such acts affirmatively on the recommendations.[19]

It may be laid down as a general rule that when several persons are authorized to perform a public service or to do an act of a public nature as an organized body which required deliberation, they should be convened in a body in order that they may have the counsel and advice of every member, although they may not all be of the same opinion concerning the matter at hand.[20] Individual and independent action, even by a majority of the members of the board, will not suffice. A public body, such as a school board, consisting of several persons authorized to perform acts of a public nature and to which public duties are intrusted, such as the employment of teachers for the public schools, should perform such duties as a board. To do so, it is imperative that all should meet or at least be notified of such meetings and have an opportunity to meet, and consult relative to the employment of such teachers before a valid contract can be entered into by them binding the district.[21]

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[19] Taggart v. School District No. 1, 188 Pac. 908 (Oregon, 1925).

[20] Ryan v. Humphries, 150 P. 1106 (Oklahoma, 1915).

[21] School District No. 39 v. Shelton, 109 Pac. 67 (Okla., 1910).

It is a firm rule that a board of education, in entering into contracts with employees, must do so in light of the statute. A New York case illustrates this principle. A superintendent brought an action to recover damages for breach of a written contract. The Supreme Court, Appellate Division, held that statutory power of city board of education to appoint superintendent of school for term not to exceed five years did not empower board to enter into written contract with the superintendent for such services.

In ruling, the court had this to say:

> In our opinion the power of the board of education pursuant to section 2507 of the Education Law, to appoint a superintendent of schools for a term not to exceed five years, does not empower the board to enter into a written contract with the superintendent for such services. Section 2507 is derived from former section 2565 of the Education Law. Prior to 1948, the board of education of a city had no power to contract with a superintendent of schools; it could only appoint a superintendent of schools to serve at its pleasure, with the right in the superintendent to resign by giving written notice (L. 1917, Ch. 786, §869). In 1948 the Legislature added to the predecessor section 2515 the clause permitting an appointment for a term not to exceed five years (L. 1948, Ch. 111). The Legislature did not recind the right of the superintendent to resign on written notice; nor did the Legislature expressly confer the power to contract with a school superintendent, found elsewhere in the Education Law (cf, Education Law, §1711). A board of education may enter into such contracts only when permitted to do so by statute....[22]

A number of contractual problems have arisen from statutes providing for automatic renewal of employment contracts of teachers which have been enacted by several states. Oklahoma, for example, has an automatic renewal statute which provides that:

A board of education shall have authority to enter into

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[22] Smith v. Helbraun, 251 N. Y. S. (2d) 531 (1964).

> written contracts with teachers for the ensuing fiscal year prior to the beginning of such year. If prior to April 10th, a board of education has not entered into a written contract with a regularly employed teacher or notified him in writing by registered mail that he will not be employed for the ensuing fiscal year, and if, by April 25th, such teacher has not notified the board of education in writing by registered mail that he does not desire to be re-employed in such school district for the ensuing year, such teacher shall be considered as employed on a continuing contract basis and on the same salary schedule used for other teachers in the school district for the ensuing fiscal year, and such employment and continuing contract shall be binding on the teacher and on the school district.[23]

A case came before the courts in Oklahoma concerning the continuing contracts.[24] On the 27th day of June, 1955, defendant, Board of Education of Lacy, met and decided to conduct two schools at D-5 school district in Kingfisher County, Oklahoma, and by a resolution dated that day elected Mrs. George to serve as a teacher in the school district. Mrs. George was further notified of the election by a copy of the resolution signed by the board and delivered to her.

As a result of this arrangement, Mrs. George felt that the board obligated itself to hire her for the school year 1955-1956. She further stated that she relied upon the election and notification by the board and was ready to teach but was refused service. Wherefore she sued for $3,600 and whatever other relief may seem to the court as equitable and just and the cost of the action.

The plaintiff argued that the continuing contract of employment phase of the statutes controls the issue superseding the statutory provisions requiring a written contract and the approval of such contract

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[23] 70 O. S. 1961 (6-1).

[24] George v. Joint School District No. 5 of Kingfisher County, Okla. 317 P. (2d) 251 (1957).

by the county superintendent of schools after the beginning of the new fiscal year.

The court did not agree. In the absence of a contract of employment, it is unnecessary to determine the applicability of the continuing contract. The petition does not show or allege any written teacher's contract as required by statutes. Therefore, under the circumstances, there is not a case for action.

In Missouri, where the statutes provide that failure to notify a teacher of his non-employment by April 15th would automatically constitute re-employment, an interesting case came before the court. A board of education, not certain of finding another teacher, hesitated to dismiss a teacher. In so doing, it neglected to notify the teacher by the appointed date. During the summer, another teacher was employed. On the first day of school in the fall, both teachers appeared at school, together with the board of education.

The board members informed the students they were to obey the second teacher. The board then sought an injunction against the first teacher to vacate the school. The court in ruling stated that the first teacher was entitled to the position inasmuch as the board had failed to follow the letter of the law in serving notice before the date specified. The court further noted that the plight in which the board was in was of their own failure to proceed in accordance with statutes of the state; to follow the statutes in making the contract was mandatory, and not open to the discretion of the board.[25]

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[25] Community School District 27 of Gasconode County v. Brinkmann, 233 S. W. (2d) 768 (Mo., 1950).

Statutes which control the legal relationship between the board of education and the teacher are not often mentioned in the contract itself. It is taken for granted that the board and teacher are aware of such statutory provisions and conduct themselves accordingly.

State departments of education, by virtue of state statutes or state constitutional provisions, are charged with the responsibility of public education and enforcement of the school laws. These state agencies are limited in their power by the legislature that creates them, but they usually possess explicit or implied power to prescribe rules and regulations for the public schools. State departments of education have been given power to determine the general educational policies, particularly in respect to teachers' qualifications, the educational curriculum, and supervision.

To determine the extent to which the rules and regulations of a state education department become binding on a teacher, it is necesary to examine the law of that particular state. A state department of education may be enjoined on the ground that it has gone beyond the power conferred on it by the law of the state. When the rules or regulations of the board of education do not conform to statutory provisions, it will be of no effect. However, courts will not always uphold the rules and regulations of state boards of education as the following case will indicate.

This case came before the court in Delaware whereby it was provided in a teaching contract that the teacher "agreed to observe and enforce the school law of the State of Delaware, the rules and regulations of the State Department of Education, and the Mount Pleasant Special School District." At the time the teacher signed the contract of

employment, she was handed a pamphlet containing the rules and regulations of the school district, but not a copy of the rules and regulations of the state board of education. The rules and regulations of the state board of education provided for teacher's salary on a per diem basis but the teacher's contract clearly indicated that a monthly basis of payment was contemplated by the parties. In determining that the regulations of the state board were not a part of the teaching contract in this regard, the court had this to say:

> Would a reasonable person in the light of such language and all the surrounding circumstances here mentioned, believe that she was being charged with knowledge of regulations of the State Board dealing with compensation not made available to her and which she had never seen: To me the use of the words 'observe and enforce' connote an agreement bearing on the conduct of a school teacher in the execution of her duties such as--for instance, to agree to observe all regulations requiring teachers to behave themselves with decency both in and out of school, of these deal with discipline, standards of teaching and a hundred and one other subjects that might readily come to mind; but not with those governing compensation already clearly set forth in the contract itself.[26]

Whether the rules and regulations of a state board or department are a part of the teacher's contract of employment may only be determined after careful consideration of a particular factual situation, and the power of the board to make such rule or regulation as evidenced by the language of the particular state statute.

Ratification of Invalid Contracts

There is a rule of law to the effect that in certain circumstances a contract which is invalid in its inception may subsequently become valid if the parties who are contracting ratify it. Ratification may be

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[26] State ex. rel. Hirst v. Black, 83A. (2d) 678 (Delaware, 1950).

expressed or implied. Express ratification consists of a later specific agreement between the contracting parties that the contract shall be valid. Implied ratification occurs when both parties proceed to act on the contract as though it was valid at the time formulated. There cannot be any legal ratification that does not conform to mandatory statutory provisions. If a statutory law requires teachers' contracts to be in writing, oral contracts are invalid.[27] An invalid contract of employment cannot be validated in its entirety by part performance and payment of salaries as specified therein.[28]

If a contract is defectively executed and therefore voidable, it may be turned into a contract by ratification; if the contract is void, however, it cannot be ratified. Ratification of a defective and voidable contract may be accomplished by subsequent action by the board when it follows the proper procedure. A voidable contract may be considered ratified when a board accepts partial performance.[29]

An important principle of law is that a contract which is void because of legal disability of one of the parties cannot be ratified; whereas, one which is voidable because of defective procedure can be ratified even by acceptance of partial performance. For example, a teacher employed without a certificate has a void contract and if dismissed before the end of the contract period has no recourse. However, if she had been properly certified but employed by a defective procedure,

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[27] Riegel v. Holmes, 171 N. E. (2d) 553 (Ohio, 1960).

[28] Dungan v. Independent School District No. 39, 77 P. (2d) 1117 (Okla., 1938).

[29] Williams v. Board of Education of Woodward, 171 P. (2d) 120 (Okla., 1941).

the voidable contract is enforceable as a whole.

Where the statutes prescribe a mode of contracting to the exclusion of all other modes, the mode prescribed becomes the measure of power, and there can be no ratification inferred from acts recognizing the legality of the contract.[30]

If the contract is one which the board could not enter into legally in the first instance and cannot, therefore ratify, the teacher cannot recover the value of services which may have been rendered under it.[31] The reasoning on this point is the same as that advanced for refusal to allow recovery for services rendered by a teacher who does not hold a teacher's certificate.[32]

Sometimes the courts will allow recovery on invalid contracts on the theory that, even though the contract is invalid, the board should pay for the services rendered. However, such ratification will ordinarily be only for the time of performance, and not to the full extent of the contract. An Oklahoma court in ruling on the question of the ratification of an oral contract, when the statutes called for contract to be in writing had this to say:

> We hold, therefore, that the ratification herein extends only to the period of performance, and such oral contract cannot be enforced in its entirety. The plaintiff having been paid for the services actually rendered by him, the defendant's liability has been settled in full and the plaintiff cannot recover in this action.[33]

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[30] Floyd County Board of Education v. Slone, 307 S. W. (2d) 912 (Ky., 1957).

[31] Goose River Bank v. Willow Lake School Township, 44 N. W. 1002 (N. D., 1890).

[32] Wayne County v. Hopper, 75 So. 766 (Miss., 1917).

[33] Williams v. Board of Education of Woodward, 189 Okla. 342 (1941).

Rights of Teachers Under Contract When School is Closed

According to the weight of authority, a teacher is entitled to full payment of her salary while the school is closed because of the prevalence of an epidemic. While it is settled that if performance of a contract is made impossible because of an act of God or a public enemy, the district is relieved from liability under its contracts, but the prevalence of an epidemic does not fall within that category.[34] It is difficult, if not impossible, to determine as an abstract matter just what acts of God will relieve one of contractual liability. It would hardly admit of doubt that an epidemic is an act of God, and under the general rule should relieve the district of liability. The opposite conclusion can be justified, however, on the ground that the possibility of an epidemic is one which may be reasonably foreseen, and unless the district expects to assume the risk of an epidemic rendering it necessary to close the schools, it should provide against the risk in the teacher's contract. A court in Oklahoma in ruling on a case of this nature had this to say:

> In our judgment, the board of education might have stipulated that the plaintiff should have no compensation during the time the schools were closed on account of the prevalence of a contagious disease, but not having done so, and the suspension being temporary, it cannot deny him compensation for the time lost on account of the temporary suspension from duty.[35]

Some courts draw a distinction between cases in which the schools are closed by health officials and those closed by the board of

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[34] Carthage v. Gray, 37 N. E. 1059 (1910).

[35] Board of Education of Hugo v. Couch, 162 P. 485 (Okla., 1917).

education, denying recovery by teachers in the former and permitting it in the latter. The former is based on the theory that teachers know that health officials have authority under the law to protect the public health by closing the schools if that seems necessary. The contract of the teacher is entered into with that understanding and that she, therefore, assumes the risk of the schools being closed. A case in Illinois appeared before the courts concerning this. The teacher was regularly employed to teach in the school district. Due to the prevalence of an influenza epidemic, the school was ordered closed for two months by the board of health. The board refused to pay her salary for the time the school was closed on the grounds that the rule where schools are closed by state boards of health does not apply where schools are closed by school authorities. The court in ruling had this to say:

> Here the school was closed for the protection of lives and health of the people in the community against the spread of a contagious epidemic, and whether closing was by board of health or school authorities, it was lawful. That the school might be closed on that account was a contingency that might happen, and whether the school officials took the initiative, or whether it was done by the board of health does not alter the rights of the parties to the contract. It works no hardship on anyone to require the school authorities to insert in the contract of employment a provision exempting them from liability in the event that school is being closed on account of contagious epidemic.[36]

Courts will not insert by construction, for the benefit of one of the parties, a condition which they have omitted from their own contract.

Board Rules and Regulations as Part of the Teacher's Contract

Frequently, teachers will sign contracts without any specific

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[36] Phelps v. School District, 134 N. E. 312 (Ill., 1922).

knowledge of the existence or nature of the rules and regulations of the board. One should know that a board has the authority to adopt reasonable rules and regulations with which the employee is obligated to comply.

A teacher should understand that upon signing a contract, he is bound by the laws of the state and the rules of the state board of education and the local board. The local board has inherent power to make reasonable rules. No statute is needed specifically to confer such power. The only restrictions placed on these rules are that (1) they must be reasonable and (2) they must be within the legal framework of the state.

In Texas, where a school board had a policy which provided that employees of the school district shall not be commercially involved in the liquor traffic, discharged a teacher who, after signing the contract but before school opened, purchased a liquor store. The court, in affirming the right of the school board to discharge said teacher had this to say:

> The general rule is that regulations and operational policies adopted by a school board prior to making a contract with a teacher form a part of the contract, and the teacher's employment is subject thereto.
>
> Since the records reflect that it was the school district's policy that a teacher be not involved in the liquor traffic, prior to the date of the plaintiff's contract.
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> It also seems to be the law that a regulation adopted after a teaching contract is made becomes a part of it and the employment is subject thereto.[37]

In Oklahoma, one elected as a member of the legislature was

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[37] Romeike v. Houston Independent School District, 368 S. W. (2d) 895 (1963).

discharged by the board, on the ground that he could not, thereafter, legally be employed as a teacher, and an action was brought to compel the board to pay his salary as a teacher. The statutes provided that no member of the legislature shall be interested in any contract with the state or any of its subdivisions.

On October 4, 1963, the Attorney General of Oklahoma issued his official opinion in which he held in effect, among other things, that no member of the legislature may receive compensation out of the general fund of any school district to which there had been appropriated funds by the State Board of Education derived from state aid.

The court in ruling had this to say:

> Under the facts here presented we have concluded that justice, and the avoidance of confusion and disorder, requires us to grant a writ of mandamus for and during the accomplishment of the duties of the parties under their written contract entered into on July 1, 1963.
>
> It is our further conclusion that the plaintiff should not be disqualified, under the situation here presented, from seeking employment in any school in the public school system of the state for the school year 1964-1965 and subsequent years because of membership in the Twenty-Ninth Legislature (1963) but if he elects to continue serving in his profession as a public school teacher it should be understood that subsequent appropriations for state aid by the Legislature, of which he is a member, will for reasons set forth in this opinion invalidate any subsequent school teaching contract of his which depends upon state aid for its validity.[38]

In a New York case decided in 1951, a group of teachers questioned the authority of the board of education to assign them certain "incidental" duties not expressly covered in their contracts. This question was raised after a request by the teachers for a salary increase was denied. Upon the recommendation of the superintendent of schools, the board

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[38] State v. Board of Education of Dependent School District No. D-38 389 P. (2d) 356 (Oklahoma, 1963).

passed a resolution to the effect that every teacher be required to give service outside of regular classroom instruction as one of the incidental obligations under his contract. The teachers sued the board of education seeking annulment of the resolution. The teachers' suit was unsuccessful. After calling attention to the statutory provisions conferring upon the board power to establish rules and regulations, the court made it clear that the hours of service of teachers may not necessarily coincide with the hours of instruction in the classroom. It is not legally required that the hours fixed be the same for all teachers. The New York court used the following significant language which will probably be quoted widely by the courts in other states should the question arise:

> The hours established in any case must be reasonable. The broad grant of authority to fix "duties" of teacher is not restricted to classroom instruction. Any teaching duty within the scope of the license held by a teacher may properly be imposed. The day in which the concept was held that teaching duty was limited to classroom instruction has long since passed. Children are being trained for citizenship, and the inspiration and leadership in such training is the teacher. Of course, it is recognized that any bylaw of the board outlining teachers' duties must stand the test of reasonableness. Any teacher may be expected to take over a study hall; a teacher engaged in instruction in a given area may be expected to devote part of his day to student meetings where supervision of such teacher is, in the opinion of the board, educationally desirable. Teachers in the fields of English and Social Studies and undoubtedly in other areas may be expected to coach plays; physical training teachers may be required to coach both intramural and inter-school athletic teams; teachers may be assigned to supervise educational trips which are properly part of the school curriculum. The band instructor may be required to accompany the band if it leaves the building. These are illustrations of some of the duties which boards of education have clear legal justification to require of their employees. A board is not required to pay additional compensation for such services. The duty assigned must be within the scope of teachers' duties. Teachers may not be required, for instance, to perform janitor services, police services (traffic duty), school bus driving service, &c. These are not 'teaching duties.' The board may not impose upon a teacher a duty foreign to the field of

> instruction for which he is licensed or employed. A board may not, for example, require a mathematics teacher to coach intramural teams. Where the service is not part of the duties of the teacher, there is nothing to prevent the board from arranging for such extra service and paying for the same in its discretion. It is pointed out that section 1709, subdivision 16, of the Education Law specifically notes that the board may utilize teachers for playground activities and may pay them extra for so doing. These are some of the activities that are part of instruction but, by their very nature, may be performed after the close of the regular school session. The athletic program, for instance, in many instances take place under such circumstances. It has, nevertheless, over the years been always regarded as part of the school curriculum (see Commissioner's Regulations section 155). As has heretofore been stated, in department publications, 'athletic activities are a definite and integral part of the instruction program in physical education.' Coaching in athletic sports is teaching. It, therefore, does not follow that because an activity is conducted after regular class hours, it is not part of the regular curriculum.[39]

The implications of the educational philosophy expressed by the court in New York are tremendously significant to both teachers and boards of education. The effect of the court's decision is to restrict the obligations of teachers under their contracts to duties related more or less closely to the teachers' subject matter areas. Under the theory of this case, teachers in certain subject matter areas would not, for example, be legally required to supervise school picnics, take tickets at football or basketball games, or perform other similar duties in no way related to their respective fields of instruction. In the implications of the decision above quoted, boards of education would be obligated to either pay additional compensation for the performance by teacher of duties unrelated to their subject matter fields, or hire additional employees to perform the innumerable detail tasks so essential to the successful ongoing of the school.

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[39] Parrish v. Moss, 106 N. Y. S. (2d) 577 (New York, 1951).

A somewhat similar problem arose in the Sacramento City schools. A male teacher, who had recently obtained tenure, along with other male teachers had been required to attend certain non-classroom activities and act in a supervisory capacity. The activities the teachers were asked to supervise were school football and basketball games carried on under the auspices and control of the school authorities. These games were held at places other than the school premises. Six of these athletic assignments were made to each male member of the faculty during the school year, three football games and three basketball games. At the beginning of the school year, each teacher was permitted to select the three football games he would prefer to supervise. At the end of the football season, he was then permitted to select the three basketball games he would prefer to attend in a supervisory capacity. To the extent possible, the requests of the teachers were complied with in scheduling their assignments. Their duties consisted of maintaining order in the student section of the stands, sitting in the student section, reporting disturbances to the police if necessary, preventing spectators from going on the playing field, and such other similar duties as the circumstances may demand. The teacher in question objected to the assignment and went to court for a determination of his rights and duties under his contract of employment in the high school. He complained that the duties at the athletic contests were (1) in the nature of police work, (2) unprofessional, (3) foreign to his field of instruction, and (4) imposed unreasonable hours upon him, and therefore were not within the scope of his teaching duties required by his contract. The California court was not impressed with the teacher's complaint. The court ruled that the teacher was obligated to perform the

duties described as part of his duties under contract despite the fact that duties of this nature are not specifically enumerated in the agreement between the teacher and the board. The court in ruling had this to say:

> We are convinced that the school board had the right to assign plaintiff to assist in the supervision of any and all athletic or social activities, wherever held, when conducted under the auspices of the Sacramento Senior High School, or any class or organization thereof, provided such assignment is made impartially and without discrimination against plaintiff with relation to the other teachers employed at said school. It must be borne in mind that the respondent school authorities are entrusted with the responsibility of administering the affairs of the school district and that as stated in Bates v. Board of Education, 72 p. 907: 'The public schools are not created, nor are they supported, for the benefit of the teachers therein, as implied by the contention of the appellant, but for the benefit of the pupils and the resulting benefit to their parents and the community at large.' And as stated in Knickerbocker v. Redlands High School District, 122 p. (2d) 289: 'The whole system of legislation regarding the educational machinery is based upon the consideration of the welfare and best interest of the children. The proper regulation of tenure in office and other rights of teachers were also properly considered and regulated, but the fundamental purpose and primary objective of the legislature was the consideration of the welfare of the children. This fundamental purpose must not be lost sight of by courts in the construction of legislation dealing with an educational system.'
>
> We believe that respondent school authorities had the right under the law and the contract with appellant to assign appellant to attend and to assist in supervising these athletic contests. We believe that the presence of teachers at such contests should be helpful not only to the student but that the school authorities had the right to determine that such duties should be performed by the teachers assigned thereto. Have the parents not the right to expect, and indeed, to demand that all such school activities be under the supervision of the school authorities? If not, then who is to be in control? The answer to these questions seem obvious .... Our courts have repeatedly enunciated the principle that they will not lightly interfere with the exercise of the functions entrusted by law to the school authorities.[40]

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[40] McGath v. Burkhard, 280 P. (2d) 864 (Calif., 1955).

The court recognized that so-called extracurricular duties are essential to a complete educational program, and that the supervision of such activities is part of a teacher's legal responsibility despite the fact that the duties were not spelled out in his contract. The rule is educationally sound, and a teacher is protected by the legal requirement that any outside assignment must be reasonable and that assignments be impartially distributed among the teachers.

Salary Schedule

Salary schedules which provide rates of compensation for teachers in various classifications have been widely adopted either under statutes expressly requiring them, or under general authority of local school boards to fix the compensation of teachers. Since salary schedules normally become part of a teacher's contract, obviously the administration of salary schedules vitally affects a teacher's financial rights under his contract.

Courts have uniformly sustained the legality of salary schedules if the classifications meet the test of reasonableness. Arbitrary and unreasonable classifications uniformly incur judicial displeasure. However, a salary schedule which provides complete uniformity among teachers of like experience and performing similar services, rewards the inefficient teachers equally with the efficient, and thus provides no incentive for diligent effort and the development of professional abilities. The courts have recognized this and have sustained various types of salary schedule provisions designed to give recognition to differences in individual ability and performance.

It is also generally held that minimum salary laws are just what

their name implies. They are not considered as maximums. In New York, where the statute required boards of education to adopt schedules fixing minimum mandated salaries, a school board, having adopted such a schedule and finding itself with additional funds, granted cost-of-living adjustments to all teachers in the first four years of teaching. An action was brought by certain teachers on the ground that the board had no authority to deviate from the salary schedule as respects to one particular group of teachers. In ruling, the court had this to say:

> Herein, the board adopted a schedule that fully complied with the statute and in no manner discriminated among those in any class or group set forth in the schedule... The board then found itself with additional funds. It decided to use the money in an attempt to attract new teachers. It adopted a revised schedule applicable to those in the first four years of teaching in all three educational groups. The cost of living adjustments were graduated from $400 to $100 annually with the larger amount going to those in the first and second year of service. We conclude that this was the right of the Board and petitioners, who are concededly receiving the statutory minimum salaries for their respective groups and years of service, have no legal grounds for action.[41]

With respect to salaries, it is a rule of law that, in absence of statutes, a board may not increase a teacher's salary during the period for which he is under contract. In California, in a case where a board adopted a new salary schedule, the court stated that a school board, "subject to designated minimum requirements," is vested with the statutory authority to change the salary schedule of teachers, including those on tenure, as long as it does not act arbitrarily or unreasonably, and provided such a schedule:

> ... is adopted prior to the beginning of the school year ... except that a schedule increasing salaries may be adopted

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[41] La Penna v. Union Free School District, 246 N. Y. S. (2d) 817 (N. Y., 1964).

> during the school year if the board has reserved the right to do so by an appropriate rule adopted prior to commencement thereof or by a provision in the contract of employment.[42]

While this decision appears to have been rendered in light of a statute, it is also the common-law rule.

In considering contracts, salary and recovery rights are important topics and the basis of some litigation. In an unusual Missouri case, the Supreme Court of that state decided that several county superintendents were entitled to receive additional compensation for the preparation of budgets and the supervision of transportation even though they had no such duties to perform. The court in ruling had this to say:

> Thus plainly the legislature has entrusted the counties, the local levels in school administration, with the function and business of distributing the funds appropriated for supervision of transportation and budget preparation. From the general tenor of the statutes it is the function of the appellants to distribute these funds to the counties.
>
> There is no claim that these superintendents have abandoned their office, and 'the fact that he does not perform all or any of its duties will not affect his right to the salary attached thereto unless a statute otherwise provides.'
>
> The General Assembly could have attached conditions to the superintendents rights to receive additional compensation but did not do so. One of the conditions could have been that there were or must have been common school districts with budget and transportation problems.
>
> Not only could the General Assembly have attached conditions to the superintendent's receipt of compensation in connection with school transportation and budget, it could have authorized the Commissioner of Education, the State Board of Education, the State Treasurer and the Comptroller or some other official to make the determination that there were no duties to perform and that, therefore, this part of the appropriated school funds should not be transferred to the counties, but as the judgment implies that has not been done.[43]

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[42] San Diego Federation of Teachers v. Board of Education, 31 Cal., Rptr. 146 (1956).

[43] State v. Carpenter, 388 S. W. (2d) 823 (Mo., 1966).

It is a well-settled rule in considering salary rights under contract that where teachers have been unlawfully dismissed they are entitled to the balance due under contract.[44] Not only are illegally dismissed teachers entitled to their salaries under contract, but if the contract is a continuing one they are entitled to salary benefits during the period from dismissal to reinstatement. In an unusual case in California, the period of illegal suspension was for more than ten years and the salary benefit amounted to $82,476.[45] In this case, the teacher was also awarded the right to participate in retirement benefits and to pre-judgment interest as an element of damages on each salary payment as it accrued. On the other hand, the teacher was not entitled to recover for the loss of fringe benefits such as medical protection and insurance plans for the board's employees. The court denied recovery on these items primarily because no losses were demonstrated by the teacher which were attributed to the suspension of medical and insurance benefits.

A board of education may require membership in a professional teachers' organization as a condition of a salary schedule according to a Missouri court. A board of education of the Riverview Gardens school district adopted a resolution that each teacher on the salary schedule must join the local, county, state, and national professional organization. Failure to join these organizations would preclude the person from benefits derived through the salary schedule. A teacher brought suit to test the right of the board to enforce such a resolution. The court in holding the rule reasonable and a valid exercise of board

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[44] School District v. Propes, 392 P. (2d) 292 (Colo., 1966).

[45] Mass v. Board of Education, 394 P. (2d) 579 (Calif., 1966).

power, used the following language:

> The legislature of this state has given Board of Education the broad powers 'to make all needful rules and regulations for the organization, grading and government in their school district.' In the teaching profession, as in all professions, membership in professional organizations tends to increase and improve the interest, knowledge, experience, and over-all professional competence.... Such membership affords an opportunity for self-improvement and self-development on the part of the individual member. It is the duty of every school board to obtain the services of the best qualified teachers, and it is not only within their power but it is their duty to adopt rules and regulations which seek to elevate the standards of teachers and the educational standards within their district.[46]

Teachers' Right to Hold Other Employment

The right of a public school teacher to hold employment outside the school system while under contract in the public schools has been the subject of some litigations. Boards of education are invested by law with large discretion in matters pertinent to the management of schools. Courts have no rightful authority to interfere unless there has been such abuse of their discretion as works palpable injustice or injury.

A teacher in an Illinois school was under contract to teach agriculture on a twelve-month basis. He became involved in a business venture in which he sold seed oats, advertised and sold fertilizers, tested soils, and operated a fertilizer blending factory. The board of education sought to determine whether he would teach during the ensuing year, but he refused to inform the board on this point. He did affirm that if he sold 500 tons of fertilizer that he would not teach the following year. The board discharged him on the ground that (1) his outside

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[46] Magenheim v. Board of Education of Riverview Gardens, 347 S. W. (2d) 409 (Mo., 1961).

activities interfered with his teaching duties, and (2) the best interests of the schools would be served thereby.

The teacher brought suit for reinstatement to his former position. In dealing with the question of outside activities of the teacher, the court had this to say:

> It is peculiarly a province of the Board of Education in the exercise of its discretion whether the outside activities of the appellant had progressed to such an extent as to interfere with the performance of his duties as a member of the teaching staff of the educational institution under its direction.
>
> The best interest of the schools of the district is the guiding star of the Board of Education and for the courts to interfere with the execution of the powers of the board in that respect is an unwarranted assumption of authority and can only be justified in cases where the board has acted maliciously, capriciously, and arbitrarily.[47]

In Pennsylvania, a teacher holding a contract under the teacher tenure law of that state acted as a waitress in a restaurant managed by her husband. On certain occasions, she served as a bartender after school hours and during summer vacations. In the restaurant, and in the presence of her pupils, she took an occasional drink of beer, served beer to customers, shook dice with customers for drinks, and played and showed customers how to play a pinball machine. She was rated by her superintendent as "43 per cent" competent, a rating of fifty per cent being the passing average rating. She was dismissed by the board on the grounds of incompetency, and she sued for reinstatment.

State law in Pennsylvania provides that a teacher holding a contract under the teacher tenure law could be dismissed only on the grounds of immorality, incompetency, intemperance, cruelty, willful and

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[47] Meredith v. Board of Education of Community Unit School District No. 7, 103 N. E. (2d) 5 (Ill., 1939).

persistent neglect of duty, and other specified causes. The teacher's argument was that she was illegally dismissed, since her holding an outside job did not come under the specified provisions of the tenure act. She further contended that her outside employment had no bearing on her competency as a teacher, since it did not pertain to her knowledge of subject matter used in teaching. On the question of the teacher's conduct, the court had this to say:

> Is such a course of conduct immoral or intemperate, and does it--in combination with her scholastic and efficiency rating--amount to incompetency? We hold it to be self evident that under the content and meaning of the act, incompetence is not essentially confined to a deviation from sex morality; it may be such a course of conduct as offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and to elevate. Nor need incompetency be confined strictly to overindulgence in alcoholic liquors--temperate in conduct without being an alcoholic addict. And so as to incompetency; as we take it, this means under the Act incompetence as a teacher--but does it mean that competency is merely the ability to teach the three R's?
>
> We conclude that it would be 'just' to affirm the action of board in dismissing the teacher.[48]

In New York where the statutes prohibit New York public school teachers from occupying more than one position under the board of education, a case came before the court concerning the "Dual Job Law." The court, in refusing to find the law unconstitutional, had this to say:

> The issue here is one of law, not of policy; one of power, not of the wisdom in the exercise of the power. The policy has been expressed by the Legislature through this law, and with its wisdom or economics the Court on these motions cannot concern itself. Conceivably, the law will operate harshly on many individuals. There is force to the appeal of the Teachers Union that present occupants be exempted from the sweep of the law. Unfortunately, however, the Legislature has limited the Court's power to inquire into

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[48] Horosko v. Mount Pleasant Township School Dist. 36 A. (2d) 866 (Pa., 1939).

> the plea. The law is presumed to be constitutional, unconstitutionality cannot be declared unless the reasons therefore appear clear and compelling.
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> Of the approximately 38,000 teachers employed under the Board of Education, about 1,200 hold more than one teaching position; some of them holding as many as four. The plaintiff teaches both in Day High School and Evening High School. Yet, some 5,000 teachers on eligible lists are awaiting appointment.
>
> Inasmuch as the law applies to all persons of a class, it is not discriminatory. Nor does the law transgress or affect that provision of the Constitution which prescribed merit and fitness as the standard for appointment to the civil service.[49]

In Arkansas, a statute of that state provided that members of a school board must "not hold any salaried or fee office of the state or any public subdivision thereof."[50] The court said that the position of a teacher was not an office within the meaning of the statute, but instead was an employment. However, the court would not allow the teacher to act as an employee and a board member in the same school district, but saw no reason why the teacher could not serve as a board member in one district while acting as teacher in another.

It seems apparent from these leading cases that boards will be upheld in their dismissal of teachers whose outside work is of such nature as to make him unfit for the position as teacher, or whose outside activities occupy so much of his time that he "slights" his teaching duties under contract to the board. While it is obvious that teachers may sometimes accept outside employment to supplement their salaries, the board still may release them should such employment substantially interfere with the performance of their teaching duties.

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[49] Lapolla v. Board of Education of City of New York, 15 N. Y. S. (2d) 149 (N. Y., 1939).

[50] Maddox v. State, 249 S. W. (2d) 972 (Ark., 1952).

Leaves of Absence

State laws requiring or permitting local school boards to grant leaves of absence for professional or sickness or for other reasons have been enacted in most of the states. Many local rules and regulations provide for teachers in the particular district. Even when there is a state law on the subject, a great deal is left to local discretion as only general guides for granting leaves of absence are contained in most of the states.

Among the rules and regulations which boards are authorized to adopt are those providing for leaves of absence from teaching duties in such instances as maternity of the teacher, illness or death in the family, professional improvement, and health reasons. Several state legislatures have provided leaves of absence for teachers. Of course, when rules and regulations of school boards conflict with state statutes in such matters, the state law is controlling.

The courts of Massachusetts, in an early case, went so far as to hold that granting a leave of absence with pay constituted a gift and was beyond the power of the board.[51] Since it is now commonly accepted that school systems profit by the added learning, vigor, and enthusiasm of persons returning from leaves of absence, probably no court would now hold that a leave with pay is a "gift". In fact, the exact opposite has been held. In Louisiana, it was specifically ruled that teachers could be granted sabbatical leaves with pay.[52]

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[51] Whittaker v. City of Salem, 104 N. E. 359 (Mass., 1914).

[52] State ex. rel. Scroggens v. Vernon Parish School Board, 44 So. (2d) 385 (La., 1950).

In the absence of state legislation on the matter, it is fairly well established that boards have power to provide for employee leaves of absence. This authority is not only applied from the board's role as an employer, but also from its role as trustee and steward of the welfare of the children in the public schools. The courts will construe as nearly as possible such board rules and regulations in the light of benefits to children, as long as the board acts judiciously in the handling of public monies in its care.

Maternity Leave

At one time, the majority of women teachers were single. Today, however, most of the female teaching force is married. Courts have not always implied through their decisions that boards of education should expect pregnancy among married women teachers. Some state legislatures have dealt with the problem, and most school districts have formulated a policy in one way or another. Usually, it is in the courts that the reasonableness of maternity leave policies is finally decided. A Pennsylvania case is in point. The court in this case was called upon to decide whether because of her pregnancy a teacher became incompetent to perform her duties. The board had so ruled, and had dismissed the teacher on grounds of incompetency. There was general agreement that her incompetency, if it were such, arose not from her educational qualification, but entirely from her physical condition. The teacher sought reinstatement to her position.

The action of the board was upheld by the Supreme Court of Pennsylvania. Said the court in ruling on the case:

> We must bear in mind that Mrs. Brown was not being discriminated against because of her marriage.... Her dismissal

> was due neither to that fact nor her legitimate pregnancy, but because she became incompetent due to her physical incapacity to discharge her duties.[53]

Following World War II, a serious teacher shortage developed and housewives, many of whom had previous teaching experience, were used in the teaching service to alleviate the shortage. It became apparent that married women should not be discriminated against in their employment because of motherhood, a natural consequence of their marital status. If and when pregnancy occurred, the married teacher should not be penalized.

Faced with this problem, several states enacted statutes outlining the rights of the married teacher to maternity leave. In the absence of statutes, boards of education began to include provisions for maternity leave in their policies. In Louisiana, where state statutes provide that regularly employed teachers "shall be granted maternity leave for a reasonable time before childbirth," a board of education adopted a rule requiring any married woman teacher in its employ who became pregnant to ask for a leave of absence immediately after having knowlege of her condition, and under no condition to remain at work after three months of pregnancy. Later, the board adopted a resolution which provided that a teacher who became pregnant again while already on maternity leave must remain off the job six months after the birth of the second child.

A teacher in that state, with tenure, while on maternity leave, notified the board that she was again pregnant, but that the second child would be born in time for her to resume her duties when school reopened in the fall. This request was denied by the board.

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[53] Appeal of School District of City of Bethlehem, 32 A. (2d) 565 (Pa., 1943).

In bringing action for reinstatement, the teacher argued that the board's refusal to permit her to resume teaching was in effect a "removal from office." In Louisiana, a tenure teacher may be removed only on written and signed charges of willful neglect of duty, incompetency, or dishonesty. The teacher's suit for reinstatement was dismissed. The court in ruling that the board had not acted arbitrarily, had this to say:

> No one will quarrel with the fact that a maternity leave is mandatory on the school board, but although the law was intended to benefit the expectant mothers in the teaching profession, the needs of the school system cannot be overlooked. The school has the duty of securing enough teachers for each term and must arrange the teachers' maternity leave in such a way as not to disrupt the operation of the schools. It is not the duty of the school board under the statutes to take 108 S (2d) 96 (La., 1959) under advisement the case of each pregnant teacher and determine what would be a reasonable time before and after childbirth to allow that particular teacher leave. The board is authorized to make such rules and regulations for its own government as it may deem necessary, not inconsistent with law.[54]

A similar case arose in Pennsylvania in which the supreme court of that state held reasonable a board rule which required that female employees should apply for leaves of absence in cases of expected maternity. A teacher who refused to apply for such leave was discharged because of such refusal. The court in upholding the board's ruling had this to say:

> It was her plain duty to notify the board of her changed status and apply for maternity leave in accordance with the regulations. This, however, she obstinately refused to do. Such conduct amounted to 'persistent and willful violation of the school laws,' and in our opinion affords ample justification for termination of her employment.[55]

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[54] Sepulvado v. Rapid Parish School Board (1959) La. 1085 (2d) 96 (La., 1959).

[55] Board of School Directors of Ambridge Borough School v. Snyder 29 A. (2d) 34 (Pa., 1942).

It seems apparent from these cases that boards of education have wide discretionary power in dealing with maternity leave for teachers in their employ, in the absence of a statute directly bearing on the subject.

Sick Leave

The practice of making deductions from the teacher's salary for absences occurred by sickness or personal injury is rapidly disappearing. Boards are coming to realize that granting leaves for a period with full pay for illness or injury has beneficial effect for both the school system and the teacher. Such payments are clearly within the authority of the local board to grant in absence of statutes to the contrary.

It is universally held that a board may compel a teacher to take a leave of absence if the cause is illness or any type of physical or mental disability.

The Supreme Court of New York has a case that will illustrate this point. A teacher had been placed on "inactive status without pay," having been placed there after a medical examination by board of education physicians. The teacher in this case contended that by the board's action she was in fact suspended or temporarily removed from her position without charges or a hearing in violation of the tenure statutes. The court, indicating that no questions of fact were considered, said:

> In our opinion, the placement on inactive status was not a suspension or removal from office, with termination rights; and, therefore, the service of charges and a hearing thereon were not required.[56]

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[56] Brown v. Board of Education, 259 N. Y. S. (2d) 179 (N. Y., 1965).

In a similar case, in the New York Courts, a teacher on tenure had been placed on an enforced leave of absence for alleged illness. The board's bylaws require that an employee who has exhausted his compensable sick leave to immediately apply for and accept leave of absence without pay, stating that failure to do so shall be deemed neglect of duty and an act of insubordination. The teacher in this case maintained that her unsolicited leave was in fact a suspension and that such could not be accomplished without the benefit of a hearing as required under the tenure law. During the pendency of this proceeding, she was re-examined and found fit. The court in ruling for the teacher had this to say:

> The facts in Brown v. Board of Education are quite similar except that this respondent adopted the view in that case that the petitioner was on 'inactive status.' The net results are the same. Respondent's position that petitioner in the instant preceding does not have the same complaint since she has been reinstated since this proceeding began, poses a distinction only in degree. Petitioner here has still lost over a year in pay and accumulated sick leave under circumstances that cannot be justified under the applicable statutory law or respondent's by-laws....
>
> Accordingly, petitioner's application is in all respects granted and respondent is directed to reinstate her as of date when she was originally relieved of her duties with full restoration of loss of pay and sick leave.[57]

The major difference reported was in the former case the teacher had been placed on "inactive status without pay," having been placed there after a medical examination by the board of education physicians. In the latter case, there was no mention of an examination by the board physicians.

Reinstatement at the end of a leave depends upon the terms of the

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[57] Pantaleo v. Board of Education of City of New York, 259 N. Y. S. (2d) 447 (N. Y., 1965).

agreement at the time the leave is granted, or upon the language of the law under which the leave is granted. Usually a teacher on leave returns at the same salary which had been paid in the school year immediately preceding the leave, however, in at least one instance they were not required to do so. In 1962, in Wisconsin, a case of this nature reached the supreme court of that state. The plaintiff-teacher had been engaged as a physical education instructor in the Kenosha public school for 35 years and was on tenure. In October, 1958, he applied for a leave of absence and submitted a physician's certificate to the effect of refraining from his present work from six to nine months because of his medical status. At the time of the application, the teacher was district manager for an encyclopedia firm, and had been selling books for them during the summer months. He had been informed by the company that if he were to remain in that capacity he would have to work full time.

The board of education granted the leave of absence, but attached a condition to the effect that plaintiff was not to engage in any kind of gainful or remunerative employment during the leave.

The teacher took his leave and continued to sell books. When he returned to work he was requested to sign an affidavit to the effect that he engaged in no gainful employment during his leave. This he refused to do so the board advised the teacher that the contract was void but offered him re-employment as a beginning teacher at a lower salary.

The teacher brought suit to test the validity of the contract and the Supreme Court of Wisconsin affirmed the dismissal. The courts pointed out that the school system has a substantial interest in

protecting the continuity of its teaching staff. Substitutes are difficult to obtain, and changing teachers during the school year has a deleterious effect on the students. In ruling, they had this to say:

> Tenure is for the benefit both of the school system and the teachers. It insures the teachers of a permanent position and insures the school system of the continuous services of teachers and reduces the annual turnover of teachers and administrative problems. To protect this interest, the board of education may place upon the granting of leaves of absence restrictions which will reasonably protect that interest and prevent an abuse of such leaves of absence of their use for purposes determined by the school system to be detrimental to it, however, beneficial to the teacher. Such condition was reasonably necessary for the protection of this interest.[58]

No doubt, boards of education will continue to allow teachers leaves of absence for reasonable manner, so long as the board acts in good faith and within its statutory powers.

Remmlein states that a sick leave may be "demanded as a right" on a teacher's part and that a board may compel such leave if the disability might interfere with the efficiency of the teacher.[59] A teacher should not guess what provisions have been provided for such leave.

In the state school code and the local regulations are the provisions governing the granting of sick leaves for employees.

Other Leaves of Absence

The list of the types of leaves to which teachers may be entitled is varied. In some states, the legislature provides that all workers, including teachers, shall be excused from work for a certain limited period of time in order to visit the polls and vote. Leaves for jury

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[58] Liddicoat v. Kenosha City Board of Education, 117 N. W. (2d) 369 (Wisc., 1962).

[59] Madaline Kinter Remmlein, School Law (New York, 1950), p. 137.

duty, for active service in the armed forces, and for other community service may be provided.

In the absence of state laws on the matter, it is generally conceded that boards may exact reasonable rules and regulations governing employee leaves of absence. What constitutes reasonableness, however, may be open to question. Sometimes, the teacher may feel that his rights have been infringed upon and seeks, through court action, to ascertain his status before the law. In Indiana, for example, a tenure teacher declared his candidacy for state representative. The board immediately passed a resolution that any school employee elected to public office would be required to take a leave of absence without pay. The teacher brought action to recover salary lost through enforcement of the resolution. The court in ruling in favor of the board had this to say:

> This rule, general in terms and applying to all teachers, does not to us seem such an unreasonable exercise of the board's powers as to warrant judicial interference. The board, not the courts, is charged with the duty of managing the school system and so long as it acts with fairness its decisions on matters within its descretion are not subject to judicial view.[60]

The fact that the resolution was passed subsequent to the announcement regarding his candidacy, the court said that it was not necessary for the board to wait until the anniversary of the contract to put new rulings into effect. The principles of law propounded in this case are majority holdings in most of the states.

Perhaps the most common type of leave is for professional improvement. This may range from leave for teaching in a foreign country on an exchange basis to attending a professional meeting. Sabbatical leave

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[60] School City of East Chicago v. Sigler, 36 N. E. (2d) 760 (Ind., 1941).

for professional study in one instance was declared to be the right of a teacher. A case came before the courts in Louisiana seeking to compel a school district to grant a Sabbatical leave for one semester for cultural improvement. The board refused on the grounds that a qualified substitute to replace him, while on leave, could not be found. The court in ruling in favor of the teacher had this to say:

> In the first place, there is no testimony in the records to show that they could not get a qualified substitute teacher and there is no showing that any effort was made to get a substitute teacher and we cannot take judicial cognizance of the shortage of school teachers. It would appear to us the board could have found one teacher to employ if it made an effort and it was their duty to do so.
>
> And in view of the fact that his application was filed in accordance with law and in time prescribed thereby, we believe we should affirm the judgment and order the defendant school board to grant relator sabbatical leave as requested in brief filed in his behalf.[61]

Professional leave is usually a privilege granted by the board of education. Unless provision is made by the statutes, leave for reasons other than illness is a matter within the discretion of the local board. Generally, boards have become more liberal in defining professional leaves of absence. Travel, with the special purpose of study, is being gradually included within the scope of such leave.

Teacher Tenure

One of the most constructive concepts for improving both the effectiveness of the school system and the general welfare of public school personnel is that relating to tenure. It may be thought of as a

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[61] State ex rel. Scroggins v. Vernon Parish School Board, 44 S (2d) 385 (La., 1950).

security measure which society establishes in behalf of personnel entrusted with the education of its children. In its finest intent, tenure is a necessary safeguard to provide continuity of employment for the competent, to prevent unjustified dismissals, and maintain staff stability and academic security in the interest of carrying out the function of the school system.

Tenure practices that affect public school personnel are shaped by statutory provisions and court decisions. Within the legal framework, however, a heavy responsibility rests with local school officials for realizing the intent of tenure.

Legislation designed to afford security for teachers in their position is of fairly recent origin. Historically, boards of education had the power to employ and discharge teachers at the end of the term at will. Educators and other groups interested in education have long recognized the detriment to education which necessarily follows from the instability of teaching personnel. Insecurity renders the profession unattractive to many of the most able people to the detriment of education. Furthermore, it deprives the schools of the advantage which would be gained by the retention of teachers in their positions long enough to enable them to acquaint themselves with the community and its problems.

Characteristics of Tenure

Tenure, in the broadest sense, embodies a system designed to provide educators with continuing employment during efficient service, and which establishes an orderly procedure to be followed before their services are terminated. Some features of the tenure system include:

1. Completion of a specified probationary period, the duration of which is generally three years. The probationary

period is construed to mean a temporary appointment, during which time the individual is carefully supervised and appraised in terms of the extent of his ability to render efficient service to the school organization.

2. Automatic tenure status at the end of the probationary period to personnel who meet established requirements.

3. An orderly procedure for the dismissal of personnel. This includes provisions for notifying the individual that his services are unsatisfactory, as well as a reasonable opportunity to show improvement before notification of intent to dismiss is given.

4. Notice of the intent to terminate the services of the individual in the event that the desired improvement in service has not been attained. Written notice of the intent to dismiss details the specific reasons for the action which is contemplated.

5. A hearing before local authorities which provides an opportunity for the accused to defend himself against the charges.

6. The right to appeal an adverse decision to higher educational authorities, and to the courts.[62]

The meaning and operation of tenure laws are not always understood by some persons within the teaching field, nor by many boards as well. Perhaps this misunderstanding has given rise to the relative high incidence of tenure litigation. The number of litigation involving tenure laws are increasing rapidly. There are a number of reasons for this increase. There is the normal increase that follows from the enactment of tenure legislation in a greater number of states. Upon the passage of special acts affecting a large number of persons or agencies, there inevitably arises a series of cases seeking to have the law construed by the courts. Until such construction is had, there are doubts as to the scope of its application. The conflict between the enthusiasm of

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[62]William B. Castetter, Administrating the School Personnel Program (New York, 1962).

teachers to enforce their newly acquired rights and the tendency of the board to cling to tradition will doubtless be responsible for a large number of litigations.

Tenure legislation varies in the several states from that which provides merely that the teacher's contract shall continue from year to year unless the teacher is notified within a specified time that it will not be renewed, to more elaborate systems which provide that after a stated probationary period the employment shall become permanent. The probationary period varies from one year in some states to five years in others. During the probationary period, the teacher may be dismissed at the end of the year for any or no reason, but once tenure has become permanent, one may be dismissed only for causes stated in the law. If the law merely continues the contract unless or until notice of termination is given, the teacher has little protection she would not have in the absence of the law. Of course, the notice which must be given a stated number of days before the end of the term enables her to seek another position earlier than she otherwise would be able to do, but it makes her position no more secure. The board may dismiss her at the end of any year merely by giving notice to that effect. Such legislation can hardly be called tenure legislation. The teacher is entitled to no hearing, no cause for her dismissal need be shown, and the procedure required of the board is very simple and formal in its nature.

Objectives of Tenure Legislation

One of the major purposes of tenure legislation is to protect the teacher from unjust and hasty dismissal. A Louisiana court had this to say:

> The tenure teacher act was designed to accomplish a laudable purpose. If sanely and impartially administered, the beneficient results to inevitably follow vindicate the persistent efforts of its champions in procuring its adoption. It was intended to protect the worthy instructors of youth of the parish from enforced yielding to the political preferences of those theretofore having the power to grant or without employment and to vouch-safe to such teachers employment, after a long term of satisfactory service to the public, regardless of the vicissitudes of politics or the likes or dislikes of those charged with the administration of the school affairs.[63]

The Minnesota Supreme Court in discussing the purposes of tenure legislation used the following language:

> In 1885, the National Education Association brought forth the question of tenure for school officials. A committee of the association studied the matter and later submitted a report. Generally speaking, the tenure so sought was interpreted to mean, in substance, the application of principles of civil service to the teaching profession. It was thought for the good of the schools and the general public the profession should be made independent of personal or political influence, and made free from the malignant power of spoils and patronage. The bases for recommendation were that better talent would be attracted to the teaching profession; that annual contracts therefore in vogue had not resulted in the elimination of poor, incompetent, and inefficient teachers; that the principle of annual elections or appointment officers, and in the very nature of things should not apply to teachers; that not infrequently the best teachers were discharged for inadequate reasons.[64]

Tenure Status When District Merges With Another

Does a tenure teacher automatically lose her tenure status when the school district in which she holds tenure merges with another district? This was an issue in New Mexico in 1962. The court's decision should be of interest to teachers and school board members who, by virtue of reorganization, may find their district with an oversupply of tenure

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[63] Andrews v. Union Parish School Board, 184 So. 574 (La., 1938).

[64] McSherry v. City of St. Paul, 277 N. W. 541 (Minnesota, 1938).

teachers. In this case, the teacher in New Mexico had acquired tenure status in the Forrest School District No. 53 in Quay County and came within the protection of the tenure law in that state. New Mexico statutes provide that any public school teacher who has taught for three consecutive years, and holds a contract for the completion of the fourth consecutive year in a particular district shall be entitled to tenure status and the rights attendant thereon. The board of education of the Forrest School employed the teacher for the fifth consecutive year, but before she could enter upon her duties, the Forrest and Melrose districts merged. A new school board was elected and the teacher was allowed to teach and to receive compensation for the ensuing year. However, on April 17 she was notified of her dismissal. When the board refused her a hearing, and retained a nontenure teacher for her position, the teacher appealed to the state board of education. The state board affirmed the decision of the local board so the teacher took her case to court.

The district court entered judgment in favor of the teacher, and the state board of education appealed. In upholding the lower court's ruling and the teacher, the Supreme Court of New Mexico asserted:

> The question for consideration is not one related to consolidation only; rather the question is whether a teacher automatically loses tenure status acquired in a particular district when that district is consolidated or merged with another district. The trial court held that the teacher does not, and we think it reached the correct conclusion.
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> As we read the statutes, upon consolidation, the governing board of the consolidated district becomes the governing board of the particular school district which merged into and became part of the newly created district. Actually, the consolidated district was a continuation of the old district which went into it. It follows, therefore, that the newly consolidated district was the 'particular' district in which appellee earned tenure.[65]

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[65] Hensley v. State Board of Education, 376 P. (2d) 968 (N. M., 1962).

The defense given by the board for dismissing the teacher, namely, that it had too many teachers and needed to reduce the number, reasoned the court, did not appear to be a good and sufficient cause for dismissal of a tenure teacher when another teacher without tenure was retained in her place. As stated by the same court in an earlier ruling:

> The legislature has recognized the sound public policy of retaining in the public school system teachers who have become increasingly valuable by reason of their public servants and indefinite tenure of position during satisfactory performance of their duties.[66]

The court could not believe that the legislature intended that a new designation of name or a different governing board should destroy the actual existence of the "particular" school district which merged to form the consolidated district insofar as acquiring tenure was concerned.

The effect of this decision, if it receives wide acceptance, should afford greater job stability for teachers with tenure when districts merge.

Rights of Teachers Under Tenure

The right of a teacher who has been admitted to permanent tenure in the district where such right has been secured, subject to reasonable rules of the board of education, is held to be a vested right to employment in the district, and cannot be deprived of this right except through an exercise of due process of law.

A major principle of tenure, with much support by the courts, is

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[66] Ortega v. Oteco, 154 P. (2d) 252 (N. M., 1944).

the tenet that a board of education has power to dismiss a teacher under tenure only by following the procedures prescribed in the statutes. A case arose in New York where a tenure teacher was placed on inactive status, without pay, for allegedly being then physically unfit to teach, without giving her a hearing. The court in ruling had this to say:

> It is the general rule that a tenure teacher may not be removed without a hearing, even though the evidence in possession of the school board may appear to warrant removal. Moreover, a teacher's right to a hearing, accorded by statute, may not be altered by the board.
>
> Whether the action of the board resulted in a forced leave of absence due to illness, with payment from and reduction of accumulated absence reserve, or in a 'suspension' and placement on 'inactive' status without pay is of no moment. What is important is the obvious fact that respondent's action has effectively separated petitioner from her teaching position without the required hearing, which thereby prevented petitioner from attempting to refute the finding of ill health, from preserving her accumulated absence reserve, and from earning her salary as a teacher. In my view, regardless of terminology used, respondent's action has effected a suspension without pay or accompanied by a loss of such accrued reserve constitutes an unwarranted, prejudicial and damaging removal from office during the period of suspension. The finding of physical fitness without a hearing was thus contrary to law and the petitioner is entitled to be reinstated as of date she was placed in 'inactive' status.[67]

Of course, the statutory provisions for tenure differ widely from state to state, but the principle that power to dismiss a tenure teacher depends upon following statutory provisions is universally applied.

In an Illinois case where the tenure statutes provide "that if the charges assigned for dismissal are 'on account of causes that may be deemed to be remediable' the board, before serving notice of such charges, must give the teacher a written warning notice, stating with

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[67] Brown v. Board of Education, 254 N. Y. S. (2d) 60 (N. Y., 1964).

particularity the causes which, if not removed, may result in bringing dismissal charges." The board, in this case, without giving a warning notice, dismissed a teacher for inflicting corporal punishment on students, swearing, and exhibiting an ungovernable temper, and in the best interest of the school. The court in ruling in favor of the teacher had this to say:

> While there is evidence in the record that plaintiff had a fiery temper, we must consider the type of students with whom he was dealing and the rather fantastic atmosphere which existed at the school. It must be said that the findings of the Board that the conduct of the teacher was not remediable is against the manifest weight of evidence. Consequently, the plaintiff should have been given the warning notice provided for in the Tenure Act.[68]

A part of the dismissal procedure, under most tenure laws, is the requirement that a teacher who is to be dismissed or who is not to have his contract renewed must be notified in writing of the decision of the board to dismiss or to refuse to renew the contract. The specifications for such notice differ from state to state. Nevertheless, the general rule concerning notice is that failure to give a teacher a timely written notice of the proposed nonrenewal, or of the proposed dismissal, results in automatic re-employment or continuation of employment.

The nature of notice of nonrenewal of contract is sometimes at issue. Unless the statutes authorize or specify otherwise, the rule is that where notice is required to be served upon a person for the purpose of determining rights, personal service is intended. However, where service by registered mail is statutorily provided, service is effected when the notice is properly addressed, registered, and mailed and a reasonable time for the transmission and receipt of the notice has elapsed

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[68] Miller v. Board of Education, 200 N. E. (2d) 838 (Ill., 1964).

following the deposit of the notice in the post office.

An interesting case arose in Washington where a teacher was notified of the nonrenewal of her contract, but failed to respond to the "mail arrival notice" left by the carrier. The certified and registered mail addressed to her was returned to the school district. The teacher then claimed that she had not been notified. The court in ruling that one could not ignore customary and established methods of postal notification had this to say:

> The applicable principle is fundamental and unquestioned. He who prevents a thing from being done may not avail himself of the nonperformance which he has himself occasioned, for the law says to him in effect: 'This is your own act therefore you are not damnified.'
>
> In this case, it is undisputed that appellant was not bedfast; that she received her regular mail and at least one notice of the arrival of certified or registered mail; that she was aware of the principal's recommendations relating to nonrenewal of her contract; and that, as a teacher with several years' experience, she had reason to know, or should have known, of the notice provisions relating to nonrenewal of teachers contracts. It is likewise clear that each of the two letters addressed to the appellant was delivered to her home address, and a notice of arrival left, on the day following posting.
>
> Under the circumstances, we conclude that a period of four days following posting constitutes a reasonable time for transmission of the proposed nonrenewal was, accordingly, complete by April 15th at the latest.[69]

In another New York case, it has been held that an agreement by which the board attempted to get rid of a tenure teacher without charges or a hearing was violative of the tenure law and the constitutional ban against making gifts of public money. The agreement, in this case, provided that if the teacher would resign, the board would pay her for the remainder of the year. Later, the teacher decided not to be bound by

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[69] Robel v. Highline Public School District, 398 P. (2d) 1 (Washington, 1965).

the agreement and brought an action to require her restoration to her position with full tenure rights and back pay. The court rules for the teacher on the ground that the agreement was not legal, saying:

> Such an agreement was contrary to the statute which says that teachers on tenure shall not be removed except for specified causes after a hearing on written charges. It is clear on this record that petitioner never voluntarily quit her job but was told by the board president to stop teaching and not return to her classroom. It is unquestionably a violation of the statutes and of tenure rights to remove, without charges and hearing, a teacher who has tenure. Of course, a teacher like any other employee may resign but the assertion here is not that petitioner resigned but that for a consideration she waived her right to a hearing. To validate such a holding of waiver would be contrary to the strong public policy of this state expressed in the tenure statutes. The purpose of the tenure law is 'to give security to competent members of the educational system in the positions to which they have been appointed.' The statutory tenure terms can be changed by the Legislature but never by the board of education. For the courts to validate a 'waiver' by a teacher of such rights would be violative of the spirit and public purpose of the act which protects the school system by giving permanency to the jobs of experienced teachers. This school board in order to back out of an unpleasant situation tried to create its own public policy by destroying tenure rights and giving away public money.[70]

To defend their rights under tenure, professional employees must appeal to the proper authorities and use appropriate legal action. A Georgia case as an illustration helps to make this point clear.[71] A teacher's contract was not renewed for the school year 1963-64. The county board, after a hearing, upheld this action. The Georgia State Board of Education, upon another appeal, sustained the nonrenewal action. Thereupon, the teacher brought a court action for mandamus to compel the county board to reinstate him. When the case reached the Supreme Court of Georgia, the court ruled that the mandamus action would not lie against

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[70] Boyd v. Collins, 228 N. Y. S. (2d) 228 (N. Y., 1962).

[71] Maxey v. DeKalb County Board of Education, 137 S. (2d) 657 (Ga., 1964).

county board because, under the statutes, the state board's decisions were binding upon all parties. In other words, it held that the action should have been brought to compel the state board and not the county board to reinstate the teacher.

It seems to be generally conceded that the teacher's position, despite the attainment of permanent tenure, is an employment and not an office, since tenure statutes serve merely to extend the term of employment by operation of law, and not to change the relation of employer and employee existing between the district and the teacher. The tenure rights of a teacher include the right to active and continued employment, subject, of course, to removal or dismissal for the reasons and in the manner provided by statute. However, terms different from those which governed his previous service may be imposed upon a permanent teacher, so long as the terms imposed are not arbitrary or capricious, but are calculated to meet the current needs of the school. The changes and terms necessary and proper to serve best the interests of a school system must rest on the sound discretion of the administrative officials, although such discretion must not be unreasonable or capriciously exercised.

Summary

Teachers perform a governmental function, but they are not public officers; they are employees of the board of education for whom they work. The distinction between "employees" and "officers" is not always clear, although courts recognize certain differences between them.

The state may prescribe such qualifications for teachers as it deems necessary, and it may require a teacher to hold a certificate

which indicates that he possesses the prescribed qualifications. Those to whom the state has delegated authority to determine whether a prospective teacher has met the statutory requirements for a certificate and to issue a certificate when the requirements have been met, perform a discretionary function and the court will not control their discretion unless it is abused. However, agencies authorized to issue certificates cannot refuse to do so without good cause. A teacher's certificate is not a contract between the teacher and the state; it is a license. Therefore, being a mere privilege conferred by the state, the state may revoke it. The state may also impose additional qualifications upon teachers who already possess certificates.

A teacher, so it is generally held, cannot enter into a legal contract unless he possesses the certificate required by statute. One who teaches without the required certificate is a mere volunteer and cannot recover for services rendered in court of law or quantum merit in court. Where the statutes require a certificate in order to enter into a contract, he must possess it at the time of signing the contract. However, when the statutes make the possession of a certificate a condition of employment, the courts are divided with respect to time when the teacher must have the certificate. Some have ruled that it is sufficient if the certificate is held at the time he begins to teach.

A board of education cannot legally employ a teacher who does not possess the required certificate. The board may legally require additional qualifications that are reasonable. The board must also act in its corporate capacity. The meeting must be a legal meeting when employing teachers.

Where the statutes provide for written teachers' contracts, an oral

contract is invalid and a teacher, as a rule, cannot recover for services rendered. A board of education cannot delegate the authority to select and employ teachers. A board of education is bound by the statutes, and a teacher's contract may be unenforceable because of some irregularity in the making of it. However, some unenforceable contracts may be ratified. A board may ratify any contract which it had authority to make in the first instance. Acceptance of the service of a teacher, with a knowledge of all the facts, usually constitutes ratification, provided, the board had authority to make the contract in the first place. As a general rule, teachers may recover their salaries for the time school is closed because of an epidemic of some contagious disease unless the contract provides otherwise.

A statute providing for tenure for teachers does not create a contract between the teacher and the state. Such a statute is an expression of current legislative policy and may be amended by later legislative bodies. Teacher-tenure statutes are intended to protect the teachers from dismissal for causes personal to them; they are not intended to guarantee positions to teachers regardless of changing conditions.

CHAPTER III

ACADEMIC FREEDOM OF TEACHERS

It is generally assumed that teachers enjoy a considerable measure of personal, political, and academic freedom in their status as teachers because the public schools teach concepts of democracy and freedom. It may surprise many to find that teachers as a class often find themselves limited in these respects more than persons who work in industry or private enterprise. The teacher has always been in a unique position in the community. She has been under a duty to conduct herself in such a manner as to command respect and goodwill of the community in which she works. One result of that duty is the deprivation of the teacher of certain freedom of conduct and action enjoyed by persons in other vocations. Certain conduct in or outside the classroom may be such as to destroy the usefulness of the teacher in the schools. The real difficulty arises when undue restrictions which have no relationship to her usefulness are imposed upon the teacher.

Teachers are not "second class citizens", however. They have all the rights and immunities accruing to all citizens, plus some rights, such as privileged communication, which the average citizen does not ordinarily possess.[1] The limitations upon political and personal

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[1]Chester Noltre and John Phillip Linn, School Law For Teachers, (Danville, Illinois, 1963), p. 167.

freedom of teachers arise from their unique status as government employees, as well as their status under the school laws of the state.

Academic Freedom in Classroom Performance

Perhaps no problem has created more resentment among educators than attempts to control what they should teach and their freedom of thought and expression both inside and outside the classroom. The problem arises more frequently in colleges and universities, but the public schools have not escaped. That there should be complete freedom for all teachers to teach anything that may suit their fancy, discuss any matter they may choose in any class, or advocate doctrines, which according to the mores of the time, are considered pernicious, would not be contended. It is inevitable that among the many teachers in schools, a few will be found that will abuse what is commonly called academic freedom.

The best known of the academic freedom cases is the famous "Monkey Trial" of John Thomas Scopes, a teacher in Tennessee, who taught his students Darwin's theory of evolution in contravention of a state statute prohibiting the teaching of that subject. The trial court held that the state may restrict the teaching of evolution in the public schools, and fined Scopes the sum of $100. The question of the constitutionality of the statute was then appealed to the Supreme Court of Tennessee for final disposition. The court upheld the trial court, using the following language:

> The statute before us is not an exercise of the police power of the state undertaking to regulate the conduct and contracts of individuals in their dealings with each other. On the other hand, it is an act of the state as a corporation, a proprietor, an employee. It is a declaration of a master

> as to the character of work the master's servant shall, or rather shall not, perform.
>
> In dealing with its own employees engaged upon its own work the state is not hampered by the limitations of the Tennessee Constitution nor of the Fourteenth Amendment to the Constitution of the United States.[2]

The court's decision seemed to hinge on the relationship of master and servant. Scopes was an employee of the State of Tennessee, as such.

> He had no right or privilege to serve the state except upon such terms as the state prescribed. His liberty, his privilege, his immunity to teach and to proclaim the theory of evolution elsewhere than in the service of the state was no way touched by this law.[3]

In Maryland a teacher brought a suit to require the board of education to reinstate him as a teacher after his contract had not been renewed. The plaintiff's primary contention was that the County Board's action was in violation of his constitutional rights. Particularly, the termination denied him the right of free speech guaranteed by the First Amendment. The board did not renew his contract because he insisted upon assigning the book Brave New World to his psychology classes. The court in dismissing the case had this to say:

> The factual allegations contained in the complaint, and in plaintiff's affidavit, show no denial of freedom of speech. It is claimed the plaintiff's contract was terminated because a complaint had been received about his assignment and teaching from the book Brave New World, and that the book thereafter be removed from the library. There is no allegation that plaintiff's personal right to free expression is in any way inhibited by the school authorities.

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[2] Scopes v. State, 289 S. W. 363 (Tenn., 1927).

[3] Ibid.

Even if such allegations were present, they would afford no grounds for the relief sought in this case. The right of free speech or expression, like other First Amendment guarantees, is not absolute.

> Where the abridgment of the abstract right of free speech results from government action taken for the protection of other substantial public rights, no constitutional deprivation will be found to exist. No unconstitutionality results where the right of free speech is reasonably curtailed as a prerequisite to continued government employment.
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> ... A school system has the constitutional right to require school teachers, as a prerequisite to their continued employment, to adhere to such requirements as those contained in the caution at the head of the reading list.[4]

The academic freedom of teachers is further limited in other subject areas. A teacher in a boys' technical high school, who discussed matters relating to sex in his speech classes, was suspended and later discharged. He sued for reinstatement on the grounds that his dismissal had been arbitrary, oppressive, and unreasonable. The court held that the teacher had been legally dismissed and in doing so stated:

> Such argument fails to recognize that the issue is not whether it was improper conduct for relator to discuss sex in his speech classes, but rather whether his handling of this topic was such a violation of recognized standards of propriety as to constitute bad behavior. Thus, if relator's discourses on sex in his speech classes had been conducted in such a manner as to constitute proper conduct in a biology class, they would not automatically have been converted into misconduct warranting discharge by the happenstance that they took place in the speech class, absent any rule of the school authorities prohibiting the same or any specific warnings to relator from the principal or superintendent that sex was not to be a subject of discussion in his speech classes. However, if relator's manner of discoursing on the topic of sex in his speech classes exceeded the bounds of the recognized standards of propriety, we deem that it constituted bad conduct which would warrant a discharge even though there was no expressed rule prohibiting it and he had received no warning to desist therefrom. As an intelligent person trained to teach at the

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[4] Parker v. Board of Education of Prince George's County, Maryland, 237 F. Supp. 222 (Maryland, 1965).

high school level, relator should have realized that such conduct was improper.[5]

Two judges concurred in the majority opinion that the teacher had been legally dismissed, but gave as their reason that parents have a right to know that those who teach their children have had special training in the presenting of the subject matter in question. Not all teachers, asserted the judges, are competent to teach sex education; only persons properly certified should be allowed to undertake to teach this delicate subject.

Another case is noteworthy, because it involves the freedom to teach that which may be called immoral. The well-known author, Bertrand Russell, had been appointed to the chair of philosophy at City College of New York. His appointment was challenged upon the grounds that Russell was not of good moral character, and his appointment violated public policy. The court quoted from Russell's writings to the effect that he advocated temporary childless marriages among university students. The court said:

> While this court would not interfere with any action of the board insofar as a pure question of 'valid' academic freedom is concerned, it will not tolerate academic freedom being used as a cloak to promote the popularization in the minds of adolescents of acts forbidden by the Penal Law. This appointment affects the public health, safety and morals of the community and it is the duty of the court to act. Academic freedom does not mean academic license. It is the freedom to do good and not to teach evil. Academic freedom cannot authorize a teacher to teach that murder or treason are good. Nor can it permit a teacher directly or indirectly to teach that sexual intercourse between students, where the female is under the age of eighteen years, is proper. This court can take judicial notice of the facts that students in

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[5] State ex rel. Wasilewski v. Board of School Directors of the City of Milwaukee, 111 (2d) 198 (Wisconsin, 1961).

> the college of the City of New York are under the age of eighteen years, although some of them may be older.[6]

Defamation of Character

Sometimes a teacher is placed in the precarious position of having to make statements which can be construed as defaming the reputation of another. To allow teachers to carry out the proper function of teaching, the law recognizes that the teacher must be free to state candidly his observations, beliefs, and opinions. It is recognized that the responsibility of a teacher to his pupils, to his superiors, and to the public, demand a well-defined limit of free communication without threat of liability. Under certain circumstances, the teacher has a qualified privilege of communication. The right of free speech guaranteed by the First Amendment to the federal constitution does not mean the unrestricted right to say what one pleases at all times under all circumstances.

One who writes or speaks disparagingly of another or who spreads false or damaging rumors may be held guilty of defamation of character. The principle of law governing slander was spelled out by a Kentucky Court:

> Words are slanderous or actionable per se only in cases where they are falsely spoken and (1) impute the commission of a crime involving moral turpitude for which the party might be indicted and punished; (2) impute an infectious disease likely to exclude him from society; or (3) impute unfitness to perform the duties of an office or employment; or (4) prejudice him in his profession or trade; or (5) tend to discredit him.

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[6] Kay v. Board of Higher Education, 18 N.Y.S. (2d) 821 (N. Y., 1940).

> In all other cases spoken words are either (a) not actionable at all or only actionable (b) on proof of special damage.[7]

When the defamatory words are published in written form they are libelous; when verbally published, they are slanderous. Libel and slander are torts against the person of another, and an action will be where the words spoken or written constitute accusations relating to criminal activities, certain loathsome diseases, mental disorder, unchastity, or other statements resulting in damage to another.

A teacher as a public employee owes a duty to the public. If a statement by a teacher is made in good faith and without malice, the statement is generally privileged. Any statement, however, which is false or motivated by malice removes the privilege, and subjects the person to liability.

What defense has the teacher against a charge of defamation of character? One defense, of course, is that the communication was privileged. Still another defense is truth, but although truth is a defense, even the truth can prove defamatory if not published with good intentions and toward justifiable ends. School people should not feel that because they speak the truth, and enjoy a measure of privilege, publication of certain information about others is permissible.

In a case that came before the courts in Oklahoma, a teacher made the following notation in the register immediately preceding the student's name.[8] "Drag all the time; ruined by tobacco and whiskey." The teacher knew that the register would go to the clerk of the board. The

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[7] Spears v. McCoy, 159 S. W. 610 (Ky., 1913).

[8] Dawkins v. Billingsley, 172 Pac. 69 (Okla., 1918).

teacher admitted the falsity of the statement, but maintained that the statement was protected by the qualified privilege because he believed it to be true at the time of publication.

The court, however, could not agree with the teacher. The teacher had deviated from the procedure necessary to do his job effectively. Since defamatory statements in his register were beyond the teacher's strict line of duty, the court concluded that such statements are not privileged.

This brings one to another interesting question. Are student records public? The courts are not in agreement on the question of whether student records are public records. One of the earliest cases on this topic arose in Iowa in 1919 and reached the Supreme Court of that state. A high school girl, a senior, had refused to wear a cap and gown to commencement exercise, and was denied her diploma and grades. The superintendent of schools maintained that the grades were the property of his school and no one had access to them. The court, in a ruling compelling the board to issue her grades, had this to say:

> In this case, in declaring the student record a 'public' record, the court was referring to only one kind of record, that of a permanent or objective nature. Much of the information gathered on students today is of another nature, personal, confidential and temporary. It is whether or not parents should have access to this last variety that concerns teachers today.[9]

In New York, a father brought suit to require the disclosure of his son's school records. In granting this request, the court said in part:

> Petitioner's rights, if any, stem not from his status as a taxpayer seeking to review the records of a public corporation, but from his relationship with the school authorities as a parent who under compulsory education has delegated to

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[9] Valentine v. Independent School District, 174 N. W. 334 (1919).

> them the educational authority over his child. Thus the common law rule ... to the effect that when not detrimental to the public interest, the right to inspect records of a public nature exists as to persons who have sufficient interest in the subject matter, is a guide....
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> The records here sought to be inspected are not, strictly speaking, public records. No statutes exist which specifies those who are and those who are not entitled to inspect them.... The records are required by law to be kept.... It needs no further citation of authority to recognize the obvious 'interest' which a parent has in the school records of his child. We are, therefore, constrained to hold as a matter of law that the parent is entitled to inspect the records.[10]

Only four states have attempted to spell out the exact legal status of public school records. In Oklahoma, one of the states, the revelation of student information by a teacher is a misdemeanor. The statute reads:

> It shall be a misdemeanor for any teacher to reveal any information concerning any child obtained by him in his capacity as a teacher except as may be required by his contractual duties.[11]

It is clear that not everyone should have access to information which, if released to unscrupulous persons, might be damaging or even detrimental to the students. But student records are not alone the property of the faculty or of the school. The courts have termed this, "quasi-public" (like a public) record to describe the legal status of the student record.

It is doubtful if the teacher can successfully deny the disclosure of student records to parents, at least that part that is permanent. He might deny that part which is temporary and personal in nature.

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[10] Van Allen v. McCleary, 211 N. Y. S. (2d) 501 (N. Y., 1961).

[11] Oklahoma Statutes Ann. Title 70, Sec. 6-16.

In the absence of statutes, the wise board will develop defensible policies on student records against the time when a parent demands disclosure and as a safeguard for its faculty.

Communications by Teachers About Pupils

The courts have set up a protection for those whose duty it is to divulge information about others. Publication may be either absolutely or qualifiedly privileged. The former applies to legislative personnel, judges, and executive members of government in the proper discharge of their duties. It is never applicable to teachers, who come within the province of the second classification, that of qualified or conditional privilege.

A case appeared before the courts in New York concerning privileged communication.

A teacher in high school complained to the principal that a girl in her class when she got up to recite caused the other children to titter, and that there was a rumor about the school that she was pregnant, and a request was made for him to do something about it.

A meeting of the Board of Education was called, at which meeting it was moved, seconded, and carried that the principal inform the parents to take her to a physician and see if she was in proper condition to attend school. In accordance with the resolution, the principal wrote the father of the student.

The parents took the student to two doctors who examined her and found that she was not pregnant and was a virgin.

The parents then sought judgment for $1,000 for student in slander action for alleged statement of the principal to students' parents that

student was pregnant and unfit for school. The Supreme Court of New York in reversing the decision of a lower court and dismissing the case had this to say:

> ... Defendants duty required him to communicate to the board of education the fact that rumors concerning plaintiff were circulated among the students and teachers. In so acting, he was protected by a qualified privilege and is free from liability unless his conduct results from malice. That there is no actual malice is conceded. There is no evidence that defendant acted with a wanton and reckless disregard of plaintiff's rights or otherwise than in good faith.[12]

In another case, however, that appeared in the Georgia Courts concerning an action by student against a college president for slander in falsely and maliciously accusing her in hearing of another of indictable offense of larceny, during investigation of series of thefts, at college, were sufficient to establish prima facie case of liability.[13]

Words, even though ordinary slanderous, are not so considered when spoken by party in performance of public or official duty, upon first occasion and without malice.[14]

Communication by Parents About Teachers

Owing to the public nature of the teaching profession, a teacher is not exempt from criticism, but accusations imputing to a teacher's want of professional capacity, immorality, or unprofessional conduct are clearly actionable per se unless privileged. The private conduct or character of a teacher or any person engaged in activities of public conern may be criticized so far as his private conduct of character affects his public

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[12] Forsythe v. Durham, 200 N. E. 674 (New York, 1936).

[13] Davidson v. Walters, 91 S. E.(2d) 520 (Georgia, 1956).

[14] Gaillot v. Sauvagean, 154 S.(2d) 515 (Louisiana, 1963).

conduct. The criticism, although defamatory, as privileged must represent the actual opinion of the critic and not be made solely for the purpose of causing harm to the other.

The law of defamation touches the teacher's career in this way. How free is a parent to criticize a teacher, even though later it is proved that the parents accusations are false? This case was placed before the courts in New York in 1965. Since parents are taking a more active interest in school than ever before, this case should be of interest to teachers.

Plaintiff had been an industrial arts teacher in the New York City school system for seventeen years. The defendant is the mother of one of the plaintiff's former pupils. In this action for libel, plaintiff seeks damages for "injury to his credit and reputation and his standing in the community" and "great mental pain and anguish."

The defendant visited the principal of the school at his office to complain and investigate an incident which her son Charles told her took place in the school on the day before. The principal called the plaintiff to the office. In the presence of defendant and her son, plaintiff was informed by the principal that he had received an oral complaint from defendant and her son that while correcting the schoolwork of Charles, grabbed him by the neck and pushed his head into the desk, causing his nose to bleed. The teacher denied such incident took place. The principal requested the parent to write a letter concerning the incident and submit it to him. The letter was placed in the teacher's personal file at school.

The teacher brought action against the parent for libel on account of the letter accusing teacher of mistreating student.

The court held that the accusation about (1) the teacher was false and (2) that the letter and its contents were libelous. The next question is whether the communication was "privileged." The court gave the following test.

> A communication made bonafide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation.
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> The rule of law that permits such publication grew out of the desirability in the public interest of encouraging a full and fair statement by persons having a legal or moral duty to communicate their knowledge and information about a person in whom they have an interest to another who also has an interest in such person. Such privilege is known as a 'qualified privilege'. It is qualified because it does not extend beyond such statements as the writer makes in the performance of such duty and in good faith believing them to be true.
>
> Unquestionably, the defense of 'privilege' is applicable here and the courts so hold.[15]

The obvious "interest" which the parent has in his child, and in his education, makes him legally covered by the privilege, so long as (1) he complains to the school official qualified to receive such a complaint and (2) he acts not with malice and ill will, but in good faith. The motives of the accuser rather than the accusations being true or false determine the proof of damages.

Libel

Written defamation, libel, is more easily redressed in the law courts than spoken defamation. Libel is frequently actionable even

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[15] Segall v. Piazza, 260 N. Y. S. (2d) 543 (N. Y., 1965).

though the same words if spoken would not be actionable without special damage; that is, when the words are written, no injury to reputation need be proved.

In New York, a jury awarded a teacher $100,000 in damage after the defendant was found guilty of circulating to approximately sixty persons a libelous statement to the effect that the teacher was a malicious liar. Since the teacher enjoyed a fine reputation, and did not lose his job as a result of the statement, the court reduced the award of the jury to $50,000. In so ruling, the court had this to say:

> One cannot review the long, honorable, active life of this plaintiff without feeling assured that the assailing of his character or reputation, which heretofore has been without reproach according to evidence must have wounded the plaintiff deeply.
>
> The fact, however, that the jury found in favor of the plaintiff, especially in a case where the defendant pleaded the defense of truth or justification, must have given some solace and consolation to the plaintiff, if not, indeed a sort of balm for his wounded feelings.
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> The evidence justifies the inference that the defendant sought to injure the plaintiff economically and professionally by the communications which the defendant set in motion between himself and the officers of Columbia University, and other persons in the field of education and social service. But, so far as the evidence in this case tends to disclose, those efforts on the part of the defendant, however malevolently they were motivated, fortunately do not seem to have succeeded in the attainment of their harmful purpose.[16]

In order for a communication to injure one's business or professional reputation, the words must relate directly to the person's official or business character and impute misconduct to him in that capacity.

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[16] Forester v. Ridder, 57 N. Y. S. (2d) 668 (N. Y., 1945).

A case came before the courts in Georgia involving the writers on the staff of the Saturday Evening Post and Wallace Butts, the athletic director at the University of Georgia. The story alleged that Butts, coach of the University of Georgia team, had given information on Georgia players to Bryant, coach of the University of Alabama team, in advance of the Alabama-Georgia game played in Birmingham in September, 1962.

Butts, a man in his fifties holding the post of University Athletic Director at the University of Georgia, at the height of his career and having good prospects for possible advancements to a larger institution or other larger responsibilities, sued the publisher for damages of libel. Publication of the article, he said, had halted all of his current negotiations for future employment in college and professional football, and in effect, destroyed or diminished his prospects.

A jury in federal district court returned a verdict in his favor, and awarded him $60,000 actual damages and $3,000,000 punitive damages, whereupon the defendant publisher moved for a new trial on the grounds that the award was grossly excessive.

The order of the court was that the new trial be granted "unless the plaintiff, within 20 days shall in writing remit all the punitive damages awarded above the sum of $400,000; the award of $60,000 for general damage to remain."

The court in ruling had this to say:

> The article was clearly defamatory and extremely so. The Saturday Evening Post had a circulation in excess of six million copies per issue. It claims readers of twenty-two million. Butts was unquestionably one of the leading figures in the national football picture. The jury was warranted in concluding from the foregoing incidents and the persistent and continuing attitude of the officers and agents of the defendant that there was a wanton or reckless indifference of

> plaintiff's rights. The guilt of the defendant was so clearly established by the evidence in the case so as to have left the jury no choice to find the defendant liable.[17]

In the opinion of the court, the article was clearly defamatory because it unequivocally charged that Butts was a corrupt person who betrayed or sold out his students. The charge was not substantiated in court. One of the writers had specifically quoted several informants in support of his story, but most of these persons denied under oath they had given him any such information. Thus, the story appeared to be libelous publication based on charges unsupported by the evidence.

If a man teacher unjustly accused of unchastity can show special damages, or that the defamation injured his reputation as a teacher, or that the conduct of which he is accused constitutes a statutory crime of which he is innocent, he can sue for libel.

In Alabama, a statement charging a teacher with immoral conduct with his pupils was circulated in a magazine.[18] The article contained pictures and detailed description of the teacher's alleged relations with school students, an attack with a hatchet and pistol on a poster, and of his resignation from a previous teaching position following charges of improper relations with students. The jury concluded that the publications had been made and were false. They returned a verdict of damages of $45,000 to compensate the teacher for injury.

In determining whether or not an article is libelous, it must be read as a whole, and words are to be construed together with their context. In New York, a printed article misinterpreted a history

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[17] Butts v. Curtis Publishing Co., 225 F. (2d) 916 (Ga., 1964).

[18] Johnson Publishing Co. v. Davis, 124 So. (2d) 441 (Ala., 1960).

professor's statement as advocating mass ignorance of the United States history, was not libelous. The headlines did not identify any particular professor and the reading of the entire article would disclose that the claim that the professor advocated mass ignorance was merely the writer's unwarranted interpretation of professor's statement. The court in ruling had this to say:

> It is true that a defamatory heading referring to a person may be actionable although the body of the article may explain away the defamatory construction to be placed upon the headline. This is so because many readers may only read the headlines and never read the body of the article. This is, however, not such a case since the headline merely reads: 'Some Professors in Favor of Ignorance' and no one reading that plaintiff was in favor of mass ignorance. In order to connect the statement made in the headline with plaintiff one would have to read the body of the article, and upon doing so would, if a reasonable person, understand that as previously indicated, the plaintiff made no such statement.[19]

Since all defamation of character cases turn on rule of reasonableness, it is difficult to determine unequivocally in advance what may constitute defamation in any given set of circumstances. Teachers and counselors should be doubly careful to avoid abuse of privileged communications in the discharge of their duties.

Religious Education

As the American people have developed a national constitutional government based on the principle of separation of church and state, the public schools in the United States have been faced with developing a curriculum in a society of diverse religious beliefs. The quest for a solution as to what the scope of religious education should be in the

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[19] Mattingly v. News. Syndicate Co., Inc., 81 N.Y.S. (2d) 30 (N. Y., 1948).

public school has led to the inclusion of a wide variety of religious practices in the curriculum of the public schools.

Originally, the individual states were free to do as they pleased about religion. It was only the federal government that was prohibited from passing a law "respecting an establishment of religion." At one time in their history, nine of the thirteen original colonies had state religions. The Congregational Church was established in Massachusetts, Connecticut, and New Hampshire. The Anglican Church was established in New York, Maryland, Virginia, North Carolina, South Carolina, and Georgia.[20] Four of these maintained established churches for more than twenty-five years after the adoption of the First Amendment.

Upon undergoing the critical evaluation of the divergent citizenry of the country, many of the practices related to religion have been questioned as suitable activities for incorporation in the public school curriculum. Controversies have ensued over the different interpretations as to what constitutes religious freedom in the public schools, and, as a result, litigations have developed concerning the practices related to religious education in the curriculum.

Public school practices concerning the use of the Bible, the saying of prayers, and the singing of hymns as a part of the curriculum have caused controversies to be carried to the courts for adjudication.

In 1854, the Supreme Judicial Court of Maine held that a regulation by the school board acting according to the statute adopting a particular version of the Bible as a textbook for use in the classroom was

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[20]James V. Panoch and David Barr, Religion Goes to School (New York, 1968).

constitutional.[21] In Massachusetts, the Supreme Court upheld an order of the school committee that pupils should bow their heads during daily reading of the Bible and prayer.[22] In discussing the requirement, however, the court commented that a regulation requiring pupils to join in a religious rite or ceremony contrary to their religious beliefs would be involved.

In Kentucky, the practice of conducting an exercise which included prayer and reading the King James version of the Bible was upheld by the courts. Concluding that:

> A prayer offered at the opening of a public school day, imploring the aid and presence of the Heavenly Father during the day's work, asking for wisdom, patience, mutual love and respect, looking forward to a heavenly reunion after death, and concluding in Christ's name, is not sectarian.[23]

In Texas, the Supreme Court by a unanimous decision upheld the reading of the King James Bible with no comment, the reciting of the Lord's Prayer, and the singing of hymns. Although the students were required to be present and to be orderly, they were not required to participate. In support of its decision, the court reasoned as follows:

> Christianity is so interwoven with the web and woof of the state government that to sustain the contention that the Constitution prohibits reading the Bible, offering prayers, or singing songs of a religious character in any public building of the government would produce a condition bordering upon moral anarchy. The absurd and hurtful consequences furnish a strong argument against the soundness of the proposition.[24]

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[21] Donahoe v. Richards, 38 Md. 379 (Maine, 1854).

[22] Spiller v. Inhabitants of Woburn, 94 Mass. 127 (1866).

[23] Hackett v. Brooksville Graded School, 87 S. W. 792 (Kentucky, 1905).

[24] Church v. Bullock, 109 S. W. 115 (Texas, 1908).

In 1950, the New Jersey Supreme Court held that a statute requiring that at least five verses from the Old Testament of the Bible be read without comment each day in each public school classroom and premitting the saying of the Lord's Prayer in such schools did not violate the First or Fourteenth Amendments to the Federal Constitution as claimed by the plaintiff. Pointing out that the statutes had been unchallenged for forty-seven years, the court concluded its unanimous ruling as follows:

> Our view is that a prohibition which is not in the language and which is contrary to the intention of those who framed and adopted the instrument should not now be read into it. We consider that the Old Testament and the Lord's Prayer, pronounced without comment, are not sectarian, and that the short exercise provided by the statutes does not constitute sectarian instruction or sectarian worship but is a simple recognition of the Supreme Ruler of the Universe and a deference to His majesty; that since the exercise is not sectarian, no justifiable sectarian advantage or disadvantage flows therefrom; and that, in any event, the presence of a scholar at, and his participation in, that exercise is, under the direction of the Board of Education, voluntary.[25]

In 1956, the Supreme Court of Tennessee was called upon to rule on the constitutionality of a statute which imposed upon teachers the duty to read or cause to be read at the opening of every school day a selection from the Bible but prohibited the same selection from being read more than twice a month. The court explained that it was beyond the scope and authority of school officials and teachers in the public schools to conduct a program of education or explain the meaning of any chapter or verse in the Bible. The court added, however, that the reading of a verse of the Bible without comment, the singing of some inspiring songs, and the repeating of the Lord's Prayer were not violations of

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[25] Doremus v. Board of Education, 75A (2d) 880 (New Jersey, 1950).

the constitutional mandate which guarantees to all men a right to worship God according to the dictates of their own conscience, nor could such exercises be considered the support of a place or form of worship. Commenting further that the doctrine of separation of church and state should not be tortured into a meaning never intended by the founders of the Republic, Chief Justice Neil declared:

> In conclusion we think that the highest duty of those who are charged with the responsibility of training the young people of this state in the public schools is in teaching both by percept and example that in the conflicts of life they should not forget God.... For this court to hold that the statute herein assailed contemplates the establishment of a religion, and that it is a subtle method of breaking down 'Mr. Jefferson's' wall of separation 'between the church and state' would be a spectacular exhibition of judicial sophistry.[26]

In February, 1963, the United States Supreme Court heard arguments in two cases concerning the constitutionality of Bible reading and the saying of the Lord's Prayer in the public school.[27] In one of the cases under consideration, Murray v. Curlett, a Maryland court had upheld exercises involving the recitation of the Lord's Prayer and reading from the Bible.[28] The decision by a federal district court in the Schempp case, the other case being heard by the court, had held the practice of Bible reading in the public schools to be a violation of the Constitution.[29]

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[26] Carden v. Bland, 288 S. W. (2d) 718 (Tennessee, 1956).

[27] "Supreme Court Continues to Hear School Prayer Issues," The Dispatch, LXXX, No. 149 (February 28, 1963), p. 1.

[28] Murray v. Curlett and Board of Commissioners, 179A (2d) 698 (Maryland, 1962).

[29] School District of Arlington Township, Pennsylvania v. Schempp, 374 U. S. 203, 83 S Ct. 1560 (Pennsylvania, 1963).

The Supreme Court of the United States handed down its decision concerning the propriety and constitutionality of Bible reading and the recitation of the Lord's Prayer in the public schools and the laws requiring them on June 17, 1963.[30] By an eight to one majority, the court declared that the required religious practices of reading the Bible and reciting the Lord's Prayer and the laws used in connection with requiring them are unconstitutional.

Chief Justice Clark, writing the majority opinion, summarized the court's position in the following manner:

> The practice of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the state is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment.

In the quest for a solution to the problem of how to provide moral and spiritual education for young people, some school systems have resorted to various programs revolving around a released time plan for religious education.

In California, a case arose questioning the legality of a statute providing that "pupils, with the written consent of their parents, may be excused from schools to participate in religious exercises or instructions."[31] The school district cooperated with the churches of

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[30] Schempp v. School District, Arlington Township, 201 E. Suppl. 815 (Pennsylvania, 1963).

[31] Gordon v. Board of Education of Los Angeles, 178 P. (2d) 488 (California, 1947).

the city in the released time program by aiding with records. Pupils who did not participate in the program remained in the classroom for instruction by the regular teacher. The court upheld the release time plan, maintaining that such action is a matter of discretion with the school board.

In 1948, the McCollum case reached the Supreme Court of the United States.[32] The appellant had begun an action of mandamus against the Board of Education alleging that religious teachers employed by private religious groups were allowed to give religious instruction in public school classrooms. Pupils who did not participate in the religious instruction during the released time were required to leave their regular classrooms and study their secular studies at various places in the school building. The petitioner charged that the released time program for religious education in the public schools violated the First and Fourteenth Amendments of the United States Constitution. In support of the petitioner's contention, Justice Black, delivering the opinion of the court said:

> To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the first Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.
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> Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines, the State also affords sectarian groups an

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[32] Illinois ex rel. McCollum v. Board of Education of School District No. 71, 333 U.S. 302, 68 S. Ct. 46 (1948).

> invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State.

The Supreme Court of the United States heard another case pertaining to released time. This case differed from the previous case in that the classrooms were not turned over to religious instruction in the school building. Pupils were released with parental approval during the school day to go to religious centers away from the public school for religious instruction or activities, and those pupils who did not desire to participate in the program remained in the classroom. In upholding the program, Justice Douglas, delivering the majority opinion of the court, said:

> We would have to press the concept of separation of Church and State to those extremes to condemn the present law on constitutional grounds. The nullification of this law would have wide and profound effects.... The teacher ... cooperates in a religious program to the extent of making it possible for her students to participate in it. Whether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act.
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> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom of worship as one chooses ... When the state ... cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our tradition. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not, would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe....[33]

The courts have been called upon to rule on numerous controversies related to religious instruction in the public schools. Consistency in

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[33] Zorach v. Clauson, 343 U.S. 306, 72 S. Ct. 679 (N.Y., 1952).

the rulings of the courts has focused on a recognition of the principle of separation of church and state, but a divergence of opinions has existed in the interpretation of the courts as to what breaches the principle and violates the Constitution.

The Supreme Court of the United States has held a prayer prescribed for public schools by a state authority to be in violation of the First Amendment. In addition, the Court has declared that the required practice of reading the Bible and reciting the Lord's Prayer and the laws used in connection with them are unconstitutional. Since this decision, it is expected that in the future if such questions should come before the state courts that the reading of the Bible and reciting the Lord's Prayer in the public school would be held illegal.

A released time program for religious instruction in connection with the public schools has been upheld where the instruction took place outside the school premises and the operational machinery of the school was not actively involved in the program.

Stripped of its essentials, the legal background indicates that the teacher may expose but must not impose religion. "Expose" here means to convey understanding of a phenomenon, the reasons for it, the personalities who developed it, and its subsequent influence. "Impose" means to require a commitment to a particular value system.

Nothing religious has been barred from the public school. There is no theme, no concept, no idea, no personality, no object, and no book that has been banned from the public school as such. The legality depends on the use. If the use is to expose for understanding, it is legal; if it is to impose for commitment, it is illegal.

Tort Liability

A tort is a wrong committed against the person or property of another. Liability is legal responsibility.[34] Therefore, tort liability is the responsibility of one who commits a wrong against the property of another to answer to the injured by the payment of damages. Some injuries are accidental; that is, no one has been at fault. These are called "pure accidents" and no damages are recoverable. What is pure accident is determined by the process of elimination: when the rules do not classify an injury as having occurred through the negligence or intentional wrong-doing of another, the injury is said to have been caused by a pure accident. Tort liability, within the scope of this chapter, rests upon the negligence of the one who is the legal cause of the injury.

The meaning of negligence and the rules of law concerning liability for negligent acts causing injury must be examined. To discuss the tort liability of school districts, local school boards, and their employees, certain distinctions must be made.

The school district in its corporate status and the board of education as a legal entity are concepts in school law difficult to understand. Education is a state function, and to fulfill that function the state has divided its territory into subdivisions usually called school districts. Being a subdivision of the state, a school district takes on some of the attributes of the state. School boards are arms of state government, therefore acts for the state within the powers

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[34] Madaline K. Remmlein, The Law of Local Public School Administration (New York, 1953), p. 30.

delegated to it by the state. Only the board, acting as a unit in a regular convened meeting, has the authority to the action that involves the exercise of discretion. This rule has been stated as follows:

> The board of directors of a school district is an entity which can act and speak only as such. The separate and individual acts and discussions of the director members, even though they may be in complete agreement with each other, have no effect. They must be assembled and act as a board.[35]

In the normal course of events, then, tort liability is the same when a school district or its board of education is charged with negligent conduct resulting in injury.

The corporate liability of a school district depends whether or not (1) the statutes of the state are silent, (2) existing state statutes preserve the district's governmental immunity, (3) existing state statutes abrogate the district's governmental immunity, or (4) existing state statutes impose liability.[36]

In the absence of statutes, tort liability rests on common law principles. Common law was the law that was in force in England at the time the United States was founded. Common law principles remain the law in the United States unless changed for a particular state by its state legislature.

Under common law, the state and its political subdivisions are not subject to tort actions. This is called governmental immunity. It began in the Middle Ages when it was said, "The King can do no wrong." Since a tort is a wrong, school districts cannot successfully be sued in

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[35] State v. Consolidated School District No. 3, 281 S.W. (2d) 511 (Missouri, 1955).

[36] Lee O. Garber, Law and the School Business Manager (Danville, Illinois, 1957).

tort actions unless a state legislature has abrogated the common law immunity.

This reason is not as sound today as when first advanced many years ago, and the theory of governmental immunity has been criticized. Lincoln is quoted as saying, "It is as much the duty of government to render proper justice against itself, in favor of its citizens as to administer the same between private individuals."[37] Since Lincoln's day, critics have included legislators, judges, and educators. Yet, the very judges who criticize the theory as being antiquated usually follow the precedents laid down under the theory.

Several states have passed legislation that would seem to have been intended to abrogate the governmental immunity of their school districts. Among the earliest were Minnesota, Washington, and Oregon. The Oregon law of 1862 provided that:

> An action or suit may be maintained against any of the other public corporations in this state mentioned in section 8-701 including school districts in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or commission of such other public corporation....[38]

In 1917, the Washington legislature passed a law applicable to school districts specifically excluding actions based on injuries sustained in playgrounds, field houses, or from the use of athletic apparatus or appliances, or manual training equipment.[39]

In New York, the history of the development of tort liability of school districts is different. The New York courts applied the common

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[37]First Annual Message, December 3, 1861.

[38]Oregon Compiled Laws Annotated, Sec. 8-702.

[39]Revised Code of Washington, Sec. 28, 58.030.

law principle of respondent superior even before it had statutory provisions in its Education Law.[40] Then, in 1937, New York enacted a "save harmless" law for school districts, which included authorization to carry insurance.[41] Courts of New York have interpreted the same harmless law as, in effect, imposing direct liability on the school board, saying that it was unnecessary to sue an employee and obtain a judgment first and then seek settlement of the judgment from the school board.[42]

In a case decided by the Court of Appeals of New York in 1965, action had been brought against a board of education for injuries sustained by a child who was struck by a snowball on school property as she was returning to school after lunch. The school had made a rule against snowball throwing and the child's teacher had warned her pupils not to throw snowballs.

The court, in reaching its decision, laid down several significant legal rules governing playground supervision by teachers in general and stated the measure of care which teachers owe their pupils:

> Teachers have watched over the play of their pupils time out of mind. At recess periods, no less than in the classroom, a teacher owes it to his charges to exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances.
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> ... No one grows up in this climate without throwing snowballs and being hit by them. If snow is on the ground as children come to school, it would require intensive policing, almost child by child, to take all snowball throwing out of play. It is unreasonable to demand or expect such perfection

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[40] Court of Claims Act, Sec. 8.

[41] New York Education Law, Sec. 3023.

[42] Reeder v. Board of Education of New York City, 290, N. Y. 829 (1943).

> in supervision from ordinary teachers or ordinary school management; and a fair test of reasonable care does not demand it.
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> A reasonable measure of a school's responsibility for snowball throwing is to control or prevent it during recreation periods according to the best judgment of conditions, and to take energetic steps to intervene at other times if dangerous play comes to its notice while children are within its area of responsibility.
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> No requirement ... is imposed on teachers to enforce the rules against snowballs by standing outside in the cold to watch to see that children do not violate the rule as they come into the school, and it is an undue burden on the school to impose a liability because teachers did not stand outside for active intervention in the circumstances shown by the record.
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> A school is not liable for every thoughtless or careless act by which one pupil may injure another. Nor is liability invariably to fall on it because a school rule has been violated and an injury has been caused by another pupil.[43]

It appears that teachers today are being sued for negligence resulting in pupil injury more than ever before.

In the states where government immunity has been abrogated, the courts will accept a tort action against the school district based upon an injury caused by negligence of the board of education itself, collectively, or its agent or employees. However, it is theoretically possible for a district required to pay damages because of negligence of one of its agents or employees, to seek indemnity from the individual whose negligence cause the district's liability. Therefore, these statutes do not entirely relieve individuals from responsibility for their negligent acts, although from the practical point of view, the

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[43] Burns v. Board of Education of New York City, 39 N. Y. 423 (1965).

school district is not likely to seek indemnity because of the financial condition of most of its employees.[44]

Teacher Responsibility

Since an individual is not liable for damages when the injured cannot prove negligence on the part of the defendant, it is necessary to examine the meaning of negligence. When an injury occurs in such a way that the injured cannot prove it happened but the evidence shows that it could have happened only through the negligence of the defendant, such as when a locker fell, obviously because it was negligently secured to a wall, the res ipsa loquitur principle would apply if the school district were subject to tort action. However, this principle would not be applied in most states because of their government immunity. If an individual were responsible for conduct leading to such an injury, the principle would apply. It is only under this principle that the injured need not prove negligence; then he must prove that the principle applies. In all other circumstances, the injured plaintiff has the burden of proof that his injury resulted from the negligence of the defendant.[45]

Negligence as a separate tort emerged about 1825. Negligence is conduct which should be recognized by a reasonable prudent man as involving unreasonable danger to others.

Certain elements are necessary for an action based on negligence. They are:

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[44] Freund v. Oakland Board of Education, 82 P. (2d) 197 (Calif., 1938).

[45] "District Liability for Injuries," The Nations Schools, 58: 44-46, (July, 1956).

1. The duty to so act as to protect others from unnecessary risk;

2. The failure to so act;

3. The injury, of another, causing loss or damage, as the result of such failure.[46]

The burden of proof is on the plaintiff, and negligence ordinarily must be proved by circumstantial evidence. The res ipsa loquitur principle is an example. It is applicable when: (1) the accident is of a kind that ordinarily does not occur in the absence of someone's negligence, (2) the apparent cause of the accident indicates that the defendant would be responsible for any negligence connected with it, and (3) the plaintiff had not been guilty of contributory negligence.[47] Under these circumstances, the plaintiff can invoke the res ipsa loquitur principle without actual proof of the defendant's negligent conduct.

In general, negligence can be of two kinds: (1) behavior which a reasonable man would have realized involved an unreasonable risk of injury to others, and (2) failure to do an act which one is under a duty to do for the protection of another.

Harper lists a number of kinds of conduct which creates actionable negligence.[48] From this list, the following applications can be made to injuries sustained by pupils due to negligence of teachers and other school employees.

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[46]Madaline K. Remmlein, "Tort Liabilities of School Districts," Law and the School Business Manager (Danville, 1957), p. 204.

[47]Ibid., p. 205.

[48]Fowler Harper, The Law of Torts (Indianapolis, Ind., 1933), pp. 171-176.

A school employee may be negligent because:

1. He did not take appropriate care;

2. Although he used due care, he acted in circumstances which created risks;

3. His acts created an unreasonable risk of direct and immediate injury to others;

4. He set in motion a force which was unreasonably hazardous to others;

5. He created a situation in which third persons, such as pupils, or inanimate forces, such as shop machinery, may reasonably have been expected to injure others;

6. He allowed pupils to use dangerous devices although they were incompetent to use them;

7. He did not control a third person, such as an abnormal pupil, whom he knew to be likely to inflict intended injury on others because of some incapacity or abnormality;

8. He did not give adequate warning;

9. He did not look out for persons, such as pupils, who were in danger;

10. He acted without sufficient skill;

11. He did not make sufficient preparation to avoid injury to pupils before beginning an activity where such preparation is reasonably necessary;

12. He failed to inspect and repair mechanical devices to be used by pupils;

13. He prevented someone, such as another teacher, from assisting a pupil who was endangered, although the pupil's peril was not caused by negligence.

Literature abounds with discussions of negligent behavior in specific circumstances. Garber lists ten precautions to be followed to avoid negligence when taking pupils on field trips or excursions.[49]

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[49]Lee O. Garber, "Field Trips and Excursions," The Nation's Schools (September, 1955), pp. 82-85.

Leibee[50] lists sixteen ways to prevent negligent conduct on the part of physical education teachers; Piils[51] lists thirteen ways that shop teachers could be negligent.

Teacher Liability

The fact that a pupil sustains an injury in a school-related activity does not, in itself, mean that the teacher in charge of the activity will be held liable for the injury. Injury to pupils may result in pure accident which occurs without negligence.[52]

Application of the rule that a teacher is expected to exercise reasonable foresight is illustrated by a case in which a pupil was crushed by a log at a beach while on a school outing. The teacher in charge of the outing was assisted by several other adults, including the mother of the injured child. Several children climbed upon a large log lying on the beach some distance from the water's edge. While the teacher was taking a picture of the children on the log, a large wave suddenly surged up the beach causing the log to roll over. The injured child fell to the seaward side of the log, and when the wave receded it drew the log over the child. The court ruled that the injury was foreseeable and that the teacher was negligent in failing to take action to avoid the injury. The court commented:

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[50]Howard C. Leibee, "Legal Liability for Injuries in the Service Program," College Physical Education Association Proceedings (1954), pp. 34-39.

[51]H. E. Piils, "Are Shop Teachers Liable?" Safety Education, (May, 1951), pp. 13-14.

[52]Wire v. Williams, 133 N. W. (2d) 840 (Minn., 1965).

> The first proposition asks this court to hold, as a matter of law, that unusual wave action on the shore of the Pacific Ocean is a hazard so unforeseeable that there is no duty to guard against it.... On the contrary, we agree with the trial judge, who observed that it was common knowledge that accidents substantially like the one that occurred in this case have occurred at beaches along the Oregon coast. Foreseeability of such harm is not so remote as to be ruled out as a matter of law....[53]

In another case involving the question of foreseeability, it has been held that a teacher was negligent in permitting a boy to burn a hole in an automobile which had an open gasoline tank, which exploded, killing one pupil and injuring another.[54]

In other cases, however, it has been ruled that an accident which resulted in injury to a pupil could not reasonably have been foreseen by the teacher. In a Michigan case, a pupil was injured while watering plants in a nature study class. The pupil, with the teacher's knowledge, stood on a chair to water some plants and was severely cut when she fell from the chair and landed on a broken bottle in which she had been carrying water. In ruling that the teacher had not been negligent, the Supreme Court of Michigan said:

> ... There is nothing in the nature of the act itself or the instrumentalities with which plaintiff was permitted to perform the act which would lead a reasonably careful and prudent person to anticipate that the child's safety or welfare was endangered in the performance of the act. The mere fact that an accident happened, and one that was unfortunate, does not render defendant liable.[55]

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[53] Morris v. Douglas County School District No. 9, 403 P. (2d) 775 (Ore., 1965).

[54] Dutcher v. Santa Rosa High School District, 2908 (2d) 316 (Calif., 1955).

[55] Gaincott v. Davis, 275 N.W. 229 (Mich., 1937).

It has also been ruled that a teacher could not be expected to anticipate that a paper bag which she asked a pupil to pick up would contain a broken soda bottle upon which the pupil would cut herself.[56]

Liability for negligence is based upon two considerations: (1) the character of the conduct, and (2) the nature of the results. The amount of caution required is proportioned to the amount of threatened or apparent danger. The legal cause of an injury is that cause which in the natural sequence of events produced the result. The first test for determining liability is whether or not the defendant's liability is legal cause of the plaintiff's injury. To do this, the law uses the measure of foreseeability. When a reasonable prudent person could have foreseen the harmful results of his act and disregards the foreseeable consequences, his act is the legal cause of the injury and he is liable for his negligent conduct.

Summary

> It is clear that ... [teachers] have the right under our law to assemble, speak, think and believe as they will.... It is equally clear that they have no right to work for the state in the school system on their own terms.... They may work for the school system upon the reasonable terms laid down by the proper authorities.... If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.[57]

The rights of citizens, including teachers, to assemble and speak freely are constitutional rights, and should be zealously guarded, but they must yield when they conflict with a higher public interest. The

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[56] West v. Board of Education of City of New York, 187 N.Y.S. (2d) 88 (1959).

[57] Adler v. Board of Education, 342 U. S. 485 (1952).

public interest in an uninterrupted educational system is most important. It may outweigh the constitutional rights of the teacher in certain situations.

To allow the teacher to carry out the proper function of teaching, the law recognizes that the teacher must be free to state candidly his opinions, observations, and beliefs. Under some circumstances, teachers have a qualified privilege communication. However, the right of free speech guaranteed by the First Amendment to the Federal Constitution never meant the unrestricted right to say what one pleases at all times under all circumstances.

When a teacher makes a publication in good faith, whether written or oral, the statement is generally privileged communication. Any statement, however, which is motivated by malice removes this privilege and may subject the party to liability.

Since all defamation of character cases turn on the rule of reasonableness, it is difficult to declare in advance what may constitute defamation of character in any given set of circumstances. Teachers, counselors, and principals should be doubly careful to avoid abuse of privileged communications in the discharge of their duties.

The courts will not interfere in the exercise of a board's discretion on employment practices, unless it can be shown that the board has been discriminatory in its deliberations; that is, discrimination must be on the basis of race, color, or creed, rather than on the basis of the individual's qualifications. In many instances, this is not easy to prove.

The governing of the right of teachers to strike has not been precisely established, but such authority as there is indicates that

teachers, like other government employees, do not have this right. It has been held that teachers may engage in collective bargaining provided they do not do so under threat of strike.

CHAPTER IV

DISMISSAL OF TEACHERS

Introduction

The word dismissal refers to the termination of the teacher's services by a board of education prior to the lawful expiration date of the contract. It applies to the tenure teacher as well as to the probationary teacher, so long as the action is taken prior to the end of the contractual period. It does not apply to refusal of a board to renew the non-tenure teacher's contract; such non-renewal does not constitute dismissal in the legal sense of the word. In general, dismissal in legal terminology is interchangeable with such other terms as release, discharge, let go, let out, terminated, and removed from the position of teacher. While there are obvious differences of meaning in these terms, they are essentially the same when applied to teacher dismissal.

Since the right of teachers to compensation for teaching arise out of a contract with the district, it follows that she has no right to compensation if she breaks her contract and the board may discharge her with legal impunity. The right of the board to dismiss teachers is a correlative function of its right to employ them. This right must be exercised, however, in a reasonable manner and within the limitations of any existing legal framework. A teacher's contract of employment includes the implied power of the school board to dismiss the teacher who

fails to competently and loyally perform all reasonable assigned duties and to act in an exemplary manner.

There is, of course, some times great difficulty in determining what teacher action constitutes cause for dismissal. An examination of the state statutes and court cases reveals a wide range of cause for which teachers may be discharged from their positions.

The law provides for a formal procedure in reference to the termination of the contract and provides not only for notice to the teacher as to the alleged charges, but also for a hearing before the board of education. A teacher employed for a school year, if wrongfully discharged before expiration of the term of employment, may recover salary in full for the remainder of such term, upon demonstrating the failure to obtain other employment after reasonable effort to do so.[1] If employment is obtained, whatever amount is earned during such period must be offset against the salary claimed. A teacher who does not challenge the sufficiency of the reasons of the board in dispensing with his services, cannot recover salary for the remainder of the year as fixed in his contract of employment.

Statutory Rights of Board to Dismiss Teachers

In many states, the statutes provide that teachers may be dismissed upon stated grounds. In such states, they may be dismissed only upon the grounds indicated.[2] In other words, the specification of grounds of dismissal precludes all other grounds by implication. The wording of

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[1] Urie v. Board of Education of Pryor Creek, 208 P. 210 (Okla., 1922).

[2] City of Elwood v. State, 180 N.E. 471 (Ind., 1932).

statutes vary widely but most of them are to the general effect that dismissal may be had for incompetency, immorality, or neglect of duty. A few statutes have added to the grounds just stated the clause, "and for other good and just causes."

But even in these instances the cause must be of a character similar to those enumerated. In a Mississippi case, the court said:

> ... The phrase, 'or other good causes,' in the statute must be considered in connection with the specific causes preceding it. It is a well recognized rule of law where in a statute general words follow a designation of particular charges, the meaning of the general words will be presumed to to be restricted by the particular designation, and to include only things of the same kind, class, or nature as those specifically enumerated, unless there is a clear manifestation of a contrary purpose.[3]

The legal provisions for dismissal for any good or just cause refers to the teacher's fitness or capacity to discharge his duties. Any grounds put forward by a board of education must be in good faith and not arbitrary, irrational, unreasonable, or irrelevant to the board's task of building an efficient school system. In so ruling a Massachusetts court had this to say:

> Manifestly one of the most important duties involved in the management of a school system is the choosing and keeping of proper and competent teachers. The success of a school system depends largely on the character and ability of the teachers. Unless a school committee has authority to employ and discharge teachers it would be difficult to perform properly its duty of managing a school system ....
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> ... In accord with the general legislative policy in the regard to the discharge of teachers 'good sense' is held to include 'any ground which is put forward by the committee in

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[3] Madison County Board of Education v. Miles, 173 So. (2d) 425 (Miss., 1965).

> good faith and which is not arbitrary, irrational, unreasonable, or irrelevant to the committee's task of building up and maintaining an efficient school system.'[4]

Where the statutes do not specify what constitutes good cause, the power to determine this question is in the hands of the board of education. This power may not be exercised unreasonably or arbitrarily says the court in Illinois and in so ruling stated:

> It is our opinion that the statutes give the Board ample authority to determine in the first instance what causes were not remediable, and that the Board was well within its rights in apparently determining, in the first instance, and until a final hearing, that the charges, particularly when considered as a whole, were not remediable.[5]

A contract may specify grounds for dismissal where the statutes are silent or where it is clear that the grounds expressed by statutes are not intended to be exclusive of all others.[6]

The legislature has the right to determine the grounds upon which teachers may be employed and discharged and boards may not, by the weight of authority and the better view, append other grounds to those stated in the law. While there are cases to the contrary, it is usually held that of specific statutory grounds for dismissal are stated, a provision in the contract that the teacher shall teach only at the discretion of the board is invalid.

It is well established that school teachers are not public officers. They are employees, and such rights as they have to

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[4] Davis v. School Committee of Somerville, 30 N. E. (2d) 401 (Mass., 1940).

[5] Eveland v. Board of Education, 92 N. E. (2d) 182 (Ill., 1950).

[6] Consolidated School District v. Millis, 139 P. (2d) 183 (Okla., 1943).

compensation grow out of contractual relationship.[7] The welfare of the schools requires that the rights and responsibilities both of the teacher and the board of education be clearly defined and established on principles that recognize a professional status for the teachers.

Generally, teachers can be dismissed only for cause during their contract period, and as a rule they can be dismissed for no other reason.[8] The assumption is that the enumeration of causes in the statutes was intended to be exhaustive. If a board wishes to dismiss a teacher prior to the end of his contract, it must be able to prove in a hearing at least one or more of the following stipulated conditions for dismissal: incompetency, willful neglect of duty, immorality and misconduct, refusal to obey rules and order of board, marriage, and for other good causes.

Incompetency

Incompetency is a valid ground for dismissal at common law and under the statutes of the several states. By accepting a teaching position, the teacher thereby represents that he possesses a reasonable degree of skill and learning, that he will be diligent in the execution of his work and has reasonable ability to discipline and control his school. Whether the teacher meets these standards is a question of fact to be determined by the legal trier of the facts, and the burden of proof is upon those who assert that the teacher has fallen short of his obligations.

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[7] Brown v. Bowling, 240 P. (2d) 846 (New Mexico, 1952).

[8] People v. Maxwell, 69 N. E. 1092 (New York, 1904).

It is not always clear what constitutes incompetency, since the fact that the teacher holds a valid certificate is considered prima facia evidence of competence before the law. Since the teacher holds a valid certificate, the burden of proof of incompetence rests on the board of education. A Connecticut court states:

> ... It is time, as he claims, that the board had the power to terminate his employment only if the charge of 'gross inefficiency' was 'supported by a preponderence of the evidence,' viewed from the standpoint that the board had the burden of proof. This means simply, as in any civil action, that the evidence must when considered fairly and impartially, induce a reasonable belief that the fact in issue is true.[9]

In a North Dakota case, the court commented:

> ... it becomes important to distinguish between a cause for discharge and termination of contract based on a rule and a cause for discharge and termination of a contract not based on a rule. In the latter case, the misconduct must be of such a serious nature that, standing alone, it would constitute cause.[10]

It is also the opinion of several courts that examples of inefficiency or incompetent teaching behavior which can be remedied are not sufficient cause for dismissal. A teacher may be issued a warning without a written notice that, unless the quality of his performance improves, dismissal will be recommended.[11]

In Illinois a case came before the courts to determine that in the absence of prior warning, alleged failure of teacher to require enough work of students, improper grading of papers and tests, incompetence

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[9] Conley v. Board of Education of City of Britain, 123A (2d) 747 (Conn., 1956).

[10] Miller v. South Bend Special School District No. 1, 124 N.W. (2d) 475 (North Dakota, 1963).

[11] Board of Education, Tucson High School Dist. No. 1 v. Williams, 403 P. (2d) 324 (Ariz., 1965).

in classroom, failure to teach students enough were "remediable," and if teacher was entitled to warning before notice of charges for dismissal. The court in ruling had this to say:

> ... There is nothing in the record to suggest that any of the causes proved inflicted damage or injury to the school, students or faculty which could have not been remedied if complaints had been made to the plaintiff when knowledge of the causes first came to the attention of her superior and there is no evidence or reason inferable from the records why plaintiff would not have corrected the causes if her superiors had warned her or made complaints about the causes.[12]

In another case appearing before the courts it was held that the use of corporal punishment, use of improper language, and exhibiting uncontrollable temper were remediable.[13]

In the Horasho case, a teacher who worked in a beer garden was discharged on the grounds of incompetency, inasmuch as the type of work caused her to lose the respect of the community and her pupils.[14] She had been given a rating of "43 per cent competent" by the county superintendent, a rating of 50 per cent was the passing or average rating. The court ruled that the combination of her outside work and low rating constituted legal basis for dismissal on the grounds of incompetency.

In California, the Los Angeles school board dismissed a permanent teacher for incompetency, basing its charges on the lack of knowledge of subject matter, failure to organize courses or study, lack of control

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[12] Werner v. Community Unit School Dist. No. 4, 190 N.E. (2d) 184 (Ill., 1963).

[13] Miller v. Board of Education of School Dist. No. 132, 200 N.E. (2d) 838 (Ill., 1964).

[14] Horasho v. Mount Pleasant Township School District, 6A (2d) 866 (1939).

over pupils, and failure to cooperate with colleagues. The teacher contended that the charges set forth in the complaint failed to give sufficient definitions as to enable him to prepare a defense. The Supreme Court of California, in ruling for the board and against the teacher said:

> Section 5.652 (of the school code) requires that the notice specify the 'nature' of the alleged incompetency with sufficient particularity to furnish the employee an opportunity to correct his faults. It is not required that any particular facts or episodes be set forth in the notice. Defendant was given sufficient notice of the charges against him to enable him to overcome his deficiencies if he had the ability and desire to do so. Counsel for plaintiff aptly suggested that the governing board notified defendant to study more, plan more, control his temper, be more polite, to be more cooperative, and be more self-controlled. The notice was a sufficient compliance with the School Code.[15]

Neglect of Duty

As in the case of incompetency, what constitutes neglect of duty is a question of fact. The courts have not attempted to define it. It is clear that repeated absences or tardiness is such neglect of duty as to justify the dismissal of the teacher. Even if the teacher is unavoidably absent for a long period of time, as in the case of illness, her contract may be terminated. The test is not whether the absence was avoidable but rather whether it is of such duration that it goes to the essence of the contract. That is, does the absence deprive the district of a substantial part of the services to which it was entitled under the contract. If it does the contract may be terminated without liability. There may, therefore, be involuntary or unavoidable neglect of duty

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[15] Board of Education of City of Los Angeles v. Ballou, 68 P. (2d) 781 (1937).

which goes to the essence of the contract. Not every neglect of duty, however, small, will justify dismissal. The charges must be substantial.

In an Illinois case, outside employment of an agriculture teacher which tended to interfere with his teaching duties constituted sufficient neglect in the opinion of the court to warrant the teacher's dismissal.[16] Serious illness may render a teacher incapable of performing his regular duties. In California, a teacher who became the victim of sarcoidosis was absent from school for long periods of time. The board dismissed him on the ground that he was neglecting his teaching duties. The court upheld the board, noting that the teacher's affliction made it necessary for him to be absent from duty more often than the normal person.[17]

From these cases it appears that the courts will attempt to discover whether the absence was of such duration as to breach the contract, not whether the absence was unavoidable. A teacher visiting in Europe missed the ship that would have allowed her to return in time for her position was judged not to have breached her contract. The board could not legally dismiss her for neglect, inasmuch as the delay was unintentional and unavoidable.[18]

To the same effect was a case in California where the courts ruled that an unavoidable delay in reporting back to work after a brief vacation did not constitute sufficient basis for the teacher's dismissal on

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[16] Meredith v. Board of Education of Community Unit School District No. 7, 130 N. E. (2d) 5 (Ill., 1957).

[17] Riggins v. Board of Education, 300 P. (2d) 848 (Calif., 1956).

[18] School District No. 1 v. Parker, 260 P. 521 (Calif., 1927).

the ground of neglect of duty. The teacher had been employed in the district for more than twenty years. He had worked diligently, sometimes without pay, for the promotion of the summer school and other similar projects. Leaving a note on the principal's desk, he absented himself from the job, and went deer hunting, giving the impression that it was due to illness. Much to his dismay, he was "snowed in" while on the hunting trip, and reported back to school later than he had anticipated. The board deducted $96.00 from his salary, and dismissed him. The Supreme Court of California, in a three-to-two decision, refused to uphold the board in its action.

The court said that the defendant was guilty of a measure of deception and his conduct was reprehensible when measured by the high standards of his profession. But whether the legislature intended that all deception, however slight, should result in dismissal is doubtful.[19]

Courts will not, however, uphold persons that have been dismissed for willful absence from duty.[20]

A ruling by the Tenure Commission of Michigan indicates that minor neglect of duty does not justify dismissal of tenure teachers. A teacher upset over a discipline problem and an unrelated reprimand by the assistant superintendent turned his keys and classbook over to another teacher. Two days later when he apologized and indicated his willingness to return, he was informed that he was no longer employed. The Tenure Commission of Michigan held that the teacher was wrongfully

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[19] Midway School District of Kern County v. Griffeath, 172 P. (2d) 857 (Colorado, 1956).

[20] Board of Public Instruction v. State, 171 So. (2d) 209 (Florida, 1965).

dismissed and that he in fact had not quit. However, the Michigan Supreme Court held that the Tenure Commission was without authority to decide the case and that the board of education was authorized to appeal the case to the courts.[21]

In dismissing teachers, the board must not act hastily, not in an arbitrary or capricious manner, no matter how well convinced it may be that the teacher is not "working out." By doing so, a board may inadvertently act in such a manner as to render its decisions ineffective and void. Most teachers, if given the opportunity, will attempt to improve themselves, when it is clear that the board is acting in good faith.

Immorality and Misconduct

The peculiar relationship between the teacher and his pupils is such that it is highly important that the character of the teacher be above reproach. It is well settled, therefore, that a teacher may be dismissed for immorality or misconduct. The Court of Appeals of Kentucky has said that both parents and pupils regard the teacher as an exemplar whose conduct might be followed by his pupils, and the law by necessary intendment demands that he should not engage in conduct which would invite criticism and suspicions of immorality.[22] Even charges of or reputation for immorality, although not supported by full proof, might, in some cases, be sufficient ground for removal. Not merely good character, but good reputation, is essential to the greatest

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[21] School District of City of Benton Harbor v. Michigan State Tenure Commission, 126 N. W. (2d) 102 (Mich., 1964).

[22] Gover v. Stovall et al., 35 S. W. (2d) 24 (Ky., 1931).

usefulness of the teacher in the schools. It requires no extended argument to convince one that a teacher upon whom rests a well-grounded suspicion of immorality cannot be an effective teacher of public school pupils. The board is not bound to form a judgment as to the truth or falsity of the charges.

No clear definition is possible of those acts on the part of the teacher which may amount to immorality and, hence, constitute grounds for dismissal. In interpreting the meaning of the term immorality, the courts have been known to hold teachers to a stricter definition than is usually applicable to the acts of other citizens. The reason for this is obvious; the teacher is an example for the youth of the community, and his conduct is expected to be above reproach. Any deviation from the modes of the local community, or the accepted standards of behavior in its society, may subject the teacher to dismissal for immorality or moral turpitude. It is not necessary for a teacher to be found guilty of an immoral act; it is only necessary that the teacher's reputation be such as to embarrass the board.[23] Since a teacher's reputation in the community is of prime importance, a board may dismiss a teacher who has "had a bad reputation," even though he may not be found guilty of a specific wrongful act. Where the board is of the opinion that the effectiveness of the teacher has been lowered, the court ruled that it should not interfere in the legitimate exercise of board discretion.

"Drinking within the boundary of the schoolhouse and also offering such to the students" provided grounds for dismissal of a Wyoming teacher. The teacher charged that he had been illegally dismissed, and

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[23] Watts v. Stewart School Board, 14 L. Ed. (2d) 261 (Alaska, 1965).

sued for the salary due him. Said the Supreme Court of Wyoming, in ruling in favor of the board: "Even charges of or reputation for immorality, although not supported in full proof, might in some cases be sufficient ground for removal. Not merely good character but good reputation is essential."[24]

In California, a teacher was found guilty of unprofessional conduct in that she distributed pamphlets entitled "Time to Resist" which condemned United Nation troops who fought in Korea as murderers, urged the youth of the United States to resist military service by choosing prison, extolling achievements of the Communist rule in North Korea, held up the American way of life to ridicule and contempt, and condemned and belittled the action of the United Nations in Korea. The court in upholding the Board of Education's decision to dismiss the teacher for unprofessional conduct stated:

> That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the school as a part of ordered society, cannot be denied. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty.[25]

Therefore, dismissal for unprofessional conduct may be influenced somewhat by surrounding circumstances as illustrated by the following case:

Shortly after Pearl Harbor, a Chicago teacher was dismissed for unprofessional conduct in the public schools. She had written a letter to a former student, who had failed to register under the Selective

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[24] Tracy v. School District No. 22, Sheridan County, 243 P. (2d) 932 (Wyo., 1954).

[25] Laguna Beach Unified School District of Orange County v. Lewis, 304 P. (2d) 59 (Calif., 1956).

Service Act, congratulating him on his "courageous and idealistic stand," and stating that "you and others who take the same stand are the hope of America." The teacher was fully aware of the Selective Service Act when she wrote the letter. The school board dismissed the teacher and she sought through court action to be reinstated to her position, asserting that her actions were not "cause for her removal." The court in upholding the school board's decision had this to say:

> ... We think the board was fully justified in finding that the teacher writing such a letter ought not to be permitted to continue as a teacher in the public schools.... It will be noted that when the teacher was dismissed by the board, the U. S. was engaged in a war with Japan. Certainly it was incumbent upon teachers, to display the proper patriotic attitude.[26]

In Illinois, a teacher was dismissed for her outside activities when she appeared on the streets in an intoxicated condition. In upholding her dismissal, the court noted that there was no question of her competency as a teacher, but her outside activities were grounds for her dismissal. The court in ruling said:

> It is plain the dismissal was not simply because plaintiff had consumed intoxicants. It is the opinion of the court that a teacher is something of a leader to pupils of tender age, resulting in admiration and emulation, and that the board might properly fear the effect of social conduct in public not in keeping with the dignity and leadership they desire from teachers.[27]

Hamilton states that when teachers enter the teaching profession, they legally surrender a measure of their freedom of action.[28] A

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[26] Joyce v. Board of Education of Chicago, 60 N. E. (2d) 431 (Ill., 1945).

[27] Scott v. Board of Education of Alton, 156 N. E. (2d) 1 (Ill., 1959).

[28] Robert R. Hamilton, The Bi-Weekly School Law Letter (December 23, 1954).

teacher may be legally free to be immoral, so long as he violates no law, but he is not legally or educationally free to be a teacher and engage in immoral conduct.

In Wisconsin the courts have held that detailed discussion of sex matters was improper conduct for a teacher and sufficient grounds to justify his dismissal.[29]

Refusal to Obey Rules and Orders of the Board

Boards of education have expressed or implied powers to adopt and enforce reasonable rules and regulations for the government of the schools of the district. Any failure of a teacher to obey them is adequate grounds for dismissal. Rules must be reasonable and not arbitrary, and must have a reasonable relation to the management of the schools. If these conditions are met, the courts are not inclined to inquire into the wisdom of the rules.

Failure or refusal to obey reasonable rules and orders of the board is one form of insubordination and a teacher may be dismissed therefore under the statutes of the several states. Since reasonableness and unreasonableness is a question of fact, the final determination is in the courts. Very few cases holding rules or orders unreasonable have come to the attention of the courts, but there are numerous ones in which rules are held reasonable. This could indicate that there is little disposition by courts to declare rules unreasonable.

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[29] State v. Board of School Directors of Milwaukee, 111 N. W. (2d) 198 (Wis., 1961).

An illustration of the authority of the school boards to enforce reasonable rules and regulations is found in an Oklahoma case. At the opening of the school term, the superintendent of schools assigned, as he was authorized to do, a teacher to teach the fourth and fifth grades. The teacher agreed to the assignment and entered upon the discharge of her duties for about four days; then without authority or consent, she peremptorily took charge of the seventh grade and advised the superintendent that she would only teach that grade. After consultation with the county superintendent, the superintendent endeavored to persuade the teacher to perform her duties as teacher of the fourth and fifth grades, which she refused to do. Therefore, because she had failed to observe the rules and regulations of the district board, her dismissal was entered.

The contract specifically provided that the teacher "agrees in all things to observe the rules and regulations of the district board."[30]

In California, the Board of Education of San Francisco adopted a resolution requiring teachers to reside within the city and county during the term of their employment. A teacher who resided across the bay in Berkeley brought action to enjoin the enforcement of the rule. The court, in denying the injunction, had this to say:

> In contemplation of the fact that the teacher stands in loco parentis, that it may become her duty to devote her time to the welfare of individual pupils even outside of her school hours, that the hurrying for boats or trains cannot be regarded as conducive to the highest efficiency on the part of the teacher, that tardiness may result from delays or obstructions in the transportation which a non-resident teacher must use, and finally, as has been said, that the 'benefit of pupils and resulting benefits to their parents

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[30] Consolidated School District No. 4 Bryan County v. Millis, 139 P. (2d) 183 (Okla., 1943).

> and to the community at large, and not the benefit of teachers, is the reason for the creation and support of the public schools,' (Bates v. Board of Education, 72 Poc. 907), all these, and many more considerations not necessary to detail, certainly make the resolution in question a reasonable exercise of the power of the Board of Education.[31]

On the other hand, if a board makes an unreasonable rule or rules in excess of its authority, the teacher is not bound thereby. Whether a rule is reasonable or unreasonable is a matter to be decided by the courts. It was stated thus by the Supreme Court of Oklahoma:

> In the absence of a stipulation to the contrary in the contract of employment, a school teacher is not required to perform the substantial janitor work, such as carrying the fuel, making the fires and preparing the school building for occupancy during school hours; it is the duty of the school board, under such circumstances to not only furnish the building and equipment, but also to have the building made sufficiently comfortable and habitable that the teacher can discharge the duties she has contracted to perform.[32]

Academic Freedom

Perhaps no problem has created more resentment among educators than attempts to control what they shall teach and their freedom of thought and expression both inside and outside the classroom. The problem arises most frequently in colleges and universities, but the public schools have not escaped. That there should be complete freedom for all teachers to teach anything that may suit their fancy, discuss any matter they may choose in any class, or advocate doctrines, which according to the times, are considered pernicious, would not be contended. It is inevitable that among the tens of thousands of teachers in the schools, a few will be found who will abuse what is commonly called academic

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[31] Stuart v. Board of Education, 118 Pac. 712 (Calif., 1911).

[32] School District No. 25 v. Bear, 233 P. 427 (Okla. 1925).

freedom. These should be eliminated from the school. The difficulty lies in determining what constitutes such abuse.[33]

Legal relief for encroachments upon academic freedom is very inadequate. Since a teacher is an employee and not an officer, he may be discharged for any or no reason at the end of the contract period. If discharged during the contract period, the only recourse is an action for damages since the courts will not specifically enforce personal service contracts. Furthermore, it has been observed in other connections that there is decided reluctance by courts to interfere with the exercise of wide discretion by school boards.

The only real relief is that offered by legislation such as tenure laws, but even that leaves much to be desired.

The majority of discharge cases involving the principle of academic freedom do not pass upon the problem specifically. The real question is often hidden under some other charge such as incompetency, immorality, lack of cooperation, failure to observe rules, or other similar charges, or as indicated above, by mere refusing to interfere with the discretion of the boards. In still other cases in which the question is raised, there are other charges included, and the discharge is upheld upon the latter, or at least, the emphasis is placed thereon.[34]

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[33] "Academic Freedom and the Law," Yale Law Journal, 46 (1937) 670.

[34] Bump v. Union High School District, 24 P. (2d) 330 (Oregon, 1933).

Remedies of the Teacher for Wrongful Dismissal

If the statutes expressly provide that a teacher may not be dismissed without a hearing, the statute must be compiled with strictly, and deviation from the statutory procedure will render the discharge invalid. Conversely, if the laws of the particular state permit discharge at the will of the board, no hearing is necessary. In states in which the statutes provide that dismissal may be for cause only, or certain grounds for dismissal are specifically set out, that weight of authority is that a hearing is necessary even though a hearing is not specifically provided for in the law.

It is well settled in the law that anyone wishing to find relief must first exhaust all administrative avenues open to him such as appeal to the superintendent or other designated officials. Failing to obtain relief, one then may appeal to the courts. A case which arose in Minnesota concerning a teacher with a valid contract opened a letter one day from the board of education stating she had been expelled as a teacher. Minnesota law requires no hearing for nontenured teachers, and no hearing was provided. The teacher sued for the balance due under the contract. The court in ruling for the plaintiff had this to say:

> The statutes do not provide a procedure for the removal of a nontenure teacher 'for cause.' However, even though no method of procedure is set out in the statutes for the guidance of the school board, a teacher is, nevertheless, entitled to notice of charges made against him and a fair hearing before an impartial board.[35]

The statutory procedure of giving notice to the teacher of the alleged grounds for his dismissal must be followed. The notice must be

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[35] Kuehn v. School District No. 70, 22 N. W. (2d) 220 (Minn., 1948).

in writing and it must be served upon or otherwise given to the teacher. Unless some other mode of service is expressly authorized, as by registered or certified mail, personal delivery of the notice is contemplated. The charges must give fair notice of their essential nature. If they are not specifically specific to enable the teacher to prepare his case, he should be able to obtain the particulars by a timely demand.[36]

The board may not circumvent the statutory procedures by giving only the appearance of following hearings. The teacher is entitled to a fair hearing at which all the evidence used against him is presented and he has an opportunity to rebut it. Unless a statute so requires, a board need not adopt formal procedural rules for the conduct of a hearing.[37] Fair hearing also requires that the teacher be given a reasonable opportunity to present his evidence. This matter was before a Michigan court under the Michigan tenure law, which provides that a hearing with testimony under oath is necessary before a teacher can be removed. The teacher indicated that he had about one hundred witnesses to present. The board of education, however, chose to hold the meeting in a room seating only twenty-five persons. The Michigan Supreme Court in ruling that the teacher had not had a proper hearing and that the dismissal was illegal had this to say:

> ... We note that under C. L. 1948 38.121, Stat. Ann. 15.2021, a teacher has the right to appeal from the action of the school board, and that the conduct of the appeal before the commission shall be the same as provided in article 4,

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[36] Wade v. Granite Community Unit School District No. 9, 218 N. E. (2d) 19 (Ill., 1966).

[37] Moffett v. Calcasien Parish School Board, 179 So. (2d) 537 (La., 1965).

> section 4, of the act. Under article 4, section 4, of the act the school board has the power to subpoena witnesses on its own motion or at the request of the teacher against whom charges had been made. We conclude that under article 4, section 4, of the act, the commission has the right to subpoena witnesses. And, if they have the right to subpoena witnesses, they have the right to hear the evidence.[38]

Strict rules of evidence need not be followed at the hearing, but the evidence relied upon by the board to support its findings should be sufficient, relevant, and material so that a reasonable mind could accept it as adequate to support the conclusions reached. On this point a Minnesota court commented:

> ... It is true that an administrative body acting quasi-judicially is not bound by procedural strict rules which circumscribe the action of a court, and that incompetent evidence is not fatal to its determination. Nevertheless, when a teacher's job is at stake, a just concern for fair play would require that the evidence which is calculated to support the charge should be relevant and have probative value. The board should not have to find support for its determination in hearsay or to make deductions from opinions and views relating to technical or theoretical principles. If there is substance to the charge that the teacher's conduct and want of competence requires her dismissal, there ought to be substantial evidence of it which could be established in a fraction of the time consumed in the present proceedings. [39]

It has been said that the measure of damages in an action for breach of contract "is wages which would have been paid under the contract less any sum actually earned or might have been earned by the teacher in exercise of reasonable diligence in seeking and obtaining other similar employment."[40] A teacher who has been wrongfully

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[38] Rehberg v. Board of Education of Melvildale, 77 N. W. (2d) 131 (Mich., 1956).

[39] Morey v. School Board of Independent School District No. 492, 136 N. W. (2d) 105 (Minn., 1965).

[40] Miller v. South Bend Special School District No. 1, 124 N. W. (2d) 475 (North Dakota, 1963).

dismissed is under a duty to mitigate damages by using reasonable diligence in finding other comparable employment. In a court action by a teacher for loss of earnings, the burden is upon the school district to show that the teacher failed to exercise reasonable diligence in seeking other employment to mitigate his damages. In so ruling the court had this to say:

> The school district must assume the burden of proving that a teacher has failed to exercise reasonable diligence in seeking employment to minimize his damages on a breach of his contract by the school district.[41]

In order to be made whole completely, a wrongfully dismissed or suspended teacher should also be allowed to recover for items other than loss of salary. In a California case it was ruled:

> In a case in which a local board of education suspends a teacher upon charges which the board fails to establish as proper, pursuant to statutory requirements, the teacher is entitled to reinstatement, to full salary from the day of suspension, including retirement benefits, and to interest from the dates upon which such salary payments were due....[42]

As previously stated, the teacher's duty to mitigate damages by seeking other similar employment must normally be considered. Any earning during the period of suspension or dismissal ordinarily are deductible.[43]

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[41] Mier v. Foster School District No. 2, 146 N. W. (2d) 882 (North Dakota, 1966).

[42] Mass v. Board of Education of San Francisco Unified School District, 394 P.(2d) 579 (Calif., 1964).

[43] Spencer v. Laconia School District, 218 A.(2d) 437 (New Hampshire, 1966).

Summary

A summary of the various causes for dismissal enumerated in the various state statutes would, no doubt, be rather lengthy. In addition, boards of education list a variety of rules and regulations, the violation of which are considered grounds for dismissal.

It is established that the dismissal of a teacher by a board of education is not final and conclusive; an appeal may be carried to a higher authority. Not only does cause for dismissal differ in various states, different methods are prescribed whereby a party must exhaust his remedies within the state school system before he may have access to the courts. Where statutory provisions concerning administrative remedies have been enacted, the courts generally insist that a party exhaust these remedies before resorting to litigation.

When an appeal is taken to the court of an aggrieved teacher, the court will, as a rule, make a determination of three things: (1) Did the board of education act within the scope of authority? (2) Did the board follow prescribed statutory procedure? and (3) Did the board have some reasonable basis for its action?[44]

A valid contract between the teacher and the school district which employs him is essential to the existence of any mutual obligation between them. It is the board, and not the superintendent, who has the authority to employ teachers, and the superintendent may legally only recommend teacher appointment. It should be noted that a teacher is not legally employed until he possesses a legal certificate. An invalid

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[44]Edwards, p. 504.

contract between the school district and a teacher usually may be ratified and made valid by permitting the teacher to enter upon his duties.

From the early beginning of the public school system in the United States, the higher courts of the various states have been asked to make a judicial determination of controversies ensuing from problems pertaining to public schools and school personnel. Unless it appears that the act of a school agency has been unconstitutional or illegal or unless an action has amounted to an abuse of the power vested in the school authority the courts will not interfere with the discretionary action of school officials.

CHAPTER V

CONCLUSIONS AND RECOMMENDATIONS

The public school system of education in the United States has its basis in the law. Although administered on a local basis, education is in legal theory a function of the state. The primary purpose for which public schools are created and supported is not for the benefit of the individual but, rather, to provide an educational citizenry for the benefit of society.

There are basically four general types of school law. They are: constitutional provisions, legislative enactments, administrative regulations, and case law. The first three constitute that which is termed written law and the fourth, which consists of judicial decisions, is termed the unwritten law.

Written law provides effective guidelines for public school teachers and administrators, and it has a certain amount of rigidity about it. However, it is impossible to establish written law for every conceivable situation. The ever-changing environment in which one lives creates the need for new laws and new rules. In today's society, the decisions of courts cover such gaps.

The amount of legislation, the number of recent court cases, and current literature tend to indicate widespread interest and controversy related to teacher activities. These sources appear to identify those

problems associated with teachers' rights and responsibilities, academic freedom, and dismissal of teachers.

To help cope with the many problems that face them daily, boards of education and school administrators have found it necessary to adopt policies, enact rules and regulations, and take certain actions regarding school personnel. In most instances these actions require individuals to relinquish to some degree their personal freedom for the general welfare of others as well as the general well being of the school.

Lacking specific statutes to guide their actions, school boards often formulate rules and regulations that are challenged as being unreasonable, arbitrary, or illegal. Extreme instances of disagreement usually end in the courts.

Generally, when the courts are called upon to adjudicate a disagreement, they are reluctant to interfere with the operation and management of the school by local authorities unless there is a clear abuse of authority.

In making a decision concerning a case, the courts give judicial cognizance to the opinions of other courts in their jurisdiction and other jurisdictions in similar cases. The courts will consider the circumstances of each case in the light of the authority of the school officials to enact the rule, the constitutionality of the rule, and the reasonableness of the action taken. The courts will not pass upon the wisdoms or expediency of the rule or regulation in question.

The position of a public-school teacher is created by legislatures directly and by state constitutions indirectly in provisions requiring

the legislature to establish and maintain public schools. The powers and duties of public school teachers are fixed by law to a large extent.

The profession is limited to those who hold evidence of that legal qualification in the form of a certificate, license, or credential. The method of appointing establish for teachers a legal status.

Any conclusion to be drawn on the basis of cases reviewed must be limited by the influence of earlier precedents, judicial and statutory differences, and the certainty that factual situations yet to arise will pose different legal questions. Within these limitations the following general conclusions concerning recent development in legal aspects of the rights and responsibilities of classroom teachers can be drawn:

1. A teacher may not legally recover salary for services rendered unless he has a valid certificate at the time his services are performed; however, in some states, a teacher legally may be employed before he receives the certificate, but in all states he must possess a legal certificate before teaching services are performed.
2. A valid contract between the teacher and the school district is essential to the existence of any mutual obligations between them. Generally, the school board, and not the superintendent, has the authority to hire teachers. The superintendent may legally only recommend teachers for appointment.
3. An invalid contract between the teacher and a school district may be ratified and made valid by permitting the teacher to enter upon his duties. In such case, the ratified contract is as legal as if it had been valid in the first instance.

4. Generally, reasonable rules and regulations of the board of education are part of the teacher's contract. This includes rules passed after the contracts are signed as well as those in effect when contract was consummated.
5. Teachers are legally obligated to perform a reasonable amount of "outside" duties under contract even though the contract does not expressly state such duties.
6. Both the teacher and school districts may be held liable for breach of their respective contractual obligations.
7. Teachers as individuals may be held liable for their torts. Liability may be imposed upon teachers for failure to exercise adequate supervision over the pupils in their classroom and on the playground. Teachers may also be held liable for injury or damage caused by a pupil while on an errand for the teacher.
8. "Save harmless" laws have been enacted in some states to permit school districts to pay the cost of any lawsuit or judgment which teachers may incur as a result of negligence in their position. Teacher organizations should encourage the enactment of such legislation in all states.
9. In most states, the law specifically enumerates the grounds upon which boards of education may discharge teachers. The usual statutory grounds for teacher dismissal are incompetency, neglect of duty, immorality and misconduct, and "other good and just cause." Boards of education may discharge teachers for adequate cause when statutes do not provide specific grounds for teacher dismissal.

10. In practically all states, a teacher is entitled to a hearing before he may be dismissed from his position.
11. A wrongfully discharged teacher is expected to seek another position in order to mitigate the damages which the district may incur as a result of wrongful dismissal.
12. The basic policy of tenure laws is to protect the educational interest of the state and not to place teachers in a favorable position. "Permanent" tenure laws are not, in fact, permanent. The educational interest of the state dictates such change and teachers have no legal remedy against such change. Tenure laws do not entitle a teacher to any particular salary or position within the school system.
13. With certain limitations, a teacher is legally entitled to engage in political activities. Teachers legally may join unions. However, they may not legally strike.
14. School districts are corporations and may sue and be sued on their contractual obligations. However, unless the statute of the particular state expressly permits it, a school district is not liable for injury or damage caused by the negligent act of teachers or other district employees. The immunity from tort liability which a district enjoys does not extend to teachers or other district employees.
15. Defamation of character is actionable only when special injury can be shown. Therefore, it is only when a teacher is unjustly accused that action should be considered.

16. Generally, courts have held that teachers' reports to principals or other school officials are privileged communications if not written with malicious intent.

Recommendations

Although it presently appears that the court's concept of reasonable rules and regulations in the area of teachers' rights and responsibilities tend to mirror the reflections of local school authorities, boards of education and school administrators should not become complacent by these broad generalities and principles. Administration and school boards must become well informed about the factual situations in their communities, the statutes, and the effect of their policies when contemplating rules for school personnel.

Current nationwide unrest, especially among teachers, the interest in civil rights and formation of teacher unions have made the task of school administrators more complex and complicated. No longer may school authorities formulate rules and regulations simply because it is desirable. Instead they would be better advised to have some tangible evidence that a problem actually exists and their rules and regulations will produce desirable solutions.

In view of these considerations the following recommendations are made for the benefit of those persons concerned with the management and control of public schools. These suggestions are somewhat subjective and it is acknowledged that they will undoubtedly meet with some disagreement. Nevertheless, it is contended that they are based upon legal principles as well as principles of sound school administration.

1. Teachers must become aware that contracts must conform to all the general requirements of contracts in general. That is, it must be between competent parties, supported by adequate consideration, be sufficiently definite to indicate what the parties intended and conform to any special statutory provisions that may be applicable.
2. Teachers should become familiar with the tenure laws of their respective state. The courts have construed tenure laws generally in favor of teachers and liberally, to effect the general purpose of the legislation, which was to improve education. They have not in any case interpreted tenure to mean a warranty of teaching jobs under all circumstances, but have permitted dismissal for justifiable causes.
3. The business of education has become so large that it is unfair to impose on public school teachers the risks involved in their respective positions. "Save harmless" statutes for the protection of teachers should be enacted by each state legislature. These laws require or permit districts to pay judgments recovered against teachers. They also permit or require the district to defend teachers in suits against them for damages caused by their negligent acts while performing their teaching duties. Teachers should not be harassed by the possibility of judgments arising out of the conduct of their work.
4. An objective view on the legality of religious instruction in the public schools, in the light of constitutional and statutory provisions and the judicial interpretation placed upon these provisions indicated convincingly that such instruction

is limited. In fact, any instruction or related activity in the public school which contains sectarian influences is illegal. Also, any activity which aids one or more religious sects, or prefers one religious doctrine is illegal. Teachers must substitute moral and spiritual values for religious instruction. Stressing moral and spiritual values in education does not necessarily preclude friendly relations between religion and public education. This can and should be done, however, without the injection of sectarianism or indoctrination of specific religious beliefs.

5. Teachers must become aware that there are some activities outside the classroom that are subject to reasonable regulations associated with the welfare of the school. It is generally agreed that there are some types of conduct that would render them unfit to teach. However, statutes must be substantially complied with in the dismissal of teachers; otherwise, dismissal will not be upheld, even if it is for justifiable reasons. Teachers, as well as boards of education, are required to follow the designated procedures.
6. Teachers should acquire an understanding of school law as related to the areas in which they function. Principals, supervisors, and other professional personnel should have a knowledge of the legal principles derived from court decisions. Studying court cases in their entirety would not only enhance understanding of the law, but would likely develop a keener appreciation of today's judicial system.

It should be emphasized once again that public schools owe their very existence to the society that created them and that they were created primarily for the benefit of such society rather than individual benefits. To achieve this goal for which they were established, boards of education must have reasonable rules and regulations under which to operate. Someone must attempt to determine the amount of personal liberty that may be allowed its employees without interfering with the efficient and proper conduct of the entire system. This is primarily the problem that confronts the legislature, the board of education and the school administrator in adopting statutes, formulating policies and rules and regulations pertaining to its employees.

Teachers should look to their state laws for their duties and responsibilities. Ignorance of the law does not excuse one from performance of duty. It is the responsibility of the teacher to ascertain for himself just what his statutory duties are and to conform to all prescriptions of state law, state board regulations, and local school board rules.

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TABLE OF TERMS

Action. An ordinary proceeding in a court by which one party prosecutes another for the enforcement or protection of a right, the redress of a wrong, or the punishment of a public offense. In common language, a suit or lawsuit.

Allegation. Statement in pleadings, setting forth what the party expects to prove.

Allege. To state, assert, or charge; to make an allegation.

Appellant. The party who makes an appeal from one court to another.

Arbitrary. Not supported by fair cause and without reason given.

Citations. References to law books. A citation includes the book where the reference is found, the volume number, and section or page number.

Civil Action. One brought to recover some civil right, or to obtain redress for some wrong.

Code. A compilation of statutes, scientifically arranged into chapters, subheadings, and sections, with a table of contents and index.

Common Law. As here used, legal principles derived from usage and custom, or from court decisions affirming such usages and customs.

Concurring Opinion. An opinion written by a judge who agrees with the majority of the court as to the decisions in a case, but has different reasons for arriving at that decision.

Damages. Pecuniary compensation or indemnity which may be recovered in court by the person who has suffered loss or injury to his person, property, or right through the unlawful act, omission, or negligence of another.

De facto. Actually; in fact; in deed. A term used to denote a thing actually done.

Defendant. The party against whom relief or recovery is sought in a court action.

Defense. That which is offered and alleged by the defendant as a reason in law or fact why the plaintiff should not recover.

Dissenting opinion. The opinion in which a judge announces his dissent from the conclusion held by the majority of the court.

Due Process. The exercise of the powers of government in such a way as to protect individual rights.

Enjoin. To require a person, by writ or injunction from a court of equity, to perform, or to abstain or desist from, some act.

Injunction. A prohibitive writ issued by a court of equity forbidding the defendant to do some act he is threatening, or forbidding him to continue doing some act which is injurious to the plaintiff and cannot be adequately redressed by an action at law.

Liability. The state of being bound or obligated in law or justice to do, pay, or make good something; legal responsibility.

Majority opinion. The statement of reasons for the views of the majority of the members of the bench in a decision to which some of them disagree.

Mandamus. A writ to compel a public body or its officers to perform a duty.

Mandate. A command, order, or direction, written or oral, which court is authorized to give and person is bound to obey.

Mandatory. Compulsory, referring to a command for which disregard or disobedience is unlawful.

Permissive. That which may be done.

Petition. Written application or prayer to the court for the redress of a wrong or the grant of a privilege or license.

Plaintiff. Person who brings an action; one who sues by filing a complaint.

Prayer. The part of the petition in which petitioner requests the court to grant relief sought.

Precedent. A decision considered as furnishing an example or authority for an identical or similar case afterward arising on a similar question of law.

Relief. The redress or assistance which a complaint seeks from the court, not properly applied to money damages.

Res adjudicata. A matter judicially decided.

Res ispa loquitus. The thing or act speaks for itself.

Respondent. The defendant in an action; a party adverse to an appellant in an action which is appealed to a higher court.

Respondent superior. Employer is liable for the torts of his employees.

Restraint. To prohibit from action; to enjoin.

Right. A power or privilege in one person against another.

Save harmless law. A law that provides that judgment obtained against an employee is payable out of school funds under certain circumstances.

Statute. Acts of the legislature.

Ultra vius. A term used to express the action of a corporation which is beyond the power conferred upon it by its charter, or by the statutes under which it was instituted.

Void. Ineffectual, having no legal force or binding effect; said of a contract, a defective instrument which can be cured by ratification by the one who could have avoided it.

Writ of mandamus. An order which issues from a court of superior jurisdiction, and is directed to a private or municipal corporation, or any of its officers, or to an inferior court commanding the performance of a particular act therein specified or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived.

VITA

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Doctor of Education

Thesis: AN ANALYSIS OF THE LITIGATIONS PERTAINING TO CERTAIN LEGAL RIGHTS AND RESPONSIBILITIES OF CLASSROOM TEACHERS

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