AN ANALYSIS OF THE LAWS AFFECTING PUBLIC SCHOOL ADMINISTRATORS, TEACHERS, SERVICE AND AUXILIARY PERSONNEL IN WEST VIRGINIA

by

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To , who has given

so much for so little.

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BACKGROUND, PROBLEM, AND METHODOLOGY

INTRODUCTION

Public education is a subject of great concern because of its far reaching involvement with students, parents, other relatives, and even taxpayers. Parents, in particular, have more than a passing interest as school personnel are responsible for the educational development of their most valued possession, their child. It is inevitable that education has become the subject of a great amount of statutory and case law.

According to Bolimier, the public school is strictly a "legal entity," being created, supported, and governed by law. Each branch of government--legislative, executive, and judicial--affects in some way, every public school in America.[1] In fact, public education has been affected by legislation and subsequent court decisions for over three hundred thirty-five years. In 1642, the Massachusetts "School Law" held the town council of each village responsible to see that children were trained ". . . in learning and labor, and other implements which may be profitable to the commonwealth."[2] Five years later, the "Olde Deluder Satan Act" established schools in every Massachusetts township of fifty or more families.[3]

While numerous school cases have been litigated since 1642, it has been only during the last twenty-five years that the courts have reviewed issues that historically were resolved by school administrators and boards of education. These issues include conduct of students; rights of teachers and other personnel; the permissibility of differentiation in terms of race, sex, and access to educational resources;[4] plus the affirmation that education is a right and not a privilege.[5] This change is reflected in the number of cases litigated, for Hogan found that in the five years between 1966 and 1971, one hundred forty-six more federal court cases were decided than during the previous one hundred seventy-seven years.[6] This number continues to increase as evidenced by the seven hundred five cases reported in the Yearbook of School Law 1978,[7] as compared to four hundred twenty cases reported in that annual publication in 1971.[8]

While the frequency of court cases continues to increase, public school teachers, administrators, and other personnel are often unaware of the legal standards by which they carry out their responsibilities. Although many of their duties may seem perfunctory, statutes could have been passed or cases decided governing such activities. They would be wise to follow the advice of a Texas court, "Teachers of the public schools, being the important element of our population that they are, the sooner and more completely they are advised of their rights or lack of them, the better."[9]

In studying law and public education it should be understood that there are thousands of laws which bear directly or indirectly on

public education. Only by understanding the sources of school law, the system of courts, and the legal basis for public education, can an effective legal analysis of such cases be made.

SOURCES OF SCHOOL LAW

With nominal differences, the American system of law evolved directly from Anglo-Saxon law. Habeas corpus, freedom of speech, trial by jury, reasonable man standard, due process concept, rule of stare decisis, and other important fixtures of our legal system evolved directly from the English.[10] Additionally, the "Great Charter" granted by England's King John to his rebellious barons at Runnymeade in 1215 has greatly influenced the framework of our federal and state constitutions, as they echo the thought and even the language of the Magna Carta.[11]

School law, as used in the context of this study, is that body of legal precedent affecting education as derived from all sources, including constitutions, statutes, and case law. School laws can be classified into three basic areas: federal and state constitutional law; federal and state statutory law, which includes federal, state, and local administrative rules and regulations; and judicial law.[12] Opinions of the State Attorney General and interpretations of the State Superintendent of Schools are also of significance when studying the current status of school law in West Virginia.

Constitutional Law

In a sense, all law has a constitutional origin or sanction, as constitutions represent the most formal acts or documents of a society and are intended to embody its most cherished ideals.[13] In the words of one court, a constitution is ". . . a charter of government deriving its power from the governed."[14]

The Constitution of the United States secures fundamental personal, property, and political rights and gives expressed or implied powers to the Congress and to the states. It is also the supreme law of the land:

> This Constitution and the laws of the United States which shall be made in pursuance thereof; and all the treaties made or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.[15]

The United States Constitution controls the validity of the acts of all governments, local or national, executive or legislative, and as such is enforceable in West Virginia courts.[16]

State constitutions normally embody many of the rights guaranteed by the federal Constitution. For example, the Bill of Rights of the Constitution of West Virginia provides for the basic rights of life, liberty, property, pursuit of happiness, plus the freedoms of speech, press, assembly, religion, trial by jury, and freedom from unreasonable search and seizure. Additionally, no person may be deprived of life, liberty, or property without due process of law, and the judgment of his peers.[17]

Most state constitutions further define, in terms of exclusion, the various powers of the executive, legislative, and judicial departments of state government and impose a number of restrictions on their exercise.[18]

Statutory Law

The written will of the legislative branch of government, expressed in the form required to make it a law of the United States or of the state, is identified as a statute. Gray defines this term as ". . . the formal utterances of the legislative organs of society."[19]

In a broader sense, however, a statute is an administrative regulation or enactment, from whatever the source originating, to which the state gives the force of law.[20] Under this broad definition, statutory law includes all powers and procedures of administrative agencies, defined by Seavey as, ". . . an organ of government, other than a court and other than a legislature, which affects the rights of private parties through either adjudication or rule making."[21] Auerbach states that these administrative agencies generally act in three capacities: executive, to see that laws are executed; quasi-legislative, to make rules within the scope of powers delegated; and quasi-judicial, to decide controversies.[22]

In West Virginia, the West Virginia Board of Education[23] and county boards of education[24] have the authority to promulgate reasonable rules and regulations for the supervision and administration of the public schools. These enactments are considered to be statutory sources

of school law; however, such rules and regulations must be within the limits prescribed by the West Virginia Legislature.[25]

In summation, Figure 1 reflects the hierarchial organization of constitutional and statutory law as related to the administration of public schools in West Virginia. Each level of the hierarchy is limited by all higher levels, with the United States Constitution being the ultimate source of all law in the United States.

Judicial Law

Case law, judicial law, and common law are interchangeable terms used to distinguish rules of law which have originated in the courts but are derived from the laws enacted by legislative or administrative bodies. The concept of common law originated in England, the word "common" dating from the time when customs became common to all parts of the country. These customs became crystallized into legal precedent which was used with statutory law in deciding controversies throughout England.[26]

Common law contrasts with civil law which dates back to the Justinian Code promulgated by the Romans in 529 A.D. and has been adopted by all of continental Europe and most of the non-English speaking civilized world.[27] Under civil law the legal rules for all conduct and relationships are found in written statutes. In case of a dispute the judge looks to the "Code" of statutes to determine the pertinent rule, with no reliance on precedent whatsoever.[28]

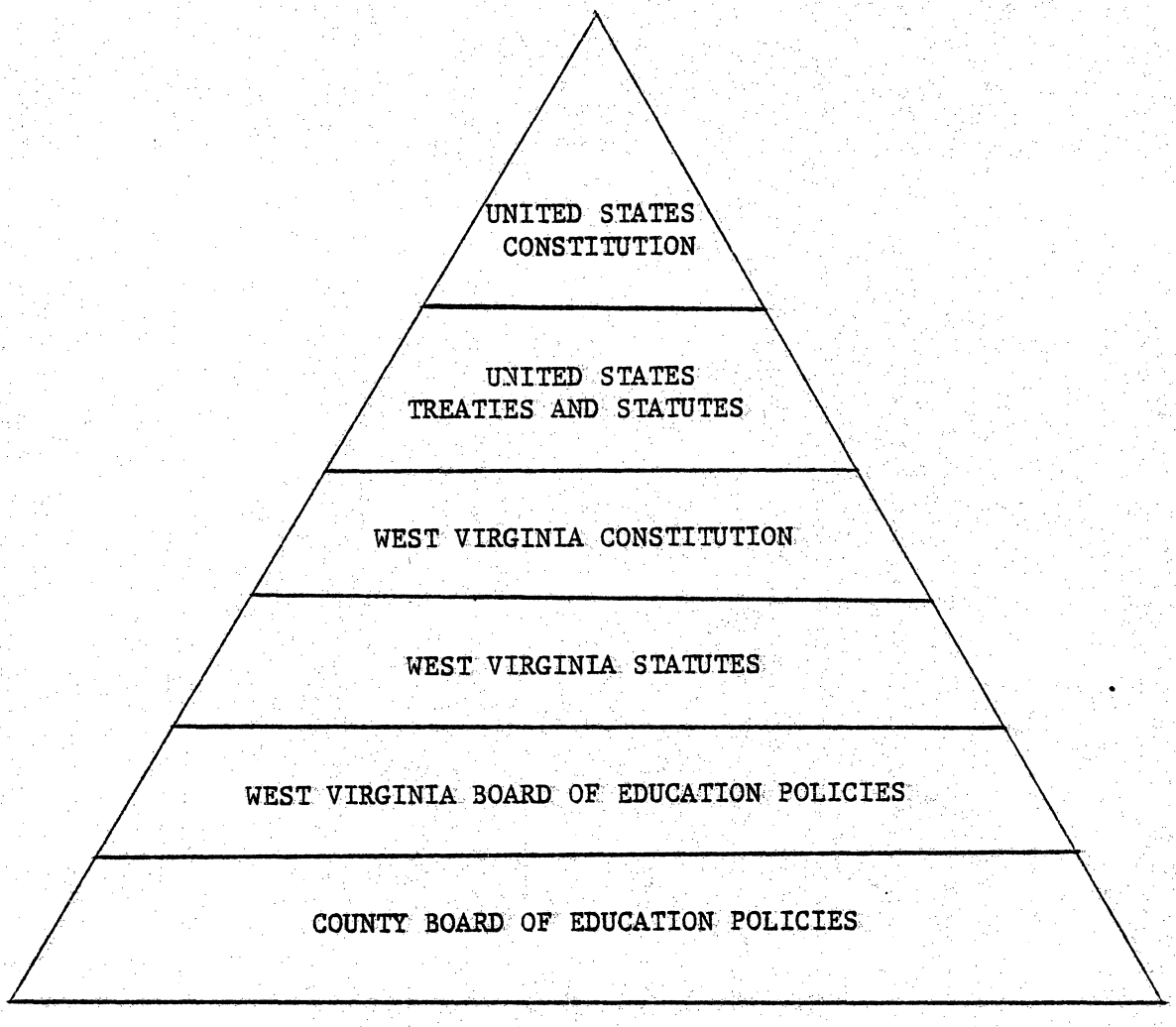

Figure 1

Hierarchy of Constitutional and Statutory
Law in West Virginia

Common law, however, is based on the doctrine of precedent or the rule of stare decisis et non qieta moreve; meaning, "to adhere to precedents, and not to unsettle things which are established."[29] Past decisions are generally considered to be binding on subsequent cases which have substantially the same factual situations. Courts usually adhere to the doctrine of stare decisis and rarely, and then only for a cogent reason, refuse to follow precedent.[30] The importance of judicial law is reflected in the use of the number of volumes of reported decisions by the legal profession, far outnumbering the volumes of written law.[31]

Opinions of the Attorney General

Another source of school law can be found in the written opinions of the state Attorney General. This office originated in England where the Attorney General was appointed by letters patent from the Crown and served at the royal pleasure.[32] As the chief law officer of the Crown of England, the Monarch's Attorney acted on behalf of the Crown in all matters in any court, thus the title, Attorney General.[33] Most commonwealths adopted the office as part of the machinery of their governments,[34] and Virginia, from which West Virginia evolved, was no exception.

When West Virginia attained statehood, its initial Constitution provided for an elected Attorney General to serve as the ex officio reporter for the West Virginia Supreme Court of Appeals.[35] While still serving in this capacity, one of the most important duties

of the Attorney General is to render advice and opinions on legal questions to executive and administrative governmental officials.[36] Written opinions of the Attorney General have, in no sense, the effect of judicial utterances; however, they are often followed and there is little question that they are of influence in affecting public interests and the rights of all persons within the state.[37]

An early decision of the West Virginia Supreme Court of Appeals held that a written opinion of the Attorney General neither justified a public officer in a particular act nor shielded him from its legal consequences.[38] Such opinions are not considered as precedent to be followed by the West Virginia Supreme Court of Appeals;[39] however, the Court has said that an opinion is persuasive when it is issued contemporaneous with the adoption of a statute in question.[40]

Interpretations of the State Superintendent of Schools

In 1866, just three years after achieving statehood, the West Virginia Legislature assigned the task of interpreting the meaning of any part of the school law, as well as the rules of the West Virginia Board of Education, to the State Superintendent of Schools.

> At the request in writing of any citizen, teacher, school official, county or state officer, the state superintendent of schools shall give his interpretation of the meaning of any part of the school law or of the rules of the state board of education.[41]

Most interpretations of the State Superintendent of Schools are summarized in the "County Superintendent's Newsletter," published monthly by the State Department of Education. Copies of all

interpretations are made available to county superintendents and other interested persons on a regular basis.

The present Attorney General of West Virginia has little regard for legal interpretations by the State Superintendent of Schools, holding that State law does not allow the State Superintendent of Schools to expend public funds for the performance of legal services, thus such interpretations "must be those of a layman administrator, untrained in the law."[42] Further, "If the superintendent's 'interpretations' are meant to have the force of legal 'opinions,' then the superintendent--if he is not an attorney--is practicing law without a license."[43]

The opinion of the Attorney General not withstanding, it is common knowledge that the State Board of Education has, for several years, retained an attorney as an administrative assistant to the State Superintendent of Schools. Thus, interpretations have generally expounded the law or policy as it applies to the issue and have detailed the legal reasons upon which the interpretation is made. While not binding on school officials, most interpretations are viewed with merit and are worthy of review.

SYSTEM OF COURTS

A court is a place wherein justice is judicially administered, being presided over by one or more judges who exercise such judicial power as has been conferred upon them by law. Courts have either general or limited jurisdiction and are either of original or appellate jurisdiction, depending on the controversy.[44]

Function of the Courts

As the federal and state constitutions are the supreme law of their particular jurisdiction, one primary function and responsibility of the courts is to determine the constitutionality of enactments of the legislature. In determining this issue, the courts first presume an act to be constitutional and anyone maintaining the contrary must bear the burden of proof. The United States Supreme Court has held that, "Questions of constitutionality are determined only when necessary to decide a case or controversy involving a bona fide dispute between parties asserting adverse legal claims."[45] In 1803, United States Supreme Court Justice John Marshall defined the function and responsibility of the judiciary on constitutional matters:

> It is emphatically the province and duty of the judicial department to say what the law is . . . . If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary acts, must govern the case to which they both apply.[46]

The second primary function of the courts in dealing with cases involving public schools is to interpret statutes. Most commonly, this type of case follows the enactment of new legislation affecting education. It is the task of the jurist to work out a method of interpreting such statutes through a predictable course of legal reasoning.[47]

Courts must also settle controversies by applying appropriate laws or principles of law to a specific set of facts. In deciding such

cases the court must first look to constitutional or statutory provisions, and in their absence, look to the common law for the rule that fits the case.[48] In deciding controversies, Llewellyn states that,

> 1. The court must decide the case before it.
>
> 2. The court can decide only the particular dispute which is before it.
>
> 3. The court can decide the particular dispute only according to a general rule which covers a whole class of like disputes.
>
> 4. Everything . . . big or small a judge may say in an opinion, is to be read with primary reference to the particular dispute, the particular question before him.[49]

In deciding a case, very few trial courts write opinions; however, when an appellate court has determined a dispute, it will usually write an opinion containing salient facts of the case, the rules of law applied by the court to govern the case, and the reasoning of the court in explanation or support of its decision.[50] Dissenting opinions are often included in the record but are not binding as precedent, being useful only as secondary authority. A judge may also formulate incidential comment, known as obiter dictum, which is merely "spoken by the way."[51]

Federal Court System

The federal system of courts was established under Article III of the United States Constitution, vesting the "judicial power" of the United States "in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish."[52]

The federal court system presently includes the nine-member Supreme Court, eleven Circuit Courts of Appeal, one or more district courts in each state, and special courts to handle specific problems or to cover special jurisdictions. Cases litigated in federal courts are cases between citizens of different states or cases involving federal statutes or the United States Constitution. The two primary means for obtaining federal court jurisdiction in cases affecting education are by questioning the validity of a state or federal statute under the United States Constitution or by alleging that some Constitutionally protected right, privilege, or immunity of the individual has been violated.[53]

There is no possible redress beyond the United States Supreme Court, the highest court in the land. Cases may be brought to the Supreme Court by appeal, writ of certiorari, or through original jurisdiction of the Court. Most school cases are taken on writs of certiorari, an action whereby a case is removed from an inferior to a superior court for decision.[54]

West Virginia Court System

The pattern of courts and government existing in Virginia was largely carried over to the new state of West Virginia when founded in 1863.[55] Since the West Virginia judiciary system evolved directly from the ancient courts of Virginia, a brief study of Virginia courts is warranted.

By action of the Virginia Grand Assembly in 1642, County Courts were established to hear "any suit concerning any debt under the value of twenty shillings or two hundred pounds of tobacco."[56] Commissioners, to be called justices of the peace in 1662, handled cases of lesser amounts. County Courts soon became courts of general jurisdiction, being comprised of eight justices of the peace, each appointed by the Governor for life.[57]

The most important judicial tribunal in the colony was the General Court, called Quarter Courts prior to 1661. The General Court was the court of last resort until 1776 when the new state constitution established a Supreme Court of Appeals, depriving the General Court of much of its jurisdiction.[58] A new constitution in 1851 abolished the General Court, establishing in its place Circuit Courts to which judges were elected for a limited term. The Supreme Court of Appeals continued to be the court of last resort but was required by law to meet once per year in what is now Lewisburg, West Virginia, as well as once per year in Richmond.[59]

By its initial constitution in 1963, West Virginia modified the Virginia judicial system, retaining the following courts: Supreme Court of Appeals, Circuit Courts, and Justice of the Peace Courts.[60] The old Virginia County Court system was revived in 1872 but was abolished as a court for the trial of causes by constitutional revision in 1879.

The West Virginia Supreme Court of Appeals initially consisted of three justices elected by the voters of the State for a twelve-year term. One additional position was added in 1880, and again in 1902,

bringing about a total of five justices.[61] To date the Supreme Court of Appeals remains unchanged except that the 1974 Judicial Reorganization Amendment to the West Virginia Constitution vests with the Court the supervision and discipline of Circuit and Magistrate courts of the State.

Initially the State was divided into nine Circuit Courts, each with a judge elected for a six-year term. In 1872, a new Constitution increased the term in office to eight years. An amendment to the constitution in 1880 increased the circuits to thirteen and granted the Legislature the authority to increase or diminish circuits,[62] resulting in twenty-nine Circuits at the present time. The 1974 amendment established, for the first time, professional qualifications for the judgeships; created a state-wide salary schedule; and permitted the Legislature to assign as many judges as is necessary per circuit.[63]

West Virginia's initial constitution provided for justices of the peace to be elected at township meetings for a term of four years. Such township justices were abolished in 1872 when each county was divided into magisterial districts, each served by at least one justice of the peace who was elected by the voters of that district.[64] The 1974 Judicial Reorganization Amendment abolished the office of the justice of the peace, establishing Magistrate Courts instead. Magistrates are elected for four-year terms and must meet qualifications established by the Legislature. The number of magistrates per county range from one in counties with less than ten thousand population to twenty in counties having in excess of two hundred thousand population.[65]

LEGAL BASIS FOR PUBLIC EDUCATION

The government of the United States is one of delegated, expressly enumerated powers.[66] States have sovereign power, unless the power has been delegated to the federal government, or denied to the states by the federal Constitution.[67] As neither "schools" nor "education" is found in the United States Constitution, the Tenth Amendment, ratified in 1791, is applicable: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[68]

While it appears that the federal government is without authority to create, maintain, and control a public school system, the United States Supreme Court ruled as early as 1936 that the federal government could tax and spend for the general national welfare under Article I, Section 8 of the Constitution.[69] While this case, U.S. v. Butler, and its 1937 companion, Helvering v. Davis,[70] were not directly related to education, it is evident that the Congress has the power to tax and spend for any purpose that promotes the general welfare, something education certainly does.[71]

Even though education, as such, has never been the central issue in a case decided by the United States Supreme Court,[72] that Court has been actively involved in educational matters, particularly since the early 1950's when it clearly recognized that certain policies and procedures of the public schools failed to meet constitutional requirements of the First and Fourteenth Amendments.[73] In the past

quarter of a century, landmark decisions by the United States Supreme Court have been handed down on such school matters as desegregation,[74] religious freedom,[75] freedom of speech,[76] tenure of school personnel,[77] school finance,[78] due process,[79] liability of school officials,[80] and corporal punishment.[81]

Today, it is generally agreed that public education is a function of the state and not the federal government or local units of government. Only the state has the authority to create, maintain, and support a system of public schools.[82] In hundreds of court decisions throughout the United States, the courts have consistently held that school districts are subdivisions of the state; that school property, including school buildings, is state property; that school monies are state monies; and that school board members are state officers.[83]

Each of the fifty state constitutions, excepting Connecticut's, has one or more provisions for the establishment of a public school system.[84] Article XII, Section 1 of the Constitution of West Virginia states: "The legislature shall provide, by general law, for a thorough and efficient system of free schools." Under this section, the West Virginia Legislature has discretionary power to determine what institutions are to be included in the "free school" system of the State[85] and is the "sole judge" as to the kind or kinds of schools that should be established and supported.[86]

The most revolutionary change ever to occur in the organization of the public schools of West Virginia was in 1933, when faced with

critical economic problems, the Legislature abolished hundreds of magisterial school districts, sub-districts, and independent school districts, making the fifty-five county units responsible for the administration of the public schools of the state.[87] In the Leonhart case arising from this action, the West Virginia Supreme Court of Appeals held that, subject only to constitutional limitations, the Legislature has the right to make changes in the educational system as it sees fit, including the right to abolish existing districts.[88]

"Free schools" in West Virginia have been defined as a system of public schools to which all children who are school age residents are admitted free and without discrimination.[89] The general supervision of the free schools is vested in the West Virginia Board of Education, comprised of nine members serving nine year terms, being appointed by the Governor, by and with the advice and consent of the West Virginia Senate.[90] The determination of educational policies of the State lies with the State Board of Education and unless unreasonable and arbitrary, its actions will not be reviewed by the courts.[91]

While the West Virginia Constitution provides for a State Board of Education, a State Superintendent of Free Schools, and for county superintendents of schools,[92] it makes no allowance for county boards of education. The Legislature, however, has established that each county school district shall be under the supervision and control of a county board of education, comprised of five non-partisan, elected members.[93] Such boards are quasi-public corporations[94] but can exercise

power only when expressly conferred or fairly arising from necessary implication, and in no mode other than that prescribed or authorized by statute.[95] A county board of education is a continuing corporate body and does not change with changes in its membership. Valid contracts of the board, once made by its officers, are binding upon the corporation even though its succeeding officers may disapprove and attempt to nullify them.[96]

STATEMENT OF PROBLEM

The purpose of this study was to examine provisions of the Constitution of West Virginia, enactments of the West Virginia Legislature, decisions of the West Virginia Supreme Court of Appeals, policies of the West Virginia Board of Education, opinions of the Attorney General, and interpretations of the State Superintendent of Schools to ascertain the legal status of West Virginia public school personnel in the employment process, in liability cases arising from tort actions, and in other areas where legal questions often arise. Federal Constitutional provisions, statutes, and court cases were also considered when of overriding importance or when West Virginia legal references were inadequate.

NEED FOR THE STUDY

A legal investigation of this nature was needed in West Virginia to provide public school teachers, auxiliary and service

personnel, and administrators with a source of legal information which will assist them in understanding their rights and responsibilities. While the recent publication of two general handbooks of West Virginia school law has provided basic legal information about school personnel,[97] there exists no comprehensive legal work on the subject. Similar studies in education and the law have been completed by Smith in North Carolina,[98] Simpson in Ohio,[99] Alexander in Kentucky,[100] Garber and Smith in Illinois,[101] and Burt in Indiana.[102]

DELIMITATION OF THE STUDY

This study was delimited to the school laws which pertain to West Virginia public school administrators, teachers, service, and auxiliary personnel. Cases from jurisdictions other than West Virginia were considered only when appropriate to this study.

PROCEDURE

The principal legal sources used in this study are as follows: (a) West Virginia Code, (b) West Virginia Reports, (c) opinions of the Attorney General, (d) Policies, Rules and Regulations of the West Virginia Board of Education, and (e) interpretations of the State Superintendent of Schools.

The West Virginia Code was examined for statutes which were applicable to the legal areas with which this study was involved. West Virginia case law was analyzed by using cases reported in West Virginia Reports and the National Reporter System, Southeastern Reporter volumes.

Opinions of the Attorney General; policies of the West Virginia Board of Education as recorded in Policies Rules and Regulations; plus interpretations of the State Superintendent were used to give explanation to statutory provisions, where there were no applicable cases.

The search for the case law was made through use of the following methods of legal research: descriptive word method, topic method, and case method.[103] The principal sources to which these methods were applied are: (a) American Digest System, (b) Virginia-West Virginia Digest, (c) Words and Phrases, (d) American Jurisprudence, (e) Corpus Juris Secundum, (f) Michie's Jurisprudence, and (g) Shepard's Citations. The latter reference work was also used to ascertain whether cases had been affirmed, reversed, dismissed, or modified on appeal.

DEFINITION OF TERMS

Persons in the field of law utilize a vocabulary which is generally unfamiliar to most laymen. While an effort has been made to keep the legal jargon of this study to a minimum, some terms necessarily must be included. A glossary of legal and technical terms which need to be clarified can be found after the Appendix section of this study.

FOOTNOTES

[1]Edward C. Bolmeier, Teachers' Legal Rights, Restraints and Responsibilities (Cincinnati: The W.H. Anderson Co., 1971), p. iii.

[2]Lee O. Garber and H. Hayes Smith, The Law and the Teacher in Illinois (Danville, Ill.: The Interstate Printers and Publishers, Inc., 1965), p. 2.

[3]Ellwood P. Cubberley, ed., Readings in the History of Education (Boston: Houghton Mifflin Co., 1920), p. 299.

[4]David L. Kirp and Mark G. Yudof, Educational Policy and the Law (Berkeley: McCutchan Publishing Corp., 1974), p. xxxvii.

[5]Brown v. Board of Education of Topeka, 347 U.S. 483 (1954); Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).

[6]John C. Hogan, The Schools, the Courts and the Public Interest (Lexington, Mass.: Lexington Books, 1974), p. 7.

[7]Philip K. Piele, ed., The Yearbook of School Law 1978 (Topeka, Kansas: National Organization On Legal Problems Of Education, 1978).

[8]Lee O. Garber and Reynolds C. Seitz, eds., The Yearbook of School Law 1971 (Topeka, Kansas: National Organization On Legal Problems Of Education, 1971).

[9]Woods v. Reilly, 147 Tex. 586, 218 S.W.2d 437 (1949).

[10]Warren Gauerke, School Law (New York: The Center for Applied Research in Education, Inc., 1965), p. 7.

[11]Carl A. Auerbach and Samuel Mermin, The Legal Process (Madison, Wis.: Capital Press, 1956), p. 187.

[12]Gauerke, op. cit., p. 11.

[13]Bernard C. Gavit, ed., Blackstone's Commentaries on the Law (Washington, D.C.: Washington Law Book Co., 1941), p. 21.

[14]Fairhope Single Tax Corp. v. Melville, 193 Ala. 289, 69 So. 470 (1936).

[15]United States Constitution, Article VI.

[16]Claude J. Davis, et al., West Virginia State and Local Government (Morgantown, W.Va.: Bureau of Governmental Research, West Virginia University, 1963), p. 225.

[17]West Virginia Constitution, Article III, Sections 1-20.

[18]Bernard C. Gavit, Introduction to the Study of Law (Brooklyn: The Foundation Press, Inc., 1951), p. 24.

[19]John C. Gray, The Nature and Sources of Law (New York: The Macmillion Co., 1938), p. 152.

[20]50 Am.Jur.1st Stat. 2.

[21]Warren A. Seavey, ed., Ballantine's Problems in Law (St. Paul, Minn.: West Publishing Co., 1957), p. 31.

[22]Auerbach, op. cit., p. 837.

[23]West Virginia Constitution, Article XII, Section 2.

[24]West Virginia Code, § 18-5-1.

[25]Hunt v. Board of Education, 321 F.Supp. 1263 (S.D. W.Va. 1971).

[26]Kern Alexander, Ray Corns, and Walter McCann, Public School Law (St. Paul, Minn.: West Publishing Co., 1969), p. 3.

[27]Bernard C. Gavit, Introduction to the Study of Law, op. cit., p. 19.

[28]Bernard C. Gavit, Blackstone's Commentaries on the Law, op. cit., p. 23.

[29]Black's Law Dictionary (Rev. 4th Edition, 1968). p. 1578.

[30]Samuel I. Shuman and Norman D. West, American Law (Detroit: Wayne State University Press, 1971), p. 40.

[31]Chester M. Nolte and John Philip Linn, School Law for Teachers (Danville, Ill.: The Interstate Printers and Publishers, Inc., 1964), p. 7.

[32]State ex rel Lamb v. Cunningham, 83 Wis. 90, 53 N.W. 35 (1889).

[33]13 Ill.L.Rev. 395 (March, 1919).

[34]33 Temp.L.Q. 78 (Fall, 1959).

[35]West Virginia Constitution, Article VII, Section 1.

[36]West Virginia Code, § 5-3-1.

[37]State v. Burleigh Co., 19 N.D. 819, 124 N.W. 417 (1923).

[38]State v. Conley, 118 W.Va. 508, 190 S.E. 908 (1937).

[39]State v. Wassick, 191 S.E.2d 283 (W.Va. 1972).

[40]Walter v. Ritchie, 191 S.E.2d 275 (W.Va. 1972).

[41]West Virginia Code, § 18-3-6.

[42]Op. Att'y Gen., June 26, 1974.

[43]Ibid.

[44]Arthur T. Vanderbilt, ed., Studying Law (New York: New York University Press, 1955), pp. 420-421.

[45]United States v. Johnson, 319 U.S. 302 (1943).

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

[47]Roscoe Pound, Cases on the Interpretation of Statutes by Frederick J. DeSloovere (St.Paul, Minn.: West Publishing Co., 1931), pp. v-vii.

[48]Benjamin N. Cardoza, The Nature of the Judicial Process (New Haven, Conn.: Yale University Press, 1962), pp. 18-19.

[49]Karl Llewellyn, The Bramble Bush (New York: Oceana Publications, 1951), pp. 42-43.

[50]Nolte, op. cit., pp. 44-45.

[51]Eugene Wambaugh, "How to Use Decisions and Statutes," Studying Law, ed. Arthur T. Vanderbilt (New York: New York University Press, 1955), p. 554.

[52]United States Constitution, Article II, Section 1.

[53]John C. Hogan, The Schools, The Courts and the Public Interest (Lexington, Mass.: Lexington Books, 1974), p. 8.

[54]Alexander, op. cit., p. 717.

[55]Claude J. Davis, et al., op. cit., p. 7.

[56]John W. Mason, "The Origin and Development of the Judicial System in West Virginia," Semi-Centennial History of West Virginia, ed. James M. Callahan (Charleston, W.Va.: Tribune Printing Co., 1913), p. 493.

[57]Ibid.

[58]Mason, op. cit., p. 394.

[59]Code of Virginia, Chapter 160, p. 680 (1860).

[60]West Virginia Constitution, Article VIII (1863).

[61]Davis, op. cit., p. 232.

[62]Davis, op. cit., p. 230.

[63]West Virginia Constitution, Article VIII.

[64]Davis, op. cit., pp. 230-232.

[65]West Virginia Code, §§ 50-20-1, -2.

[66]Newton Edwards, The Courts and the Public Schools (Chicago: The University of Chicago Press, 1971), p. 1.

[67]Nolte and Linn, op. cit., p. 18.

[68]United States Constitution, Amendment X.

[69]United States v. Butler, 297 U.S. 1 (1936).

[70]Helvering v. Davis, 301 U.S. 619 (1937).

[71]Garber, op. cit., p. 15.

[72]Thomas A. Shannon, "Rodriguez: A Dream Shattered or a Call For Financial Reform," Phi Delta Kappan, LIV (May, 1973), p. 589.

[73]Hogan, op. cit., p. 10.

[74]Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

[75]Abington School District v. Schempp, 374 U.S. 483 (1963); Lemon v. Kurtzman, 403 U.S. 602 (1971); Wisconsin v. Yoder, 406 U.S. 205 (1972).

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

[77]Perry v. Sindermann, 408 U.S. 593 (1972); Roth v. Board of Regents, 408 U.S. 564 (1972).

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

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

[80]Wood v. Strickland, 420 U.S. 308 (1975).

[81]Baker v. Owen, 423 U.S. 907 (1977).

[82]Garber, op. cit., p. 17.

[83]Lorin A. Burt, School Law and the Indiana Teacher (Bloomington, Ind.: Beanblossom Publishers, 1967), p. 7.

[84]Edward C. Bolmeier, The School in the Legal Structure (Cincinnati: The W. H. Anderson Co., 1968), p. 66.

[85]51 Op. Att'y Gen. 852 (1966).

[86]Kuhn v. Board of Education, 4 W.Va. 499 (1871).

[87]George D. Strayer, A Digest of a Report of a Survey of Public Education in the State of West Virginia (Charleston, W.Va: Jarrett Printing Co., 1945), pp. 20-21.

[88]Leonhart v. Board of Education, 114 W.Va. 9, 170 S.E. 418 (1933).

[89]51 Op. Att'y Gen. 852 (1966).

[90]West Virginia Constitution, Article XII, Section 2.

[91]Detch v. Board of Education, 145 W.Va. 722, 117 S.E.2d 138 (1960).

[92]West Virginia Constitution, Article XII, Sections 2-3.

[93]West Virginia Code, § 18-5-1.

[94]Herald v. Board of Education, 65 W.Va. 765, 65 S.E. 102 (1909).

[95]Honaker v. Board of Education, 42 W.Va. 170, 24 S.E. 544 (1896).

[96]State ex rel. Campe v. Board of Education, 94 W.Va. 408, 118 S.E. 877 (1923).

[97]Richard Meckley, Handbook of West Virginia School Law (Morgantown, W.Va.: Department of Education Administration, West Virginia University, 1975); Neil L. Gibbons, Zane McCoy, and Bernard Queen, Law of Free Public Education in West Virginia (Danville, Ill.: The Interstate Printers and Publishers, Inc., 1978).

[98]Michael R. Smith, Law and the North Carolina Teacher (Danville, Ill.: The Interstate Printers and Publishers, Inc., 1975).

[99]Robert J. Simpson, Education and the Law in Ohio (Cincinnati: The W. H. Anderson Co., 1968).

[100]Samuel Kern Alexander, Jr., "An Analysis of the Laws Affecting Public School Administrative and Teacher Personnel in Kentucky" (unpublished Doctoral dissertation, Indiana University, 1965).

[101]Lee O. Garber and H. Hayes Smith, The Law and the Teacher in Illinois (Danville, Ill.: The Interstate Printers and Publishers, 1965).

[102]Lorin A. Burt, School Law and the Indiana Teacher (Bloomington, Ind.: Beanblossom Publishers, 1967), p. 7.

[103]Morris L. Cohen, Legal Research in a Nutshell (St. Paul, Minn.: West Publishing Co., 1971), pp. 50-54.

Chapter 2

LEGAL PROVISIONS AFFECTING THE EMPLOYMENT OF PUBLIC SCHOOL PERSONNEL

The status of public school personnel, while little understood by the general public, is well settled in the law. In West Virginia, employees of county boards of education have been defined, classified, certified, and scrutinized by statute, case law, State Board of Education policy, opinions of the Attorney General, and legal interpretations of the State Superintendent of Schools.

While there are many definitions of the word "teacher," within this chapter the term is used in accordance with West Virginia statute:

> 'Teacher' shall mean teacher, supervisor, principal, superintendent, public school librarian or any other person regularly employed for instructional purposes in a public school in this state.[1]

The term "administrator" is undefined in West Virginia law but is used here to mean those professional educators who are employed as principals, assistant principals, supervisors, coordinators, directors, and others regularly employed in an administrative or supervisory capacity, excepting the county superintendent of schools. The position of county superintendent is omitted in this study because the person who serves in this capacity is a public officer whose employment is governed by dissimilar statutes and case law.

School support personnel in West Virginia are divided by statute into two distinct categories: "auxiliary personnel" who are

selected and trained for teacher aide classifications such as monitor aide, clerical aide, classroom aide, or general aide;[2] and, "service personnel" who serve the school system in a nonprofessional capacity, including such areas as secretarial, custodial, maintenance, transportation, and food service.[3]

In West Virginia, public school teachers, administrators, auxiliary, and service personnel are employed, supervised, and paid through county boards of education. However, since education is a state function under the West Virginia Constitution,[4] school personnel are also considered to be quasi-state employees and as such accrue most of the benefits afforded other state employees. Although school personnel perform a governmental function, only the county superintendent of schools is a public officer. Other personnel are not covered by constitutional provisions governing public officers.[5]

While school employees must respond to public needs, they are legally responsible neither to the public nor to the patrons of the schools, but to the proper school officials; the board of education, the county superintendent of schools, and the State Superintendent of Schools.[6]

THE EMPLOYMENT PROCESS

It has generally been established that school districts have the power to employ agents, assistants, and other employees as implied or specified by statute.[7] Chapters Eighteen and Eighteen A of the West Virginia Code authorize county boards of education to employ

teachers, administrators, auxiliary, and service personnel.

The person having greatest responsibility in the employment of school personnel in West Virginia is the county superintendent of schools. West Virginia law provides that the county superintendent shall

> . . . nominate all personnel to be employed; in case the board of education refuses to employ any or all of the persons nominated, the superintendent shall nominate others and shall submit the same to the board of education at such time as the board may direct, but no such person or persons shall be employed except on the nomination of the county superintendent; . . .[8]

As the above statute has not been specifically repealed, controversy has arisen between some boards and county superintendents since 1969 when the Legislature enacted a new chapter of the code dealing exclusively with school personnel.[9] Under this revision the board is authorized to employ such auxiliary and service personnel as is deemed necessary for the operation of the schools.[10] In two separate opinions, the Attorney General has stated that the recommendation and nomination of the county superintendent is now unnecessary for the employment of auxiliary and service personnel. He felt that the Legislature had, in fact, repealed by implication the county superintendent's authority to nominate such personnel.[11]

It is, however, well settled that the employment of professional personnel must be made by the board only upon nomination and recommendation of the county superintendent of schools. In Cochran v. Trussler the court held that this method is exclusive and ". . . is an indispensible prerequisite to the execution of a valid teaching contract."[12]

In an earlier case, the court held that even where personnel were nominated by a county superintendent who had been illegally appointed, he was a de facto "public officer" and his nominations for employment, if acted upon by the board, were valid.[13]

Steps to Employment

While specific employment procedures vary from county to county in West Virginia the usual steps in the employment of school personnel include the following:

1. Announcement of vacancy.

2. Acceptance of applications.

3. Screening of candidates.

4. Verbal offer of position to selected candidate by superintendent of schools or his designee.

5. Verbal acceptance by the candidate.

6. Nomination of the candidate by the superintendent of schools to the board of education.

7. Consideration and subsequent approval of nominee by the board. If candidate is rejected, the superintendent may nominate an alternate candidate.

8. Issuance of a written contract by the board of education through the office of the superintendent of schools, being properly signed by both the president of the board and the board secretary (county superintendent of schools).

9. Acceptance of employment by nominee as verified by return of the signed contract.

It is universally held that school personnel can only be employed by a board of education when it is meeting in a legally convened session.[13] In an 1882 West Virginia case indirectly related to personnel the Supreme Court of Appeals held that school board members cannot act individually and separately in making contracts or promises.[14] However, in Rhodes v. Board of Education that same court held that any member of the board or any other person could make an informal, unwritten application for any prospective employee.[15]

Special Conditions of Employment

West Virginia statute requires that all school personnel shall have a chest x-ray or an approved tuberculin skin test once every two years. School employees found to have tuberculosis in a communicable stage shall have their employment discontinued or suspended until the disease has been arrested and is no longer communicable. Personnel who have not had the required examination are to be suspended from employment until such examination is made and its negative determination confirmed.[16]

Official policy of the West Virginia Board of Education mandates that school bus operators have an annual medical examination. Drivers over fifty years of age are required to have semi-annual examinations.[17] Additionally, the county superintendent, prior to discharging his duties, must file with the board of education a health certificate noting his fitness for the position.[18] County boards of education may also require physical examinations for other employees; however, the cost of all required examinations must be borne by the board.[19]

While there is no state statute on residency requirements, it is apparent that a county board of education may require that a person become a resident of the county after becoming employed.[20] Further, the State Superintendent of Schools has ruled that ". . .the board may limit such a policy to one or more categories of its employees, or it may make it applicable to all of its employees."[21]

It is fundamental that an individual cannot properly represent the public interest in transacting business with himself. School board members, superintendents, supervisors, principals, and teachers in West Virginia are prohibited by statute from having any pecuniary interest, directly or indirectly, in the proceeds of any ". . . contract or service, or in furnishing any supplies in the contract for, or the awarding or letting of, which . . . he may have any voice, influence, or control."[22] In such cases, it is immaterial whether or not a profit was made, or whether a corrupt or immoral act was commited. It is sufficient to prove that the conduct was forbidden by statute.[23] A person convicted of violating this provision may be fined up to five hundred dollars, imprisoned for one year, and be removed from his position. If a professional employee, he may also have his teaching certificate revoked.[24] A revision of the code in 1977 allowed the lawful employment of the spouse of a board member, superintendent, supervisor, principal, or teacher as a principal, teacher, auxiliary, or service employee in the public schools of any county.[25] Previously, the spouse could be employed only as a principal or teacher.

DISCRIMINATION AND EMPLOYMENT

A legal definition of discrimination is, "In general, a failure to treat all equally."[26] To overcome this inequality in educational practices, the United States Supreme Court has consistently prohibited racial discrimination since 1954 when it handed down its landmark decision in Brown v. Board of Education of Topeka.[27] The Congress has also responded by enacting several important measures including the 1964 Civil Rights Act which prohibits discrimination on the basis of race, color, or national origin,[28] Title IX of the Education Amendments of 1972 outlawing sex discrimination,[29] plus recent legislation prohibiting discrimination on the basis of physical, mental, or emotional handicaps.[30] The responsibility for developing guidelines and regulations to implement and enforce this legislation has been with the United States Department of Health, Education, and Welfare, the Equal Employment Opportunity Commission, and other federal agencies. Compliance by school districts has often been linked to a threatened elimination of federal funds.

Many unanswered questions remain concerning possible discriminatory practices in the employment of public school personnel. For example, the federal courts had, until recently, held that civil rights legislation prohibits not only overt discriminatory practices but also those practices which, though nondiscriminatory in nature, nevertheless produce discriminatory effects.[31] However, in a 1976 case involving two black police officers, the Supreme Court held that a written personnel test used to ascertain verbal skills may have a

"differentiated impact" on black and white applicants so long as there was no intent to discriminate.[32] In 1978, that same court upheld South Carolina's use of the National Teachers Examination to hire and pay its teachers. The court held that the test is a rational way to select teachers and does not ". . . demonstrate intent to discriminate, . . ." even though it serves to disqualify a greater number of black applicants and to place a greater number of black teachers in lower paying classifications.[33]

In the area of sex discrimination, it has generally been held that Title IX regulations are applicable to employment practices in districts receiving federal funds; however, the Seventh Circuit Court recently ruled that Title IX does not create a private, individual right of action for sex discrimination[34] and a federal district court in Michigan has held that the regulatory authority of the Department of Health, Education, and Welfare, under Title IX, must be confined to ". . . students and only students. . . ."[35]

In summary, it can be said that federal regulations and decisions of the federal courts continue to evolve, leaving behind more questions than answers regarding employment practices which may be discriminatory.

School administrators in West Virginia must not only comply with federal statutes and court decisions regarding discrimination, they must also be in compliance with the 1961 West Virginia Human Rights Act. This statute prohibits discrimination in employment, public accomodations, and housing. As related to employment the Act provides:

> It is the public policy of the State of West Virginia to provide all of its citizens equal opportunity in employment. . . . Equal opportunity in employment. . . is hereby defined to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, or blindness.[36]

The Act further provides that:

> It shall be unlawful discriminatory practice, unless based on a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the State of West Virginia . . . for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required. . . ."[37]

In essence, this legislation prohibits employer discrimination against an individual with respect to job advertising, pre-employment inquiries, hiring, classification, transfer, promotion, demotion, tenure, salary, and any other terms, conditions, and privileges of employment. It is applicable to State government, political subdivisions, including public school districts, and any person employing more than twelve persons within the state excepting "private clubs."[38]

The West Virginia Human Rights Commission has the responsibility of enforcing the protections established by the Human Rights Act. The Commission must investigate, at public expense, all charges alleging illegal discriminatory acts. It is also empowered to subpoena records, hold formal hearings, make findings, enter into conciliation agreements or consent orders, issue cease and desist orders, and apply to the circuit courts for enforcement of its rulings. Willful violation of Commission orders are misdemeanors punishable by fines of one hundred to five hundred dollars and/or imprisonment not to exceed thirty days.[39]

Most school cases which come before the Human Rights Commission are either abandoned by the complainant, found to be non-discriminatory in a preliminary investigation, or settled through conciliatory agreements satisfactory to the school district and the complainant. During the last three years only two school cases have been carried to full determination by the Commission.

In an alleged sex discrimination case, Decker v. Administrative Council of the United Career Center, the complainant, a female, had been rejected for four administrative positions at the Career Center between 1973-75. In each instance, Ms. Decker was found to hold the necessary paper qualifications; however, the Administrative Council members testified that they found her abrasive, belligerent, self-centered, and unable to get along with others.[40] The Commission ruled in favor of the Administrative Council, holding that Decker's rejection had been based on a bona fide occupational qualification and was not discriminatory. In the words of the Commission,

> . . . The fact that subjective evaluation is a mechanism for discrimination does not make every such subjective evaluation discrimination per se. . . . The law does not require that Ms. Decker be hired for the positions simply because she is a woman. Rather it requires only that she not be rejected for that reason.[41]

The second recent school case before the Human Rights Commission alleged racial discrimination in the hiring practices of high school athletic coaches. In Smith v. Logan County Board of Education, the complainant had been employed by the school system since 1943 and had served as the head football coach in a segregated black school for seventeen years, winning seventy percent of his games, two state

championships, and national recognition. He had also served as an assistant coach at the integrated Logan High School for six years.[42]

Smith alleged that he had been terminated as an assistant coach in 1973 for racial reasons and that he had been discriminated against when he had not been considered for the head football coaching position the five times it had been vacant since 1966. The respondent Board acknowledged that the complainant's objective qualifications were probably superior to any head coach employed since 1966, the present coach excepted; however, they felt that Smith was not ". . . the best man for the job." The hearing revealed that Smith was never contacted or interviewed for the head position even though he had filed appropriate applications.[43]

The Human Rights Commission held that the respondent had discriminated against Smith on account of his race when he was terminated as assistant coach in 1973 and when he was not employed as head coach in 1974 and again in 1976. The Board was ordered to pay Smith the salary he would have earned as an assistant coach in 1973-74 and as a head coach for 1974-75 through 1977-78. In addition:

> The first time the position becomes vacant the Respondent shall offer Lacy Smith the position of head football coach of Logan High School. Until such time the Respondent shall compensate him at a salary equal to that which he would receive if he were head coach in addition to his other teaching duties.[44]

It is noted that the Logan County Board of Education has appealed this case to the Logan County Circuit Court.

DUE PROCESS

The remainder of this chapter discusses employee rights and responsibilities in certification matters and contracts of employment. Any discussion of such employee rights must first consider constitutional due process guarantees.

The concept of constitutional due process in the United States had its roots in the Great Charter of England, the Magna Carta, for therein is first found a promise that

> No freeman shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgement of his peers and by the law of the land.[45]

The Fifth Amendment to the United States Constitution, adopted as part of the Bill of Rights in 1791, provides, ". . . nor shall any person be . . . deprived of life, liberty, or property, without due process of law."[46] Further, section one of the Fourteenth Amendment, passed in 1868, extends these due process requirements to the states:

> [N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.[47]

Actions taken by public school authorities in their official capacities are considered in the law as actions of the state. Because they are state actions, they are controlled by the Fourteenth Amendment.[48]

The Constitution of West Virginia also guarantees comparable rights to all of its citizens: "No person shall be deprived of life,

liberty, or property, without due process of law and the judgment of his peers."[49]

While an exact definition of due process cannot be given to cover all cases, it is generally recognized to encompass two separate but related legal principles; substantive due process and procedural due process. A person must have a substantive right to due process before he is entitled to procedural claims.

Substantive Due Process

Due process attempts to define the liberty and property rights of public school employees and to state under what circumstances these rights can be limited by school authorities.

Under substantive due process, a statute, policy, or regulation must not deprive an employee of a fundamental right. Such a statute, policy, or regulation must have a purpose which is within the power of government to pursue, and it must be clearly and rationally related to the accomplishment of that purpose.[50] Stated another way, an enactment must represent a valid objective and the means used must be reasonably calculated to achieve that objective.[51]

Two landmark decisions of the United States Supreme Court illustrate the nature of substantive due process rights. In Meyer v. Nebraska, decided in 1923, the Court held that a state law forbidding the teaching of a foreign language in any public or private school to a child who had not successfully completed the eighth grade was unconstitutional because it interfered with the property right of a teacher of German to earn a living and the liberty rights of a parent

to have his child taught a foreign language.[52] Two years later, in Pierce v. Society of Sisters, the Court held invalid an Oregon law requiring all children to attend public schools. The Court said that the law violated the property rights of those who operated private schools since it, in effect, put them out of business and it also violated the liberty rights of parents because it ". . . unreasonably interferes with the liberty of parents or guardians to direct the upbringing and education of children under their control."[53]

The preponderance of recent cases involving employee's substantive rights allege abridgment of First Amendment guarantees. Most often alleged is the abridgment of the freedom of expression, but the freedom of association and the freedom of religion are also used.

While one court noted that it could see no substitute for a case by case inquiry as to what legitimate interests of school authorities are sufficient to circumscribe a teacher's speech,[54] most decisions reflect an unwillingness to allow an abuse of the freedom of expression which disturbs the learning process or to allow intemperate attacks upon educational leaders by the unfair use of public forum. Generally speaking, however, the courts continue to strongly protect, without hesitation, such basic freedoms.[55]

The case most often quoted in regard to free speech and employee substantive due process rights is Pickering v. Board of Education, issued by the Supreme Court in 1968. Pickering argued that his exercise of free speech had been abridged when he was dismissed for sending to the local newspaper a letter critical of the way the

superintendent and the board had handled past proposals to raise new revenue for the school system. In holding for the teacher, the high court acknowledged that Pickering had made erroneous public statements which were critical of his ultimate employer, but

> . . . which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teacher's opportunities to contribute to the public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.[56]

The problem, said the Court, is to arrive at a balance between the interests of the teacher, as a citizen, in commenting on matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. The Court suggested that the state's interest might outweigh that of the teacher where either disciplinary action by immediate superiors or harmony among co-workers was in issue.[57]

An employee's involvement in constitutionally protected activities does not preclude dismissal on grounds of other compelling reasons as evidenced by a 1977 decision of the United States Supreme Court in Mt. Healthy v. Doyle.[58] The high court held that even though conduct protected by the First and Fourteenth Amendments played a substantial part in the decision not to rehire the nontenured Doyle, this does not necessarily amount to a constitutional violation justifying remedial action.[59]

In vacating the judgment of the appeals court and remanding the case for further proceedings the Court suggested that a three-part "test

of causation" be applied. First, a court must be shown by the employee that his conduct was constitutionally protected. Second, the court must determine whether an employee's exercise of that constitutionally protected right played a "substantial part" in the board's actual decision not to renew his contract. Third, the board and administration must demonstrate to the court that they not only could, but in fact would have reached the same decision not to rehire the employee had the exercise of the constitutionally protected conduct not existed. Application of this "test of causation," said the Court, helps " . . . distinguish between a result caused by a constitutional violation and one not so caused."[60]

Early in 1979, the United States Supreme Court relied on both Pickering and Doyle in deciding Givhan v. Western Line Consolidated School District.[61] In this case a teacher had been dismissed following a series of private conferences with her principal where she allegedly made "petty and unreasonable" demands described by the principal as "insulting," "hostile," "loud," and "arrogant." The Court of Appeals for the Fifth Circuit had held these complaints and opinions were not protected by the First Amendment because they were expressed privately to the principal and because there is no constitutional right to "press even 'good' ideas on an unwilling recipient."[62] The Supreme Court reversed this judgment and remanded the case, stating

> The First Amendment forbids abridgement of 'freedom of speech.' Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than spread his views before the public.[63]

The Court also rejected the "captive audience" rationale. "Having opened his office door to petitioner, the principal was hardly in a position to argue that he was the 'unwilling recipient' of her views."[64]

In a recent Fourth Circuit case involving West Virginia parties, a Jackson County teacher was denied his tenure year contract. He alleged that he was not reemployed because of his activities as president of the local professional education association, activities which he argued were protected by the First Amendment. The court reinstated the teacher ruling that the absence of contractual or tenure rights does not affect constitutional claims.[65]

In contrast, a student teacher candidate at Bluefield State College in West Virginia alleged that he had been refused the opportunity to complete student teaching because of his involvement in protest activities on the College campus. In holding for the defendants, the federal district court indicated that the right of free speech is not absolute.

> . . . This court finds, however, that here the plaintiff has transgressed the protected limits of the privilege afforded him under the law. In other words, certain of his statements and actions as shown by the evidence, went beyond legitimate criticism and protest protected by the First Amendment. The record is clear that these statements and actions were violently abusive and personally defamatory. . . and were designed to and did produce many of the disruptions and disturbances. . . .[66]

The court further held that school authorities have the substantive right as well as the duty to ". . . screen officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society."[67]

Similarly, the Sixth Circuit has held that a teacher who consistently denounced school officials to teachers and other school employees in abusive language had been properly dismissed.[68] The dismissal of a curriculum coordinator in Pennsylvania was also upheld for abuse of the First Amendment privilege in calling his superintendent a "liar" and an "autocratic administrator."[69]

Procedural Due Process

While governmental employment itself is not a constitutional right, surrounding circumstances can be of such importance so as to vest the school employee with substantive constitutional rights which cannot be withdrawn without procedural due process of law.

The United States Supreme Court has held that procedural due process is a question of "fair play," encompassing different rules in different factual situations and different types of proceedings.[70]

Similarly, the West Virginia Supreme Court of Appeals, in a 1977 decision, set forth three fundamental principles of procedural due process:

> First, the more valuable the right sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation.[71]

Under the Fifth and the Fourteenth Amendments, procedural due process is, in essence, a concern for the element of fairness in any proceeding which effects the life, liberty, or property interests of an individual.

In two 1972 decisions, Board of Regents v. Roth[72] and Perry v. Sindermann,[73] the United States Supreme Court reconfirmed the proposition that a public employee cannot be deprived of either a liberty or property interest without due process of law.

In Roth, the high court explained the broad meaning of liberty.

> . . . Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men. . . .[74]

However, in regard to whether Roth, a nontenured college teacher who had not been reemployed, was entitled to procedural due process because of a liberty interest, the Court said, "It stretches the concept too far to suggest that a person is deprived of a 'liberty' when he simply is not rehired in one job but remains as free as before to seek another. . . ."[75] A teacher could show a violation of liberty when his dismissal is based on a charge that might ". . . seriously damage his standing and associations in his community. . ." or by jeopardizing his or her ". . . good name, reputation, honor or integrity creating a stigma."[76]

In regard to "property interest" the Court observed that to have a property interest protected by procedural due process, a person must clearly have more than ". . . an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[77] Procedural due

process rights are guaranteed when an employee is under contract; whenever he has tenure; or when he has some other promise or expectancy of continued employment. Such property interests, the Court said,

> . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules and understandings that secure certain benefits and that support claims of entitlement to those benefits.[78]

State law, the employee's contract, and the governing procedure of the educational institution will be considered in determining if there is a property interest.

In Sinderman, the Court ruled that the non-tenured faculty member who was not reemployed had a property interest. Even though the junior college at which he taught had no explicit tenure, it did have tenure in practice because its policy stated:

> Odessa College had no tenure system. The administration of the college wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.[79]

In examining this policy in relationship to the criteria outlined in Roth, the Court said,

> We made it clear in Roth . . . that 'property interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' . . . A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.[80]

In an important non-school case decided later, Bishop v. Wood, the Supreme Court further defined a property interest in public employment by stating that a property interest ". . . can, of course,

be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law.[81]

Bishop, a policeman in Marion City, North Carolina, was discharged by the city manager who privately told him the reasons for his removal. In addition to claiming a property interest, Bishop also said his liberty rights had been violated because the city manager's reasons were false. The Court held that even if the reasons for discharge stated to the policeman were false, ". . . the reasons stated to him in private had no different impact on his reputation than if they had been true."[82] The Court said that unless those reasons are publicized and stigmatize the employee or prevent comparable employment elsewhere, procedures beyond those specified by statute are not required. "The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions."[83]

While no precise due process requirements are set forth, it is well understood that should a state statute establish due process procedures, those procedures will generally be strictly enforced by the courts.[84] The West Virginia Supreme Court of Appeals recently held that a school board, as an administrative body, ". . . must abide by the remedies and procedures it properly established to conduct its affairs."[85] In ordering the Ritchie County Board of Education and its superintendent to utilize the board's grievance procedure in the non-renewal of a probationary teacher, the court said:

> We need to go no further than to hold the county superintendent and school board to the notions of fair play and due process which they have chosen to accord employees under their own regulations.[86]

That same West Virginia court, in 1977, held that standard due process procedures require the following:

> . . . a formal written notice of charges; sufficient opportunity to prepare to rebut the charges; opportunity to have retained counsel at any hearings on the charges, to confront his accusers, and to present evidence in his own behalf; an unbiased hearing tribunal; and an adequate record of the proceedings.[87]

Most authorities, however, include only four primary elements of procedural due process: proper notice, opportunity to be heard, judgment by an impartial tribunal, and opportunity for appeal.

Proper notice. The element of proper or legal notice is defined as, "Knowledge brought home to a party in a prescribed form."[88] Proper notice to a West Virginia public school employee concerning action which will affect his employment can be further divided into adequacy of the notice, means by which the notice is given, and the timing of the notice.

It is generally felt that adequate notice must be in writing and shall include such pertinent details as the reasons or causes for the contemplated adverse action; notification of the opportunity for a hearing, specifying the date, time, and place, and informing the employee of his right to be represented by counsel at the hearing; his right to cross-examine witnesses; and his right to present evidence in his own behalf.

The West Virginia Supreme Court of Appeals has held that a specific, clear statement of the charges against an employee is a required aspect of adequate notice. In Greene v. Board of Education,

that court held that a teacher could not be dismissed without the filing of written charges in sufficient detail to inform the teacher of the particulars upon which the charges rested.[89]

West Virginia law provides for different means of notification for the various adverse actions. In some instances the employee must simply be notified in writing, while in other cases, written notification must be by certified mail, return receipt requested. In most suspension and dismissal proceedings the notice must be "served" upon the employee. The State Superintendent has advised that "served" generally means that the delivery of the notice should be made by ". . . an officer authorized by law to serve legal processes and papers within the county in which the employee lives, such as the county sheriff's office.[90]

A reasonable amount of time must be allowed between filing of the notice and the hearing. While the West Virginia Code is silent as to many types of proceedings for school personnel, in suspension, dismissal, and transfer cases ten days notice must be given.[91] Thus, it would seem that a minimum of ten days between the filing of the notice and the hearing would be acceptable in other types of personnel proceedings.

Opportunity to be heard. In Grannis v. Ordean, the United States Supreme Court said, "The fundamental requisite of due process of law is the opportunity to be heard."[92] Such a hearing is the core of procedural due process because it provides the employee with an opportunity to refute the charges or to establish that they do not constitute grounds for the pending action.

While the board must take every precaution to guarantee that procedural due process rights have not been abridged, the adjudicatory hearing held by the board need not be a rigid, court-like trial.[93] Procedural safeguards articulated by the United States Supreme Court in a non-school case, however, may be worthy of review.

1. The employee has the right to appear personally and to be represented by counsel;

2. The employee must have an effective opportunity to defend himself, including oral presentation of evidence, witnesses, and arguments;

3. The employee must have an opportunity to confront and cross-examine witnesses;

4. The evidence presented must be restricted to only that which pertains to the charges;

5. The decision must rest solely on the evidence adduced at the hearing; and

6. The decision must be rendered in writing, noting reasons for the determination and the evidence relied on.[94]

It is generally held that the testimony of witnesses, both for and against the employee, should be taken only after the witness has been given an oath or affirmed that he will tell the truth. In a non-school case, the West Virginia Supreme Court of Appeals held that "A 'hearing' by either a judicial or a quasi-judicial tribunal contemplates the taking of evidence, and oral testimony presupposes the administration of an oath."[95]

Employee hearings as conducted by boards of education, are generally held in closed executive sessions; however, West Virginia statute now provides that the hearing must be held in open session if requested by the employee.[96] The hearing is normally conducted by the president of the board who has the responsibility of insuring fairness to both parties and to exclude extraneous testimony and questions.

Impartial tribunal. The concept of a fair trial in American jurisprudence assumes that judgments will be made before an impartial tribunal. In school matters this procedure is complicated because boards of education make rules, enforce them, and also sit in judgment of alleged violators. West Virginia law, for example, allows school board members to bring charges, hear evidence, and pass judgment.[97]

While most states, including West Virginia, continue to utilize the local board of education as the hearing board, some states have established alternate methods, such as the use of state officials in New Jersey,[98] an appeal's board in Oregon,[99] and transfer to the courts in California.[100]

In absence of malice or personal interest, the courts have generally upheld the fairness and impartiality of hearings in which the board of education served as the hearing tribunal. In the famous Hortonville case, several teachers were dismissed for being on strike in violation of Wisconsin law. In holding for the school district, the United States Supreme Court held that the due process clause of the Fourteenth Amendment does not require the decision to terminate school

personnel to be made or reviewed by anybody other than the local school board. Permitting the board to make the decision ". . . assures that the decision whether to dismiss teachers will be made by a body responsible for that decision under state law."[101]

Earlier, that Court had held that a physician's license had been legally revoked by a medical board of examiners which had acted both as an investigatory body and as an adjudicatory body:

> The initial charge of determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandum and that they relate to the same issues does not result in a procedural due process violation.[102]

There are exceptions, however. When an Oklahoma superintendent was dismissed by the board at the first meeting following the election of a member who had made firm public statements that he would have the superintendent fired, the Tenth Circuit Court held that the board was not an impartial tribunal and that the superintendent had been denied procedural due process of law. The court said,

> We do not say that such statements in an election campaign or between members [of the board] were unlawful or improper. However, the due process principle is bent too far when such persons are then called on to sit as fact finders and to make decisions affecting the property interests and liberty interests of one's reputation and standing in his profession."[103]

Administrative and judicial review. The law generally requires that agencies such as school districts provide remedial avenues whereby persons aggrieved by the administrative process may seek appropriate redress. In public education, appeal may be provided to the state board of education,[104] commissioner of education,[105] state tenure commission,[106] or alternatively[107] or exclusively[108] with the courts.

In West Virginia, grievance appeals and suspension and dismissal cases and other personnel controversies may be appealed directly to the State Superintendent of Schools.[109] In such appeals both the employee and the county board of education must be afforded procedural due process as evidenced in Smith v. Siders, where the West Virginia Supreme Court of Appeals held that if a local board were not afforded such rights the decision of the State Superintendent would be declared null and void.[110]

Administrative appeal does not rule out the possibility of judicial appeal. Courts have reached different results in considering whether administrative channels must be exhausted before the court will hear the case. In West Virginia, it is well settled that an appeal to the State Superintendent is not exclusive of the circuit courts right to review the case on writ of certiorari.[111] Additionally, a county board of education has standing to obtain judicial review in the circuit court by writ of certiorari of an order of the State Superintendent of Schools to reinstate a dismissed employee.[112]

If federal constitutional guarantees are allegedly abridged, the employee may seek redress in the federal courts. However, he may have to exhaust available administrative remedies, if such remedies afford the relief the plaintiff would otherwise be entitled and if readily available to provide speedy resolution of the complaint.[113]

CERTIFICATION OF PROFESSIONAL PERSONNEL

A certificate may be defined as a license to pursue a profession. To legally pursue the teaching profession in any state, one must be certificated by that state. One of the basic purposes of certification statutes is to provide a capable, competent instructor in every classroom; therefore, a certificate is generally a prerequisite to employment. While all states have some statutes governing teaching certificates, there is considerable variance as to substantive and procedural requirements.[114]

A teaching certificate is not a contract between the state and the teacher; it is but a license, a mere privilege conferred by the state. Therefore, the state has plenary power over the certification process and may impose new or additional burdens on the licensee or may withhold or revoke the certificate for cause.[115] As a general rule, however, if a teacher satisfies all the requirements set forth in the statutes and regulations relative to the issuance of a certificate, the certifying body may not arbitrarily refuse to issue the certificate.[116]

Certificated teachers are also usually required for a school district to qualify for state aid.[117] The primary component of the West Virginia "basic foundation" allowance is the number of certificated professional staff.[118]

Excepting the county superintendent, professional educators employed by county boards of education in West Virginia are required by statute to hold a valid teaching certificate. The certificate licenses

the educator to teach or to perform other professional services in the public schools of the state in the particular specializations and grade levels indicated on the certificate.[119]

To be eligible for a teaching certificate in West Virginia a person must have completed a teacher preparation program leading to a bachelor's degree from an accredited institution of higher education.[120] As interpreted by the State Department of Education, an "accredited institution of higher education" is a college or university accredited by one of the five regional accrediting associations in the United States.[121] The applicant must also be of good moral character, at least eighteen years of age, physically, mentally, and emotionally qualified, and a citizen of the United States. The citizenship requirement may be waived in granting a permit to an exchange teacher from a foreign country or an alien who meets certification requirements and who has filed a declaration to become a naturalized citizen.[122] However, a federal district court in New York recently held that a similar New York statute requiring aliens to apply for citizenship prior to employment in the public schools was in violation of the equal protection clause of the Fourteenth Amendment.[123] The above criteria apply not only to regularly employed professional teaching personnel but also to substitute teachers and even student teachers, except that student teachers will not have completed degree requirements.[124]

Types of Certificates.

The State Superintendent of Schools in West Virginia is authorized by statute to issue two major types of teaching certificates.

The "professional teaching certificate" requires the completion of a teacher education program and a bachelor's degree from an accredited institution of higher education. The "professional administrative certificate" requires completion of an approved program and a master's degree from an accredited institution of higher education.[125] Other certificates and permits may be issued by the State Superintendent, subject to approval of the West Virginia Board of Education to persons who do not qualify for a professional certificate.[126]

In three separate opinions, the Attorney General had held that the bachelor's degree required for a teaching certificate and the master's degree for an administrative certificate constitutes the highest level of training required by the State and that only the Legislature has the authority to increase the requirements on a state-wide basis.[127] A county board of education may, however, establish additional educational requirements to be used in the selection of its professional staff.[128]

The provisional professional certificate is first issued for a period of three years. Upon recommendation of the county superintendent and successful completion of six semester hours of approved college credit, a certificate may be reissued every three years until the holder has completed the requirements for the five year certificate, three years of teaching experience and six semester hours of credit. The holder of a five year certificate may be issued a permanent certificate upon completion of the third renewal of the certificate or upon completion of the master's degree and five years experience.[129]

The professional administrative certificate is endorsed to reflect the level of administration for which the holder is certified. Endorsements presently available are school superintendent, secondary school principal, elementary and junior high principal, general supervisor, and special supervisor of instruction. This certificate is issued provisionally for a three year period and can be renewed with six hours of appropriate graduate credit or converted to a permanent certificate upon completion of the required course of study and three years of successful experience in that endorsement.[130]

Using authority granted by statute,[131] the State Board of Education has authorized the issuance of a "professional service certificate" for social workers, counselors, audiologists, psychologists, and specialists in communication disorders. Also, teachers holding professional certificates may additionally be granted "associate professional" certificates which permit them to supervise student teachers.[132] On a year to year basis the state board also authorizes the granting of permits, out-of-field authorizations, and other temporary certificates to persons who are not fully certified.

Generally speaking, a teacher or administrator who does not have an appropriate certificate is not a competent party to contract with a board of education. Any agreement with such a person is of no legal effect and school funds cannot be expended therefore.[133] In West Virginia, however, if a teacher is employed in good faith on the anticipation that he is eligible for a certificate and it is later determined that he is ineligible, the State Superintendent of Schools

may authorize payment by the county board of education for employment up to three school months or the date of notification of ineligibility, whichever shall occur first.[134] The burden of proof is upon the teacher to prove that he has a valid certificate because the West Virginia Supreme Court of Appeals has held that when a teacher signs his contract of employment there is then a presumption on the part of the board that he is eligible for a certificate.[135]

Interstate Reciprocity. West Virginia, along with most other states, participates in the Interstate Certification Compact organized to

> . . . facilitate the movement of teachers and other professional educational personnel among the state's party to it, and to authorize specific interstate educational personnel contracts to achieve that end.[136]

The West Virginia Board of Education is authorized to enter into a contract with a member state only where there are programs of education, certification standards, or other acceptable qualifications that assure preparation or qualification of educational personnel on a basis sufficiently comparable to that prevailing in West Virginia.[137] West Virginia currently has reciprocity contracts with all states except Alabama, Alaska, Arizona, Colorado, Georgia, Illinois, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, Tennessee, and Wyoming.[138]

West Virginia's agreement with the states of the Compact provides for reciprocity of only the traditional elementary and secondary teaching certifications plus special education. Other types of certificates such as the professional administrative certificate, professional

service certificate, and the associate professional certificate are not included.[139]

New graduates of approved teacher preparation programs in reciprocity states qualify for a three year provisional professional certificate. The five year certificate is issued only to experienced teachers who have taught for three of the last seven years with two of the three years being on the certificate they are using for reciprocity.[140]

Teachers from states which are not included in the Interstate Certification Compact may qualify for West Virginia certification by meeting the substantial equivalent of the West Virginia requirements as ascertained by the West Virginia Department of Education.[141]

Revocation of Certificates. Since the state possesses the power to issue certificates, it follows that the state also has the power to revoke them. In the words of one court, "A certificate to teach in the public schools is merely a license granted by the state and is revocable by the state at its pleasure."[142] This fact notwithstanding, courts have consistently accepted the teaching certificate as prima facie evidence of the competency of the teacher until such time that it has been proven otherwise.[143]

The principle is generally accepted that where a statute authorizes revocation of certificates for certain ennumerated causes, a certificate can only be revoked for those causes.[144] West Virginia law is very specific in this regard:

> The state superintendent may, after ten days notice and upon proper evidence, revoke the certificates of any teacher for drunkenness, untruthfulness, immorality, or for any physical, mental, or moral defect which would render him unfit for the proper performance of his duty or refusal to perform the same, or for using fraudulent, unapproved, or insufficient credit, or for any other cause which would have justified the withholding of a certificate when the same was issued.[145]

In recent years only two certificates have been revoked by the State Superintendent of Schools. Both cases occurred in 1977, resulting from similar proceedings in Florida. In the first case the holder had been found guilty of drunken driving and negligent homicide. In the second instance, the West Virginia Superintendent relied on evidence adduced by the State Board of Education in Florida in revoking a young male teacher's certificate after he admitted he had made sexual advances to male students.[146]

CLASSIFICATION OF AUXILIARY AND SERVICE PERSONNEL

West Virginia Legialative enactments of 1975 and 1977 require all non-certificated board of education employees to be classified with an appropriate class title. A total of seventy-one class titles with appropriate job descriptions have been established by the Legislature including aides, custodians, cooks, secretaries, maintenance positions, mechanics, bus operators, supervisors of food service, maintenance, and transportation, and several miscellaneous titles.[147]

The State Board of Education was also authorized to establish class titles, job descriptions, and appropriate pay grades for auxiliary and service personnel holding positions other than those approved by the

Legislature.[148] Approvals to date include many miscellaneous positions which have subsequently been included in statute, plus a very important "multi-classification" class title permitting county boards of education to place persons in more than one employee classification if the employee's job responsibilities cover more than one specific title. An employee so classed must be compensated at the highest class title assigned.[149]

A complete listing of all approved class titles and job descriptions for service and auxiliary personnel is found in the Appendix.

CONTRACTS OF EMPLOYMENT

County boards of education in West Virginia are quasi-public corporations[150] and as such may sue and be sued, plead and be impleaded, be contracted with and contract.[151] A board of education is a continuing corporate body which does not change with its members, thus contracts once made, if valid when made, are binding upon the corporation even though its succeeding officers may disapprove of and attempt to nullify them.[152] In the words of one early West Virginia court, ". . . the contracts made by the board are corporate in character, not the contracts of individuals who then constituted the board."[153]

The formal relationship between a county board of education in West Virginia and an employee is established by use of a contract. The West Virginia Code provides that all teachers and auxiliary and service personnel who are employed by a board on a regular basis must execute a contract of employment with their board of education.[154]

Considerable weight is given contractual obligations in general, as evidenced by Article I, Section 10 of the Constitution of the United States, "No state shall . . . pass any bill . . . or law impairing the obligation of contracts."[155] This is of more than passing interest since employee contracts are governed by general rules of contract law, except where modified by statute or limited by constitutional mandates.[156]

A contract is ". . . a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty."[157] Contracts may be unilateral or bilateral. A unilateral contract consists of a promise or a group of promises made by one of the contracting parties only.[158] Contracts between boards of education and their employees are bilateral because the contracted agreement consists of mutual promises made in exchange by each of the contracting parties. The employee's contract of employment is an agreement whereby the services or labor of the employee are stipulated to be given over a specific period of time in return for a certain salary and fringe benefits.[159]

All contracts under the common law possess five essential elements, the absence of any one of which will render the contract null and of no effect. These elements are:

1. The contract must be between competent parties;
2. The contract must be based on mutual assent;
3. The contract must contain a valid consideration;
4. The contract must contain rights and liabilities sufficiently definite to be enforceable; and

5. The contract must be of such a nature as not to be prohibited by statute or common law.[160]

In order to meet the requirement of legal competency, neither party must be prohibited by law from making the contract and must be otherwise eligible to contract. In West Virginia, public school employees must meet the requirements as to age, citizenship, training, degree, certification, etc., as imposed by statute and local board of education policy.

It has been stated in hundreds of decisions that before a contract can result, the "minds of the parties must meet," reaching mutual assent on the same bargain, on the same terms, and at the same time. This is called an offer and acceptance.[161]

A valid contract must provide for consideration on the part of both parties, being either a benefit to the promisor, or a detriment to the promisee.[162] An early West Virginia court noted that the cash value of the benefit or detriment is irrelevant to the courts, but a sum must be recorded in the contract. Therefore, a contract between a board of education and an employee must fix the salary to be enforceable.[163]

It is a well settled principle of law that a contract lacks validity when the rights and liabilities of the contracting parties are not sufficiently definite to be enforceable.[164] School personnel contracts in West Virginia should include such particulars as length of contract, job classification, and job assignment.[165]

Contracts with personnel employed in the public schools of West Virginia must be in writing and be a matter of official board

record. Auxiliary and service personnel contracts may be in letter form;[166] however, contracts for professional personnel must be in the form prescribed by the State Superintendent of Schools.[167] That contract includes an oath to support the Constitutions of the United States and West Virginia, and to honestly demean himself in the teaching profession, and, to the best of his ability, execute his position as a teacher. Also included are statutory provisions regarding transfer, assignment, dismissal, employment term and other particulars.[168] The prescribed teacher's contract provides that "The services to be performed by the Teacher shall be such services as are required by law, by the lawful rules and regulations of the State Board of Education and by the lawful rules and regulations of the Board."[169]

While it has been universally held that an employee must comply with the lawful rules of the local board of education, the West Virginia Supreme Court of Appeals first acknowledged, in 1977, that the rules and regulations of the State Board of Education have the effect of law. The court cited constitutional and legislative authority vested in the State Board of Education to provide "general supervision" of the State free school system.[170]

In West Virginia, there are two basic types of employment contracts; probationary and continuing. Similar statutes govern both auxiliary and service personnel and professional personnel; therefore, they will be discussed together.

Probationary Contracts.

Most states have sought to protect the child and society from incompetence by setting aside a probationary period during which all teachers must prove they have the necessary attributes to function as teachers. In the forty-five states which have probationary periods, such periods range from one year to five years in length. If a person is reemployed upon completion of the probationary period, the employee will receive tenure.[171]

A teacher's initial contract in West Virginia is for a probationary term of not less than one nor more than three years. Upon successful completion of three consecutive years of employment a teacher who is reemployed will receive a continuing contract, providing he or she holds a professional certificate and a bachelor's degree.[172] Substitute teaching, intern teaching, student teaching, and teaching under emergency credentials are not usually considered a part of this probationary period.[173]

West Virginia is one of the few states which also has a three year probationary period leading to a continuing contract for auxiliary and service personnel. Probationary contracts are issued on a yearly basis but if reemployed the fourth consecutive year, a continuing contract shall be issued.[174]

By recent legislative enactment all probationary employees are afforded substantive and procedural due process protections in nonreemployment cases. This new section of the Code provides that:

> The superintendent at a meeting of the board on or before the first Monday in May of each year shall provide in writing to the board a list of all probationary teachers that he recommends to be rehired for the next ensuing school term . . . . Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be notified in writing, by certified mail, return receipt requested, to such persons' last known address within ten days following said board meeting, of their not having been rehired or not having been recommended for rehiring.
>
> Any probationary teacher who receives notice that he has not been recommended for rehiring or other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. . . . At the hearing, the reasons for the nonrehiring must be shown.[175]

Although the Legislature enacted due process protections for probationary school employees, it remains for the courts to define the acceptable reasons for nonreemployment. However, it can be said that under general law those reasons cannot be arbitrary, capricious, or unreasonable. Further, policy of the West Virginia Board of Education as affirmed in Powell v. Brown[176] provides specific guidelines which must be followed:

> Every employee is entitled to know how well he is performing his job, and should be offered the opportunity of open and honest evaluation of his performance on a regular basis. Any decision concerning promotion, demotion, transfer or termination of employment should be based upon such evaluation, and not upon factors extraneous thereto. Every employee is entitled to the opportunity of improving his job performance, prior to the terminating or transfering of his services, and can only do so with assistance of regular evaluation.[177]

The State Superintendent of Schools in Skavenski v. Pendleton County Board of Education, held that,

> . . . decisions made by a county board of education and by a county superintendent of schools with respect to the employment of a teacher, although discretionary, must be reasonably related to the degree of success of the teacher in proving himself/herself as a

> professional educator whose service has been and can be expected to continue to be beneficial to the children of the county.[178]

It is noted that, during the contractual period, probationary employees have identically the same rights as do persons holding continuing contracts. In regard to transfer, assignment, demotion, suspension, dismissal, and other employment practices, probationary personnel can be treated no differently than tenured employees.

Continuing Contracts and Tenure

With the continued reduction of employment opportunities in education, protections afforded personnel by tenure laws have become increasingly important. Tenure is not, however, peculiar to education, for federal judges are appointed for life and federal and state employees generally are protected by some type of tenure system.[179] In fact, the first state tenure law for teachers, enacted in Massachusetts in 1886, was an adaptation of the 1883 Federal Civil Service Law.[180]

A tenure law has been defined by Nolte and Linn as a statute which provides for continuing employment of the teacher who has acquired tenure status, so long as service rendered remains satisfactory, and which also contains a specific procedure to be followed if there is just cause for dismissal.[181]

While the word tenure is noticeably absent from West Virginia statutes, school personnel do, in effect, acquire tenure under the above definition. State law provides that when an employee has completed three years of acceptable employment and enters into a new contract, that

contract shall be a continuing contract. Teachers, however, must hold a valid teaching certificate to be eligible for a continuing contract. Any continuing contract shall remain in full force and effect, except as modified by mutual consent of the school board and the employee.[182] The employee may, however, be dismissed, terminated, or suspended pursuant to statutory provisions as discussed later in this chapter.

The courts in most states have interpreted tenure laws as merely statements of legislative policy which may be altered or revoked at the discretion of the legislature at some later date.[183] It is possible, however, for a tenure statute to be worded in such a way as to create a binding contract between the teacher and the state. In an early Indiana case the United States Supreme Court held that the legislature had granted an ". . . indefinite contract and any subsequent legislation would impair or breach the contract and would be violative of Article I, Section 10 of the United States Constitution."[184]

Under a different set of circumstances the Supreme Court held that if a legislative granting of tenure required the execution of a written contract, the obligation of the contract could not be impaired. If, however, the granting of tenure was mere gratuity, involving no agreement of the parties, and creating no vested right, that gratuity can be taken away.[185] A Kentucky case serves as an example, for the court there held that ". . . teacher tenure is statutory and not contractual, and the legislature may abridge or destroy it."[186]

Tenure has been deemed desirable as a preventive against unbridled and unwarranted dismissal of teachers, as evidenced in an Arizona decision,

> The broad purpose of teacher tenure is to protect worthy instructors from enforced yielding to political preferences and to guarantee to such teachers employment after a long period of satisfactory service regardless of the vicissitudes of politics or the likes or dislikes of those charged with the administration of school affairs.[187]

A second purpose of tenure is for the benefit of the pupil, as described by a Missouri court:

> . . . the general purpose of . . . [teacher tenure] statutes is not to grant special privileges to teachers as a class but to protect and improve state education by retaining in their positions teachers who are qualified and capable and who have demonstrated their fitness, and to prevent the dismissal of such teachers without cause.[188]

In most states tenure can only be attained after successful completion of a probationary period. At the end of the designated probationary period some states provide automatic tenure while in other states such as West Virginia, the superintendent must recommend such tenure with affirming action required of the board of education.[189] Some few states also provide that the probationary period may be extended for a teacher whose work has been satisfactory, but not to the point of granting tenure.[190]

The State Superintendent of Schools has ruled that the three probationary years of employment required in West Virginia to secure a continuing contract must be successive; however, the first contract may be for only a portion of one year.[191]

When a tenured employee transfers to another county school system within West Virginia, that person must serve another probationary

period in the new county.[192] The Attorney General has held that when a tenured teacher resigns and is subsequently reemployed, he must again serve the three year probationary period.[193]

County boards of education may provide released time to a teacher for any special professional or governmental assignment without jeopardizing the employee's continuing contract status.[194] Further, a board may grant unpaid leaves of absence for extended illnesses, maternity purposes, educational training, or for ". . . other cause authorized or approved by the board."[195] Paid sabbatical leave for public school employees, however, is not permissible under present state law.

When the county superintendent feels it is necessary or desirable, a county board of education may approve the attendance of any or all employees at educational conventions, conferences, or other professional meetings held on school days. Attendance at such meetings may be substituted for an equal amount of employment and personnel attending approved meetings shall not suffer any loss in pay.[196]

Employees holding a continuing contract need not be reappointed annually as are probationary personnel. The tenured public school employee in West Virginia is literally entitled to the equivalent of a succession of contracts for an extended period of time.[197]

Administrative Tenure Rights

Whether school administrators such as principals, supervisors, and directors acquire tenure as administrators in West Virginia is unclear at this time. West Virginia statutes do not provide for a

continuing contract as an administrator, only as a teacher or as a auxiliary and service employee.[198] The State Superintendent of Schools, however, has conditionally said that administrators secure "tenure" in their positions as administrators.[199] In answering the question, "Can a person gain tenure in the position of principal?" the chief school official in West Virginia replied:

> The answer appears to be yes. A person holds an appointment as principal by employment and assignment and on written contract. Tenure in the appointment is indefinite, but it may only be terminated on the initiative of the county superintendent of schools and with the approval of the county board of education according to the procedure set forth in §18A-2-7 of the School Law and as elucidated by State ex rel Linger v. Board of Education. While transfer and reassignment from a principalship to a teaching position is provided by law, it is ordinarily a demotion and, therefore, for this reason ordinarily, must be justified by reasonable cause. Moreover, a principal has a contract right to his or her position, and therefore, has contract right to retain the principalship during the proper performance of duties.[200]

In Linger v. Board of Education, cited above by the State Superintendent, two Putnam County school principals were demoted to principalships of less responsibility, importance, and pay. They were notified of their employment in these new positions without having been placed on the transfer list, without notice, and without an opportunity to be heard. The court considered the two principals as teachers under the law and said that, "The statute is clear and unambiguous and its pertinent provisions are mandatory with regard to the board and the superintendent." Accordingly, both principals were ordered reinstated to their original positions.[201]

In a related interpretation by the State Superintendent, it was held that supervisors and directors of instruction may only be removed

from their positions by the transfer and reassignment procedure outlined in statute.[202] If such transfers were to positions of lesser authority, responsibility, or compensation, ". . . the superintendent and the board must justify such an action by 'reasonable cause.,' for such action would constitute a demotion"[203]

In summary, it would appear that administrators in West Virginia have some form of "tenure" in their positions as administrators; however, they may be reassigned to lesser positions at lower pay for reasonable cause, if done in accord with statutory provisions on transfer and reassignment detailed later in this chapter.

The United States Supreme Court recently upheld an order of the Supreme Court of California denying a former associate superintendent reinstatement because he had been dismissed without notice and without a hearing.[204] The lower court said an employee could expect reinstatement ". . . only when he had been dismissed in violation of statutory rights . . ," and that an associate superintendent did not possess statutory rights in his administrative position but only to his permanent classification as a classroom teacher. This latter right, the court held, could be enforced by mandamus; however, the plaintiff had never sought reinstatement to a teaching position.[205]

ASSIGNMENT AND TRANSFER

The power to assign, transfer, promote, and demote school personnel in West Virginia is given to the county superintendent of schools, subject only to approval of the board of education.[206] However,

in a Calhoun county case involving the reassignment of a teacher to another school, the Supreme Court of Appeals held that such power must be ". . . exercised in good faith for the benefit of the school system without arbitrary or capricious action."[207]

West Virginia law is very explicit in regard to the annual assignment of public school personnel.

> [A]n employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred. Any teacher or other employee who desires to protest such proposed transfer may request in writing a statement of the reasons for proposed transfer. Such statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education. The hearing on the proposed transfer shall be held on or before the first Monday in May. At the hearing, the reasons for the proposed transfer must be shown.[208]

In addition, the county superintendent shall, on or before the first Monday in May, furnish the board with a list of teachers and other personnel to be considered for transfer and subsequent assignment for the next school year. All persons on the transfer list shall, within ten days, be notified by certified mail, return receipt requested, of the recommendations for transfer, their subsequent reassignment, and the reasons thereof. All employees not listed shall be considered as reassigned to the positions or jobs held at the time of this meeting.[209]

Only the county superintendent of schools may place the name of an employee on the proposed transfer list. Individual members of the board or the board itself cannot perform this function; however, employees listed may not be transferred unless the board concurs.[210]

The board of education may not take action on the recommendations of the county superintendent until the employee has been afforded the opportunity of a hearing, for in Linger, supra, the West Virginia Supreme Court of Appeals held that an employee must, ". . . be given an opportunity to be heard before the board is authorized to accept the recommendation and effectuate the transfer.[211]

According to the State Superintendent of Schools a single hearing may satisfy both the statutory requirements and Linger, supra, if all of the issues involved in the employee's transfer are considered at that hearing. These include removal from the current assignment, the proposed assignment, and any other related matter. However, when this is not the case, the employee must be given the opportunity for a separate hearing on each issue in the transfer process, unless the transfer proposal is either disapproved or withdrawn.[212] The hearing requirement is not applicable if a person has to be transferred because a building becomes damaged or destroyed through an unforeseeable act.[213]

Public school personnel in West Virginia do not have a vested right to teach or work in a particular assignment. In upholding the transfer of a teacher to an outlying school within Calhoun County the Supreme Court of Appeals said

> . . . the applicable statutes and the continuing contract prescribed by the State Superintendent confers no right to a teacher to compel the board and the county superintendent to reassign a teacher to a school in which he has taught the previous school year, or to any other particular school of the county.[214]

In addition to the more common "annual reassignment" transfer procedure outlined above, personnel may also be transferred to new

positions, subsequent to the execution of contracts, if for regulatory purposes or in emergency situations. Authority for such action is found in the West Virginia Code §18-4-10, which outlines duties of the county superintendent and in part states that he shall, ". . . Assign, transfer, suspend or promote teachers and all other employees of the district, subject only to approval of the board."[215] This power must be exercised in a reasonable manner and the best interests of the schools must be intended.[216]

The Attorney General has ruled that a county superintendent may, with approval of the board and subsequent to the annual assignment of teachers, transfer a teacher from one room assignment within a school building to another room assignment within the same building. This transfer can be without the teacher's consent when the transfer is clearly of a regulatory nature on in emergencies, and no material alteration of the contract is shown to exist.[217]

Two cases, Neal v. Board of Education[218] and White v. Board of Education[219] serve to illustrate the unreasonableness which will not be tolerated by the courts in regulatory or emergency transfers.

In the Neal case, the plaintiff had been reappointed as principal of an elementary school in Putnam County. In mid-August he and forty-six other teachers and principals were transferred to new positions in the county. While the transfers had been recommended by the superintendent, one board member publicly proclaimed that he was responsible for the transfers. In holding for the plaintiff, the court said:

> The wholesale shifting of teachers on August twentieth is alone sufficient to shake the presumption of good faith which is ordinarly accorded an official act. . . . arbitrary or capricious use of this power will not be tolerated.[220]

The circumstances in the White case were somewhat similar except that when a new board of education took office on July one, they hired a new county superintendent and subsequently transferred seventy-two teachers to new positions. White and seven others brought charges protesting the transfers, alleging that their contractual rights had been abridged. In holding for the teachers, the court said that an employee ". . . cannot be transferred as mere matter of expediency, . . . for therein solemn contract rights have been intervened."[221]

It is important to point out that transfers agreed to by the employee, recommended by the superintendent, and approved by the board may be effected at any time.[222]

SUSPENSION AND DISMISSAL

In order to maintain the integrity of ordered society and to promote the general welfare of the state, school authorities have the right and the responsibility to evaluate the fitness of school personnel.[223] While tenured personnel are given great security in their positions and even probationary personnel have similar employment rights during their contractual period, employees can be suspended and dismissed for sufficient cause. Even under the common law the right to employ includes the right to discharge, except as restricted by contractual or constitutional considerations.[224] However, in White v. Board of

Education, the Supreme Court of Appeals stated, "A teacher may not be lightly shorn of the privileges for which he fairly contracted."[225]

The county superintendent of schools, subject to approval of the board, has the authority to suspend school personnel and to recommend their dismissal; however, his right to suspend

> . . . shall be temporary, pending a hearing upon charges filed by the superintendent with the board of education and such period of suspension shall not exceed thirty days unless extended by order of the board.[226]

While the superintendent may recommend dismissal, the authority to dismiss personnel is vested in the county board of education, acting in a quasi-judicial capacity. Nonetheless, the board itself may also bring charges against school employees for suspension and dismissal purposes.[227]

The courts have traditionally held that when specific causes are given in the statutes, employees could be dismissed only for those causes. In an early West Virginia case illustrating this principle the court ordered reinstatement of a teacher who had been dismissed for being married. In the words of the court, ". . . marriage is not covered by one of these [causes] and therefore does not constitute in and of itself ground for removal."[228]

Most states have enacted legislation which specifies the grounds upon which an employee may be suspended and dismissed and West Virginia is no exception.

> Notwithstanding any other provision of law, a board may suspend or dismiss any person in its employment at any time for: Immorality incompetency, cruelty, insubordination, intemperance, or wilful neglect of duty.[229]

Additionally, county boards of education may, under other sections of the West Virginia Code, dismiss an employee for lack of need.[230]

Immorality

The term immorality is generally defined as that which is inimical to the welfare of the general public and contrary to good morals.[231] The case of Horosko v. School District of Mount Pleasant, decided by a Pennsylvania court in 1939, is still often quoted.

> Immorality 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 elevate.[232]

More recently, the California Supreme Court, in upholding the revocation of a teacher's certificate, said, "Parents should have the right to expect that the teacher's concept of morals and sexual relationships not be at substantial variance with concepts that are generally accepted and approved in the community."[233]

Inasmuch that there are no West Virginia cases of record for suspension and dismissal of school personnel for immorality, further review of recent court cases from other jurisdictions is of value.

It is generally held that the alleged immorality must be inimical to the welfare of the schools or the community.[234] However, the discretion of the courts is very broad in this area as evidenced by a recent federal court decision in Nebraska. That court held that no constitutional right had been abridged when an unwed, but pregnant, teacher was terminated because of the pregnancy, since there was a

rational relationship between the out-of-wedlock pregnancy and the board's interest in conserving marital values.[235]

In a recent Colorado case involving the dismissal of a male teacher for immorality because of his conduct on a field trip with minor female students, the court said,

> In our view, whenever a male teacher engages in sexually provocative or exploitive conduct with his minor female pupils, a strong presumption of unfitness arises against the teacher.[236]

In Jenkyns v. Board of Education, the Eight Circuit Court of Appeals held that a school principal could be dismissed for immorality, even though he had been tried in a court of law for such offense and found not guilty,[237]

It is pointed out that standards of morality differ from community to community and change from year to year. For this reason, caution must be exercised in attempting to specify what conduct currently represents immorality, especially that sufficient to justify dismissal.[238]

Incompetency

It has generally been held that "incompetency" has a common and approved usage. It is a relative term without technical meaning, but which may be employed as meaning disqualification, inability, incapacity, lack of legal qualifications, or unfitness to discharge the required duty.[239] Incompetency is also considered to be (1) want of physical, intellectual, or moral ability, (2) an inadequacy or general lack of capacity, or (3) a lack of special qualities required for a particular purpose.[240]

In a West Virginia case, Green v. Board of Education, a teacher was dismissed on the grounds of ". . . inefficiency and failure to perform the duties of a teacher. . . ." The Supreme Court of Appeals held this to be synonymous with the term "incompetency."[241]

In a recent case before the Fourth Circuit Court of Appeals, the termination of a North Carolina teacher for incompetency was upheld. The superintendent charged she had discipline problems, was inadequately prepared for her teaching activities, and was generally incompetent.[242]

When a teacher is dismissed for incompetency, the burden of proof is upon the board of education, for the teacher's certificate is prima facie evidence of qualification and must be overcome by positive evidence to the contrary.[243] It is noted, however, that the courts appear to be reluctant to second-guess school authorities in cases of alleged incompetency. Where all procedural safeguards have been met, judicial review is generally confined to a determination of whether the action of school authorities is supported by substantial evidence and whether such action was arbitrary, capricious, or an abuse of discretion.[244]

Cruelty

Black defines cruelty as ". . . the wanton, malicious, and unnecessary infliction of pain upon the body, or the feelings or emotions; abusive treatment; inhumanity; outrage."[245]

A thorough search of West Virginia cases reveals no court decisions of record related to the suspension or dismissal of school

personnel for this cause. However, recent cases from Illinois and Pennsylvania provide insight into the nature of such offenses.

The Illinois Court of Appeals, in a case where cruelty was alleged as the reason for dismissal, upheld an administrative finding that the use of a cattle prod to discipline a sixth-grade class constituted cruelty.[246]

In Pennsylvania, a Commonwealth court held that a male teacher of sixteen years experience had been properly dismissed for cruelty following an incident where he had pushed a student against the blackboard, grabbed him by the hair, and caused the student to twice fall to the floor. The court noted that the provocation for this incident appeared to be insubstantial or nonexistent and that the teacher had no previous record of such activities.[247] In a companion case, that same court found cruelty a proper ground for dismissing a teacher who had struck children, wrestled with them, and abused them verbally.[248]

It is pointed out, however, that acts which are merely accidental, though they may inflict great pain, are not "cruel" in the sense the word is used in statutes against cruelty and could not, therefore, result in dismissal.

Insubordination

Public school personnel are obligated to obey all reasonable rules and regulations of the board, regardless of whether those rules were in force at the time of employment or were promulgated

at some later date. All contracts are made in contemplation of the law, and an employee impliedly consents to obey all rules which a board may legally make.[249] According to Burt, disobedience of an unreasonable rule would not, however, constitute insubordination.[250]

In recognizing the seriousness of insubordination, a California court said,

> The example of a teacher who is continually insubordinate and who refuses to recognize constitutional authority may seriously affect the discipline in school, impair the efficiency, and teach children lessons they should not learn.[251]

In a 1975 West Virginia case, Beverlin v. Board of Education, a high school teacher in Lewis County was suspended by the superintendent and subsequently dismissed by the board for willful neglect of duty and insubordination. The plaintiff, without permission from his principal or superintendent, had missed the greater part of the opening day of the school term for the purpose of enrolling in graduate school. The Supreme Court of Appeals held that the superintendent and the board had been capricious and arbitrary and ordered Beverlin reinstated with back pay.[252]

A Federal Court has held that a teacher was properly dismissed for insubordination in being ". . . uncooperative, disregarding schedules, and not accepting directives."[253] Additionally, a Louisiana teacher who failed to secure a physical examination pursuant to board policy was, in view of the court, properly dismissed for insubordination.[254]

In Ingraham v. Wright, the United States Supreme Court recently reaffirmed the authority of the state to permit and regulate the use of

corporal punishment.[255] Recent state court decisions sustain the authority of a board of education to dismiss for insubordination teachers who violate corporal punishment regulations.[256]

On occasion, personnel are dismissed for insubordination in regard to personal appearance regulations. In Kelly v. Johnson, the United States Supreme Court ruled on the constitutionality of a grooming regulation applicable to male police officers, ". . . directed at the style and length of hair, sideburns, and mustaches. . . ." The Court held that enactment of the regulation was not so irrational that it could be considered a violation of the officer's "liberty" interest to choose his hairstyle.[257]

A recent decision of the First Circuit Court relied in part on Kelly in sustaining the termination of a teacher's contract for reasons of dress. While the teacher contended that the sole reason for her dismissal was her dress length, or in the words of the court "over-exposure," the court stated that even if this were true, its intervention was not warranted.[258]

In 1977 the Second Circuit Court of Appeals upheld the teacher dress code of the East Hartford Connecticut school board requiring male teachers to wear neckties in most classes. An English teacher refused, claiming such a regulation violated both his liberty interests and his symbolic speech rights.[259] The Court applied the Kelly standard, finding that the necktie regulation was not "so irrational that it may be branded arbitrary," thus was not violative of any liberty interest. In examining the symbolic speech claim, the Court pointed out

that symbolic speech is not pure speech, but is mixed with conduct and thus is not afforded the same protection as pure speech. The Court held the teacher's claim to be close to the conduct end of the "speech-conduct" continuum and was "so unsubstantial as to border on frivolous.[260]

Intemperance

Conduct while at school is not the sole basis for determining the fitness of a public school employee. Outside activities may be used in determining fitness; however, the courts have generally held that such activities must be a material and substantial interference with the efficiency and discipline in the operation of the school.[261]

In its normal legal connotation, intemperance is the use of intoxicating drinks which disqualifies the person a great portion of the time from properly attending to business.[262]

Inasmuch that there are no West Virginia cases of record for dismissal for intemperance, two cases from other states are of interest. In Illinois, a teacher was arrested three times for public intoxication. The court upheld his dismissal, noting that, "The board has the right to consider a teacher's conduct in public."[263] An early Arizona court held that a teacher who had been found guilty of drunkenness and disorderly conduct had also been properly dismissed.[264]

Willful Neglect of Duty

In Fox v. Board of Education, the West Virginia Supreme Court of Appeals generally defined willful neglect of duty.

> We don't attempt to formulate a comprehensive definition of 'wilful neglect of duty' that would reasonably support a teacher's permanent dismissal. A continuing course of lesser infractions may

> well, when viewed in the aggregate, be sufficient, and we may envision a single act of malfeasance whereby severe consequences are generated, that mandates dismissal.[265]

Fox, a teacher in Doddridge County for twenty-three years, had been suspended by the county superintendent and dismissed by the board for being absent from an evening parent-teacher conference to which all teachers were scheduled to attend. The court held that while his absence had caused inconvenience to parents and embarrassment to school officials, the harm caused thereby was of such small magnitude that the subsequent dismissal for willful neglect of duty was an unreasonable and arbitrary punishment. Fox was ordered reinstated with back pay, except for twenty days, which the court held would have been a proper period of suspension.[266]

Lack of Need

State law in West Virginia provides that auxiliary and service personnel may be dismissed for reasonable cause.[267] In a recent interpretation, the State Superintendent of Schools ruled that " reasonable cause" may include "lack of need" if it is ". . . a proven fact according to some specific objective standard."[268]

In regard to teachers, the law is much more specific.

> [A] continuing contract shall not operate to prevent a teacher's dismissal based upon the lack of need for the teacher's services pursuant to the provisions of law relating to the allocation of teachers and pupil-teacher ratios. But in case of such dismissal, the teachers so dismissed shall be placed upon a preferred list in the order of their length of service with that board, and no teacher shall be employed by the board until each qualified teacher upon the preferred list, in order, shall have been offered the opportunity for reemployment: Provided, that he has not accepted a teaching position elsewhere. Such reemployment shall be upon a teacher's preexisting continuing contract and shall have the same effect as

> though the contract had been suspended during the time the teacher was not employed.[269]

In Bates v. Board of Education, a teacher attempted to compel the board of education to permit him to carry out his continuing contract after being dismissed for lack of need. In holding for the board, the court said:

> . . . where the need for the services of a teacher has ended; and the absence of gross abuse of discretion, lack of good faith, or arbitrary or fraudulent conduct on the part of the board, mandamus does not lie to control its action in the premises.[270]

Most courts have held that when a reduction in staff occurs and a position is abolished, nontenured personnel must be terminated prior to tenured employees. Whether nontenured and tenured personnel must be laid off on the basis of seniority is a matter of statute or contract since seniority rights do not exist at common law.[271]

Although untested in court, it appears that §18A-2-2 cited above would provide, by implication, for the dismissal of teachers for lack of need on a seniority basis.[272] Teachers dismissed for lack of need are placed on a preferred list for reemployment and no other teacher may be hired in similar capacity until such time that all certified teachers, in order of service, have been offered reemployment.[273]

In suspension and dismissal of school personnel for cause in West Virginia, written notice ". . . shall be served upon the employee within five days of the presentation of the charges to the board."[274] Said notice shall enumerate the charges in sufficient detail, shall provide the employee with the opportunity for a hearing, and shall identify other procedural due process rights. At least ten days must

be allowed between the date the notice is served and the date of the scheduled hearing. In Green v. Board of Education, the court held that a suspension or a dismissal can only be effected by the procedure prescribed in §18A-2-8, requiring a minimum of ten days notice.[275]

When a local school board is not unanimous in its decision to suspend or dismiss an employee, that person has the right of direct appeal to the State Superintendent of Schools.[276] Such administrative appeal does not, however, rule out the possibility of judicial appeal either in the circuit court or, if a constitutionally protected right has allegedly been abridged, in federal district court.

Generally speaking, courts will afford judicial deference so long as the board does not act unreasonably, arbitrarily, capriciously, or unlawfully.[277] The First Circuit recently held that an employee may successfully argue that his dismissal was arbitrary and capricious if he can prove:

> . . . that each of the stated reasons [underlying his dismissal] is trivial or is unrelated to the educational process or to working relationships within the educational institution, or is wholly unsupported by a basis in fact.[278]

While some authorities recommend that an employee continues to be paid while suspended from duty and awaiting dismissal proceedings the Attorney General in West Virginia has ruled that an employee is not entitled to any salary during the period of suspension if the dismissal charges are upheld.[279]

RESIGNATION

Since public school personnel in West Virginia are employed under contract, the employee, as well as the employer, has an obligation to fulfill the terms and conditions thereof. While a contract can be altered, amended, or canceled by mutual consent at any time, boards of education may refuse to accept the resignation of a teacher or other employee for the next school year if tendered after the first day of April. Resignations should be tendered in writing to the secretary of the board of education and become effective only when approved by the board.[280]

If a teacher does not fulfill the obligations of his contract, he may be disqualified from teaching in any other public school in West Virginia and the State Department of Education may hold his teaching certificate for a one year period. Exceptions to this contractual obligation are personal illness and other just cause, including marriage.[281]

EMPLOYMENT TERM

The minimum employment term for school personnel is defined by statute in West Virginia and most other states. All public school employees in West Virginia are employed for a minimum of ten months, a month being defined as twenty employment days. At least one hundred eighty but no more than one hundred eighty-five days of the two hundred day term must be established as the instructional term for teachers and

students. The board, however, may choose to extend the instructional term, in which case the employment term must be extended an equal number of days.[282]

Non-instructional days in the school calendar may be used for curricular development, preparation for the opening and closing of the instructional term, in-service and professional training of teachers, parent-teacher conferences, professional meetings, and other related activities.[283]

A county board of education may contract with any or all personnel for a longer employment term. Generally, an employee is entitled to his same daily rate of pay during the extended term, if he is doing comparable work.[284]

Schools and county board of education offices in West Virginia are closed on the following holidays: Independence Day, Labor Day, Veteran's Day, Thanksgiving Day, Christmas Day, New Year's Day, and Memorial Day. When the holiday falls within the employment term it is considered to be a paid holiday for all school employees. If it falls on Saturday, schools will be closed the preceeding Friday, and if on Sunday, the schools will be closed on the following Monday.[285]

COMPENSATION

Minimum salaries for professional, auxiliary, and service personnel are established by state statute in West Virginia. County boards of education may establish salary schedules in excess

of the state minimum; however, such schedules must be uniform for personnel with like classification, experience, or job titles.[286]

The minimum salary schedule for public school teachers established by the West Virginia Legislature is based upon the number of years of teaching experience and the teacher's level of collegiate training.[287]

Years of experience is defined as the number of school terms in which the teacher has worked at least one hundred thirty-three days in the teaching profession or in a related educational position outside the public schools. If a teacher under contract is inducted into the armed services, time spent therein is also counted. Salary increments for experience are given for up to thirteen years with a Bachelor's degree, sixteen years with a Master's degree, and nineteen years for the Master's plus thirty hours or the Doctorate classifications.[288]

Present training classification levels are: Bachelor's degree, Bachelor's plus fifteen hours, Master's degree, Master's plus fifteen hours, Master's plus thirty hours, and the Doctorate. Some few non-degreed teachers, hired by county boards of education when there was a shortage of teachers, are allowed to continue teaching at lower pay on second, third, or fourth class certificates.[289]

County boards of education may fix higher salaries for teachers placed in special instructional assignments or in one-room schools. Teachers who perform duties other than regular instructional duties may also receive supplemental compensation, as can those teachers performing duties beyond the scope of the regular school day. However, all persons

within the county who perform like assignments and duties must receive uniform compensation.[290]

Under policy of the West Virginia Board of Education teachers may not be required to work more than eight hours per day or forty hours per week. Boards of education may, however, pay extra for additional services.[291]

Nominal supplemental salary schedules as established by the Legislature[292] and by the West Virginia Board of Education[293] provide monthly increments for school principals. The criteria utilized in these schedules are the number of teachers supervised, degree held, and whether the principal holds a valid principal's certificate. Additional increments may be established by the county board of education so long as they are applied uniformly. In Payne v. Board of Education, The West Virginia Supreme Court of Appeals held that it was the local board's discretionary right to set supplemental salary schedules for principals having extra duties and responsibilities. The Court said that such salary schedules could be based on number of teachers supervised, experience, hours of work, or other objective criteria.[294]

Salaries for assistant principals, supervisors, directors, coordinators, assistant superintendents, and other administrative personnel are established by the local board of education. When there is more than one person performing like assignments and duties, uniformity in salary schedules is mandated.[295]

A minimum monthly salary schedule with accompanying class titles and pay grades for auxiliary and service personnel was enacted

by the West Virginia Legislature in 1975.[296] Such personnel are now employed under contract with a designated class title reflecting a specified pay grade. There are eight different pay grades, each having experience increments for up to thirteen years of service with a board of education in any capacity. As with teachers, a year of service is a minimum of one hundred thirty-three days. Active duty in the Armed Services is also counted if the person was employed at induction.[297]

In a 1974 opinion, the Attorney General held that auxiliary and service personnel do not have to work eight hours or more to be entitled to the full time daily pay scale.[298] His opinion was in response to a legislative enactment which provided that auxiliary and service personnel employed for more than three and one-half hours per day shall be at the full time rate and if under three and one-half hours at the half time rate.[299]

County boards of education must determine the number of pay periods each year for the various classes of employees. Boards may choose to allow employees who work less than twelve months to be paid their annual salary over a period of twelve months, extending into July and August of the next fiscal year.[300]

SUMMARY

Legal provisions affecting the employment of teachers, administrators, auxiliary, and service personnel in West Virginia are primarily established by the federal and state constitutions, statutes, and case law. Of additional importance are policies of the West Virginia Board

of Education, opinions of the Attorney General, and interpretations of the State Superintendent of Schools.

Public school personnel in West Virginia are quasi-state employees and accrue many state sponsored benefits and privileges, however, they are employed, supervised, and paid through county boards of education.

The person having the foremost responsibility and authority in the employment process of public school personnel in West Virginia is the county superintendent of schools. Subject to board approval, the superintendent is responsible for employment, placement, transfer, demotion, promotion, and suspension of school personnel. Only in the employment of auxiliary and service personnel and in suspension, dismissal, and nonrenewal cases can the board act independently of the superintendent.

At no time during pre-employment or employment can the superintendent, board, or any supervisory person discriminate against any person on the basis of race, color, national origin, sex, handicap, or age.

Professional educators in West Virginia are required to hold a valid teaching certificate which licenses the holder to teach specified subjects at identified grade levels. Upon completion of an approved graduate program of study and after gaining required experience as a teacher, a person may also qualify for an administrative certificate which allows him to serve as a principal, supervisor, or county superintendent.

Auxiliary and service personnel do not, of course, hold certificates or licenses; however, each person employed in such capacity must be classified by the superintendent and the board with a state approved job title.

Under both the United States Constitution and the Constitution of West Virginia, public school employees are accorded due process rights and must be treated fairly in all matters relating to employment. If an employee can show that he has a liberty or property interest, he then accrues substantive due process rights which cannot be removed by statute, state board policy, county board policy, or administrative regulations. Additionally, he would be entitled to procedural due process which provides for proper notice, opportunity to be heard, judgment by an impartial tribunal, and the opportunity of appeal. Under West Virginia statute, he would also be afforded specific rights in cases of non-renewal, reassignment, suspension, and dismissal.

Upon employment, all school personnel in West Virginia are required to execute a written contract with their board of education. For professional personnel, probationary contracts may be issued for up to three years; however, auxiliary and service probationary contracts must be issued on an annual basis. If after three years of successful, continuous service, an employee is offered a new contract of employment, that contract shall be a continuing contract and the employee would then have "tenure."

School personnel may be transferred to new positions only if the superintendent and the board follow precise statutory procedural due

process requirements. Initial notification by the superintendent must be made prior to the first Monday in April with the employee having the right to learn the reasons for the contemplated transfer and to be heard before the board. State law does provide for exceptions to this procedure if emergency or regulatory conditions exist.

Any school employee who is no longer needed in his position may be dismissed for lack of need. Employees so dismissed would, however, be placed on a preferred list for reemployment. Employees may also be suspended or dismissed at any time for immorality, incompetency, cruelty, insubordination, intemperance, or willful neglect of duty.

The minimum employment term for school personnel in West Virginia is two hundred days which is defined as ten months of twenty days each. Boards of education may, however, contract with an employee for a longer term.

State minimum salary schedules have been established in West Virginia for teachers, auxiliary, and service personnel. County boards of education may, however, choose to compensate employees at a rate higher than the state established schedule, provided that all such schedules are uniform for personnel with like classification, experience, assignment, and duties.

FOOTNOTES

[1]W.Va. Code, § 18A-1-1(a).

[2]W.Va. Code, § 18A-1-1(e).

[3]W.Va. Code, § 18A-1-1(f).

[4]West Virginia Constitution, Article XII, Section 1.

[5]State ex rel. Board of Education v. Martin, 112 W.Va. 174, 163 S.E. 850 (1932).

[6]Heath v. Johnson, 36 W.Va. 782, 15 S.E. 980 (1892).

[7]78 C.J.S. Schools and School Districts, § 146 (1952).

[8]W.Va. Code, § 18-4-10.

[9]W.Va. Code, Chapter 18A.

[10]W.Va. Code, §§ 18A-2-4 and 18A-2-5.

[11]Op. Att'y. Gen., August 28, 1969, January 22, 1975.

[12]Cochran v. Trussler, 141 W.Va. 130, 89 S.E.2d 306 (1955).

[13]Madaline K. Remmlein and Martha L. Ware, School Law (Danville, Ill.: The Interstate Printers and Publishers, 1970), p.5.

[14]Pennsylvania Lightning Rod Co. v. Board of Education, 20 W.Va. 360 (1882).

[15]Rhodes v. Board of Education, 95 W.Va. 57, 120 SE 183 (1923).

[16]W.Va. Code, § 16-3-4.

[17]West Virginia Board of Education, School Transportation Regulations (Charleston, W.Va.: W.Va. Board of Education, 1978), pp. 17-23.

[18]W.Va. Code, § 18-4-2.

[19]W.Va. Code, § 18A-2-10.

[20]McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976); Mogle v. Sevier County School District, 540 F.2d 478 (10th Cir. 1976); Wardwell v. Board of Education of the City School District of Cincinnati, 529 F.2d 625 (6th Cir. 1976).

[21]Interpretation, State Superintendent of Schools, "Employee" August 8, 1977 (5).

[22]W.Va. Code, § 61-10-15.

[23]Alexander v. Ritchie, 132 W.Va. 865, 53 S.E.2d 735 (1949).

[24]W.Va. Code, § 61-10-15.

[25]W.Va. Code, § 61-10-15.

[26]Black's Law Dictionary (Rev. 4th Edition, 1968), p. 553.

[27]Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

[28]42 U.S.C. 2000, et seq., as amended.

[29]20 U.S.C. 1681-86.

[30]20 U.S.C. 1401; 29 U.S.C. 791.

[31]Griggs v. Duke Power Co., 401 U.S. 430 (1971).

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

[33]National Education Association v. State of South Carolina, 434 U.S. 1026 (1978).

[34]Cannon v. University of Chicago, 559 Fed. 1063 (7th Cir. 1977).

[35]Romeo Community Schools v. HEW, 438 F.Supp. 1021 (E.D., Mich. 1977).

[36]W.Va. Code, § 5-11-2.

[37]W.Va. Code, § 5-11-2.

[38]W.Va. Code, § 5-11-14.

[39]W.Va. Code, § 5-11-14.

[40]Decker v. Administrative Council of the United Career Center, West Virginia Human Rights Commission, Docket No. ES36-73 (1976).

[41]Ibid.

[42]Smith v. Logan County Board of Education, West Virginia Human Rights Commission, Docket No. ER33-73 (1978).

[43]Ibid, p. 7.

[44]Ibid, p. 16.

[45]Magna Carta, Thirty-Ninth Chapter, approved by King John, June 15, 1215.

[46]United States Constitution, Amendment V.

[47]United States Constitution, Amendment XIV, Section 1.

[48]A.A. Morris, The Constitution and American Education (St. Paul, Minn.: West Publishing Co., 1974), pp. 107-111.

[49]West Virginia Constitution, Article III, Section 10.

[50]E. Edmund Reutter, Jr. and Robert R. Hamilton, The Law of Public Education (Mineola, N.Y.: The Foundation Press, 1976), p. 363.

[51]16 Am.Jur.2d, Constitutional Law, § 550.

[52]Meyer v. Nebraska, 262 U.S. 390 (1923).

[53]Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[54]Mailloux v. Kiley, 448 F2d 1242 (1st Cir. 1971).

[55]J. Everette DeVaughn, "Employees," The Yearbook of School Law 1975, ed. Philip K. Piele (Topeka, Kansas: National Organization of Legal Problems in Education, 1975), p. 180.

[56]Pickering v. Board of Education, 391 U.S. 563 (1968).

[57]Ibid.

[58]Mt. Healthy City School District Board of Education v. Doyle, 425 U.S. 433 (1977).

[59]Ibid.

[60]Ibid.

[61]Givhan v. Western Line Consolidated School District, 47 U.S.L.W. 4102 (No. 77-1051, Jan. 9, 1979).

[62]Western Line Consolidated School District v. Givhan, 555 Fed. 1309 (5th Cir. 1977).

[63]Givhan v. Western Line Consolidated School District, 47 U.S.L.W. 4102 (No. 77-1051, Jan. 9, 1979).

[64]Ibid.

[65]Shumate v. Board of Education, 478 F.2d. 233 (4th Cir. 1973).

[66]James v. West Virginia Board of Regents, 322 F.Supp. 217 (S.D. W.Va. 1971).

[67]Ibid.

[68]Amburgey v. Cassady, 507 F.2d. 728 (6th Cir. 1974).

[69]Spano v. School District of Borough of Brentwood, 12 Pa.Cmmwlth. 1701, 316 A.2d 657 (1974).

[70]Hannah v. Larche, 363 U.S. 420 (1960).

[71]North v. Board of Regents, 233 S.E.2d 411 (W.Va. 1977).

[72]Board of Regents v. Roth, 408 U.S. 564 (1972).

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

[74]Board of Regents v. Roth, 408 U.S. 564 (1972).

[75]Ibid.

[76]Ibid at 577.

[77]Ibid.

[78]Ibid.

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

[80]Ibid.

[81]Bishop v. Wood, 426 U.S. 34 (1976).

[82]Ibid.

[83]Ibid.

[84]Reutter and Hamilton, op. cit., p. 49.

[85]Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977).

[86]Ibid.

[87]North v. Board of Regents, 233 S.E.2d 411 (W.Va. 1977).

[88]Black's Law Dictionary (4th Edition, 1968), p. 72.

[89]Green v. Board of Education, 133 W.Va. 356, 56 S.E.2d 100 (1949).

[90]Memorandum from Rex M. Smith, State Superintendent of Schools to county school superintendents, October 20, 1969.

[91]W.Va. Code, §§ 18A-2-7,-8.

[92]Grannis v. Ordean, 234 U.S. 385 (1914).

[93]William R. Hazard, Education and the Law (New York: The Free Press, 1971), p. 309.

[94]Goldberg v. Kelly, 397 U.S. 254 (1970).

[95]Ellis v. State Road Commission, 100 W.Va. 531, 131 S.E. 7 (1925).

[96]W.Va. Code, § 6-9A-4(2).

[97]W.Va. Code, § 18A-2-8.

[98]New Jersey Statutes Ann., § 18A: 6-10 (1960).

[99]Oregon Revised Statutes, §§ 342.085 to 342.955 (1971).

[100]California Education Code, § 13412-13 (1960).

[101]Hortonville Joint School District v. Hortonville Education Association, 426 U.S. 482 (1976).

[102]Withrow v. Larkin, 421 U.S. 35 (1975).

[103]Staton v. Mayes, 552 F2d 908 (10th Cir. 1977).

[104]New Mexico Stat. Ann., § 77-8-17 (Supp. 1967)

[105]New York Education Law, § 30/2.3 (McKinney Supp. 1967).

[106]Alabama Code, 52 § 360 (1958).

[107]New York Education Law, § 3012.3 (McKinney Supp. 1967).

[108]Ohio Revised Code Ann., § 3319.16 (1960).

[109]West Virginia Board of Education, Policies, Rules and Regulations, § 1340, see also W.Va. Code, § 18A-2-8.

[110]Smith v. Siders, 183 S.E.2d 433 (W.Va. 1971).

[111]Green v. Board of Education, 133 W.Va. 356, 56 S.E.2d 100 (1949); State ex rel. Board of Education v. Martin, 112 W.Va. 174, 163 S.E. 850 (1932).

[112]Mason County Board of Education v. State Superintendent of Schools, 234 S.E.2d 321 (W.Va. 1977).

[113]Gonzales v. Shanker, 533 Fed. 832 (2nd Cir. 1976),

[114]Reutter and Hamilton, op. cit., p. 363.

[115]Hodge v. Stegall, 206 Okl. 1161, 242 P.2d 720 (1952).

[116]State ex rel. Hopkins v. Wooster, 111 Kan. 830, 208 P. 656 (1922.).

[117]Kern Alexander, Ray Corns, and Walter McCann, Public School Law (St. Paul, Minn.: West Publishing Co., 1969), p. 387.

[118]W.Va. Code, § 18-9A-4.

[119]W.Va. Code, § 18A-3-1.

[120]W.Va. Code, § 18A-3-2.

[121]Statement By Thomas J. McGinnis, Coordinator for Teacher Certification, State Department of Education, in personal interview, January 19, 1979.

[122]W.Va. Code, § 18A-3-1.

[123]Norwick v. Nyquist, 417 F.Supp. 913 (S.D. N.Y. 1976).

[124]James v. West Virginia Board of Regents, 322 F.Supp. 217 (S.D. W.Va. 1971)

[125]W.Va. Code, § 18A-3-3.

[126]Ibid.

[127]51 Op. Att'y. Gen. 622 (1965); 51 Op. Att'y. Gen. 676 (1966); 51 Op. Att'y. Gen. 803 (1966).

[128]Interpretation, State Superintendent of Schools, "Certification" October 28, 1977 (30).

[129]W.Va. Code, § 18A-3-3.

[130]West Virginia Board of Education, Minimum Standards for the Licensure of West Virginia School Personnel (Charleston, W.Va.: W.Va. Board of Education, 1972), pp. 70-86; see also West Virginia Board of Education, Standards for the Accreditation of Teacher Preparation Programs in West Virginia (Charleston, W.Va.: W.Va. Board of Education, 1976).

[131]W.Va. Code, § 18A-3-2.

[132]West Virginia Board of Education, Standards for the Accreditation of Teacher Education Programs in West Virginia, op. cit.

[133]Sorenson v. School District No. 28, 418 P.2d 1004 (Wyo. 1966).

[134]W.Va. Code, § 18A-3-2.

[135]Pond v. Parsons, 117 W.Va. 777, 188 S.E. 232 (1943).

[136]W.Va. Code, § 18-10E-1.

[137]Ibid.

[138]Statement by Thomas J. McGinnis, Jr., Coordinator for Teacher Certification, State Department of Education, in personal interview, March 30, 1979.

[139]Memorandum to county superintendents from Thomas J. McGinnis, Jr., Director of Certification, State Department of Education, January 14, 1972. See also a memorandum to county superintendents from Dr. Daniel B. Taylor, State Superintendent of Schools, February 6, 1979.

[140]Memorandum to county superintendents from Thomas J. McGinnis, Jr., Director of Certification, State Department of Education, January 14, 1972.

[141]Memorandum by Thomas J. McGinnis, Jr., Director of Certification, State Department of Education, distributed at regional certification meetings, April, 1977.

[142]Man v. Matthews, 270 S.W. 586 (Texas 1954).

[143]M. Chester Nolte and John Philip Linn, School Law For Teachers (Danville, Ill.: The Interstate Printers and Publishers, Inc., 1964), p. 74.

[144]Stone v. Fritts, 169 Ind. 361, 82 N.E. 792 (1907).

[145]W.Va. Code, § 18A-3-6.

[146]Statements by William Toussant, Administrative Assistant to the State Superintendent of Schools, in personal interviews during March and April, 1978. (State Superintendent's Office would not release names or transcripts of the revocation cases.)

[147]W.Va. Code, § 18A-4-8.

[148]Ibid.

[149]West Virginia Board of Education, Policies, Rules and Regulations, § 5610.

[150]Herald v. Board of Education, 65 W.Va. 765, 65 S.E. 102 (1909).

[151]W.Va. Code, § 18A-5-5.

[152]State ex rel. Campe v. Board of Education, 94 W.Va. 408, 118 S.E. 877 (1923).

[153]State ex rel. Rhodes v. Board of Education, 95 W.Va. 57, 120 S.E. 183 (1925).

[154]W.Va. Code, §§ 18A-2-2,-4.

[155]United States Constitution, Article I. Section 10.

[156]Barngrover v. Maack, 46 Mo. App. 407 (1891).

[157]Samuel Williston, A Treastise on the Law of Contracts, ed. W.E. Jaeger (3rd ed.; Kisco, N.Y.: Baker, Voorhis and Co., 1957), p. 1; See also American Law Institute, Restatement of Contracts, Article I (1932).

[158]Arthur Linton Corbin, Corbin on Contracts (St. Paul, Minn.: West Publishing Co., 1952), p. 31.

[159]Nolte and Linn, op. cit., p. 82.

[160]Newton Edwards, The Courts and The Public Schools, (Chicago: The University of Chicago Press, 1971), p. 171.

[161]Lawrence P. Simpson, Handbook of the Law of Contracts, St. Paul, Minn.: West Publishing Co., 1965), pp. 8-9.

[162]Restatement of Contracts, § 75 (1932).

[163]Cleavenger v. Board of Education, 114 W.Va. 39, 170 S.E. 901 (1933).

[164]Nolte and Linn, op. cit., p. 92.

[165]Knotts v. Board of Education, 113 W.Va. 56, 166 S.E. 703 (1932).

[166]W.Va. Code, §§ 18A-2-4,-5.

[167]W.Va. Code, § 18A-2-2.

[168]State Superintendent of Schools, Prescribed probationary and continuing contracts of employment for teachers.

[169]Ibid.

[170]Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977).

[171]Daniel J. Gatti and Richard D. Gatti, The Teacher and the Law, (West Nyack, N.Y.: Parker Publishing Co., Inc., 1972), p. 129.

[172]W.Va. Code, § 18A-2-2.

[173]Gatti and Gatti, op. cit., p. 116.

[174]W.Va. Code, § 18A-2-6.

[175]W.Va. Code, § 18A-2-8a.

[176]Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977).

[177]West Virginia Board of Education, Policies, Rules and Regulations, § 5300-6.

[178]Skavenski v. Pendleton County Board of Education, Appeal Decision of the State Superintendent of Schools, July 27, 1977.

[179]Kern Alexander, "Due Process Rights of Teachers," Legal Rights of Teachers and Students, eds. M. David Alexander, A.P. Johnson, and H. Conley (Gainesville, Fla.: Maxwell-King Co., 1973), p. 31.

[180]Nolte and Linn, op. cit., p. 114.

[181]Nolte and Linn, op. cit., p. 116.

[182]W.Va. Code, §§ 18A-2-2,-6.

[183]M. David Alexander, "Teacher Tenure in Virginia," Legal Rights of Teachers and Students, eds. M. David Alexander, A.P. Johnson, and Houston Conley (Gainesville, Fla.: Maxwell-King Co., 1973), p. 57.

[184]Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1935).

[185]Dodge v. Board of Education of Chicago, 302 U.S. 74 (1937).

[186]Gullet v. Sparks, 444 S.W.2d 901 (1967).

[187]School District No. 8, Pinal County v. Superior Court, 433 P.2d 28 (1967).

[188]State v. Board of Education of the City of St. Louis, 206 S.W.2d 566 (1947).

[189]W.Va. Code, § 18A-1-1.

[190]Gatti and Gatti, op. cit., p. 119.

[191]Interpretation, State Superintendent of Schools, "Employee" August 21, 1972 (21).

[192]45 Op. Att'y. Gen. 201 (1953).

[193]45 Op. Att'y. Gen. 692 (1954).

[194]W.Va. Code, § 18A-2-2.

[195]W.Va. Code, § 18A-4-10; see also Interpretation, State Superintendent of Schools, June 13, 1972.

[196]W.Va. Code, §§ 18A-5-4,-4a.

[197]W.Va. Code, §§ 18A-2-2,-6.

[198]Ibid.

[199]Interpretations, State Superintendent of Schools, "Principal" July 12, 1977 (005); "Principal" July 22, 1977 (29).

[200]Interpretations, State Superintendent of Schools, "Principal" July 12, 1977 (005); "Principal" July 22, 1977 (29).

[201]State ex rel. Linger v. Board of Education, 152 W.Va. 379, 163 S.E.2d 790 (1968).

[202]Interpretation, State Superintendent of Schools, "Principal" June 16, 1977 (45).

[203]Ibid.

[204]Barthuli v. Board of Trustees of Jefferson Elementary School District, 434 U.S. 1337 (1977).

[205]Barthuli v. Board of Trustees of Jefferson Elementary School District, 19 Cal.3d 717 (1977).

[206]W.Va. Code, §§ 18-4-10; 18A-2-7; see also Dooley v. Board of Education, 80 W.Va. 648 (1917).

[207]Weaver v. Board of Education, 128 W.Va. 42, 35 S.E.2d 679 (1945).

[208]W.Va. Code, § 18A-2-7.

[209]Ibid.

[210]Interpretation, State Superintendent of Schools, "Employee" April 9, 1973 (24); see also West Virginia Code § 18A-A-2-7.

[211]State ex rel. Linger v. Board of Education, 152 W.Va. 379, 163 S.E.2d 790 (1968).

[212]Memorandum from State Superintendent of Schools to county superintendents, March 20, 1978.

[213]W.Va. Code, § 18A-2-7.

[214]Weaver v. Board of Education, 128 W.Va. 42, 35 S.E.2d 679 (1945); see also State ex rel. Linger v. Board of Education, 152 W.Va. 379, 163 S.E.2d 790 (1968).

[215]W.Va. Code, § 18-4-10.

[216]Neal v. Board of Education, 116 W.Va. 435, 181 S.E. 541 (1935); Wysong v. Walden, 120 W.Va. 122, 52 S.E.2d 392 (1938); Rowan v. Board of Education, 125 W.Va. 406, 24 S.E.2d 583 (1943); State ex rel. Linger v. Board of Education, 152 W.Va. 379, 163 S.E.2d 790 (1968).

[217]Op. Att'y. Gen. 57 (1954).

[218]Neal v. Board of Education, 116 W.Va. 435, 181 S.E. 541 (1935).

[219]White v. Board of Education, 117 W.Va. 114, 184 S.E. 264 (1936).

[220]Neal v. Board of Education, 116 W.Va. 435, 181 S.E. 541 (1935).

[221]White v. Board of Education, 117 W.Va. 114, 184 S.E. 264 (1936).

[222]W.Va. Code, § 18A-2-2.

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

[224]Reutter and Hamilton, op. cit., p. 476.

[225]White v. Board of Education, 117 W.Va. 114, 184 S.E. 264 (1936).

[226]W.Va. Code, § 18A-2-7.

[227]W.Va. Code, § 18A-2-8.

[228]Jameson v. Board of Education, 74 W.Va. 389, 81 S.E. 1126 (1914).

[229]W.Va. Code, § 18A-2-8.

[230]W.Va. Code, §§ 18A-2-2,-6.

[231]Black's Law Dictionary, (Rev. 4th Edition, 1968), p. 885.

[232]Horosko v. School District of Mount Pleasant, 335 Pa. 369, 6 A.2d 866 (1939).

[233]Pettit v. State Board of Education, 513 P.2d 889 (1973).

[234]Jarvella v. Willoughby, 233 N.E.2d 143 (1967).

[235]Brown v. Bathke, 416 F.Supp. 1194 (D.Neb. 1976).

[236]Weisman v. Board of Education of Jefferson City School District, 547 P.2d 1267 (Colo. 1976).

[237]Jenkyns v. Board of Education, 294 F2d 260 (8th Cir. 1961).

[238]Floyd G. Delon, "Legal Controls on Teacher Conduct," (paper presented at a meeting of the American Association of School Administrators, Atlanta, Ga., February, 1978).

[239]42 C.J.S. 396.

[240]Horosko v. School District of Mount Pleasant, 335 Pa 369, A.2d 866 (1939).

[241]Green v. Board of Education, 133 W.Va. 356, 56 S.E.2d 100 (1949).

[242]Sigmon v. Poe, 564 F2d 1093 (4th Cir. 1977).

[243]Newton Edwards, The Courts and the Public Schools, (Chicago: The University of Chicago Press, 1971), p. 484.

[244]Betsy Levin, "Employees," The Yearbook of School Law 1976, ed., Philip K. Piele (Topeka, Kansas: National Organization on Legal Problems of Education, 1976), pp. 138-9.

[245]Black's Law Dictionary, (Rev. 4th Edition, 1968), p. 484.

[246]Rolando v. School Directors of District No. 125, 358 N.E.2d 945 (Ill. 1976).

[247]Landi v. West Chester Area School District, 353 A.2d 895 (Pa. 1976).

[248]Coffas v. Board of School Directors of Upper Dauphin Area School District, 353 A.2d 898 (Pa. 1976).

[249]Edwards, op. cit., pp. 482-4.

[250]Lorin A. Burt, School Law and the Indiana Teacher (Bloomington, Ind.: Beanblossom Publishers, 1967), p. 45.

[251]Johnson v. Taft School District, 19 Cal.App. 2d 405, 65 P.2d 912 (1938).

[252]Beverlin v. Board of Education, 216 S.E.2d 554 (W.Va. 1975).

[253]Drown v. Portsmouth School District, 451 F.2d 1106 (1st Cir. 1971).

[254]Pitcher v. Iberia Parish School Board, 280 So.2d 603 (La. 1973).

[255]Ingraham v. Wright, 429 U.S. 975 (1977).

[256]Delon, op. cit., p. 5.

[257]Kelly v. Johnson, 425 U.S. 238 (1976).

[258]Tardif v. Quinn, 545 F.2d 761 (1st Cir. 1976).

[259]East Hartford Educ. Ass'n. v. East Hartford Board of Education, 562 Fed. 838 (2nd Cir. 1977).

[260]Ibid.

[261]Gatti and Gatti, op. cit., p. 111.

[262]Black, op. cit., p. 947.

[263]Schott v. Board of Education, 156 N.E.2d 1 (Ill. 1951).

[264]Williams v. School District No. 40, 4 Ariz.App. 5.

[265]Fox v. Board of Education, 236, S.E.2nd (W.Va. 1979).

[266]Ibid.

[267]W.Va. Code, § 18A-2-6.

[268]Interpretation, State Superintendent of Schools, "Contract" July 11, 1977 (15).

[269]W.Va. Code, § 18A-2-2.

[270]Bates v. Board of Education, 133 W.Va. 225, 55 S.E.2d 777 (1949).

[271]Reutter and Hamilton, op. cit., p. 494.

[272]W.Va. Code, § 18A-2-2.

[273]Ibid.

[274]W.Va. Code, § 18A-2-8.

[275]Green v. Board of Education, 133 W.Va. 356, 56 S.E.2d 100 (1949).

[276]W.Va. Code, § 18A-2-8.

[277]Fisher v. Snyder, 476 F2d 375 (8th Cir. 1973).

[278]McEnteggart v. Cataldo, 451 F.2d 1109 (1st Cir. 1971), cert. denied 408 U.S. 943 (1972).

[279]52 Op. Att'y. Gen. 422 (1967).

[280]W.Va. Code, §§ 18A-2-2,-6.

[281]W.Va. Code, § 18A-2-2.

[282]W.Va. Code, § 18-5-15.

[283]Ibid.

[284]Interpretation, State Superintendent of Schools, "Salary" December 20, 1976 (22).

[285]W.Va. Code, § 18A-5-2.

[286]W.Va. Code, §§ 18A-4-1,-5,-8.

[287]W.Va. Code, § 18A-4-1.

[288]Ibid.

[289]Ibid.

[290]W.Va. Code, § 18A-4-5.

[291]West Virginia Board of Education, Policies, Rules and Regulations, § 5210.

[292]W.Va. Code, § 18A-4-3.

[293]West Virginia Board of Education, Policies, Rules and Regulations, § 5630.

[294]State ex rel. Payne v. Board of Education, 135 W.Va. 349, 63 S.E.2d 579 (1951).

[295]W.Va. Code, § 18A-4-5.

[296]W.Va. Code, § 18A-4-8.

[297]Ibid.

[298]Op. Att'y. Gen., January 17, 1974.

[299]W.Va. Code, § 18A-4-8.

[300]W.Va. Code, § 18A-4-9.

Chapter 3

TORT LIABILITY OF SCHOOL PERSONNEL

Every person in our society has a duty to conduct his daily activities in such a manner so as not to subject others to unreasonable risk of harm. Public school employees owe this same duty to the students they serve.

The word tort is of French origin derived from the Latin, "torquere," meaning to twist or bend. An act of tort is a wrongful act resulting from the omission or commission of an act by one, without right, which causes direct or indirect injury to another person, his property, or reputation.[1] A tort is ". . . a civil wrong, other than breach of contract, for which the courts will provide a remedy in the form of an action for damages."[2]

A civil action may be brought against one who commits a tortious act against another. This action is initated and maintained by the injured party for the purpose of obtaining compensation for an injury he has suffered.

Legal remedies for tortious action may be classified into two areas: (1) "Traditional torts" serve to protect the right of a person against injury to his body, reputation, character, conduct, habits, and property. Types of "traditional torts" include strict liability, intentional interference, and negligence;[3] (2) "Constitutional torts" arise when a person's rights guaranteed by the United States Constitution have been abridged by state or local governmental authorities.

STRICT LIABILITY

While most tort cases are based on the supposition that someone was injured by the intentional acts or negligence of another party, strict liability cases hold a person liable for injuries of another without requiring proof of either intent or negligence. In many instances, the courts have allowed damage awards based on strict liability even though the defendant was not at fault for the plaintiff's injury.[4]

The premise of strict liability is that the defendant is engaged in an activity necessarily so dangerous that injury to another person is to be expected. Under strict liability the acts of the defendant are not so important as the injury and suffering of the injured person. The doctrine has its origin in the social justice reasoning that "he who breaks must pay," regardless of whether the damage is knowingly or negligently caused.[5] Prosser points out that in some strict liability cases the defendant may be held liable although he is not charged with any moral wrongdoing and has not even departed in any way from a reasonable standard of intent or care. Where there is blame on neither side, there is a tendency to ask who can best bear the loss by creating liability where there has been no fault.[6]

Unless statute requires it, strict liability will never be found unless the defendant is aware of the abnormally dangerous condition or activity and has voluntarily engaged in or permitted it. Once this is established, the defendant is liable although he has taken every possible

precaution to prevent the harm and is not at fault in any moral or social sense.[7]

While strict liability cases reported by appellate courts involving activities in the public schools are very, very scarce, the possibility of such actions, nevertheless, exists.[8] School employees, however, would not likely be involved without some negligence on their part being alleged. In West Virginia, there are no strict liability cases on record involving school personnel or boards of education.

INTENTIONAL INTERFERENCE

An individual may be liable in tort for an intentional act which results in injury to another. While intent is an essential element, it is not necessary for the wrongdoer to be hostile or desire to harm the injured party. An intentional tort may result from an intended act whether accompanied by enmity, antagonism, maliciousness, or by no more than a good natured practical joke.[9]

While there are a few school cases alleging mental distress or improper detention, almost all of the intentional interference cases involving school personnel are based on assault and battery or defamation.

Assault and Battery

Contrary to popular belief, assault does not require physical contact. Rather, it is a tort committed against the "mind" of another by use of words or actions or both. For assault to exist there must be an "overt act or an attempt, or the unequivocal appearance of an attempt to do some immediate physical injury to the person of another."[10]

Battery constitutes a separate tort, having as its major element the touch, described as unpermitted, unprivileged contact with another in a rude or angry manner.[11] In school related cases these two torts most often go together, usually as a result of a teacher's attempt to discipline a student through use of corporal punishment.

Assault and battery cases against school personnel may be filed as civil and/or criminal actions. Civil cases alleging assault and/or battery are tort actions which require the plaintiff to prove by a preponderance of the evidence that the defendant's acts were improper and that the plaintiff was injured as a result.[12] Criminal actions alleging assault and battery may be filed by the complainant or the county prosecutor as simple assault and/or battery, punishable as a misdemeanor, or as malicious assault, punishable as a felony.[13] In criminal cases the defendant is presumed to be innocent and it is the duty of the state to prove beyond all reasonable doubt that the defendant is guilty of unreasonable punishment amounting to assault and/or battery.[14]

The courts maintain that the public school teacher stands *in loco parentis* and thus has the right to chastise a student, subject to state law and local board policy. In addition, West Virginia teachers have certain statutory authority:

> The teacher shall stand in the place of the parent or guardian in exercising authority over the school, and shall have control of all pupils enrolled in the school from the time they reach the school until they have returned to their respective homes . . . .[15]

Under West Virginia law, the term teacher as used above includes

> . . . principals, regular teachers, substitute teachers, student teachers, teacher aides, and other school personnel assigned responsibility for directing or supervising instructional programs or board approved activities.[16]

The West Virginia Supreme Court of Appeals has further defined the in loco parentis doctrine as it relates to corporal punishment cases:

> A parent, or one standing in loco parentis, has the authority to administer chastisement or correction to his child. The moral sense of children is not sufficiently developed in all cases to admit of a successful appeal to the child to desist from wrong-doing without the aid of physical coercion.[17]

Regulations promulgated by the West Virginia Board of Education in 1975 outline specific rights and responsibilities of teachers and principals in administering corporal punishment.

> The use of excessive physical force by school officials on students is illegal. Moderate corporal punishment used to promote discipline is permitted by law. However, such punishment must not be wanton or malicious and must not be in excess of the offense.
>
> Corporal punishment must be administered by the principal or assistant principal, or by the teacher with the permission of the principal. In all cases, corporal punishment must be administered in the presence of a witness.[18]

The basic prerequisities for legal corporal punishment is that the punishment be reasonable and moderate. Reasonableness is determined by the size, age, sex, condition, or disposition of the student under the circumstances. Moderation reflects the type of instrument used, the part of the body struck, and the force used.[19] Generally, if the punishment becomes immoderate or is for the purpose of revenge or is maliciously done, the right of the teacher to corporally punish ends and the student's right of self-defense begins.[20]

In the landmark case of Ingraham v. Wright, two pupils who had been paddled severely, brought suit alleging that school officials had violated the Eighth Amendment prohibition against "cruel and unusual punishment" and that they had been denied substantive and procedural due process guarantees of the Fourteenth Amendment. The United States

Supreme Court held that the Eighth Amendment was inapplicable to disciplinary corporal punishment, as the Amendment was designed to protect those convicted of a crime. The court also held that notice and hearing were not required by the Fourteenth Amendment prior to imposing corporal punishment:

> In view of the low incidence of abuse, the openness of our schools, and the common law safeguards that already exist, the risk of error that may result in the violation of a school child's substantive rights can only be regarded as minimal.[21]

Two years earlier, the Supreme Court had summarily affirmed the decision of a three-judge district court rejecting arguments that to allow corporal punishment against parental wishes was an invasion of family privacy.[22]

In civil actions seeking damages in corporal punishment cases in West Virginia there is a presumption that the teacher acted properly under the circumstances and that the punishment was justified. It is the duty of the plaintiff to prove by the preponderance of the evidence that the teacher's acts were improper and that the student was injured as a result.

A school employee has the same right as any citizen to protect his person from attack. When subjected to physical attack by a student, the teacher is justified in responding with such force as is reasonably necessary to end the threat. Teachers also have the right as well as the responsibility to use reasonable physical force to protect students from physical attack.

Defamation

Since school personnel work in an environment which often fosters rumors, accusations, and gossip, one legal area of potential harm is defamation, defined as,

> . . . that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, good will or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him.[23]

The twin torts of libel and slander constitute defamation. Publication by writing, printing, or pictures constitutes libel; if by word of mouth or by gesture, it is slander.[24]

To constitute the tort of libel or slander it must be shown that a false statement bringing hatred, disgrace, ridicule, or contempt on another person was published or communicated to a third person.[25]

The courts have recognized that there are four kinds of slander for which no proof of any actual harm to reputation or any other damage is required for the recovery of either nominal or substantial damages:

1. Statements which impute the commission of crimes involving "moral turpitude."

2. Statements imputing certain loathsome diseases such as veneral disease or leprosy,

3. Imputation of a person's reputation for skill in his business, office, trade, profession or occupation, tending to cause his position to be prejudically affected, and

4. Words imputing unchasity in a woman.

Slanderous words which cannot be fitted into these catagories are actionable only upon proof of actual damages.[26]

On the other hand, defamatory imputation conveyed in libelous form is actionable without the necessity of pleading or proving that the plaintiff had in fact suffered any damage as a result. The existence of damages is conclusively assumed from the publication of the libel itself.[27]

In an early West Virginia case, the Supreme Court of Appeals held that to constitute libel,

> [I]t is sufficient if the language tends to injure the reputation of the party, to throw contumely, or to reflect shame or disgrace upon him, or to hold him up as an object of scorn, ridicule, or contempt, and the words will be understood in their plain and ordinary import.[28]

That same court has also held that in all actions of tort, ". . . where the wrong is maliciously, wantonly, and willfully committed, the jury has the discretion to assess punitive, exemplary, or vindictive damages, these terms being synonymous."[29]

Two primary defenses, truth and privilege, are used by defendants in defamation cases. Generally, both are complete defenses, avoiding all liability when established. Article three, section eight of the West Virginia Constitution provides for truth as a complete defense in West Virginia.

> In prosecutions and civil suits for libel the truth may be given in evidence; and if it shall appear to the jury that the matter charged as libelous is true and was published with good motivies, and for justifiable ends, the verdict shall be for the defendant.[30]

An early Michigan court defined privilege as follows:

> Where a party makes a communication and such communication is prompted by a duty owed either to the public or to a third party, or the communication is one in which a party has an interest, and it is made to another having a corresponding interest, the

communication is privileged if made in good faith and without actual malice.[31]

The protection afforded privileged communications is divided into two levels: absolute privilege and conditional or qualified privilege.

Comments by judges while on the bench, by lawmakers during legislative sessions, and by certain executive officers of federal and state governments when carrying out the duties of their office are absolutely privileged.[32] The West Virginia Supreme Court of Appeals has reflected this in holding that ". . . with few exceptions, absolutely privileged communications are limited to legislative, judicial, and quasi-judicial proceedings and other acts of the state."[33]

An early West Virginia court held that to establish a defense of qualified or conditional privilege three things must be shown:

1. The occasion upon which the words are used must be privileged;

2. The words used must not transcend the scope of the privilege of the occasion; and

3. The words must be used in good faith, without actual malice.[34]

Special care must also be taken to limit the publication to the parties to whom a duty is owed, or to the parties who may be concerned in the protection of a legitimate interest.[35]

The courts have held that conditional or qualified privilege exists for publications by school personnel to parents, administrators, members of the school board, other teachers, and in some instances, even to a newspaper.[36] However, such publications must be made in good faith, be based on reasonable ground, made during a proper occasion, with

a proper motive, and in a proper manner.[37]

Qualified privilege requires that the person conveying the information do so for reasons which protect the interests of the public, third parties, or one's self. A qualified privilege may also be applicable even when misinformation is given. However, the conveyor must have honestly believed the information to be reliable and given to advance a legitimate interest.[38]

School personnel must not transmit information to persons other than those who are qualified to help the student with the problem. To communicate student information to another pupil, to non-school personnel, and to school employees who do not have the responsibility for educating or counseling that student will place the person outside the limits of qualified privilege. The privilege will also be lost if the teacher or administrator is motivated by personal reasons or if the subject matter goes beyond educational relevancy.[39]

The transmittal of student records comes under the qualified privilege of the teacher so long as the record is forwarded to parents, teachers, counselors, principals, supervisors, or others who have a legitimate reason to learn more about the student in an effort to help him fulfill his educational needs.[40]

In defamation cases, lesser defenses such as retraction, bad reputation of the plaintiff and proper motive of the defendant merely serve to reduce the damages to be recovered and are of little importance in school related cases.

NEGLIGENCE

Of all school related cases, negligence is the most frequently alleged basis for a tort action. It differs from intentional torts in that the injury causing action is not deliberate and was not expected or anticipated. However, a reasonable person in the position of the actor could have foreseen the harm resulting from the negligent act.[41]

Negligent conduct is defined as that ". . . which falls below the standard established by law for the protection of others against unreasonably great risk or harm."[42]

> Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.[43]

It is important to note that just because one is injured it does not automatically follow that someone is liable for damages. An accident which is unavoidable and could not have been prevented by reasonable care does not constitute negligence. Numerous incidents of such pure accidents occur each year on the playgrounds of every school. In such cases, the actor is not liable.[44]

In determining whether an act was negligent the courts apply the standards of what a reasonable man would have done under the same circumstances and whether the harmful consequences were foreseeable.

The "Reasonable Man" Standard

While the whole theory of negligence presupposes some uniform standard of behavior, the infinite variety of situations which may arise

makes it impossible to fix definite rules in advance for all conceivable human contact. To deal with this difficult problem the courts have created a fictitious person, the "reasonable man." The "reasonable man" is a model of all proper qualities with only those human shortcomings and weaknesses which the community will tolerate on the occasion.[45] Different courts have described this model as a prudent man, a man of average prudence,[46] or a man of ordinary sense, using ordinary care and skill.

Although a community ideal, the "reasonable man" varies in every court case. According to Herbert, he had the following characteristics: (1) the physical attributes of the defendant himself; (2) normal intelligence; (3) normal perception and memory with the minimum level of information and experience common to the community; and (4) such superior knowledge[47] and skill as the actor has or holds himself out as having.

Justice Holmes clarified the concept when he wrote,

> The law takes no account of the infinite varieties of temperment, intellect, and education which makes the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason.[48]

Standard of Foreseeability

To be held liable for negligence, a person must have been able to foresee the danger created by his act. When a reasonable, prudent person could have foreseen the harmful consequences of his act, the actor, in disregarding the foreseeable consequences, is liable for negligent conduct.[49]

In a recent West Virginia case, the court held that the concept of foreseeability does not require that the particular injuries

suffered be anticipated, only that it be anticipated that an injury might result from the negligent act.[50] Specifically in regard to teachers, a Maryland court said:

> If a rule can be developed from the teacher liability cases, it is this: a teacher's absence from the classroom, or failure to properly supervise student's activities, is not likely to give rise to a cause of action for injury to a student unless under all the circumstances the possibility of an injury was reasonably foreseeable.[51]

Gatti and Gatti say that injury is generally foreseeable in the following school situations: (1) where large crowds of students are gathered without supervision, (2) in specialized activities such as vocational education, physical education, or science education, or (3) in cases where the teacher is absent from the room for an unreasonable amount of time.[52]

Elements of Cause of Action

According to Prosser, four elements are necessary to base a court claim upon the charge of negligence:

> 1. A duty or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks.
>
> 2. A failure on his part to conform to the standard required.
>
> 3. A reasonably close casual connection between the conduct and the resulting injury.
>
> 4. Actual loss or damage resulting to the interests of another.[53]

Tersely, these elements become: duty, standard of care, proximate cause, and injury. In essence, a school employee is negligent if he fails to carry out a duty owed a student, and that specific omission or unreasonable act is established as the proximate cause of an injury suffered by that student.[54]

Individual citizens rely upon the reasonable acts of others for their own protection. The normal routine of everyday living creates situations in which individuals have a duty to abide by a standard of reasonable conduct in the face of apparent risks.[55]

As determined primarily through litigation, school personnel duties have been summarized into three categories: (1) proper instruction, (2) proper supervision, and (3) proper maintenance of equipment and supplies used by students.[56]

Duty of proper instruction. Two types of instruction have been cited in litigation and subsequently interpreted by the courts: (1) educational development resulting in student mastery of certain processes and basic skills, and (2) complete instruction on how to perform potentially dangerous activities.[57]

The most vital of all duties of the teacher is clearly the duty to educate. In fact, the United States Supreme Court in Goss v. Lopez stated that knowledge and skills to be gained by the education guaranteed by the state is a property right protected by the Fourteenth Amendment of the United States Constitution.[58]

Only in the recent past have suits been brought against public school systems and teachers claiming that they have breached their duty to educate with damaging results to the students. Such suits are commonly called educational malpractice suits and attempt to show that a student's failure to learn is the failure of the school system and its teachers.[59]

The most widely publicized educational malpractice case is Peter W. v. San Francisco.[60] In this case a young man who had graduated from high school with a regular diploma brought charges that the school district had been negligent in teaching, promoting, and graduating him when he, in fact was not qualified, and that his performance and progress had been misrepresented to his mother.[61] The plaintiff was unsuccessful because he had no cause of action under existing California tort law. In noting that the cause of the plaintiff's failure to learn could not be established with the school system, the Court made the following statement about educational attainment:

> Unlike the activity of the highway or the market place, classroom methodology affords no readily acceptable standards of care, or cause, or injury. . . . Substantial professional authority attests that the achievement of literacy in schools, or its failure, are influenced by a host of factors which affect the pupil subjectively from outside the formal teaching process, and beyond the control of its ministries.[62]

Two years later, in 1978, a New York Court denied relief in a five million dollar suit filed on behalf of a student who was graduated from high school even though he received failing grades in several subjects and lacked basic reading and writing skills. It was the Court's opinion that educational policy is made by education authorities and not by judges, that the plaintiff's report cards gave ample notice he was failing two or more subjects, and that a student's failure to learn does not automatically signify a failure to teach, especially when the plaintiff's classmates, exposed to the same instruction, were not showing a failure to learn.[63]

It is anticipated that the student competency testing program being mandated in most states will produce a greater number of educational

malpractice suits, particularly if such tests produce a sizeable number of student failures.[64]

Teachers have been found to be negligent for failing to give complete instructions to students on how to perform a specific task or activity. The courts have continuously maintained that students should not be permitted to attempt a school activity without first receiving proper instruction, especially when the activity is potentially dangerous.[65]

Guidance given by the teacher should include an explanation of the basic procedure involved, some suggestions on conduct while performing the activity, and the identification and clarification of any risks that might be involved.[66] In fact, the courts have made it clear that any instruction which does not include information as to the degree of the danger and the gravity of the injury which could result from not following directions is legally inadequate.[67]

In holding a chemistry teacher liable for a laboratory explosion which seriously injured a student, it was said that the teacher,

> . . . was guilty of negligence in failing to exercise reasonable care in providing and labeling dangerous materials to be used in chemical experiments, and in failing to properly instruct and supervise the selection, compounding, and handling of dangerous ingredients.[68]

Similarly, a physical education teacher was held liable when a student was fatally injured in a boxing match held in class:

> [P]upils shall be warned before being permitted to engage in a dangerous and hazardous exercise. The young men should have been taught the principles of defense.[69]

On the other hand, a recent Maryland court held that a student had contributed to his own negligence by engaging in "horseplay" on a trampoline, after the teacher had given proper instructions, appropriate

warm-up exercises, and a demonstration of the activity.[70]

Vacca reports that the courts have suggested that teachers, in giving instructions to pupils, should consider the degree of difficulty involved in the activity, the age, the level of maturity, and the past experiences of the students.[71]

Duty of proper supervision. Parents have entrusted their children to the public schools for instructional purposes as the compulsory attendance laws direct. The law anticipates that the children's best interests will be protected by those in charge. However, the vast majority of tort claims against public school personnel are founded on charges of inadequate supervision.[72]

There is no uniform standard provided in case law to measure adequate, necessary, or proper supervision. "What constitutes due care and adequate supervision depends largely upon the circumstances surrounding the incident. . . ." stated an Indiana court in 1974.[73] Thus the public school employee's duty to protect his charges is proportional to the risk or hazard of a particular activity. He also has a responsibility to act affirmatively to assist an injured student, to protect other students, and to try to rescue a student from peril. In the latter case, he is only required to provide such assistance as a man with his training and experience in similar circumstances could reasonably provide.[74]

While the courts do not require constant scrutiny, the teacher must be able to show that he was performing his duties reasonably and it was not his act or omission which was the legal cause of the harm. Generally, the courts have held that the teacher is not liable for an

injury that results while the teacher is absent from the classroom for justifiable reasons. However, Knowles states that there are two qualifications: (1) the length of time the teacher is absent, and (2) the known tendencies of the individual students in the class.[75]

The greatest incidence of injuries and consequently the highest number of teacher liability cases are found in those educational programs which involve physical activity or equipment, which, if improperly used, could inflict harm on the student. Shapiro calls these high risk areas "danger spots" in the school program.[76] Alexander and Alexander classify them into five areas: (1) school grounds, (2) athletic events, (3) physical education, (4) shops and laboratories, and (5) field trips.[77] Hazard calls for special emphasis in the supervision of students at lunch, before and after school, between classes, and of certain groups that no prudent teacher would leave alone, even for a brief time.[78] Concern is also warranted when students are sent on errands, requested to do housekeeping or maintenance work, participate in school patrols, and when released to go home during the school day.[79]

While there are no West Virginia cases of record in these areas there is a case alleging negligence of school transportation personnel. In Keirn v. McLaughlin, a ten year old student who had attempted to hitch a ride by grabbing a handle on the exterior of a school bus fell under the moving wheel, sustaining serious injury. The bus was owned and operated by the defendant on a contract basis for the local board of education. The court found for the defendant because he had no prior knowledge of such activities and because he could not see the plaintiff from the driver's seat.[80]

Duty to properly maintain equipment and supplies. The third duty of school personnel concerns the upkeep and safety of supplies and equipment used by students. Several suits have been filed against school personnel for allowing students to use faulty machinery, playground equipment in need of repair, dangerous auditorium platforms, faulty science equipment, improperly constructed glass doors, and numerous other items.[81]

As an example, a Virginia court recently held that a shop teacher was negligent in allowing a student to use a defective power saw. In the words of the court, the teacher ". . . was negligent in the performance of duties, in that he permitted the plaintiff to use the tool which the defendant knew, or should have known, was defective and improperly equipped."[82]

While school personnel cannot ensure the safety of another from defective equipment, they are expected to take reasonable precautions in inspecting the school premises, noting any dangerous conditions and taking necessary and appropriate steps to correct them.[83] Where a child was injured on a piece of rusted tin protruding from a sliding board, the principal of the school was held liable because a teacher had earlier reported the condition of the slide to him and no action had been taken to prevent the injury.[84]

Standard of care. Once a duty is found in negligence cases, the duty, in theory at least, always requires the standard of care that a reasonable man would exercise under the same or similar circumstances.[85] The West

Virginia Supreme Court of Appeals has said, "Due care is a relative term and depends on time, place, etc. and should be in proportion to the danger apparent and within reasonable anticipation."[86]

The standard of care required to avoid liability is not uniform among all persons. Children and aged persons have generally been given sustantially more leeway in their activities than the usual adult. On the other hand, courts have held that a teacher's standard of care toward his pupils is greater than the ordinary standard. In the words of a Vermont court, a teacher's

> . . . relationship to the pupils under his care and custody differs from that generally existing between a public employee and a member of the general public. In a limited sense the teacher stands in the parents' place in his relationship to a pupil. . . and has such a portion of the powers over the pupil as is necessary to carry out his employment.[87]

A California court advised that, "The amount of care due children increases with their immaturity. . ." and so also ". . . do the occasions for care."[88] Similarly, a Federal Court in Tennessee held that,

> A teacher's superiority in knowledge and experience imposes responsibilities . . . which become an inherent element in measuring his compliance with due care which is required of him.[89]

In the essence, the standard of care required of a school employee in any particular instance is that which a reasonable, prudent employee would exercise under the same conditions. "Highest degree of care," according to the West Virginia Supreme Court of Appeals, "implies highest care a man of ordinary prudence would bestow under similar circumstances, not continuity of most perfect human care."[90]

Causality. Unlike criminal prosecutions, the burden of proof in civil suits does not require that the jury be convinced beyond all reasonable doubt, only that they be persuaded that a preponderance of the evidence is in favor of the party sustaining the burden of proof. The burden or proof of the defendant's negligence is uniformly placed on the plaintiff since he is asking the court for relief.[91]

Before a person can be found guilty of negligence, there must exist an adequate causal relationship, as explained in Restatement (Second) of Torts:

> In order that a negligent actor should be liable for another's harm, it is necessary not only that the actor's conduct be negligent toward the other, but also that the negligence of the actor be a legal cause of the others harm.[92]

For a defendant to be liable, his act must be both the cause in fact and the proximate cause of the plaintiff's misfortune. In a 1975 decision, the West Virginia Supreme Court of Appeals held that, "Negligence alone, without proof of proximate cause, is insufficient to warrant recovery; . . ."[93]

Courts have emphasized that an actor's negligent act must be a continuous and active force up to the actual harm. There must be no intervening cause rendering the original negligent act an unsubstantial or insignificant force in the harm.[94] The court of last resort in West Virginia described the concept of intervening cause only seventeen years after achieving statehood:

> In order to give a right of action for the negligence of another party, the damages caused thereby must be direct and natural consequence of the negligence, and if there is an intervening cause between the negligence and the damage resulting, which intervening cause is act of some third responsible person, the connection between the first act of negligence and the damages is broken, and no right of action accrues thereon.[95]

Thus, in school cases the school employee may be relieved of liability if some intervening act is sufficient to break the causal relationship between the act and the pupil's injury. This point is illustrated by a New Jersey case where a student turned on a power saw in violation of safety rules, injuring another student. The Court held that the teacher was not liable, even though he had failed to have an appropriate safety shield on the machine, because the action of the student turning on the machine was an independent intervening cause.[96]

On the other hand, courts are often faced with situations where there are two negligent causes in fact and must decide whether the second cause so changed the natural and continuous sequence so that the first cause is no longer a proximate cause. When a student was injured by a car immediately after departing from a school bus, a Minnesota court held that the bus operator had a continuing obligation which was not ended by the negligence of the driver of the auto.[97]

Injury or actual loss. Even though negligence can be shown, a defendant is not liable for damages unless the plaintiff demonstrates that he had actually suffered injury to his person or property. According to Prosser, "Negligent conduct in itself is not such an interference with the interest of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered."[98] The threat of future harm, not yet realized, is not enough.[99]

If injury or actual loss can be shown, and the defendant is found liable, Kallen reports that the defendant may have to pay for any

injuries directly resulting from his wrongful acts, any subsequent re-injury which was occasioned by the plaintiff's physical impairment, any diseases resulting from the plaintiff's lowered defenses, any harm received as a result of negligent medical treatment of the injury, and any further physical injuries caused by the emotional shock surrounding the primary injury.[100]

If the injury suffered was caused by more than one person, damages may be apportioned by the court among all the feasors. In a New Jersey case where a student was shot in the eye with a paper clip, the principal, the school district, and the defendant student were all held liable. The Court held that the principal and the school district had not provided adequate supervision and that the offending student's act was not a sufficient intervening cause to absolve them totally from liability.[101]

In negligence cases, the burden of proof is upon the plaintiff; however, in some rare cases the rules of res ipsa loquitur may be invoked, shifting the burden of proof to the defendant. Res ipsa loquitur means "the thing speaks for itself," thus the plaintiff submits to the jury proof of the injury indicating negligence on the part of the defendant. In a California case, a three year old child was taken to a private nursery school in good health. When the parents returned in the afternoon the child was suffering from a brain concussion. The Court ruled that res ipsa loquitur was applicable in this instance.[102]

Defenses for Negligence

Whenever a civil action is brought against a school employee alleging negligence, several defenses or legal arguements are available

to the defendant. If the evidence tendered by the plaintiff is so scant that no reasonable jury could find negligence, the trial judge may summarily dismiss the case.[103] In all cases alleging negligence the defendant may attempt to show that the injury was a mere accident, that his act was not the proximate or legal cause of the injury, or that some other act intervened and was responsible for the injury.[104] The defendant may also claim that the injury was caused by an act of God and was the direct, immediate, and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the powers of man and without human intervention.[105]

In tort cases, counsel for the defense would generally plead that his client was not negligent for any or all of the above reasons. Additionally, he could attempt to show that one or more of the following affirmative defenses would be applicable: (1) contributory negligence, (2) comparative negligence, (3) assumption of risk, and (4) immunity.

Contributory negligence. All persons must exercise, for their own safety, that degree of care a reasonably prudent person would exercise under like circumstances. Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm suffered, which falls below the standard to which he is required to conform for his own protection.[105]

The defense of contributory negligence does not rest upon the idea that the defendant is relieved of any duty toward the plaintiff. Rather, the defendant may acknowledge that he has violated his duty, has been negligent, and would otherwise be liable; however, the negligent

conduct of the plaintiff prevents the plaintiff from recovery for his injuries. In the eyes of the law, both parties are at fault; and the defense is one of the plaintiff's negligence, rather than the defendant's innocence.[107]

It is important to note that minors are held to a different degree of care for self-protection than are adults. The expected standard of self-care for children is the same as other children of the same age, physical characteristics, sex, and training.[108] Kallen points out, however, that where there is a child plaintiff, the judge will almost never rule that a child has contributed to his own negligence. In fact, he says that judges in many states will rule, as a matter of law, that very young children cannot be found contributory negligent under any circumstances.[109]

As the student matures he is required to exercise greater responsibility for his personal welfare. In a recent Oregon case the plaintiff, a secondary school student, was injured after he and another student took dangerous chemicals from the chemistry storeroom without the knowledge or authorization of the teacher. The court held that,

> The particular child for whose injury recovery is sought may be barred from recovery, either because he fully realized the risk and consciously encountered it or because, while he may not have realized the danger involved in exposing himself to the condition, he failed to exercise the care which children of his age, intelligence, and experience are required to exercise for their protection.[110]

The most commonly accepted modification of the strict rule of contributory negligence is the doctrine of "last clear chance." According to Prosser, ". . . if the defendant has the last clear opportunity to avoid the harm, the plaintiff's negligence is not a 'proximate cause

of the results.'"[111] In effect, the doctrine of "last clear chance" shifts the legal cause of the injury from a contributory negligent plaintiff back to the negligent defendant. Describing the process as a "counter-attack" against the defense of contributory negligence, Alexander and Alexander state, ". . . if a defendant has a 'last clear chance' to avoid the harm and does not, the plaintiff's negligence is not the legal cause of the result."[112]

In upholding this doctrine, the courts have determined that there must be proof that the defendant discovered the situation, that he then had time to take action which would have saved the plaintiff, and that he failed to do something which a reasonable man would have done.[113] In the absence of any of these elements, the plaintiff is generally denied recovery.

Comparative negligence. Whereas, the defense of contributory negligence, where proved, will absolve the defendant from all liability, comparative negligence allows the court to determine degrees of negligence and allow recovery based on the relative degree of fault. In essence, the plaintiff will not be totally barred from recovery even though he is partly to blame for his own harm.

It should be pointed out that the majority of the states do not have general comparative negligence statutes; in fact, Prosser reports that only twelve states have such formal laws.[114] However, he does note that ". . . it is an open secret that juries do in fact adjust the damages according to fault, even where there is no apportionment statute and they are instructed not to do it, . . ."[115]

While few states have general statutes, approximately thirty have some type of comparative negligence laws. Most are applicable to particular classes of plaintiffs or defendants, or to particular situations.[116] Generally, if the plaintiff's fault is found to be equal to the defendant's then the plaintiff will recover only one-half of the damages, if the plaintiff's fault was only one third, he would recover two-thirds of the damages.[117] Comparative negligence is not available as a defense in negligence cases arising in West Virginia.

Assumption of risk. In its simplest and primary sense, the doctrine of assumed risk means that a person has given his advance consent to the possibility of injury from a known risk arising from what the plaintiff is to do or leave undone, thereby relieving the defendant of an obligation of conduct toward him.[118] In essence, the defendant is not under any legal duty to protect the plaintiff.[119]

The West Virginia State Superintendent of Schools has ruled that a teacher whose negligence to another person has caused injury may use this defense ". . . where the injured person, (1) upon full consideration of the danger, and (2) with sufficient reflection upon the consequences, (3) freely consented to risk the injury in acting or omitting to act as he did."[120]

The West Virginia Supreme Court of Appeals further held that assumption of risk rests on the premise that the nature and extent of risk were fully appreciated by the injured party and that the risk was voluntarily incurred.[121]

The doctrine of assumed risk is not permitted if it can be shown that a child's age or lack of information or experience prevented him from fully comprehending the risk involved in a known situation.[122]

Immunity. While not available to individual school employees, the defense of immunity is very important to the educational community. An immunity differs from a privilege in that the latter avoids liability for tortious conduct only under particular circumstances while an immunity avoids liability in tort under all circumstances, within the limits of the immunity itself.[123]

A general rule of law is that the government is immune from tort liability unless the government specifically waives the immunity, the common law theory being that a government cannot be sued without its consent.[124] This theory evolved from the medieval concept that "the King can do no wrong," together with the feeling that it was a contradiction of his sovereignty to allow him to be sued as of right in his own courts.[125]

The doctrine of governmental immunity was first extended to a subdivision of the state in 1788 in Russell v. Men of Devon, where the English court found that an action for tort liability against the men of Devonshire should not be permitted because the action was ". . . brought against the general public," and there was no corporate money to pay such claims.[126]

Governmental immunity reached America in the 1812 Massachusetts case of Mower v. The Inhabitants of Leicester. In relying on Russell, the Court held that the common law allowed no such action. To recover, a remedy must be provided by statute. Even though the town of Leicester

was incorporated and could sue and be sued, the court held that immunity applied and that such quasi-corporations are not liable for such neglect under common law.[128]

While the doctrine of governmental immunity later disappeared from England and several other European countries which had adopted the principle, it remains as a common law rule in the majority of the states of this country.[129] As political subdivisions of the state, local public school districts are generally covered by the cloak of immunity in the states where this doctrine is honored.

Several reasons have been given in support of the position that a school district should not be liable in tort. Some courts have held that the common law rule of respondent superior, meaning the master is responsible for the acts of his servants, is not applicable to school districts. Others take the position that no liability attachs because the law provides no funds for the payment of such claims against the district. A third reason assigned is that school funds may be expended only for school purposes and that the payment of tort claims is not an expenditure for school purposes.[130] Vacca states that the primary reason for governmental immunity of local school districts is because ". . . legally they are state agencies, created by state law to perform a governmental function (public education)."[131]

In states where the common law rule of governmental immunity has not been abrogated by the legislature, Nolte and Linn report that school districts are not liable for injuries caused by negligence of their officers and employees engaged in a governmental function; however, the

district may be liable if the activity is of a proprietary nature.[132] The courts have generally held that where the function is within the scope of the public school operation, as expressed or implied by statute, it is considered to be governmental.[133]

The question of governmental or proprietary function has been an important one in West Virginia where county courts and municipalities have been liable for engaging in proprietary activities.[134] While no West Virginia board of education has ever been held liable for negligence, the West Virginia Supreme Court of Appeals had held on several occasions that boards derive their immunity from their governmental function. In Green v. Board of Education, the court stated, "The immunity of the board of education against suits or actions is not by virtue of any constitutional provision, but because it was engaged in a governmental function."[135]

Boards of education were then thought to be liable if performing a proprietary function. However, in 1978, that same Court, in Boggs v. Board of Education, reviewed the precedent of Green and other relevant board of education cases, finding "more questions than answers."[136] The Court then considered whether boards of education secure their immunity on the basis of engagement in a governmental function or from the Constitution, as found in Article six, Section thirty-five:

> The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.[137]

To answer the constitutional question, the Court reviewed the general criteria for the application of sovereign immunity it had established

two years earlier in Woodford v. Glenville State College Housing Corporation:[138]

> The first criterion is whether boards of education were created or granted authority to perform any function on behalf of the State by specific enactment of the Legislature. . . . code and constitutional provisions relating to education leave no doubt that county boards of education are performing functions on behalf of the State itself, not merely on behalf of the various localities within the State.
>
> The second Woodford criterion for evaluating governmental immunity is whether the Legislature appropriates funds for the operation of the governmental body claiming the benefit. . . . The scheme of state financing of public schools makes it abundantly clear that the Legislature appropriates funds for the operation of county boards of education. It is also clear that county boards of education rely on State monies to pay their debts, thereby satisfying another Woodford criterion.
>
> Not only are county boards of education dependent to a large degree on State fiscal support, but they are also subject to extensive State control exerted by the West Virginia Board of Education and the State Superintendent. . . . It hardly would seem equitable to deny county boards of education the protection of W. Va. Const., Art. 6, § 35, when much of what they do either stems directly from, or is in furtherance of, policies imposed on them by the State Board of Education, an arm of the State clearly entitled to the protection of W. Va. Const., Art. 6, § 35.[139]

The Boggs case involved a seven year old child who fell from a footbridge enroute to school in Clay County. The infant child and her father brought suit in Circuit Court against the County Board of Education and the County Court. The Circuit Court dismissed the complaint on the basis of governmental immunity asserted by both defendants. On appeal, the West Virginia Supreme Court of Appeals, for reasons cited above, held that the boards of education have constitutional immunity under the "soverign cloak of the state."[140] County courts, however, were found to have governmental immunity by virtue of function only and the case was remanded back to the circuit court to ascertain if the county

court had been negligent in regard to the bridge in question, as the Legislature had abrogated the county court's immunity in this area.[141]

While boards of education in West Virginia are thus totally immune from tort action, school personnel are not. Local boards may, however, legally provide at public expense, adequate "professional liability insurance for board employees."[142]

According to Knowles, there is one factor which is even more important than all the complexities of formal legal doctrine; the "American jury system - the finders of fact." He remarks that members of juries are often parents or relatives of children and therefore identify and sympathize much more with young children than with school personnel. "They enjoy twenty-twenty vision of hindsight and weigh all the facts in a clinical, dispassionate, and sober atmosphere of the courtroom."[143]

CONSTITUTIONAL TORTS

A constitutional tort can be caused either negligently or intentionally and bears some of the attributes of strict liability. Action for damages alleges the deprivation of a person's constitutional rights by the state or local governmental authorities.

The first eight amendments of the Bill of Rights of the United States Constitution protect individual citizens from the awesome, potential power of federal government intrusion. Protection from abuse by state government, however, was not afforded until passage of the Fourteenth Amendment in 1868. This amendment embodied the first eight amendments of the Bill of Rights into its due process clause:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."[144]

In addition, the equal protection clause of the Fourteenth Amendment provides that no state shall ". . . deny to any person within its jurisdiction the equal protection of the laws."[145] Under this clause Congress has the power to enact legislation by which individuals may seek vindication for violation of their constitutional rights. The Civil Rights Act of 1871, presently codified as Section 1983 of Title 42 of the United States Code, was also enacted and provides that,

> Every person who, under the color of any statute, ordinance, regulation, custom or usage of any State or territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[146]

This act, sometimes called the "Ku Klux Act," was primarly enacted to enforce the provisions of the fourteenth Amendment in preventing discrimination against Negroes. In recent years more liberal interpretations have found application against school administrators and boards of education, not only in desegregation cases but also in the area of denial of due process in the dismissal of teachers and students.

The United States Supreme Court has stated that the legislative history of Section 1983 demonstrates that it was intended to "'. . . [create] a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution."[147]

Section 1983 establishes a federal cause of action for damages against state and local officials who have caused individuals to suffer constitutional deprivation. It was designed to protect individuals against a misuse of power made possible only because the wrong doer is clothed with the authority of state law.[148]

In cases brought under Section 1983, the plaintiff must show that he has been deprived of rights secured by the United States Constitution and that such deprivation occurred under the color of state law.[149] Original jurisdiction is vested in the federal district courts. Equitable relief in the form of an injunction and legal relief in form of monetary damages may be sought.

A similar civil action may also be filed in federal district court under Section 1331, Title 28, of the United States Code, where the alleged damages arising from a constitutional deprivation exceeds ten thousand dollars:

> The District Court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000., exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States.[150]

Prior to 1975, courts had generally held that school board members and other school officials were immune from § 1983 action unless malice, ill will, lack of good faith, or gross abuse of discretion could be proven against the defendant.[151] However, the United States Supreme Court, in Wood v. Strickland, observed the need to balance the responsibility of school officials to perform their duties in good faith without fear of reprisal against the interest of students in receiving compensation for damages arising from violation of their constitutional

rights.[152] In this case, where the board had expelled two students for "spiking the punch" at a school party, the court held that a school official must not only act with proper motives in disciplining a child but he must also respect the basic constitutional rights of his charges:

> Therefore in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. . . . A compensatory award is appropriate only if the officials acted with such an impermissable motivation or with such disregard of the students clearly established constitutional rights that his actions cannot reasonably be characterized as being in good faith.[153]

In an important 1978 constitutional due process case, Carey v. Piphus, two Chicago students alleged that they had been suspended from school without procedural due process as guaranteed by the United States Constitution. They argued that substantive damages should be awarded under § 1983, whether or not any injury was caused by the deprivation, since constitutional rights are valuable in and of themselves.[154] The United States Supreme Court held that the right to procedural due process is "absolute," in the sense that it does not depend upon the merits of a claimant's substantive assertions and because of its importance to organized society. However, in regard to damages, the Court said

> . . . we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury. . . . Substantial damages should be awarded only to compensate actual injury, or in the case of exemplary or punitive damages, to deter or punish malicious deprivation of rights.[155]

The Court held that rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored

to the interests protected in the various branches of tort law. The basic purpose of a § 1983 damage award, noted the Court, is to compensate persons for injuries caused by the deprivation of constitutional rights and absent proof of actual injury, nominal damages only are recoverable.[156]

Generally, suits filed against school board members and other school officials can be brought under § 1983, as such officials are considered "persons" under the statute. Until recently, however, local boards of education, as governmental entities, generally were not held to be "persons" under § 1983. In 1963, the United States Supreme Court, in Monroe v. Pape,[157] held municipalities immune from suit under § 1983. Local boards of education were considered to be similarly protected. In 1973, that Court extended this immunity to suits seeking injunctive relief.[158] In 1978, however, the Supreme Court, in Monell v. Department of Social Services of the City of New York, overruled Monroe, holding that local governments, including school boards, are "persons" under § 1983, and may be sued

> . . . for monetary, declaratory, and injunctive relief in those situations where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those edicts or acts may fairly be said to represent official policy.[159]

The Court further held that local governments, like every other § 1983 "person," may be sued for constitutional deprivations which occurred pursuant to governmental "custom" even though such "custom" has not received formal approval through the government's official decision-making channels. However, a local government cannot be held liable under

§ 1983 simply because it employs a tort-feasor who acts without official sanction.[160]

Considering the Civil Rights Attorney's Fees Award Act of 1976, the Monell Court ruled that the Act ". . . allows prevailing parties (in the discretion of the court) in § 1983 suits to obtain attorney's fees from the losing party. . . ."[161] This Act provides:

> In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985 and 1986 of this Title, Title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Revenue Code, or Title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.[162]

In another 1978 case, Hutto v. Finney, the Ninth Circuit Court held that the Act authorizes fee awards payable by the state when their officials are sued in their official capacities.[163] On this basis, school districts may be able to pay such awards on behalf of school board members and other school officials.

On the other hand, a Texas court held that an unsuccessful plaintiff can be assessed attorney fees only where it is shown that the suit was clearly frivolous, vexatious, or brought for harassment purposes.[164]

SUMMARY

A tort is a civil wrong, other than breach of contract, for which the courts provide a remedy in the form of an action for damages. A tort may result from the omission or commission of an act, without right, causing injury to another person. Legal remedies for tortious action are generally classified as "traditional torts" or "constitutional torts."

Traditional tort liability cases involving school personnel usually allege the intentional torts of assault and battery or defamation, or the non-intentional tort of negligence.

School related assault and battery cases generally evolve from acts of corporal punishment where the parent alleges excessive or malicious physical force. In West Virginia, school personnel discharge their disciplinary responsibilities under the doctrine of in loco parentis, which permits moderate corporal punishment. However, such action must be administered in the presence of a witness by the school principal, the assistant principal, or by the teacher, with the consent of the principal. The age, sex, condition, and disposition of the student must be considered.

To constitute the tort of defamation, it must be shown that a false statement was communicated to a third person bringing hatred, disgrace, ridicule, or contempt on another person. If by gesture or word of mouth, the communication is slander; if written, printed, or pictoral, it constitutes libel. If charges are brought against school personnel for defaming a student the defense of qualified or conditional privilege may be exercised; however, such publication must be made in good faith, must be based on reasonable grounds, and must be made during proper occasion, with proper motive, and in a proper manner.

Of all school related tort cases, negligence is most frequently alleged. Negligent conduct is the omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do. To constitute negligence, the plaintiff must

have suffered a foreseeable injury caused by the negligence of the defendant, who failed in carrying out a duty owed the plaintiff.

Public school teachers have a duty to properly instruct students both in the mastery of academic skills and in how to perform activities which may be potentially dangerous. Teachers and administrators also have a responsbility to provide adequate supervision during the entire educational experience and to properly maintain equipment and supplies.

Affirmative defenses against charges of negligence by school personnel are (1) contributory negligence, (2) comparative negligence, or (3) assumption of risk. While school employees are responsible for their tortious conduct, county boards of education in West Virginia have state constitutional immunity from traditional tort action.

In recent years, a greater number of constitutional tort cases have been filed in federal courts alleging constitutional deprivation under Section 1983 of the Civil Rights Act of 1871. Successful plaintiffs have been able to secure injunctive relief as well as damages from school officers and boards of education, both now considered to be "persons" under the Act. Similar action may also be filed under Section 1331, Title 28, of the United States Code where the alleged damages arising from a constitutional deprivation exceeds ten thousand dollars.

Under the Civil Rights Attorney's Fees Award Act of 1976, courts may now grant the prevailing party a reasonable attorney's fee as a part of the costs in cases involving abridgement of civil rights.

FOOTNOTES

[1]74 Am. Jur.2d Torts § 1 (1974).

[2]William L. Prosser, Law of Torts (St. Paul, Minn.: West Publishing Co., 1971), p. 2.

[3]Prosser, op. cit., pp. 26-27.

[4]Ruth Alexander and Kern Alexander, Teachers and Torts (Middletown, Ky.: Maxwell Publishing Co., 1970), p. 8.

[5]Prosser, op. cit., p. 492.

[6]Prosser, op. cit., p. 494.

[7]Prosser, op. cit., p. 517.

[8]Alexander and Alexander, op. cit., pp. 9-10.

[9]Alexander and Alexander, op. cit., p. 3.

[10]State v. Ingram, 237 N.C. 197, 74 S.E.2d 532 (1953).

[11]Daniel J. Gatti and Richard D. Gatti, The Teacher and The Law (West Nyack, N.Y.: Parker Publishing Co., Inc., 1972), p. 32.

[12]Edward H. Greene, Greene's West Virginia School Guide (Cincinnati: The W. H. Andrew Co., 1963), p. 127.

[13]W. Va. Code, § 61-2-9.

[14]Greene, loc. cit.

[15]W. Va. Code, § 18A-5-1.

[16]Ibid.

[17]State v. McDonie, 80 W.Va. 185, 109 S.E. 710 (1921).

[18]West Virginia Board of Education, Rights and Responsibilities of Students in West Virginia (Charleston, W.Va.: West Virginia Board of Education, 1975), p. 15.

[19]Johnson v. Horace Mann, 241 So.2d 588 (La. 1970).

[20]Dill v. State, 87 Tex. Crim. 49, 219 S.W. 481 (1920).

[21]Ingraham v. Wright, 430 U.S. 657 (1977).

[22]Baker v. Owen, 423 U.S. 907 (1977).

[23]Prosser, op. cit., p. 739.

[24]State v. Aler, 39 W.Va. 549, 20 S.E. 585 (1894).

[25]Kern Alexander, Ray Corns, and Walter McCann, Public School Law (St. Paul, Minn.: West Publishing Co., 1969), p. 325.

[26]Prosser, op. cit., pp. 754-760.

[27]Ibid.

[28]Colcord v. Gazette Publishing Co., 106 W.Va. 419, 145 S.E. 751 (1928).

[29]Michaelson v. Turk, 79 W.Va. 31, 90 S.E. 395 (1916).

[30]West Virginia Constitution, Article III, Section 8.

[31]Zanky v. Hyde, 208 Mich. 96, 175 N.W. 261 (1919).

[32]Prosser, op. cit., pp. 776-782.

[33]Parker v. Appalachian Power Co., 126 W.Va. 666, 30 S.E.2d 1 (1944).

[34]Johnson v. Brown, 13 W.Va. 71 (1878).

[35]Porter v. Eyster, 294 F.2d 613 (4th Cir. 1961).

[36]J. D. Kallen, Teacher's Rights and Liabilities Under the Law (West Nyack, N.Y.: Parker Publishing Co. Inc., 1972) p. 84.

[37]Gatti and Gatti, op. cit., p. 46.

[38]Reynolds C. Seitz, Law and the School Principal (Cincinnati: The W. H. Anderson Co., 1961), p. 155.

[39]Kallen, op. cit., p. 86.

[40]Seitz, op. cit., p. 156.

[41]Alexander and Alexander, op. cit., p. 10.

[42]Restatement (Second) of Torts § 282 (1965).

[43]Restatement (Second) of Torts § 283 (1965).

[44]Alexander and Alexander, op. cit., p. 10.

[45]Prosser, op. cit., pp. 149-150.

[46]Ibid.

[47]Alan Patrick Herbert, Misleading Cases in the Common Law (London: Methuen, 1928), p. 176.

[48]Oliver Wendell Holmes, Jr., The Common Law (Boston: Little, Brown and Co., 1881), p. 108.

[49]Madaline K. Remmlein and Martha L. Ware, School Law (Danville, Ill.: The Interstate Printers and Publishers, 1970), pp. 321-322

[50]Long v. City of Weirton, 214 S.E.2d 832 (W.Va. 1975).

[51]Segerman v. Jones, 256 Md. 109, 259 A.2d 794 (1969).

[52]Gatti and Gatti, op. cit., p. 62.

[53]Prosser, op. cit., p. 143.

[54]Richard S. Vacca, "Teacher Malpractice: Negligence Leads to Responsibility," Legal Rights of Teachers and Students, ed. M. David Alexander, et. al. (Gainesville, Fla.: Maxwell-King Co., 1974), p. 48.

[55]Alexander and Alexander, op. cit., p. 13.

[56]Alexander, Corns, and McCann, op. cit., pp. 363-364.

[57]Vacca, op. cit., p. 49.

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

[59]Richard S. Vacca, "Competency Testing: Legal Implications" (paper presented at Seventh Annual Conference, Legal and Policy Issues in Education, Blacksburg, Va., October, 1978), p. 17.

[60]Peter W. v. San Franscisco Unified School District, 131 Cal. Rptr. 854 (1976).

[61]Ibid.

[62]Ibid.

[63]Donohue v. Copiague Union Free High School District, No. 77-1122, New York Supreme Court, App. Div., August 31, 1978.

[64]Vacca, "Competency Testing: Legal Implications," op. cit., p. 19.

[65]Vacca, "Teacher Malpractice: Negligence Leads to Responsibility," op. cit., p. 49.

[66]Ibid.

[67]Kallen, op. cit., p. 43.

[68]Mastrangelo v. West Side Union High School District of Merced Co., 2 Cal.2d 540, 42 P2d 634 (1935).

[69]La Valley v. Stanford, 272 New York App. Div. 183, 70 N.Y.S.2d 1160 (1949).

[70]Berg v. Merricks, 20 Md. 666, 318 A.2d 220 (1974).

[71]Vacca, "Teacher Malpractice: Negligence Leads to Responsibility," op. cit., pp. 49-50.

[72]Edward C. Bolmeier, Teachers' Legal Rights, Restraints, and Responsibilities (Cincinnati: The W. H. Anderson Co., 1971), p. 105.

[73]Miller v. Grissel, 308 N.E.2d 701 (Ind. 1974).

[74]Alexander, Corns, and McCann, op. cit., p. 86.

[75]Lawrence W. Knowles, "Tort Liability of School Employees," The Yearbook of School Law 1972, eds. Leroy J. Peterson and Lee O. Garber (Topeka, Kans.: National Organization on Legal Problems of Education, 1972), p. 37.

[76]National Education Association, Who is Liable for Pupil Injuries (Washington, D.C.: National Education Association, 1963), p. 36.

[77]Alexander and Alexander, op. cit., p. 58.

[78]William R. Hazard, Education and the Law (New York: The Free Press, 1971), p. 417.

[79]Ibid.

[80]Kiern v. McLaughlin, 121 W.Va. 30, 1 S.E.2d 176 (1939).

[81]Vacca, "Teacher Malpractice: Negligence Leads to Responsibility," op. cit., p. 51.

[82]Crabbe v. Northumberland County School Board, 209 Va. 356, 164 S.E.2d 96 (1960).

[83]H. C. Hudgins, Jr., "Tort Liability," The Yearbook of School Law 1976, ed. Philip K. Piele (Topeka, Kans.: National Organization on Legal Problems of Education, 1976), p. 56.

[84]District of Columbia v. Washington, 332 A.2d 347 (1975).

[85]Prosser, op. cit., p. 206.

[86]Johnson v. United Fuel Gas Co., 112 W.Va. 578, 166 S.E. 118 (1932).

[87]Eastman v. Williams, 124 Vt. 445, 207 A.2d 146 (1965).

[88]Raymond v. Paradise Unified School District, 31 Cal.Rpt. 847 (1962).

[89]Stehn v. Bernan McFaddin Foundation, Inc., 434 F.2d 811 (6th Cir. 1970).

[90]Bennett v. Bartlett, 110 W.Va. 478, 158 S.E. 712 (1931).

[91]Prosser, op. cit., pp. 208-809.

[92]Restatement (Second) of Torts § 430 (1965).

[93]Long v. City of Weirton, 214 S.E.2d 832 (W.Va. 1975).

[94]Alexander, Corns, and McCann, op. cit., p. 89.

[95]Washington v. Baltimore and Ohio R. Co., 17 W.Va. 90 (1880).

[96]Meger v. Middletown Board of Education, 86 A.2d 761 (N.J. 1952).

[97]Mikes v. Baumgartner, 227 Minn. 923, 152 N.W.2d 732 (1967).

[98]Prosser, op. cit., pp. 143-144.

[99]Ibid.

[100]Kallen, op. cit., p. 69.

[101]Titus v. Lindberg, 49 N.J. 66, 278 A.2d 65 (1967).

[102]Fowler v. Seaton, 394 P.2d 697 (Cal. 1964).

[103]Knowles, op. cit., p. 31.

[104]Alexander and Alexander, op. cit., p. 22.

[105]Nolte and Linn, op. cit., p. 253.

[106]Prosser, op. cit., p. 417.

[107]Ibid.

[108]Alexander and Alexander, op. cit., p. 23.

[109]Kallen, op. cit., p. 24.

[110]Hutchinson v. Toews, 476 P.2d 84 (Oreg. 1970).

[111]Prosser, op. cit., p. 427.

[112]Alexander and Alexander, op. cit., p. 25.

[113]Prosser, op. cit., pp. 429-430.

[114]Prosser, op. cit., p. 436.

[115]Ibid.

[116]Ibid.

[117]Alexander and Alexander, op. cit., p. 26.

[118]Prosser, op. cit., p. 440.

[119]Alexander and Alexander, loc. cit..

[120]Interpretation, State Superintendent of Schools, "Teacher" June 14, 1973 (SDE).

[121]Cross v. City of Wellsburg, 156 W.Va. 1, 190 S.E.2d 19 (1972).

[122]Harvey B. Barrett, "An Analysis of Court Decisions Pertaining to Tort Liability for Student Injuries Sustained in Science Activities in Public Systems Throughout the United States" (unpublished Doctoral dissertation, Virginia Polytechnic Institute and State University, 1977), p. 18.

[123]Prosser, op. cit., p. 970.

[124]Alexander and Alexander, op. cit., p. 34.

[125]Prosser, loc. cit.

[126]Russell v. Men of Devonshire, 2 Term. Rep. 671, 100 Eng. Rep. 359 (1788).

[127]Mower v. Inhabitants of Leicester, 9 Mass. Rep. 247 (1812).

[128]Ibid.

[129]Hazard, op. cit., p. 428.

[130]Alexander, Corns, and McCann, op. cit., p. 336.

[131]Vacca, "Teacher Malpractice: Negligence Leads to Responsbility," op. cit., p. 46.

[132]M. Chester Nolte and John Philip Linn, School Law For Teachers (Danville, Ill.: The Interstate Printers and Publishers, Inc., 1964), p. 243.

[133]Alexander and Alexander, op. cit., p. 44.

[134]Ward v. County Court of Raleigh County, 141 W.Va. 730, 955 S.E.2d 44 (1956).

[135]Green v. Board of Education, 133 W.Va. 750, 58 S.E.2d 279 (1950).

[136]Boggs v. Board of Education, 244 S.E.2d 799 (W.Va. 1978).

[137]West Virginia Constitution, Article VI, Section 34.

[138]Woodford v. Glenville State College Housing Corp., 225 S.E.2d 671 (W.Va. 1976).

[139]Boggs v. Board of Education, 244 S.E.2d 799 (W.Va. 1978).

[140]Ibid.

[141]Ibid.

[142]W.Va. Code, § 18-5-13 (11).

[143]Knowles, op. cit., p. 30.

[144]United States Constitution, Amendment XIV, Section 1.

[145]Ibid.

[146]42 U.S.C. 1983

[147]Carey v. Piphus, 435 U.S. 247 (1978).

[148]Duchesne v. Sugarman, 566 F.2d 817 (2nd Cir. 1977).

[149]Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1977).

[150]28 U.S.C. 1331, see also Bivins v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

[151]Eldon D. Wedlock, Jr., "Pupils," The Yearbook of School Law 1975, ed. Philip K. Piele (Topeka, Kans.: National Organization on Legal Problems of Education, 1975), p. 139.

[152]Wood v. Strickland, 420 U.S. 308 (1975).

[153]Ibid.

[154]Carey v. Piphus, 435 U.S. 247 (1978).

[155]Ibid.

[156]Ibid.

[157]Monroe v. Pape, 365 U.S. 167 (1961).

[158]City of Kenosha v. Bruno, 412 U.S. 507 (1973).

[159]Monell v. Department of Social Services of the City of New York, 429 U.S. 1071 (1978).

[160]Ibid.

[161]Ibid.

[162]42 U.S.C. 1988

[163]Hutto v. Finney, 437 U.S. 678 (1978).

[164]Lopez v. Aransas County Independent School District, 570 F.2d 541 (5th Cir. 1978).

Chapter 4

OTHER LEGAL PROVISIONS AFFECTING SCHOOL PERSONNEL

This section addresses the legal rights and responsibilities of West Virginia school personnel relating to curriculum and instruction, academic freedom, assignment of duties, personal leave, leaves of absence and other absences, retirement, grievance procedure, employee organizations, and collective bargaining/negotiations.

CURRICULUM AND INSTRUCTION

All public schools in the United States have been established under state legislative enactment. In the absence of express constitutional limitations, the authority to prescribe the course of study, the system of instruction pursued, as well as the textbooks used is well within the power of the legislature to control. That body also has every legal right to require that certain studies essential to good citizenship be taught and that nothing be taught which is contrary to the public welfare.[1]

The West Virginia Legislature has prescribed several courses of study which must be taught in the public schools of the State: history of West Virginia and of the United States, civics and related studies of Americanism including the constitutions of West Virginia and the United States,[3] early childhood education,[4] special programs

for exceptional children,[5] driver education,[6] scientific temperance including the nature of alcoholic drinks and narcotics,[7] and fire prevention.[8]

Public school personnel who violate the statutory provisions which require the teaching of West Virginia and United States history, civics and Americanism, and temperance are guilty of a misdemeanor and are subject to both a fine and removal from their position with the public schools.[9]

One of the landmark decisions of the United States Supreme Court concerned the West Virginia statutory requirement that a course of study include the ". . . teaching, fostering and perpetuating the ideals, principles, and spirit of Americanism."[10] Out of their concern for patriotism during World War II, the West Virginia Board of Education adopted a policy requiring all public school students to salute and pledge allegiance to the United States flag. Pupils who refused were to be expelled and treated as "truant" subjecting them to delinquency statutes and their parent or guardian to fine and imprisonment.[11]

In Barnette, members of the Jehovah's Witness faith brought a class action suit against the State Board of Education seeking an injunction restraining enforcement of the policy. The Witnesses objected because their faith teaches that,

> . . . the obligation imposed by the law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, Verses 4 and 5, which says: 'Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or

> that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.' They consider that the flag is an 'image' within this command.[12]

In holding for the Witnesses and reversing its decision made three years earlier in Minersville School District v. Gobitis,[13] the Supreme Court said,

> We think the action of local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment of our Constitution to reserve from all official control.
>
> . . . no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matter of opinion or force citizens to confess by word or act their faith therein.[14]

While the West Virginia Legislature has prescribed certain courses of study, the responsibility for establishing minimal standards rests with the West Virginia Board of Education:

> The state board of education shall prescribe minimum standards in the courses of study to be offered in elementary schools, high schools, vocational schools, and in all other kinds, grades, and classes of schools, or departments thereof, which may now or hereafter be maintained in the State, in whole or in part, from any state fund or funds.[15]

To be eligible for high school graduation in West Virginia a student must have earned a minimum of seventeen credits, of which thirteen must be in grades ten, eleven, and twelve. A credit is defined as the equivalent of ten semester hours of study.[16] Specific courses required for graduation by the State Board are: English (four credits), biology (one credit), mathematics (one credit), physical education (one credit), and social studies (three credits). For college bound students, one additional unit of science and one

additional unit of math are required.[17] County boards of education are encouraged by the State Board to increase the above requirements.[18]

Generally speaking, elective courses offered in the high schools of West Virginia do not have to be approved by the State Department of Education or the State Board. However, certain vocational courses must have Department approval if the local school district is to receive state and federal funds for the operation of the class. Some vocational offerings may also necessitate the approval of agencies outside the Department of Education.

In a recent Kanawha County case, the local board of education was required to submit an application to the State Committee of Barbers and Beauticians to obtain a license to operate a school of beauty culture at a public school vocational center. The State Committee approved the application, subject to an inspection of the facility to ascertain compliance with the rules and regulations governing the operation of such schools. Relying on this action, the school board furnished and equipped the school, contracted the teachers, and enrolled forty students. During the interim, the State Committee, upon hearing complaints from private beauty schools, rescinded its previous action without notifying the Kanawha County Board of Education. In directing the State Committee to issue a license, the West Virginia Supreme Court held that the action by the Committee was arbitrary and capricious, thus being unlawful.[19]

In the seventh and eighth grades, language arts, science, math, social studies, art, music, and physical education are required

courses.[20] A full year's study of West Virginia history must be taken in the eighth grade with world regions being studied in the seventh.[21]

At the elementary level, early childhood through grade six, the following subjects must be taught: language arts which includes reading, spelling, writing, and English; science and health; mathematics; social studies; art; music; and physical education. Optional subjects such as applied music, applied art, family living, modern foreign language, technology, and humanities may also be taught. At the early childhood level, combined subjects may replace one or more of the required courses.[22] There are no minimum daily time requirements for elementary subjects except physical education which must be taught a minimum of thirty minutes per day, excluding recess.[23]

The West Virginia Board of Education currently requires all schools to provide instruction in the International Metric System of Measurement. This system is to be the primary method taught and used beginning with the 1980-81 school term.[24]

While county boards of education have authority to establish a school curriculum in accordance with West Virginia law and State Board policy, the local board has no legal power to compel the student to take a course which would violate a constitutional right of the pupil or his parent.[25] In California, a local school board prescribed dancing as a part of the physical education curriculum. The father of two students objected on religious grounds and suggested that his

children be taught some other game or exercise. The board denied his request and expelled the two students after they had refused to participate. In ordering reinstatement, the court held that if a regulation is unduly burdensome or violative of any fundamental right of any person or set of persons, it will be set aside as unconstitutional.[26]

In a later Alabama case, a female student refused to participate in physical education class because of the required uniform. Her parents, objecting on religious grounds, continued refusal even after the school had made reasonable adjustments which would allow her to wear clothing she considered modest. The court held that when the concessions made by school authorities were considered, the legislative policy overrode the parent's objections. No constitutional rights had been abridged in this instance.[27]

The State Superintendent of Schools has ruled that public school students are not to be excused from required courses for religious reasons; however, school authorities may make accommodation for matters of attire or activity.[28]

Selection of Textbooks and Instructional Materials

In West Virginia, the process of selecting basal textbooks to be used in the elementary schools is precisely defined by state law. Elementary subjects are classified into five groups with textbooks to be adopted for each group for a five year period.[29] Prior to August first of the year preceding adoption, the State Board of Education solicits from the various publishers, samples and prices of all

elementary textbooks to be considered for adoption. Prior to December first, the State Board, with assistance of a fifteen member textbook selection committee, publishes an approved list of at least five books or series of books for each subject and grade.[30] Subsequently, the State Board enters into a contract with the publishers of the selected textbooks to provide approved books for the five year period at the lowest wholesale price contained in the bid.[31]

It is important to note that the State Board of Education has authority only to select and approve elementary basal textbooks. An attempt to approve a list of supplemental texts, as recommended by the State advisory committee, resulted in an opinion of the State Attorney General which held that such action is beyond the authority of the State Board.[32]

Prior to April first of the adoption year, county boards of education, upon the recommendation of the county superintendent and a local adoption committee having up to five teacher members, select one or more books or series of books from the approved list to be used as exclusive basal textbooks for the five year adoption period.[33] Prior to April fifteenth, the county superintendent sends a complete list of books adopted to the State Board of Education and the respective publishers.[34]

While the elementary textbook selection procedure is clearly defined by statute, there are no state laws governing the adoption of supplemental instructional materials or secondary textbooks. Only the following minor policy of the State Board is applicable:

> . . . [T]he West Virginia Board of Education directs the several county boards of education each to establish a uniform county system of textbook adoption so that the same textbooks will be adopted for the same courses in the various schools of the county, and this uniformity shall be applicable to the junior high school and to the senior high school systems of the county.[35]

Thus, local boards of education have complete authority over the adoption of textbooks at the secondary level, so long as the books are adopted county-wide by utilizing a uniform system of textbook adoption.

According to reports filed with the State Department of Education, most county boards of education are utilizing secondary adoption procedures which closely resemble the mandated elementary process. In practically all cases, a committee of teachers is asked to provide advance recommendations to the superintendent and the board.[36]

Some local boards of education are also utilizing ad hoc advisory committees comprised of parents and lay citizens to assist in the selection process. Such committees, however, may not be substituted for the committee of professional educators charged with the responsibility of recommending elementary textbooks.[37]

The involvement of parents in the selection of textbooks in West Virginia has increased since the highly publicized Kanawha County textbook controversy of 1974. Following disruption, related violence, and temporary school closings, parents and others objecting to textbooks and supplemental materials, which allegedly discouraged Christian values and good citizenship, brought suit in federal court claiming a violation of religious freedom and privacy guaranteed

by the First and Ninth Amendments to the United States Constitution. While the Court conceded that some materials were indeed offensive to the petitioners' religious beliefs, it could not find any infringement of religious freedom, holding that the First Amendment ". . . does not guarantee that nothing about religion will be taught in the schools nor that nothing offensive to any religion will be taught."[38] In regard to the privacy issue the Court concluded that the books' presence in the schools did not violate any provision of the Ninth Amendment.[39]

School officials and members of adoption committees should be cognizant of the state statute governing gifts and bribes to influence textbook selection:

> Any member of the state board of education, any county superintendent, any member of a county board of education, or any other person who shall receive, solicit, or accept any gift, present, or thing of value to influence him in his vote for the adoption of books, or any person who shall either directly or indirectly give or offer to give any such gift, present, or thing of value to any person to influence him in voting for the adoption of books, shall be guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than three years.[40]

A 1970 policy of the State Board of Education requires that state and local textbook committees and individual educators shall select only those textbooks and materials ". . . which accurately portray minority and ethnic group contributions to American growth and culture and which depict and illustrate the intercultural character of our pluralistic society."

Supplemental materials such as workbooks, reference materials, laboratory manuals, and other instructional aids may be selected

and provided at the discretion of the county board of education. The board may also exclude certain textbooks and supplemental resources from the schools of the district. In a recent Ohio case, the Sixth Circuit Court held that a teacher's freedom of speech is not curtailed when he is denied the right to choose the text for his course. However, the court said the First Amendment right of the teacher and the students may be violated if the teacher is prohibited from referring to any of the banned books.[42]

That same court found that the local school board was not required by law to have a school library, but having created it, the board could not place conditions on its use that were related solely to the social or political tastes of the board members. The court found that removing books from the school library was a much more serious restriction on freedom of classroom discussion than the prohibition on wearing black armbands by students to protest the Vietnam War that the United States Supreme Court had declared unconstitutional in Tinker v. Des Moines Independent School District.[43]

West Virginia statute requires county boards of education to ". . . provide textbooks to be used in the free school for the pupils whose parents, in the judgment of the board, are unable to provide the same."[44] In 1974, the West Virginia Supreme Court of Appeals interpreted this requirement to include textbooks, workbooks, and materials necessary for use in the required curriculum, so that all students may successfully complete their public school education.[45] Three years later, a federal district court ordered all West Virginia

school districts to provide textbooks, workbooks, and instructional materials to all students who qualify for free or reduced price meals under guidelines established yearly by the United States Department of Agriculture. "Instructional materials" were defined to include paper, pencils, art supplies, and even physical education uniforms or equipment, if such were required by the board.[46]

Religious Instruction

Since passage of the Bill of Rights in 1791, the United States Constitution has required a separation of church and state. The First Amendment provides, in part, ". . . Congress shall make no law respecting establishment of religion or prohibiting the free exercise thereof."[47] Similar provisions are found in Article III, Section 15 of the Constitution of West Virginia:

> No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever; nor shall any man be enforced, restrained, molested, or burthened, in his body or goods, or otherwise suffer, on account of his religious opinions or belief. . . . and the Legislature shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination.[48]

While states can prescribe compulsory attendance for all children, as West Virginia has for ages seven through sixteen,[49] states cannot require all students to attend public schools only. In 1925, the United States Supreme Court in Pierce v. Society of Sisters held that such a requirement by the Oregon legislature violated the liberty right of parents in the education of their children and also

deprived private and parochial schools of their property without due process of law.[50]

West Virginia law provides that students will be exempt from the compulsory attendance laws if they are receiving instruction in an approved private or parochial school:

> Such instruction shall be in a school approved by the county board of education and for a time equal to the school term of the county for the year. In all such schools it shall be the duty of the principal or other person in control, upon the request of the county superintendent of schools, to furnish to the county board of education such information and records as may be required with respect to attendance, instruction, and progress of pupils enrolled between the ages of seven and sixteen years.[51]

The United States Supreme Court has held that neither a state nor the federal government could aid one religion, aid all religions, or prefer one religion over another. No tax, large or small, can be levied to support any religious activity or institution.[52] However, the First Amendment does not prohibit a state from extending its general benefits to all its citizens without regard to their religious beliefs.[53]

In school related cases, it has been shown that textbooks and transportation are two basic areas of general benefit for all students - public, private, or parochial. Thus, a board of education which provides such services does not violate the United States Constitution. In 1930, the United States Supreme Court held that a Louisiana statute which provided free textbooks for children regardless of the school they attended was not unconstitutional since the benefits accrued to the child rather than the school.[54] This case gave rise to the "child

benefit" theory which was extended to include transportation of parochial school students in the Everson case in 1947,[55] and for certain diagnostic and therapeutic services in 1977.[56] While permissible under the federal Constitution, some state constitutions, such as South Dakota, legally prohibit aid to religion "in any form."[57]

In absence of a statutory mandate to provide pupil transportation and secular textbooks to parochial school students, most courts have held that to deny such services is not violative of "equal protection" required by the Fourteenth Amendment.[58] A modified exception is found in West Virginia, where statute provides that county boards of education may provide adequate means of transportation ". . . for all children of school age who live more than two miles distance from the school."[59] In a 1970 case, the West Virginia Supreme Court of Appeals found that when a county board of education provided such transportation to public school students, it was violative of the First and Fourteenth Amendments to the United States Constitution to withhold transportation services to students enrolled in the parochial schools.[60]

West Virginia statute provides that county boards of education may furnish state-adopted textbooks for use by pupils enrolled in any private school if their parents, in the judgment of the board, are unable to provide them.[61] In an opinion of the Attorney General, free textbooks may be provided to parochial school students only as specifically authorized by this statute.[62] However, under guidelines recently established on order of the Federal Court for the Northern

District of West Virginia, approved secular textbooks, workbooks, and instructional materials may have to be provided private or parochial students who qualify for free or reduced price school meals.[63]

The United States Supreme Court has held that students may be released from the regular public school program to participate in religious instruction held off the school premises.[64] However, religious instruction taught in the regular public school classroom during the school day is violative of the First Amendment to the United States Constitution, even though participants are "released" from their regular classes to attend.[65]

In West Virginia, the Attorney General has ruled that county boards of education may establish procedures which would allow students who are enrolled in private or parochial schools to participate in "shared time" or "dual enrollment" plans with the public schools. Under such plans, parochial school students could enroll in one or more regularly scheduled classes in a public school and students from the public school could enroll in classes at the parochial school. The Attorney General emphasized, however, that a child who has elected to attend a private or parochial school ". . . has no legally enforceable right to compel his enrollment in the public schools under a 'shared time' or 'dual enrollment' plan."[66]

The United States Supreme Court has been called upon to decide matters related to prayer and bible reading in the public schools. In the 1962 Engel case, the Court ruled that a general prayer composed by state educational authorities violated the "establishment clause"

of the First Amendment.[67] One year later that Court struck down Bible reading and the use of the Lord's prayer in the public schools, setting forth the following test for distinguishing permitted from forbidden governmental involvement with religion:

> What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances or inhibits religion.[68]

In 1971, the Supreme Court in Lemon v. Kurtzman added one other requirement; that the activity must not foster "excessive entanglement" of government with religion.[69]

Federal courts of appeals have held that student recitation of prayers before meals was unconstitutional,[70] as was Bible reading and non-denominational group prayers organized by teachers, parents, and students to be presented over the school intercom system.[71] The fact that students are allowed to participate on a voluntary basis or that non-participants are excused during such exercises does not legitimize the activity.[72]

On the other hand, the Supreme Court has held that the public schools may study and use historic documents, such as the Declaration of Independence, which contain references to God. Pupils may also observe, on a voluntary basis, patriotic ceremonies which refer to God or may sing anthems professing faith in God.[73] Further, the study of the Bible and religion, as a part of a secular program of education, for their literary and historic values, is not unconstitutional.[74]

The Bible, however, may not be used for recitation with the intention of inculcating religious beliefs, or promoting moral or Christian ideals.[75]

In 1976, a federal district court upheld the constitutionality of a Massachusetts statute which had been adopted in 1966 and amended in 1973:

> At the beginning of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held shall announce that a period of silence not to exceed one minute in duration shall be observed for meditation or prayer, and during any such period silence shall be maintained and no activities engaged in.[76]

The court concluded that the statute and the school district's guidelines for implementing it did not advance or inhibit religion or coerce any student into any activity that interferes with the free exercise of his religion. Furthermore, use of the word "or" in this context avoids conflict with the First Amendment's establishment clause and provides evidence of the state's neutrality on the matter of religion and the lack of direct involvement.[77]

On many occasions religious groups have sought to promote the tenents of their organizations by the dissemination of their religious literature through the schools. When opponents of such practices have sought judicially to halt them, the suits have been uniformly successful.[78]

ACADEMIC FREEDOM

A federal district court judge has analyzed the legal status of academic freedom in the following manner:

> Although academic freedom is not one of the enumerated rights of the First Amendment, the Supreme Court on numerous occasions emphasized that the right to teach, to inquire, to evaluate and study is fundamental to democratic society. . . .
>
> The right to academic freedom, however, like all other constitutional rights, is not absolute and must be balanced against the competing interests of society. The court is keenly aware of the state's vital interest in protecting the impressionable minds of its young people from any form of propagandism in the classroom.[79]

Some teachers have argued that their freedom of speech to the classroom should approach the student's greater right to know.[80] While this may be true of the university professor, elementary and secondary school students are compelled to attend school because of compulsory attendance laws and generally have no choice as to their teachers.[81]

Nolte states that there are five well-settled principles of law governing academic freedom of public school teachers:

1. Teachers may not use their classrooms as forums for imposing their pet ideas on a captive audience, the student.

2. The age, size, and maturity of the students present some limits on what can or cannot be introduced.

3. The board may set reasonable limits on the bounds of the curriculum thereby curtailing the freedom to go outside those limits.

4. The teacher is restricted to his own area of expertise.

5. The board may prescribe other prohibitions by resolution or prescribe in what ways controversial subjects are to be treated, if at all, in the classroom.[82]

In considering whether a classroom activity is within the scope of academic freedom, the courts will also consider whether the activity has a valid educational purpose. For example, the Seventh Circuit Court recently upheld the termination of three non-tenured teachers who, after attending a showing of the movie "Woodstock," distributed to their students alleged obscene materials which also encouraged students to sample marijuana and LSD.[83]

In contemplating use of materials which some people may consider "obscene" the teacher must not only consider the above factors but must recognize that the United States Supreme Court has held that contemporary community standards in obscenity cases should be interpreted by local rather than national norms.[84] Recently the Tenth Circuit Court ruled that such "community standards" may be used to dictate the extent of a teacher's First Amendment rights in the classroom. The Court held that a teacher does not have a constitutional right to persist in utilizing teaching techniques disapproved by the principal and the board.[85]

Teachers do not have the right to advocate school disruption, riot, destruction of property, or an invasion of the rights of others. For example, a Missouri algebra teacher who told his students that they were ". . . 4000 strong, and could drive out the warmongers," meaning R.O.T.C. officials, was held to have exceeded his authority and was properly dismissed.[86]

It is well established that a state legislature can require those subjects which are ". . . plainly essential to good citizenship,"

however, it can prohibit only that which is ". . . manifestly inimical to the public welfare."[87] From the latter evolved this country's most widely publicized court case on academic freedom. Early in this century the state of Tennessee enacted a statute making it illegal to teach the "theory of evolution" in the public schools of that State. Scopes, a biology teacher, expounded on this theory in the classroom, resulting in his dismissal and the subsequent "Scopes Monkey Trial," where he was found guilty and was assessed a fine.[88] In reviewing the action of the lower court, the Tennessee Supreme Court reversed the conviction of Scopes on the grounds that the jury and not the judge should have set the fine; however, the Court held that no constitutional right had been abridged:

> Plaintiff in error was a teacher in the public schools of Rhea County. He was an employee of the state of Tennessee or of a municipal agency of the state. He was under contract with the state to work in an institution of the state. He had no right or privilege to serve the state except on 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 in no wise touched by this law. . . . He was always at liberty to take his beliefs and go elsewhere.[89]

Over forty years later, the United States Supreme Court considered the constitutionality of a statute prohibiting the teaching of evolution in the state-supported schools of Arkansas, one of three states having such a law in 1968. After some discussion of academic freedom and freedom of expression in the classroom, the Court finally based its decision on another First Amendment clause, that of establishment of religion. The Court held the statute to be unconstitutional because it attempted to blot out a particular theory which is

in conflict with the Biblical account of creation, thus advancing one religion over all others.[90]

Much earlier, in Meyer v. Nebraska, the Supreme Court invalidated a statutory prohibition against teaching a foreign language in grades lower than the ninth in any school, public or private. While the Court upheld the power of the state over curriculum in general in its tax supported schools, it held that to impose such a regulation on the private schools and its teachers, like Meyer, was limiting the rights of modern foreign language teachers to teach, of pupils to gain knowledge, and of parents to control the education of their children. The primary thrust of the Court's decision was that the statute deprived a person of the constitutional right to pursue an occupation which is not contrary to the public interest.[91]

It is not the function of the courts, however, to judge the academic merits of the teaching method being used by the teacher. A California court said:

> Teachers are protected by the fact that they cannot be disciplined merely because they made a reasonable, good faith, professional judgment in the course of their employment with which higher authorities later disagreed.[92]

In 1974, the Fifth Circuit Court ordered the reinstatement of a twelfth grade civics and political science teacher who had taught such controversial subjects as race relations and the Vietnam War. The Court upheld the district federal court's reasoning that a teacher has a right to choose a teaching method which serves a demonstrated educational purpose and has not been proscribed by regulations of the administration or the board.[93]

According to Nolte, students are entitled to alternate assignments in cases where they object to readings or passages in books which to them or their parents are indecent, irreligious, or embarrassing. "Academic freedom does not mean the right of a teacher to force-feed students on the grounds that 'it will be good for them.'"[94]

While there are no West Virginia cases of record on academic freedom, other courts make it clear that teachers have the right to assemble, speak, think, and believe as they will; however, it is equally clear that they have no right to work in the public school on their own terms. Rather, they must comply with reasonable rules and regulations of the school system and not stray too far from acceptable community norms.

ASSIGNMENT OF DUTIES

While most school employees are fully aware of their primary responsibilities, there are often many questions about extra assignments and related duties. Whether the assignment of extra duties to a school employee is legal is largely a matter of contract. In West Virginia, a written contract in the form prescribed by the State Superintendent of Schools[95] is required of the teacher and the county board of education. That contract states in part:

> . . . [T]he Teacher agrees faithfully to perform all the duties of said position and employment, and agrees faithfully to observe and enforce the rules and regulations lawfully prescribed by legally constituted school authorities insofar as such rules and regulations may be applicable to said county.

> The services to be provided by the Teacher shall be such services as are required by law, by the lawful rules and regulations of the state board of education and by the lawful rules and regulations of the Board.[96]

While there are no West Virginia cases of record on extra duties, other courts have held it permissible to assign teachers to supervise athletic events,[97] English teachers to coach school plays,[98] physical education teachers to coach intramural and interscholastic teams,[99] and to force attendance at school sponsored workshops,[100] and "open house" activities.[101]

On the other hand, the Supreme Court of Pennsylvania held that a teacher could not be required to supervise a voluntary high school boys' bowling club since it was not truly a school activity and since the teacher was not to teach, coach, or instruct, but was simply to maintain discipline of the boys at the local bowling alley.[102] Additionally, Reutter and Hamilton state that, "No teacher may be compelled to perform such services as janitor service, traffic duty, and school bus driving."[103]

West Virginia teachers are often required to participate in parent-teacher conferences and in-service educational programs, not as extra duty, but as part of the paid employment term as provided for by the Legislature:

> Noninstructional days in the employment term may be used for curriculum development, preparation for opening and closing of the instructional term, in-service and professional training of teachers, teacher-pupil-parent conferences, professional meetings, and other related activities.[104]

This provision notwithstanding, problems do occur as evidenced by two recent West Virginia cases. In Doddridge county, a teacher was

dismissed when he failed to participate in a parent-teacher conference. While his reinstatement was ordered by the West Virginia Supreme Court of Appeals, the Court did impose a twenty day suspension without pay as proper penalty for the teacher's willful absence.[105] Similarly, a Lewis County teacher who had been dismissed for insubordination and willful neglect of duty for missing the greater part of the opening day of school for the purpose of enrolling in graduate school was ordered reinstated by this same Court.[106]

While the content and form of the contract executed between the county board of education and its auxiliary and service personnel do not have to be approved by the State Superintendent of Schools, the contract must be in writing[107] and may include provisions similar to the contract used for teachers. Contracts for auxiliary and service personnel must identify the employee's "class title," thereby establishing the primary responsibilities of the position as enumerated by state statute.[108]

While county boards of education, as political subdivisions of the State of West Virginia, are now exempt from federal wage and hour laws under the United States Supreme Court ruling in National League of Cities v. Usery,[109] there are applicable state statutes. Recent enactments of the West Virginia Legislature provide a minimum salary schedule for auxiliary and service personnel and also provide that such personnel working less than three and one-half hours shall be paid one-half of the full salary for the position, while employees working more than three and one-half hours shall receive full

compensation.[110] It makes no difference whether the full-time employee works four or eight hours, the pay will be the same. West Virginia labor laws applicable to school auxiliary and service personnel provide that:

> . . . [N]o employer shall employ any of his employees for a workweek longer than forty-two hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.[111]

In regard to the daily and weekly schedule for teachers, policy of the West Virginia Board of Education provides:

> 'Regular school day' shall not exceed eight hours of school duty in one day nor more than forty hours of school duty each week. Assignment to school duty is considered to be the interval a teacher is required to be present to perform curriculum or co-curriculum services.[112]

The State Superintendent of Schools has interpreted this regulation as follows:

> Compensatory time or other compensation at the regular rate of pay must be given by a county board of education to a teacher for attendance at a staff meeting, inservice training, or other activity (planning time, etc.) which the teacher is expected to attend, unless the activity falls within the regular work day of a teacher (which may not be more than eight hours) and the regular work week of a teacher (which may not be more than forty hours). A teacher may not be required to work more than this time, but he or she may agree to do so for compensation at the regular rate.
>
> Once the school year has begun, the teacher's work day or work week may not be increased unilaterally by the county board of education, although the teacher may agree to such increase for adequate compensation.[113]

It is the statutory responsibility of every school employee in West Virginia to properly keep such records and make such reports as may be required by the local board of education or the State

Superintendent of Schools. An employee's pay may be withheld until all reports have been submitted.[114]

PERSONAL LEAVE

Public school employees are expected to carry out, on a daily basis, their contractual responsibilities to the local board of education. In West Virginia, absences from work which are not included in personal leave provisions may result in an appropriate reduction in pay.

At the beginning of each employment term, any regular, full-time employee is entitled annually to at least one and one-half days of annual personal leave for each employment month or major fraction thereof in the employee's employment term. Unused leave is accumulative without limitation and is transferable within the State. If an employee should claim and receive personal leave which he has not yet accumulated on a monthly basis and subsequently leave his employment, "he is required to reimburse the board for the salary or wages paid him for such unaccumulated leave."[115]

County boards of education in West Virginia are given much latitude in implementing the personal leave policy established by the Legislature.

> A regular full-time employee who is absent from assigned duties due to accident, sickness, death in the immediate family, or other cause authorized or approved by the board, shall be paid his full salary from his regular budgeted salary appropriation during the period which he is absent, but not to exceed the total amount of leave to which he is entitled.[116]

It is noted that a "regular full-time employee" is defined as ". . . any person employed by a county board of education who has a regular position or job throughout his employment term, without regard to hours or method of pay."[117]

County boards of education may legally extend the reasons for granting personal leave beyond the statutory provision of ". . . accident, sickness, and death in the immediate family."[118] Additionally, the local board may establish reasonable regulations for reporting and verifying the cause of absences except that effective July 1, 1979, each employee is entitled to be absent from work under personal leave coverage for three days per year without cause. These days may not be consecutive unless approved by the principal or supervisor and cannot be used for the purpose of a strike or work stoppage.[119] For all other absences the State Superintendent has held that the county board of education may impose regulations which include a requirement calling for a signed statement from a physician; however, the board may not require that the nature of the illness be disclosed.[120]

Interpretations by the State Superintendent of Schools have defined "sickness" to include medical and dental appointments on school time,[121] infectious diseases resulting in the employee being quarantined,[122] and when a female employee is physically unable to perform her duties due to the effects or after-effects of pregnancy.[123] In the latter instance, the State Superintendent said, "While pregnancy itself could not, of course, be termed a sickness, it is a reasonable presumption that a pregnant woman who is unable to perform her work is also sick. . . ."[124]

The subject of fringe benefits for pregnancy has been the subject of much litigation in the last decade, resulting in action by both the United States Supreme Court and the United States Congress. In 1974, the Supreme Court declared unconstitutional school board regulations which required all pregnant teachers, regardless of circumstances, to absent themselves from the classroom for arbitrary periods of several months prior to child birth.[125] However, two years later in General Electric Co. v. Gilbert, that same Court said, ". . . an exclusion of pregnancy from disability benefits plan providing general coverage is not gender-based discrimination at all."[126] Then in 1977, the Court found that an employer's policy of not awarding sick leave pay to pregnant employees, ". . . legally indistinguishable from the disability insurance program upheld in the previous instance."[127] That same year, the federal court for the Southern District of West Virginia held that pregnancy related "sickness" was not a "sickness" within the meaning of the West Virginia statute and that a board of education which had not provided sick leave for this reason ". . . has not violated any rights of the plaintiff secured to her by either Title VII or the Equal Protection Clause of the Fourteenth Amendment."[128]

What the courts could not provide the pregnant employee, the Ninety-Fifth Congress saw fit to approve in October, 1978. In enacting Public Law 95-555, Congress amended Title VII of the Civil Rights Act of 1964 by adding a new subsection:

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be

> treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise.[129]

Thus, county boards of education must grant personal leave for illness related to pregnancy in the same manner as they would for any other cause.

School employees in West Virginia are entitled to their normal daily rate of pay when absent under provisions of the state and county personal leave policy. School principals, coaches, band directors, and others who receive supplemental pay for non-instructional duties have a legal right to receive full salary for days missed under the policy.[130]

The State Superintendent has ruled that legal holidays falling within the period of personal leave are not charged against the employee's personal leave entitlement.[131] State law provides that when a holiday falls within the employment term all regular school employees shall receive their normal pay for that day;[132] therefore, the employee is entitled to the paid holiday even though he may be off for personal leave prior to and following the holiday.[133] Similar application is appropriate when schools are closed because of inclement weather or conditions beyond the control of the local board of education, unless "appropriate alternate work schedules" are required. If employees are not able to work such alternate schedules, available personal leave, if applicable, would be chargeable against the employee's personal leave entitlement.[134]

Substitute personnel who are not "regular full-time employees" are not entitled to personal leave benefits.[135] Neither would they receive compensation for holidays or when schools were closed because of inclement weather or other emergency.[136] However, a substitute employed under contract is considered a "regular full-time employee" and would be eligible for full benefits.[137]

LEAVES OF ABSENCE AND OTHER ABSENCES

While paid sabbatical leave is not available to public school employees in West Virginia, county boards of education may grant unpaid leaves of absence for periods up to one year for purposes it deems worthwhile. Most leaves usually are granted for medical, maternity, educational, or professional reasons; however, any reason may be found adequate in the eyes of the local board.[138] Yearly extensions of the unpaid leave may also be granted at the discretion of the board.[139]

Personnel having continuing contracts with the board of education are entitled to a position with the board upon their return from a leave of absence. While the board is not required to place the returning employee in the position he/she formerly held, the statutory procedure for transferring personnel, as defined in Chapter 2, would have to be followed.[140]

Probationary personnel who are granted leaves of absence are also entitled to reemployment unless they are terminated in accordance with statutory provisions, also discussed in Chapter 2.[141]

West Virginia teachers serving under continuing contract may, upon consent of the board, be provided released time for special professional or governmental assignments without jeopardizing their contractual rights or any other rights, privileges, or benefits.[142]

A county board of education may approve the attendance of any or all employees at educational conventions, conferences, professional meetings of teachers, or service meetings of auxiliary and service personnel, when in the judgment of the superintendent it is necessary or desirable. Approved attendance at such meetings on school days may be substituted for an equal amount of teaching or employment and employees attending shall not suffer loss of pay.[143] The board may pay all or part of the expenses of any personnel designated to represent the board at such meetings or to visit another school system.[144]

When a teacher's employment term overlaps his participation in summer schooling at an institution of higher learning for the purpose of professional growth, the county superintendent may approve the substitution of up to four days of such schooling for a like number of non-instructional days of the employment term.[145]

Unless excused by the judge of the court, West Virginia school personnel are required to serve when called as jurors during their employment term. The local board of education is responsible for the difference in pay between that allowed for such jury service and the amount of salary due the employee for the period of service.[146]

There is no express authority for payment of salary to any school employee absent from duty to testify before a court, even though

subpoenaed. However, it would seem that a county board of education has the authority to include such absences in its personal leave policy.[147] State law does provide that a subpoenaed witness is entitled to receive from the court not less than ten or more than twenty dollars, plus mileage, for each day of required attendance as a witness.[148]

County school employees who are members of the national guard or any military reserve unit of the United States armed services are entitled to a leave of absence without loss of pay or status on the days during which they are engaged in drills, parades, or other duty. The maximum period for such is thirty days in any one calendar year. The Statutory term "without loss of pay" means that the employee shall continue to receive his present salary or compensation, even though he may be receiving other compensation for his military service.[149]

WORKMEN'S COMPENSATION

All school districts in West Virginia are required to subscribe to and pay premiums into the West Virginia Workmen's Compensation Fund. All employees, professional, auxiliary, and service, are afforded protection under this program.[150]

The Workmen's Compensation Fund provides for medical treatment and hospitalization for employees who suffer injuries by reason of their employment. Temporary total disability benefits for any compensable injury are also provided.[151] Coverage includes injuries which may be sustained during travel or at an alternate duty station if in performance of duties required by the employer.[152]

Upon sustaining an on-the-job injury, the employee is responsible for notifying the local board of education and the Workmen's Compensation Commissioner of the time, place, nature, and cause of the injury and whether disability has resulted therefrom. Notice to the board may be given personally or by registered mail.[153]

UNEMPLOYMENT COMPENSATION

To comply with the Federal Unemployment Tax Act, as amended by Public Law 94-566, the West Virginia Legislature, in 1978, extended the federal-state unemployment compensation program to agencies of the state and local governments, including county boards of education.[154] School employees are now eligible for the same coverage as persons employed in the private sector, a thirteen week period.[155]

Benefits are to be denied a school employee between school terms, provided he has worked for a board of education the previous term and has reasonable assurance of, or a contract for, such work the next term. Similar denials cover periods of vacation and holidays.[156]

INSURANCE

The State of West Virginia provides a comprehensive group insurance program for all employees of the State, including personnel employed by county boards of education. Benefits of the voluntary program, administered by the West Virginia Public Employees Insurance Board, include life insurance, accidental death and dismemberment insurance, comprehensive hospitalization and health care insurance,

and major medical insurance. Additional group life insurance and accidental death and dismemberment insurance are available on an optional basis.[157]

Employees who work at least twenty hours per week or one thousand forty hours per year are eligible to participate in the State insurance program. Employees who do not enroll in the program during their first thirty-one days of employment must satisfy the insurance carrier that they are in good health prior to becoming insured.[158]

Participants are required to pay thirty percent of the cost of their insurance program for the first year. After that, the full cost of the basic life and health care insurance for the employee, his spouse, and children is fully borne by the State.[159]

In addition to the State insurance program, the Legislature has authorized school employees to participate in local group insurance programs for life, health and accident, hospitalization or surgery, death benefit,[160] and automotive.[161] At the present time, many local group insurance programs are either loss-of-time or cancer-care insurance plans. In all cases, only those companies whose plan or plans receive the majority vote of the employees shall have the privilege of payroll deductions.[162] However, the Attorney General has held that instructional and administrative personnel may subscribe to one insurance program and the auxiliary and service personnel to another company, or they may select the same company.[163]

A county board of education may also enter into a tax-sheltered annuity agreement with employees and insurance agents licensed to do

business in the State. Under such agreements, the employee would authorize the withholding of a portion of his salary to be deposited in an annuity plan for tax deferment purposes.[164]

RETIREMENT

Established in 1941, the State Teachers Retirement System provides an independent retirement program for all professional personnel regularly employed for at least one-half time service in the public schools of the State, in the State Department of Education, or in the State colleges and universities. Also included are non-teaching personnel employed by the above entities or the Teachers Retirement Board, providing such personnel are regularly employed for full-time service.[165] "Full-time service" is defined as performing the duties of a regularly established position or job throughout an employment term, regardless of the number of hours worked. For purposes of the retirement program, all public school professional and non-teaching personnel are considered "teachers."[166]

Membership in the State Teachers Retirement System is mandatory for personnel employed by county boards of education, the State Department of Education, and by the Board of Regents, except that state college and university employees may elect alternate membership in their own retirement program.[167] County board of education personnel employed under the various federally funded programs are included as members of the State Teachers Retirement System; however, the federal program is responsible for the full employer contribution.[168]

Membership in the State Teachers Retirement System continues until the employee dies, retires, withdraws membership upon cessation of teaching or school employment in the State, or when service credit amounts to less than five years in any period of ten consecutive years.[169]

Each member of the retirement system is presently required to contribute six percent of his monthly earnable compensation to the retirement board.[170] Member contributions are deducted by the employer and are credited to the employee's individual account. Employer contributions are derived from Legislative appropriations matching the annual contribution of the membership.[171]

Retirement credit is granted for military service in the armed forces of the United States ". . . in any period of national emergency within which a federal selective service act was in effect."[172] Credit awarded for such service shall not exceed ten years or twenty-five percent of the total service at retirement. Full credit is granted for prior participation in the West Virginia Public Employees Retirement System. Service credit may also be purchased for employment as a teacher by the federal government or a state or territory of the United States on the same basis as that retirement system would allow credit for service to a teacher from West Virginia.[173]

Eligibility for retirement allowances is based upon age, years of service, and in some instances disability. Presently, a member is eligible for full retirement benefits, regardless of age,

if he has served thirty-five years. Full benefits are also provided if a member has reached the age of sixty, having served at least five years. Members who are fifty-five years of age and have thirty years experience may retire and receive benefits; however, only ninety percent of the prior service allowance will be counted.[174]

A member is also eligible for retirement allowances if he has credit for twenty years total service and has notified the Retirement Board in writing that he desires retirement benefits to be deferred until age sixty.[175]

Disability benefits are available after ten years of West Virginia service. An examination by a physician or physicians selected by the Retirement Board must show that the member is incapacitated for service as a teacher and that the disability is total and likely to be permanent. Continuance of the disability necessitates a medical examination annually for five years and at such other times that the Retirement Board may require.[176]

A year of service credit corresponds with each school term or fiscal year completed and is to be defined by the Teachers Retirement Board. Present rules call for fractional credit to be awarded when a member is absent for more than one month in a school year or for teaching one-half time.[177]

In compliance with Public Law 95-256 passed by Congress in 1978,[178] the mandated retirement age of members of the State Teachers Retirement System has been changed to age seventy; however, an employee reaching seventy years of age during the school year may complete that employment term.[179]

GRIEVANCE PROCEDURE

By policy of the State Board of Education enacted in 1972, county boards of education are required to adopt a formal written grievance procedure that "clearly provides for the resolution of differences between employees and employer."[180] Counties are allowed to adopt such grievance procedures as it may deem appropriate and effective; however, the State Board states that such procedures must contain at least the following essential provisions:

1. Terms used in the adopted procedure shall be fully defined.

2. No reprisals of any kind may be taken by either party as a result of the use of the procedure.

3. The adopted procedure should be as clear and unambiguous as possible, and should be available to all employees in the county.

4. Differences should be resolved as quickly as possible.

5. Any employee should be permitted to have assistance should he desire it in utilizing the adopted procedure.[181]

In a case decided by the West Virginia Supreme Court of Appeals in 1977, a county board of education refused to grant a grievance hearing in the nonrenewal of a teacher's probationary contract. The Court acknowledged that a due process hearing was not required under state or federal statute or under the common law when a person's liberty or property rights have not been abridged. However, it held that when a county board of education establishes an employee grievance procedure which extends an employee's rights beyond those

guaranteed by statute and Constitution, the superintendent and the board must ". . . abide by the remedies and procedures it properly establishes to conduct its affairs."[182] It is noted that West Virginia statute has since been changed to allow probationary personnel to secure a hearing before their county board of education in nonrenewal cases.[183]

Excepting that redress may be sought through the courts, final authority in grievance matters rests with the State Superintendent of Schools who will review any grievance appeal having exhausted local remedies.[184] "Rules of Procedure for Resolving Controversies and Disputes" were adopted by the West Virginia Board of Education in 1971 for the purpose

> . . . of handling those problems arising in the state school system which have gone beyond the normal routine remedies which are available at the county level. . . . The State Superintendent shall use his discretion as to whether or not he may hear a controversy at any time.[185]

EMPLOYEE ORGANIZATIONS

The right of public school employees in West Virginia to join and participate in employee organizations is based on both federal and state constitutional provisions. The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, forbids any law abridging ". . . the right of the people peacefully to assemble, and to petition the government for a redress of grievances."[186] Section Sixteen of Article III of the West Virginia Constitution has a similar provision:

> The right of the people to assemble in a peaceable manner, to consult for the common good, to instruct their representatives, or to apply for redress of grievances, shall be held inviolate.[187]

These provisions give public school employees, as citizens, the right to assemble peacefully and to petition the government. To deny these constitutional rights would be to deny equal protection of the law.

In 1966, the West Virginia Attorney General concluded that public employees may join and participate in the activities of labor unions, professional organizations, or non-professional employee organizations because of their state and federal constitutional freedom of expression, assembly, and petition.[188] Official policy of the West Virginia Board of Education has a similar provision: "School employees are entitled to meet together, form associations, and work in concert in order to improve their circumstances or the circumstances of the schools."[189]

State board policy and the common law provide that employees may petition the administration and the board of education on matters of concern without fear of reprisal.[190]

COLLECTIVE BARGAINING/NEGOTIATIONS

Although West Virginia public school employees may meet and discuss the conditions of their employment with their board of education, through or with the assistance of an employee organization,[191] several opinions rendered by the office of the Attorney General since 1938 have consistently held that school employees

may not strike and that county school boards may not legally enter into a collective bargaining contract as that term is generally defined.[192] The most recent opinion cites the common law origin of this position,

> . . . (1) The fact that the law of this State has its origin in the common law (Article III, Section 21, Constitution of West Virginia), which prohibits public employees from exercising the right to bargain collectively, the right to strike, closed shops and other related activities normally associated with and approved by the courts as rights belonging to such organizations and groups in the private sector of our society; and (2) the absence of legislation or a definitive decision by the Supreme Court of Appeals of West Virginia modifying the common law in this regard, authorizing, permitting or directing county school boards (or any other public agencies) to enter into such 'collective bargaining' contracts with designated groups, labor unions or other representatives of public employees.[193]

A 1966 opinion of the Attorney General summarizes the authority of the West Virginia Legislature on collective bargaining matters,

> . . . (1) [F]ixing of conditions of work in the public service is a legislative function; (2) neither the executive nor the legislature may delegate such functions to any outside group; (3) unless specifically authorized by law, a governmental unit may not enter into a collective bargaining agreement; (4) the Legislature, or executive, must be free to change the conditions of employment at any time, and thus cannot set for a fixed period of time upon or bind a subsequent executive or legislature by its action.[194]

While the State Superintendent of Schools has stated that county boards of education may not negotiate the terms and conditions of employment, may not enter into any such agreements with employee organizations, and may not recognize an employee organization as the exclusive bargaining representative of any group of employees,[195] the State Attorney General has taken a different position in each instance. In a lengthy 1976 opinion, the Attorney General declared "negotiations"

to be lawful under the following definition:

> The terms 'negotiate' and 'negotiation' as used in this opinion are defined herein to include the process or procedure between public employers and public employees or their duly authorized representative or representatives by which an agreement --oral or written-- is attempted to be reached regarding wages, hours of employment, grievances, etc., affecting the total conditions of employment and the relationship between the public employer and the public employee.[196]

"Neither the term 'negotiate' or the process of 'negotiations' suggests or includes any illegal act or activity on the part of the county school boards," said the Opinion.[197] However, "collective bargaining" is unlawful because its definition, ". . . includes, in some instances at least, the right to strike, compulsory or binding arbitration, compulsory or binding fact-finding by a third party, etc."[198]

According to the Attorney General, local school boards may also "recognize," for negotiation purposes, a labor union or other employee organization which has been selected by a majority of the employees of a "negotiation unit."[199] The board may also enter into a contract or an agreement with the following stipulation:

> The only limitation upon any such 'contract' or 'agreement' is the general law applicable to the possibility of financial or statutory changes that may occur during the life of the written document which may make some or all of its terms inoperative.[200]

The Attorney General states that a school board and an employee organization could legally submit unresolved issues to "mediation" or "advisory fact-finding" since neither procedure consists of binding decisions or determinations being made by a third party. However, he notes that "binding arbitration" would constitute an ". . . illegal and unlawful delegation of authority and responsibility imposed by law solely upon the public employer."[201]

So far as can be ascertained from the State Department of Education, no county board of education has a "negotiated" contract with an employee organization,[202] even though the Attorney General ruled such was legal almost five years ago.

In 1969, approximately four thousand employees of the West Virginia State Road Commission were involved in an eight-day work stoppage. When employees did not return to work following an appeal from the Governor, he dismissed them for participation in an illegal strike against the State. In Kirker v. Moore, the Federal Court for the Southern District of West Virginia said,

> It is axiomatic that a strike by public employees for any purpose is illegal under the common law, and no statutory declaration of their illegality is necessary.
>
> Under the circumstances, the Governor and the State Road Commissioner had the right, if not indeed the responsibility, to terminate the plaintiffs' employment with the State. This action . . . not only comported with the law of the State, but violated no federal constitutional rights of the employees so discharged.[203]

In response to an alleged abridgement of the employees' procedural due process rights, the Court held that ". . . if the plaintiffs had any rights to procedural due process, they forfeited such rights through their own misconduct.[204]

While West Virginia school employees do not expressly have the right to negotiate or bargain collectively, the West Virginia Legislature has considered bills which would permit such activities each year since 1971.[205] While the West Virginia Education Association, representing the majority of the teachers in the state, has

sponsored much of this legislation, the West Virginia School Service Personnel Association, representing the majority of the service and auxiliary personnel, has always voiced opposition.[206]

SUMMARY

As education is a state function, it is clearly evident that a state legislature has the authority to prescribe the course of study, the system of instruction pursued, as well as the textbooks to be used in the public schools of the state.

While the West Virginia Legislature has, in fact, prescribed certain courses of study, the responsibility for implementation of the public school instructional program in the State lies with the West Virginia Board of Education. That Board has established minimal graduation requirements and has designated required courses of study for the elementary, seventh and eighth, and high school levels. County boards of education are encouraged to increase graduation requirements and to offer a diversity of elective courses.

The process of selecting elementary textbooks, both at the state and county level, is clearly defined by statute. Textbook selection at the secondary level, however, is left to the discretion of the county board of education, except that the texts must be adopted county-wide and for the prescribed adoption period.

West Virginia children are required to attend school between the ages of seven and sixteen; however, pupils may be exempt from this requirement if they are attending a private or parochial school approved by the county board of education. Religious instruction held

in the regular school classroom during the school day is unconstitutional; however, public school students may be released to go off school premises for such activities. Group prayers in the public schools are also unconstitutional, as are Bible reading and services held to promote religion. However, the study of the Bible and religion as a secular program of education is permissible. Likewise, the study of historical documents, participation in patriotic ceremonies, and singing anthems having reference to God are not unconstitutional.

While public school teachers have academic freedom, that freedom is not nearly as absolute as that of the university or college professor. In judging whether a classroom activity is permitted under academic freedom, the courts consider the age and maturity of the student, whether such activity had been legally prohibited by the school board or persons in charge, and whether the activity fulfilled a valid educational purpose.

In West Virginia, the regular school day for teachers cannot exceed eight hours or forty hours per week. The teacher is entitled to compensatory time or additional payment for school duties performed beyond this limit. Overtime pay for auxiliary and service personnel must be paid for all hours in excess of forty-two per week.

School personnel employed on a regular basis are entitled to at least one and one-half days of annual personal leave for each employment month. Unused leave is cumulative without limit and is available to employees who are absent due to accident, sickness, or death in the immediate family. Counties may extend this coverage and

may establish reasonable regulations for reporting and verifying the absence.

Subject to board approval, paid leave may be granted for attendance at educational conventions, conferences, and meetings deemed necessary or desirable by the county superintendent of schools. The superintendent may also grant paid leave for non-instructional days when a teacher's employment term overlaps his participation in summer school or when an employee member of the national guard or any military reserve unit is called to participate in drills, parades, or other duty. Unpaid leaves of absence may be granted school employees for any purpose deemed worthwhile by the county board of education.

Among fringe benefits afforded school employees in West Virginia are workmen's compensation insurance, unemployment compensation, and the opportunity to participate in a state-sponsored comprehensive group hospitalization and life insurance program at little or no cost. County boards of education are also authorized to deduct premiums of local group insurance plans and for tax-sheltered annuities.

All regularly employed personnel of county boards of education must participate in the State Teachers Retirement System, contributing a fixed percentage of their income to this fund. Eligibility for retirement allowances is based upon age, years of service, and in some instances, disability.

County boards of education are required to provide a written grievance procedure for all school personnel. This procedure must

clearly provide for the resolution of differences between employees and the local board.

Under federal and state constitutional provisions, school personnel may meet together, form associations, and work in concert in order to improve their circumstances or the circumstances of the schools. However, in absence of statute in West Virginia, employee organizations have no authority to bargain collectively or to strike.

FOOTNOTES

[1]E. Edmund Reutter, Jr., and Robert R. Hamilton, The Law of Public Education (Mineloa, N.Y.: The Foundation Press, 1976), p. 127.

[2]W.Va. Code, § 18-2-9.

[3]Ibid.

[4]W.Va. Code, § 18-5-18.

[5]W.Va. Code, § 18-20-1.

[6]W.Va. Code, § 18-6-2.

[7]W.Va. Code, § 18-2-9.

[8]W.Va. Code, § 18-2-8.

[9]W.Va. Code, § 18-2-9.

[10]W.Va. Code, § 18-2-9, as stated in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

[11]Policy of the West Virginia Board of Education (1942), as stated in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

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

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

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

[15]W.Va. Code, § 18-2-8.

[16]West Virginia Board of Education, Secondary School Standards for Classification (Charleston, W.Va.: W.Va. Board of Education, 1977), p. 9.

[17]Ibid, pp. 19-20.

[18]Ibid, p. 9.

[19]Board of Education v. Dyer, 179 S.E.2d 527 (W.Va. 1971).

[20]West Virginia Board of Education, op. cit., p. 20.

[21]West Virginia Board of Education, Policies, Rules and Regulations, § 2422.91.

[22]West Virginia Board of Education, Standards for Classification of Elementary Schools in West Virginia (Charleston, W.Va.: W.Va. Board of Education, 1974), p.4.

[23]West Virginia Board of Education, Policies, Rules and Regulations, § 2422.1.

[24]West Virginia Board of Education, Policies, Rules and Regulations, § 2422.12.

[25]Reutter and Hamilton, op. cit., p. 363.

[26]Hardwick v. Board of School Trustees of Fruitridge, 54 Cal. App. 696, 205 P. 49 (1921).

[27]Mitchell v. McCall, 273 Ala. 604, 143 So.2d 629 (1962).

[28]Interpretation, State Superintendent of Schools, "Religion" September 16, 1965 (26).

[29]W.Va. Code, § 18-2A-1.

[30]W.Va. Code, § 18-2A-2.

[31]W.Va. Code, § 18-2A-14.

[32]51 Op.Att'y Gen. 45 (1964).

[33]W.Va. Code, § 18-2A-5.

[34]Ibid.

[35]West Virginia Board of Education, Policies, Rules and Regulations, §2445.41.

[36]West Virginia Department of Education records as confirmed in personal interview with James Waldeck, Coordinator of Secondary Education Programs, January 30, 1979.

[37]W.Va. Code, § 18-2A-5.

[38]Williams v. Board of Education, 388 F.Supp. 93 (S.D. W.Va. 1975).

[39]Ibid.

[40]W.Va. Code, § 18-2A-9.

[41]West Virginia Board of Education, Policies, Rules and Regulations, § 2445.43.

[42]Minarcini v. Strongsville City School District, 541 F.2d 577 (6th Cir., 1976).

[43]Ibid., see also Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).

[44]W.Va. Code, § 18-5-21a.

[45]Vandevender v. Cassell, 208 S.E.2d 436 (W.Va. 1974).

[46]In Re Distribution of Educational Books and Materials, Multi-District Litigation Panel Docket No. 280, Civil Action No. 76-76-F. (N.D. W.Va. 1977).

[47]United States Constitution, First Amendment.

[48]West Virginia Constitution, Article III, Section 15.

[49]W.Va. Code, § 18-8-1.

[50]Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[51]W.Va. Code, § 18-8-1.

[52]Everson v. Board of Education, 330 U.S. 1 (1947).

[53]Ibid.

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

[55]Everson v. Board of Education, 330 U.S. 1 (1947).

[56]Wolman v. Walter, 433 U.S. 299 (1977).

[57]McDonald v. School Board of the Yankton Independent School District No. 1, 246 N.W.2d 93 (S.D. 1976).

[58]Epeldi v. Engelking, 94 Idaho 339, 488 P.2d 860 (1971), cert. den. 406 U.S. 957 (1972); Luetkemeyer v. Kaufmann, 344 F.Supp. 376 (W.D.Mo. 1973), aff'd. 419 U.S. 888 (1974). see also Gaffney v. State Board of Education, 192 Neb. 358, 220 N.W.2d 550 (1974); Paster v. Tussey, 512 S.W.2d 97 (Mo. 1974), cert. den. 419 U.S. 1111 (1975).

[59]W.Va. Code, § 18-5-13.

[60]Hughes v. Board of Education, 154 W.Va. 107, 174 S.E.2d 711 (1970).

[61]W.Va. Code, § 18-5-21b.

[62]44 Op. Att'y. Gen. 283 (1951).

[63]In Re Distribution of Educational Books and Materials, Multi-District Litigation Panel Docket No. 280, Civil Action No. 76-76-F (N.D. W.Va. 1977).

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

[65]McCollum v. Board of Education, 333 U.S. 203 (1948).

[66]52 Op. Att'y. Gen. 87 (1966).

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

[68]School District of Abington Tp. v. Schempp and Murray v. Curlett, 374 U.S. 203 (1963).

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

[70]Stein v. Oshinsky, 348 F.2d 999 (2nd Cir. 1965), cert. den. 382 U.S. 957 (1965); DeSpain v. DeKalb County Comm. School District, 384 F.2d 836 (7th Cir. 1967), cert. den. 309 U.S. 906 (1968).

[71]Mangold v. Albert Gallatin Area School Dist., 438 F.2d 1194 (3rd Cir. 1971).

[72]Commissioner of Ed. v. School Committee of Leyden, 358 Mass. 766, 267 N.E.2d 226 (1971), cert. den. 404 U.S. 849 (1971).

[73]Engele v. Vitale, 370 U.S. 421 (1962).

[74]School District of Abington Tp. v. Schempp and Murray v. Curlett, 374 U.S. 203 (1963).

[75]Ibid.

[76]Mass. Gen. Laws, Chapter 71, § 1A.

[77]Gaines v. Anderson, 421 F.Supp. 337 (Mass. 1976).

[78]Reutter and Hamilton, op. cit., p. 29.

[79]Parducci v. Rutland, 316 F.Supp. 352 (M.D. Ala. 1970).

[80]Keyishian v. Board of Regents, 385 U.S. 589 (1967).

[81]David Rubin, An American Civil Liberties Handbook, The Rights of Teachers (New York: Discus Books-Avon, 1972), p. 33.

[82]M. Chester Nolte, How to Survive in Teaching (Chicago: Teach'em, Inc., 1978), p. 139.

[83]Brubaker v. Board of Education of District 149, Cook Co. 502 F.2d 973 (7th Cir. 1974).

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

[85]Adams v. Campbell City School District, 511 F.2d 1242 (10th Cir. 1975).

[86]Birdwell v. Hazelwood School District, 491 F.2d 490 (8th Cir. 1974).

[87]Pierce v. Society of Sisters, 268 U.S. 510 (1925).

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

[89]Ibid.

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

[91]Meyer v. Nebraska, 262 U.S. 390 (1923).

[92]Morrison v. State Board of Education, 82 Cal.Rptr. 175 (Cal. 1975).

[93]Sterzing v. Ford Bend Independent School District, 496 F.2d 92 (5th Cir. 1974).

[94]Nolte, op. cit., p. 152.

[95]W.Va. Code, § 18A-2-2.

[96]State Superintendent of Schools, Prescribed Probationary and Continuing Contracts of Employment for Teachers.

[97]McGrath v. Burkhard, 131 Cal.App.2d 367, 280 P.2d 864 (1955).

[98]Parrish v. Moss, 200 Misc. 375, 106 N.Y.S.2d 577 (1951).

[99]Ibid.

[100]Brough v. Board of Education of Millard County School District, 23 Utah 2d 354, 463 P.2d 567 (1970), cert. den. 398 U.S. 928 (1970).

[101]Johnson v. United School District Joint School Board, 201 Pa.Super. 375, 191, A.2d 897 (1963).

[102]Pease v. Millcreek Tp. School District, 412 Pa. 378, 195 A.2d 104 (1963).

[103]Reutter and Hamilton, op. cit., p. 380.

[104]W.Va. Code, § 18-5-16.

[105]Fox v. Board of Education, 236 S.E.2d 243 (W.Va. 1977).

[106]Beverlin v. Board of Education, 216 S.E.2d 554 (W.Va. 1975).

[107]W.Va. Code, §§ 18A-2-4,-5.

[108]W.Va. Code, § 18A-4-8.

[109]National League of Cities v. Usery, 426 U.S. 833 (1976).

[110]W.Va. Code, § 18A-4-8.

[111]W.Va. Code, § 21-5C-2.

[112]West Virginia Board of Education, Policies, Rules and Regulations, § 5210.

[113]Interpretation, State Superintendent of Schools, "Contract" November 30, 1977 (35).

[114]W.Va. Code, §§ 18-4-9; 18A-5-5.

[115]W.Va. Code, § 18-4-10.

[116]Ibid.

[117]W.Va. Code, § 18-1-1.

[118]W.Va. Code, § 18A-4-10.

[119]Senate Bill 6, West Virginia Legislature, March 10, 1979, Approved by Governor March 28, 1979. Revises West Virginia Code, § 18A-4-10 effective July 1, 1979.

[120]Interpretations, State Superintendent of Schools, "Employee" February 22, 1974, and April 8, 1974 (6).

[121]Interpretation, State Superintendent of Schools, "Employee" April 8, 1974 (6).

[122]Interpretation, State Superintendent of Schools, "Employee" February 25, 1974 (33).

[123]Interpretation, State Superintendent of Schools, "Employee" August 31, 1976 (5).

[124]Ibid.

[125]Cleveland Board of Ed. v. La Fleur, 414 U.S. 632 (1974).

[126]General Electric Co. v. Gilbert, 427 U.S. 125 (1976).

[127]Nashville Gas Co. v. Satty, 429 U.S. 1071 (1977).

[128]Tawney v. Board of Education, 426 F.Supp. 528 (S.D. W.Va. 1977).

[129]42 U.S.C. 2000e-2.

[130]Interpretation, State Superintendent of Schools, "Salary" October 29, 1974 (15).

[131]Interpretation, State Superintendent of Schools, "Teacher" May 2, 1973 (16).

[132]W.Va. Code, § 18A-5-2.

[133]Interpretation, State Superintendent of Schools, "Teacher" May 2, 1973 (16).

[134]Interpretation, State Superintendent of Schools, "Salary" July 11, 1977 (47).

[135]Interpretation, State Superintendent of Schools, "Salary" December 8, 1971 (13).

[136]W.Va. Code, §§ 18A-5-2; 18-1-1.

[137]W.Va. Code, § 18-1-1; see also Interpretation, State Superintendent of Schools, "Employee" January 25, 1978 (37).

[138]Interpretation, State Superintendent of Schools, "Employee" June 13, 1972 (32).

[139]Ibid.

[140]W.Va. Code, § 18A-2-7.

[141]W.Va. Code, §§ 18A-2-2,-8a.

[142]W.Va. Code, § 18A-2-2.

[143]W.Va. Code, §§ 18A-5-4,-5.

[144]Ibid.

[145]W.Va. Code, § 18-5-15.

[146]W.Va. Code, § 18A-5-3.

[147]Interpretation, State Superintendent of Schools, "Employee" April 23, 1974 (42).

[148]W.Va. Code, § 59-1-16.

[149]W.Va. Code, § 15-1F-1.

[150]W.Va. Code, § 23-2-1.

[151]W.Va. Code, § 23-4-1a.

[152]Buckland v. State Compensation Comm., 115 W.Va. 323, 175 S.E. 785 (1934), as cited in Harris v. State Workmen's Compensation Comm., 208 S.E.2d 291 (W.Va. 1974).

[153]W.Va. Code, § 23-4-1a.

[154]W.Va. Code, §§ 21A-5-1; 21A-5-3; see also Public Law 94-566, amending the Federal Unemployment Tax Act, enacted by Congress in 1976.

[155]W.Va. Code, § 21A-6A-1.

[156]W.Va. Code, § 21A-5-15.

[157]W.Va. Code, §§ 5-16-1,-7; see also West Virginia Public Employees Insurance Board, State of West Virginia Group Benefits Plan (Charleston, W.Va.: West Virginia Public Employees Insurance Board, 1976), pp. 7-8 and pp. 12-20.

[158]West Virginia Public Employees Insurance Board, State of West Virginia Group Benefits Plan, op. cit., p. 6.

[159]W.Va. Code, § 5-16-13.

[160]W.Va. Code, §§ 18A-4-11; 18-5-35.

[161]W.Va. Code, § 18-5-35.

[162]W.Va. Code, §§ 18A-4-11; 18-5-35.

[163]51 Op. Att'y. Gen. 187 (1965).

[164]W.Va. Code, §§ 18-25-1; 18A-4-12.

[165]State Teachers Retirement Board, West Virginia Teachers Retirement System (Charleston, W.Va.: State Teachers Retirement Board, 1970), p. 4.

[166]W.Va. Code, § 18-7A-3.

[167]W.Va. Code, §§ 18-7A-14a; 18-23-4a.

[168]State Teachers Retirement Board, Official Rules and Regulations (Charleston, W.Va.: State Teachers Retirement Board, 1978).

[169]W.Va. Code, § 18-7A-25.

[170]W.Va. Code, § 18-7A-14.

[171]Ibid.

[172]W.Va. Code, § 18-7A-17.

[173]Ibid.

[174]W.Va. Code, § 18-7A-25.

[175]State Teachers Retirement Board, West Virginia Teachers Retirement System, op. cit., p. 6.

[176]State Teachers Retirement Board, Official Rules and Regulations, op, cit., p. 5.

[177]State Teachers Retirement Board, West Virginia Teachers Retirement System, op. cit., p. 18.

[178]29 U.S.C. 633.

[179]Willard M. Ansel, Executive Secretary, State Teachers Retirement Board, Memorandum to all employers, March 30, 1978.

[180]West Virginia Board of Education, Policies, Rules and Regulations, § 5300.

[181]Ibid.

[182]Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977).

[183]W.Va. Code, § 18A-2-8a.

[184]Statement by Dr. Daniel B. Taylor, State Superintendent of Schools, in personal interview, March 29, 1979.

[185]West Virginia Board of Education, Policies, Rules and Regulations, § 1340.

[186]United States Constitution, Amendment I.

[187]West Virginia Constitution, Article III, Section 16.

[188]51 Op. Att'y. Gen. 683 (1966).

[189]West Virginia Board of Education, Policies, Rules and Regulations, § 5300.

[190]Ibid.

[191]Opinion of the Attorney General, June 26, 1974.

[192]37 Op. Att'y. Gen. 402 (1938); 39 Op. Att'y. Gen. 218 (1942); 51 Op. Att'y. Gen. 683 (1966); Opinion of Attorney General, June 26, 1974.

[193]Opinion of Attorney General, June 26, 1974.

[194]51 Op. Att'y. Gen. 683 (1966).

[195]Interpretations of State Superintendent of Schools, "Employee" February 2, 1973 (30); "Employee" June 11, 1973 (SDE).

[196]Opinion of Attorney General, June 26, 1974.

[197]Ibid.

[198]Ibid.

[199]Ibid.

[200]Ibid.

[201]Ibid.

[202]Statement by James S. Gladwell, Deputy State Superintendent of Schools, in personal interview, January 30, 1979.

[203]Kirker v. Moore, 308 F.Supp. 615 (S.D. W.Va. 1970).

[204]Ibid.

[205]Statement by Steve Haig, West Virginia Education Association, in personal interview, January 31, 1979.

[206]Statement by Kenneth Legg, Executive Secretary, West Virginia School Service Personnel Association, in personal interview, February 9, 1979.

Chapter 5

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

On the basis of the court decisions, statutes, opinions of the Attorney General, policies of the West Virginia Board of Education, and interpretations of the West Virginia State Superintendent of Schools presented in this study, the following conclusions may be justified with respect to public school personnel in West Virginia:

1. Schools and school personnel are subject to the authority of the Legislature, the West Virginia Board of Education, and the State Superintendent of Schools.

2. Public school personnel are employed, supervised, and paid through county boards of education but are also considered to be quasi-state employees and accrue most of the benefits afforded other state employees.

3. The recommendation of the county superintendent is required before a board of education may employ a teacher or other certified person. However, the board may employ auxiliary and service personnel without the recommendation of the county superintendent.

4. At no time during pre-employment or employment may the board, superintendent, or other administrator discriminate against

a person on the basis of race, color, national origin, sex, handicap, or age.

5. Abridgment of an employee's liberty or property rights entitles the employee to both substantive and procedural due process.

6. Professional educators are required to hold a valid teaching certificate which identifies the specified subjects and grade levels which they are licensed to teach.

7. The formal relationship between a county board of education and an employee is established by a written contract. Employees acquire tenure when they receive a continuing contract which is issued following three years of successful, continuous service.

8. Public school personnel may be transferred without their consent only if precise statutory requirements are followed.

9. Employees may be dismissed for lack of need; however, such employees must be placed on a preferred list for reemployment.

10. Public school employees may be suspended and/or dismissed for immorality, incompetency, cruelty, insubordination, intemperance, or willful neglect of duty.

11. Minimum salary schedules and a minimum employment term of two hundred days have been established by the Legislature for teachers, administrators, auxiliary, and service personnel.

12. The doctrine of in loco parentis permits teachers and principals to administer moderate corporal punishment; however, such action must be administered in the presence of a witness and the age, sex, condition, and disposition of the student must be considered.

13. Employees of county boards of education are liable for their torts.

14. School personnel are generally protected by conditional privilege when communicating potentially defamatory material to authorized personnel.

15. Teachers and administrators may be negligent if they do not fulfill their duty to provide adequate supervision, proper teaching of academic skills, and necessary instructions on how to perform activities which may be potentially dangerous.

16. Abridgment of a person's Constitutional rights by school authorities may result in legal action against them, seeking injunctive relief as well as damages.

17. The Legislature and the State Board of Education have established required courses of study, minimal graduation requirements, and a prescribed method of elementary textbook selection.

18. School authorities may not permit religious services, Bible reading, or group prayers in the schools; however, the teaching of Bible and religion as a secular course of study is permissible.

19. The academic freedom of public school teachers is limited by the age and maturity of the student, policy of the board or administration, and whether such teaching serves a valid educational purpose.

20. Public school personnel may be required to participate in teachers' meetings, in-service educational programs, and parent-teacher conferences if held within the employment term.

21. Teachers are due compensatory time or additional salary for required school duties performed in excess of eight hours per day or forty hours per week.

22. Auxiliary and service personnel receive half salary if they work three and one-half hours or less per day. Full salary is due if the daily work schedule is more than three and one-half hours. Overtime must be paid for work beyond forty-two hours per week.

23. Personal leave earned at the rate of one and one-half days per employment month may be used for absences necessitated by accident, sickness, death in the immediate family, or other cause established by the board. Employees may use three of their personal leave days for absences without cause.

24. Fringe benefits afforded school employees include workmen's compensation, unemployment compensation, and the opportunity to participate in a comprehensive hospitalization and life insurance program at little or no cost.

25. All regularly employed school personnel must participate in the State Teachers Retirement System.

26. County boards of education must have a written grievance procedure available to all school personnel. Appeals may be made to the State Superintendent of Schools or to the courts.

27. Public school personnel may meet together, form associations, and work in concert to improve their circumstances.

28. Employees of county boards of education have no authority to bargain collectively or to strike.

RECOMMENDATIONS

An analysis of the findings of this study has led to the following recommendations:

1. Further study should be conducted to compare the findings of this study with actual practices in the public schools of West Virginia. Specific examples include corporal punishment administered by unauthorized personnel, use of group prayer and Bible reading in the schools, distributions of religious materials to students, required work schedules for teachers exceeding eight hours per day or forty hours per week, and inadequate due process.

2. Further study should be conducted to determine the need for legislative action in the following areas: (a) standardization of the contract of employment for auxiliary and service personnel, (b) clarification of the rights of teachers and administrators under the doctrine of in loco parentis, (c) enactment of a "save harmless" statute which would protect employees from claims arising from negligent acts committed within the course and scope of their employment, and (d) the declaration of a moratorium on additional mandated courses of study in the public schools.

3. Further study should be conducted to determine whether public school personnel are informed of their legal rights and responsibilities.

4. Similar studies of the law affecting public school personnel in West Virginia should be conducted at least biannually to ascertain enactments of the Legislature and the Congress, decisions of state and federal courts, and new policies of the West Virginia Board of Education which affect schools and school personnel.

BIBLIOGRAPHY

BIBLIOGRAPHY

Books

Alexander, Kern, Ray Corns, and Walter McCann. Public School Law. St. Paul: West Publishing, 1969.

Alexander, M. David and others, eds. Legal Rights of Teachers and Students. Gainesville, Fla.: Maxwell-King, 1974.

_____, A. P. Johnson, and Houston Conley, eds. Legal Rights of Teachers and Students. Gainesville, Fla.: Maxwell-King, 1973.

Alexander, Ruth, and Kern Alexander. Teachers and Torts. Middletown, Ky.: Maxwell Publishing, n.d.

Auerbach, Carl A., and Samuel Mermin. The Legal Process. Madison, Wis.: Capital Press, 1956.

Bolmeier, Edward C. Teachers' Legal Rights, Restraints and Responsibilities. Cincinnati: W. H. Anderson, 1971.

_____. The School in the Legal Structure. Cincinnati: W. H. Anderson, 1968.

Burt, Lorin A. School Law and the Indiana Teacher. Bloomington, Ind.: Beanblossom Publishers, 1967.

Callahan, James M., ed. Semi-Centennial History of West Virginia. Charleston, W.Va.: Tribune Publishing, 1913.

Cardoza, Benjamin N. The Nature of the Judicial Process. New Haven, Conn.: Yale University Press, 1962.

Cohen, Morris L. Legal Research in a Nutshell. St. Paul: West Publishing, 1971.

Corbin, Arthur Linton. Corbin on Contracts. St. Paul: West Publishing, 1953.

Cubberley, Ellwood P., ed. Readings in the History of Education. Houghton Mifflin, 1920.

Davis, Claude J. and others. West Virginia State and Local Government. Morgantown, W.Va.: West Virginia University, 1963.

DeSloovere, Frederick J. Cases on the Interpretation of Statutes. St. Paul: West Publishing, 1931.

Edwards, Newton. The Courts and the Public Schools. University of Chicago Press, 1971.

Garber, Lee O. and H. Hayes Smith. The Law and the Teacher in Illinois. Danville, Ill.: Interstate Printers and Publishers, 1965.

_____ and Reynolds C. Seitz, eds. The Yearbook of School Law 1971. Topeka: National Organization of Legal Problems of Education, 1971.

Gatti, Daniel J. and Richard D. Gatti. The Teacher and the Law. West Nyack, N.Y.: Parker Publishing, 1972.

Gavit, Bernard C., ed. Blackstone's Commentaries on the Law. Washington, D. C.: Washington Law Book, 1941.

_____. Introduction to the Study of Law. Brookyln: Foundation Press, 1951.

Gauerke, Warren. School Law. New York: Center for Applied Research in Education, 1965.

Gibbons, Neil, Zane McCoy, and Bernard Queen. Law of Free Public Education in West Virginia. Danville, Ill.: Interstate Printers and Publishers, 1978.

Gray, John C. The Nature and Sources of Law. New York: Macmillion, 1938.

Greene, Edward H. Greene's West Virginia School Guide. Cincinnati: W. H. Anderson, 1963.

Hazard, William R. Education and the Law. New York: Free Press, 1971.

Herbert, Alan Patrick. Misleading Cases in the Common Law. London: Methuen, 1928.

Hogan, John C. The Schools, The Courts and the Public Interest. Lexington, Mass.: Lexington Books, 1974.

Holmes, Oliver Wendell, Jr. The Common Law. Boston: Little, Brown, and Company, 1881.

Kallen, J. D. Teachers Rights and Liabilities Under the Law. West Nyack, N.Y.: Parker Publishing, 1972.

Kirp, David L. and Mark G. Yudof. Educational Policy and the Law. Berkeley: McCutchan Publishing, 1974.

Llewellyn, Karl. The Bramble Bush. New York: Oceana Publications, 1951.

Meckley, Richard. Handbook of West Virginia School Law. Morgantown, W.Va.: West Virginia University, 1975.

Morris, A. A. The Constitution and American Education. St. Paul: West Publishing, 1974.

Nolte, M. Chester. How to Survive in Teaching. Chicago: Teach'em, 1978.

_____ and John Philip Linn. School Law for Teachers. Danville, Ill.: Interstate Printers and Publishers, 1964.

Peterson, LeRoy J. and Lee O. Garber, eds. The Yearbook of School Law 1972. Topeka: National Organization on Legal Problems of Education, 1972.

Piele, Philip K., ed. The Yearbook of School Law 1975. Topeka: National Organization on Legal Problems of Education, 1975.

_____, ed. The Yearbook of School Law 1976. Topeka: National Organization on Legal Problems of Education, 1976.

_____, ed. The Yearbook of School Law 1978. Topeka: National Organization on Legal Problems of Education, 1978.

Prosser, William L. Law of Torts. St. Paul: West Publishing, 1971.

Remmlein, Madaline K. and Martha L. Ware. School Law. Danville, Ill.: Interstate Printers and Publishers, 1970.

Reutter, E. Edmund, Jr. and Robert R. Hamilton. The Law of Public Education. Mineloa, N.Y.: Foundation Press, 1976.

Rubin, David. An American Civil Liberties Handbook, The Rights of Teachers. New York: Discus Books-Avon, 1972.

Seavey, Warren A., ed. Ballantines Problems in Law. St. Paul: West Publishing, 1957.

Seitz, Reynolds C. Law and the School Principal. Cincinnati: W. H. Anderson, 1961.

Simpson, Lawrence P. Handbook of the Law on Contracts. St. Paul: West Publishing, 1965.

Simpson, Robert J. Education and the Law in Ohio. Cincinnati: W. H. Anderson, 1968.

Smith, Michael R. Law and the North Carolina Teacher. Danville, Ill.: Interstate Printers and Publishers, 1975.

Shuman, Samuel I. and Norman D. West. American Law. Detroit: Wayne State University Press, 1971.

Vanderbilt, Arthur T., ed. Studying Law. New York: New York University Press, 1955.

Williston, Samuel. A Treatise on the Law of Contracts, ed. W. E. Jaeger. Kisco, N.Y.: Baker, Voorhis and Company, 1957.

Periodicals

13 Illinois Law Review 395 (March, 1919).

33 Temple Law Quarterly 78 (Fall, 1959).

Shannon, Thomas A. "Rodriguez: A Dream Shattered or a Call for Financial Reform?," Phi Delta Kappan, LIV (May, 1973), 589.

Legal Reference Works

Black's Law Dictionary (Rev. 4th Edition, 1968).

74 Am.Jur.2d Torts § 1 (1974).

78 C.J.S. Schools and School Districts § 146 (1952).

Restatement of Contracts § 75 (1932).

Restatement (Second) of Torts §§ 282, -3. (1965).

Restatement (Second) of Torts § 430 (1965).

Bulletins and Reports

National Education Association. Who is Liable for Pupil Injuries. Washington, D.C.: National Education Association, 1963.

State Teachers Retirement Board. Official Rules and Regulations. Charleston, W.Va.: State Teachers Retirement Board, 1978.

_____. West Virginia Teachers Retirement System. Charleston, W.Va.: State Teachers Retirement Board, 1970.

Strayer, George D. A Digest of a Report of a Study of Public Education in the State of West Virginia. Charleston, W.Va.: Jarrett Printing, 1945.

West Virginia Board of Education. Minimum Standards for Licensure of of West Virginia School Personnel. Charleston, W.Va.: West Virginia Board of Education, 1972.

_____. Rights and Responsibilities of Students in West Virginia. Charleston, W.Va.: West Virginia Board of Education, 1975.

_____. School Transportation Regulations. Charleston, W.Va.: West Virginia Board of Education, 1978.

_____. Secondary School Standards for Classification. Charleston, W.Va.: West Virginia Board of Education, 1977.

_____. Standards for the Accrediation of Teacher Preparation Programs in West Virginia. Charleston, W.Va.: West Virginia Board of Education, 1976.

_____. Standards for Classification of Elementary Schools in West Virginia. Charleston, W.Va: West Virginia Board of Education, 1974.

West Virginia Public Employees Insurance Board. State of West Virginia Group Benefits Plan. Charleston, W.Va.: West Virginia Public Employees Insurance Board, 1976.

Unpublished Sources

Alexander, Samuel Kern, Jr. "An Analysis of the Laws Affecting Public School Administrative and Teacher Personnel in Kentucky." Unpublished Doctoral dissertation, Indiana University, 1965.

Barrett, Harvey B. "An analysis of Court Decisions Pertaining to Tort Liability for Student Injuries Sustained in Science Activities in Public School Systems Throughout the United States." Unpublished Doctoral dissertation, Virginia Polytechnic Institute and State University, 1977.

Delon, Floyd G. "Legal Controls on Teacher Conduct." Paper presented at the meeting of the American Association of School Administrators, Atlanta, Ga., February, 1978.

Vacca, Richard S. "Competency Testing: Legal Implications." Paper presented at Seventh Annual Conference Legal and Policy Issues in Education, Blacksburg, Va., October, 1978.

Statutes, Legal Opinions, Policies, and Interpretations

Alabama Code, 52 § 360 (1958).

California Education Code, § 13412-3 (1960).

Code of Virginia, Chapter 160, p. 680 (1860).

New Jersey Stat. Ann., § 18A: 6-10 (1960).

New York Education Law, §§ 30/2.3; 3012.3 (McKinney Supp., 1967).

Ohio Revised Code Ann., § 3319.16 (1960).

Oregon Revised Stat., §§ 342.085 to 342.955 (1971).

United States Code, §§ 20 U.S.C. 1401, 20 U.S.C. 1681-6, 28 U.S.C. 631, 29 U.S.C. 791, 42 U.S.C. 1983, 42 U.S.C. 2000 et. seq.

West Virginia Attorney General Opinions.

37 Op. Att'y Gen. 402 (1938).

39 Op. Att'y Gen. 218 (1942).

44 Op. Att'y Gen. 283 (1951).

45 Op. Att'y Gen. 201 (1953).

45 Op. Att'y Gen. 692 (1954).

46 Op. Att'y Gen. 57 (1954).

51 Op. Att'y Gen. 45 (1964).

51 Op. Att'y Gen. 187 (1965).

51 Op. Att'y Gen. 683 (1966).

51 Op. Att'y Gen. 852 (1966).

52 Op. Att'y Gen. 87 (1966).

52 Op. Att'y Gen. 422 (1967).

Op. Att'y Gen., August 28, 1969.

Op. Att'y Gen., January 17, 1974.

Op. Att'y Gen., June 26, 1974.

Op. Att'y Gen., January 22, 1975.

West Virginia Board of Education. Policies, Rules and Regulations §§ 1340, 2422.1, 2422.1, 2422.12, 2422.91, 2445.41, 2445.43, 5210, 5300, 5610, 5630.

West Virginia Code, Chapters 5, 6, 15, 16, 18, 18A, 21, 21A, 23, 50, 59, 61.

West Virginia State Superintendent of Schools, Interpretations.

"Certification" October 28, 1977 (30).

"Contract" July 11, 1977 (15).

"Contract" November 30, 1977 (35).

"Employee" June 13, 1972 (32).

"Employee" August 21, 1972 (21).

"Employee" February 2, 1973 (30).

"Employee" April 9, 1973 (24).

"Employee" June 11, 1973 (SDE).

"Employee" February 22, 1974 (6).

"Employee" February 25, 1974 (10).

"Employee" April 8, 1974 (6).

"Employee" April 23, 1974 (42).

"Employee" August 31, 1976 (5).

"Employee" August 8, 1977 (5).

"Employee" January 25, 1978 (37).

"Principal" June 16, 1977 (45).

"Principal" July 12, 1977 (005).

"Principal" July 22, 1977 (29).

"Religion" September 16, 1965 (26).

"Salary" December 8, 1971 (13).

"Salary" October 29, 1976 (5).

"Salary" December 20, 1976 (22).

"Teacher" May 2, 1973 (16).

"Teacher" June 14, 1973 (SDE).

TABLE OF CASES

TABLE OF CASES

Brown v. Bathke, 416 F.Supp. 1194 (D.Neb. 1976).

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

Bruebaker v. Board of Education of District 149, Cook Co., 502 F.2d 973 (7th Cir. 1974).

Buckland v. State Compensation Comm., 115 W Va. 323, 125 S.E. 785 (1934).

Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1977).

Carey v. Piphus, 435 U.S. 247 (1978).

City of Kenosha v. Bruno, 412 U.S. 507 (1973).

Cleavenger v. Board of Education, 114 W.Va. 39, 170 S.E. 901 (1933).

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

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

Cochran v. Trussler, 141 W.Va. 130, 89 S.E.2d 306 (1955).

Coffas v. Board of School Directors of Upper Dauphin Area School District, 353 A.2d 898 (Pa. 1976).

Colcord v. Gazette Publishing Co., 106 W.Va. 419, 145 S.E. 751 (1928).

Commissioner of Education v. School Committee of Leyden, 358 Mass. 766, 267 N.E.2d 226 (1971), cert. den. 404 U.S. 849 (1971).

Crabbe v. Northumberland County School Board, 209 Va. 356, 164 S.E.2d 96 (1960).

Cross v. City of Wellsburg, 156 W.Va. 1, 190 S.E.2d 18 (1972).

Decker v. Administrative Council of the United Career Center. West Virginia Human Rights Comm., Docket No. ES36-73 (1976).

Detch v. Board of Education, 145 W.Va. 722, 117 S.E.2d 138 (1960).

DeSpain v. DeKalb County Comm. School District, 384 F.2d 836 (7th Cir. 1967), cert. den. 309 U.S. 906 (1968).

Dill v. State, 87 Tex.Crim. 49, 219 S.W. 481 (1920).

District of Columbia v. Washington, 332 A.2d 347 (1975).

Dodge v. Board of Education of Chicago, 302 U.S. 74 (1937).

Donohue v. Copiague Union Free High School District, No. 77-1122, New York Supreme Court, App. Div., August 31, 1978.

Dooley v. Board of Education, 80 W.Va. 648 (1917).

Drown v. Portsmouth School District, 451 F.2d 1106 (1st Cir. 1971).

Duchesne v. Sugarman, 566 F.2d 817 (2nd Cir. 1977).

East Hartford Education Assoc. v. East Hartford Board of Education, 562 F.2d 838 (2nd Cir. 1977).

Eastman v. Williams, 124 Vt. 445, 207 A.2d 146 (1965).

Ellis v. State Road Commission, 100 W.Va. 531, 131 S.E. 7 (1925).

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

Epeldi v. Engelking, 94 Idaho 339, 488 P.2d 860 (1971), cert. den. 406 U.S. 957 (1972).

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

Everson v. Board of Education, 330 U.S. 1 (1947).

Fairhope Single Tax Corp. v. Melville, 193 Ala. 289, 69 So. 470 (1936).

Fisher v. Snyder, 476 F.2d 375 (8th Cir. 1973).

Fox v. Board of Education, 236 S.E.2d 243 (1977).

Fowler v. Seaton, 394 P.2d 697 (Cal. 1964).

Gaffney v. State Board of Education, 192 Neb. 358, 220 N.W.2d 550 (1974).

Gaines v. Anderson, 421 F.Supp. 337 (Mass. 1976).

General Electric Co. v. Gilbert, 427 U.S. 125 (1976).

Givhan v. Western Line Consolidated School District, 47 U.S.L.W. 4102 (No. 77-1051, January 9, 1979).

Goldberg v. Kelly, 397 U.S. 254 (1970).

Gonzales v. Shanker, 533 F.2d 832 (2nd Cir. 1976).

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

Grannis v. Ordean, 234 U.S. 385 (1914).

Green v. Board of Education, 133 W.Va. 356, 56 S.E.2d 100 (1949).

Griggs v. Duke Power Co., 401 U.S. 430 (1971).

Gullet v. Sparks, 444 S.W.2d 901 (1967).

Hannah v. Larche, 363 U.S. 420 (1960).

Harris v. State Workmen's Compensation Comm. 208 S.E.2d 291 (W.Va. 1974).

Hardwick v. Board of School Trustees of Fruitridge, 54 Cal.App. 696, 205 P. 49 (1921).

Heath v. Johnson, 36 W.Va. 782, 15 S.E. 980 (1892).

Helvering v. Davis, 301 U.S. 619 (1937).

Herald v. Board of Education, 65 W.Va. 765, 65 S.E. 102 (1909).

Hodge v. Stegall, 206 Okl. 1161, 242 P.2d 720 (1952).

Honaker v. Board of Education, 42 W.Va. 170, 24 S.E. 544 (1896).

Horosko v. School District of Mount Pleasant, 335 Pa. 369, 6 A.2d 866 (1939), cert. den. 308 U.S. 553 (1939).

Hortonville Joint School District v. Hortonville Education Association, 426 U.S. 482 (1976).

Hughes v. Board of Education, 154 W.Va. 107, 174 S.E.2d 711 (1970).

Hunt v. Board of Education, 321 F.Supp. 1263 (S.D. W.Va. 1971).

Hutcheson v. Toews, 476 P.2d 84 (Oreg. 1970).

Hutto v. Finney, 437 U.S. 678 (1978).

Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1935).

Ingraham v. Wright, 429 U.S. 975 (1977).

In Re Distribution of Educational Books and Materials, Multi-District Litigation Panel Docket No. 280, Civil Action No. 76-76-F (N.D. W.Va. 1977).

Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1977).

James v. West Virginia Board of Regents, 322 F.Supp. 217 (S.D. W.Va. 1971).

Jameson v. Board of Education, 74 W.Va. 389, 81 S.E. 1126 (1914).

Jarvella v. Willoughby, 233 N.E.2d 143 (1967).

Jenkyns v. Board of Education, 294 F.2d 260 (8th Cir. 1961).

Johnson v. Brown, 13 W.Va. 71 (1878).

Johnson v. Taft School District, 19 Cal.App.2d 405, 65 P.2d 912 (1938).

Johnson v. United Fuel Gas Co., 112 W.Va. 578, 166 S.E. 118 (1932).

Johnson v. United School District Joint School Board, 201 Pa.Super. 375, 191 A.2d 897 (1963).

Kelly v. Johnson, 425 U.S. 238 (1976).

Keyishian v. Board of Regents, 385 U.S. 589 (1967).

Kiern v. McLaughlin, 121 W.Va. 30, 1 S.E.2d 176 (1939).

Kirker v. Moore, 308 F.Supp. 615 (S.D. W.Va. 1970).

Knotts v. Board of Education, 113 W.Va. 56, 166 S.E. 703 (1932).

Kuhn v. Board of Education, 4 W.Va. 499 (1871).

Landi v. West Chester Area School District, 353 A.2d 895 (Pa. 1976).

La Valley v. Stanford, 272 N.Y.App.Div. 183, 70 N.Y.S.2d 1160 (1949).

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

Leonhart v. Board of Education, 114 W.Va. 9, 170 S.E. 418 (1933).

Long v. City of Weirton, 214 S.E.2d 832 (W.Va. 1975).

Lopez v. Aransas County Independent School District, 570 F.2d 541 (5th Cir. 1978).

Luetkemeyer v. Kaufmann, 344 F.Supp. 376 (W.D. Mo. 1973).

McCarthy v. Philadelphia Civil Service Comm., 424 U.S. 645 (1976).

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

McDonald v. School Board of Yankton Independent School District No. 1, 246 N.W.2d 93 (S.D. 1976).

McEnteggart v. Cataldo, 451 F.2d 1109 (1st Cir. 1971), cert. den. 408 U.S. 943 (1972).

McGrath v. Burkhard, 131 Cal.App.2d 367, 280 P.2d 864 (1955).

Mailloux v. Kiley, 448 F.2d 1242 (1st Cir. 1971).

Man v. Matthews, 270 S.W. 586 (Tex. 1954).

Mangold v. Albert Gallatin Area School District, 438 F.2d 1194 (3rd Cir. 1971).

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

Mason County Board of Education v. State Superintendent of Schools, 234 S.E.2d 32 (W.Va. 1977).

Mastrangelo v. West Side Union High School District of Merced County, 2 Cal.2d 540, 42 P.2d 634 (1935).

Meger v. Middletown Board of Education, 86 A.2d 761 (N.J. 1952).

Meyer v. Nebraska, 262 U.S. 390 (1923).

Michaelson v. Turk, 79 W.Va. 31, 90 S.E. 395 (1916).

Mikes v. Baumgartner, 277 Minn. 923, 152 N.W.2d 732 (1967).

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

Miller v. Grissel, 308 N.E.2d 701 (Ind. 1974).

Minarcini v. Strongsville City School District, 541 F.2d 577 (6th Cir. 1976).

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

Mitchell v. McCall, 273 Ala. 604, 143 So.2d 629 (1962).

Mogle v. Sevier County School District, 540 F.2d 478 (10th Cir. 1976).

Monell v. Department of Social Services of the City of New York, 429 U.S. 1071 (1978).

Monroe v. Pape, 365 U.S. 167 (1961).

Morrison v. State Board of Education , 82 Cal.Rptr. 175 (1975).

Mower v. Inhabitants of Leicester, 9 Mass.Rep. 247 (1812).

Mt. Healthy City School District Board of Education v. Doyle, 425 U.S. 933 (1977).

Nashville Gas Co. v. Satty, 429 U.S. 1071 (1977).

National Education Association v. State of South Carolina, 434 U.S. 1026 (1978).

National League of Cities v. Usery, 426 U.S. 833 (1976).

Neal v. Board of Education, 116 W.Va. 435, 181 S.E. 541 (1935).

North v. West Virginia Board of Regents, 233 S.E.2d 411 (W.Va. 1977).

Norwick v. Nyquist, 417 F.Supp. 913 (S.D. N.Y. 1976).

Parducci v. Rutland, 316 F.Supp. 352 (M.D. Ala. 1970).

Parker v.Appalachian Power Co., 126 W.Va. 666, 30 S.E.2d 1 (1944).

Parrish v. Moss, 200 Misc. 375, 106 N.Y.S.2d 527 (1951).

Paster v. Tussey, 512 S.W.2d 97 (Mo. 1974), cert. den. 419 U.S. 1111 (1975).

Pease v. Millcreek Tp. School District, 412 Pa. 378, 195 A.2d 104 (1963).

Pennsylvania Lightning Rod Co. v. Board of Education, 20 W.Va. 360 (1882).

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

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

Pettit v. State Board of Education, 513 P.2d 889 (1973).

Pickering v. Board of Education, 391 U.S. 563 (1968).

Pierce v. Society of Sisters, 268 U.S. 510 (1925).

Pitcher v. Iberia Parish School Board, 280 So.2d 603 (La. 1973).

Pond v. Parsons, 117 W.Va. 777, 188 S.E. 232 (1943).

Porter v. Eyster, 294 F.2d 613 (4th Cir. 1961).

Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977).

Raymond v. Paradise Unified School District, 31 Cal.Rpt. 847 (1962).

Rhodes v. Board of Education, 95 W.Va. 57, 120 S.E. 183 (1923).

Rolando v. School Directors of District No. 125, 358 N.E.2d 945 (Ill. 1976).

Romeo Community Schools v. HEW, 438 F.Supp. 1021 (E.D. Mich. 1977).

Roth v. Board of Regents, 408 U.S. 564 (1972).

Rowan v. Board of Education, 125 W.Va. 406, 24 S.E.2d 583 (1943).

Russell v. Men of Devonshire, 2 Term Rep. 671, 100 Eng.Rep. 359 (1788).

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

School District No. 8, Pinal County v. Superior Court, 433 P.2d 28 (1947).

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

Schott v. Board of Education, 156 N.E.2d 1 (Ill. 1951).

Segerman v. Jones, 256 Md. 109, 259 A.2d 794 (1969).

Shumate v. Board of Education, 478 F.2d 233 (4th Cir. 1973).

Sigmon v. Poe, 564 F.2d 1093 (4th Cir. 1977).

Skavenski v. Pendleton County Board of Education, Appeal Decision of State Superintendent of Schools, July 27, 1977.

Smith v. Logan County Board of Education, West Virginia Human Rights Commission, Docket No. ER 33-73 (1978).

Smith v. Siders, 183 S.E.2d 433 (W.Va. 1971).

Spano v. School District of Borough of Brentwood, 12 Pa.Cmwlth. 1701, 316 A.2d 657 (1974).

Sorenson v. School District No. 28, 418 P.2d 1004 (Wyo. 1966).

State v. Aler, 39 W.Va. 549, 20 S.E. 585 (1894).

State v. Board of Education of the City of St. Louis, 206 S.W.2d 566 (1947).

State v. Burleigh Co., 19 N.D. 819, 124 N.W. 417 (1923).

State v. Conley, 118 W.Va. 508, 190 S.E. 908 (1937).

State v. Ingram, 237 N.C. 197, 74 S.E.2d 532 (1953).

State v. McDonie, 80 W.Va. 185, 109 S.E. 710 (1921).

State v. Wassick, 191 S.E.2d 283 (W.Va. 1972).

State ex rel. Campe v. Board of Education,94 W.Va. 408, 118 S.E. 877 (1923).

State ex rel. Hopkins v. Wooster, 111 Kan. 830, 208 P. 656 (1922).

State ex rel. Lambe v. Cunningham, 83 Wis. 90, 53 N.W. 35 (1889).

State ex rel. Linger v. Board of Education 152 W.Va. 379, 163 S.E.2d 790 (1968).

State ex rel. Board of Education v. Martin, 112 W.Va. 174, 163 S.E. 850 (1932).

State ex rel. Payne v. Board of Education, 135 W.Va. 349, 63 S.E.2d 579 (1951).

State ex rel. Rhodes v. Board of Education, 95 W.Va. 57, 120 S.E. 183 (1925).

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

Staton v. Mayes, 552 F.2d 908 (10th Cir. 1977).

Stein v. Oshinsky, 348 F.2d 999 (2nd Cir. 1965).

Stehn v. Bernan McFaddin Foundation, Inc., 434 F.2d 811 (6th Cir. 1970).

Sterzing v. Fort Bend Independent School District, 496 F.2d 92 (5th Cir. 1974).

Stone v. Fritts, 169 Ind. 361, 82 N.E. 792 (1907).

Tardif v. Quinn, 545 F.2d 761 (1st Cir. 1976).

Tawney v. Board of Education, 426 F.Supp. 528 (S.D. W.Va. 1977).

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

Titus v. Lindberg, 49 N.J. 66, 278 A.2d 65 (1967).

United States v. Butler, 297 U.S. 1 (1936).

United States v. Johnson, 319 U.S. 302 (1943).

Vandevender v. Cassell, 208 S.E.2d 436 (W.Va. 1974).

Walter v. Ritchie, 191 S.E.2d 275 (W.Va. 1972).

Ward v. County Court of Raleigh County, 141 W.Va. 730, 955 S.E.2d 44 (1956).

Washington v. Baltimore and Ohio R. Co., 17 W.Va. 90 (1880).

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

Wardwell v. Board of Education of the City School District of Cincinnati, 529 F.2d 625 (6th Cir. 1976).

Weaver v. Board of Education, 128 W.Va. 42, 35 S.E.2d 679 (1945).

Weisman v. Board of Education of Jefferson City School District, 547 P.2d 1267 (Colo. 1976).

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

Western Line Consolidated School District v. Givhan, 555 F.2d 1309 (5th Cir. 1977).

White v. Board of Education, 117 W.Va. 114, 184 S.E. 264 (1936).

Williams v. Board of Education, 388 F.Supp. 93 (S.D. W.Va. 1975).

Williams v. School District No. 40, 4 Ariz.App. 5 (1908).

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

Withrow v. Larkin, 421 U.S. 35 (1975).

Wolman v. Walter, 433 U.S. 229 (1977).

Woodford v. Glenville State College Housing Corp., 225 S.E.2d 671 (W.Va. 1976).

Woods v. Reilly, 147 Tex. 586, 218 S.W.2d 437 (1949).

Wood v. Strickland, 420 U.S. 308 (1975).

Wysong v. Walden, 120 W.Va. 122, 52 S.E.2d 392 (1938).

Zanky v. Hyde, 208 Mich. 96, 175 N.W. 261 (1919).

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

APPENDIX

SERVICE AND AUXILIARY PERSONNEL CLASS TITLES AND JOB DESCRIPTIONS

SERVICE AND AUXILIARY PERSONNEL
CLASS TITLES AND JOB DESCRIPTIONS
(W.Va. Code 18A-4-8)

Accountant I: Personnel employed to maintain payroll records and reports and perform one or more operations relating to a phase of the total payroll.

Accountant II: Personnel employed to maintain accounting records and to be responsible for the accounting process associated with billing, budgets, purchasing, and related operations.

Accountant III: Personnel who are employed in the county board of education office to manage and supervise accounts payable and/or payroll procedures.

Aide I: Auxiliary personnel as defined in section one, article one, chapter eighteen of the West Virginia Code. (Personnel selected and trained for teacher aide, monitor aide, clerical aide, classroom aide, or general aide positions.)

Aide II: Auxiliary personnel as defined under Aide I who have completed a training program approved by the State Board of Education, or who hold a high school diploma or who have received a general educational development certificate.

Aide III: Auxiliary personnel who hold a high school diploma or a general development certificate, and who have completed six semester hours of college credit at a higher educational institution.

Audiovisual technician: Personnel employed to perform minor maintenance on audiovisual equipment, films, supplies, and the filling of requests for equipment.

Bus operator: Personnel employed to operate school buses and other school transportation vehicles as provided by the State Board of Education.

Buyer: Personnel employed to review and write specifications, negotiate purchase bids, and recommend purchase agreements for materials and services that meet predetermined specifications at the lowest available costs.

Cabinetmaker: Personnel employed to construct cabinets, tables, bookcases and other furniture.

Cafeteria manager: Personnel employed to direct the operation of a food services program in a school, including assigning duties to employees, approving requisitions for supplies and repairs, keeping inventories, inspecting areas to maintain high standards of sanitation, preparing financial reports and keeping records pertinent to food services of a school.

Carpenter I: Personnel classified as a carpenter's helper.

Carpenter II: Personnel classified as a journeyman carpenter.

Chief mechanic: Personnel employed to be responsible for directing activities which ensure that student transportation or other board-owned vehicles are properly and safely maintained.

Clerk I: Personnel employed to perform clerical tasks.

Clerk II: Personnel employed to perform general clerical tasks, prepare reports and tabulations, and operate office machines.

Computer Operator: Qualified personnel employed to operate computers.

Cook I: Personnel employed as a cook's helper.

Cook II: Personnel employed to interpret menus, to prepare and serve meals in a food service program of a school and shall include personnel who have been employed as a "Cook I" for a period of four years, if such personnel have not been elevated to this classfication within that period of time.

Cook III: Personnel employed to prepare and serve meals, make reports, prepare requisitions for supplies, order equipment and repairs for a food service program of a school system.

Crew leader: Personnel employed to organize the work for a crew of maintenance employees to carry out assigned projects.

Custodian I: Personnel employed to keep buildings clean and free of refuse.

Custodian II: Personnel employed as a watchman or groundsman.

Custodian III: Personnel employed to keep buildings clean and free of refuse, to operate the heating or cooling systems and to make minor repairs.

Custodian IV: Personnel employed as head custodians. In addition to providing services as defined in "Custodian III," their duties may include supervising other custodian personnel.

Director or coordinator of services: Personnel not defined as professional personnel or professional educators who are assigned to direct a department or division.

Draftsman: Personnel employed to plan, design, and produce detailed architectural/engineering drawings.

Electrician I: Personnel employed as an apprentice electrician helper or who holds an electrician helper license issued by the state fire marshal.

Electrician II: Personnel employed as an electrician journeyman or who holds a journeyman electrician license issued by the state fire marshal.

Electronic technician I: Personnel employed at the apprentice level to repair and maintain electronic equipment.

Electronic technician II: Personnel employed at the journeyman level to repair and maintain electronic equipment.

Executive secretary: Personnel employed as the county school superintendent's secretary or as a secretary who is assigned to a position characterized by significant administrative duties.

Food services supervisor: Qualified personnel not defined as professional personnel or professional educators employed to manage and supervise a county school system's food service program. The duties would include preparing in-service training programs for cooks and food service employees, instructing personnel in the areas of quantity cooking with economy and efficiency, and keeping aggregate records and reports.

Foremen: Skilled persons employed for supervision of personnel who work in the areas of repair and maintenance of school property and equipment.

General maintenance: Personnel employed as helpers to skilled maintenance employees and to perform minor repairs to equipment and buildings of a county school system.

Glazier: Personnel employed to replace glass or other material in windows and doors and to do minor carpentry tasks.

Graphic artist: Personnel employed to prepare graphic illustrations.

Groundsmen: Personnel employed to perform duties that relate to the appearance, repair and general care of school grounds in a county school system. Additional assignments may include the operation of a small heating plant and routine cleaning duties in buildings.

Handyman: Personnel employed to perform routine manual tasks in any operation of the county school system.

Heating and air conditioning mechanic I: Personnel employed at the apprentice level to install, repair, and maintain heating and air conditioning plants and related electrical equipment.

Heating and air conditioning mechanic II: Personnel employed at the journeyman level to install, repair, and maintain heating and air conditioning plants and related electrical equipment.

Heavy equipment operator: Personnel employed to operate heavy equipment.

Inventory supervisor: Personnel who are employed to supervise or maintain operations in the receipt, storage, inventory, and issuance of materials and supplies.

Keypunch operator: Qualified personnel employed to operate keypunch machines or verifying machines.

Locksmith: Personnel employed to repair and maintain locks and safes.

Lubrication man: Personnel employed to lubricate and service gasoline or diesel-powered equipment of a county school system.

Machinist: Personnel employed to perform machinist tasks which include the ability to operate a lathe, planer, shaper, threading machine, and wheel press. Such personnel should have ability to work from blueprints and drawings.

Maintenance clerk: Personnel employed to maintain and control a stocking facility to keep adequate tools and supplies on hand for daily withdrawal for all school maintenance crafts.

Mason: Personnel employed to perform tasks connected with brick and block laying and carpentry tasks related to such laying.

Mechanic: Personnel employed who can independently perform skilled duties in the maintenance and repair of automobiles, school buses, and other mechanical and mobile equipment in use in a county school system.

Mechanic assistant: Personnel employed as a mechanic apprentice and helper.

Office equipment repairman I: Personnel employed as an office equipment repairman apprentice or helper.

Office equipment repairman II: Personnel responsible for servicing and repairing all office machines and equipment. Such personnel shall be responsible for parts being purchased necessary for the proper operation of a program of continuous maintenance and repair.

Painter: Personnel employed to perform duties of painting, finishing, and decorating of wood, metal, and concrete surfaces of buildings, other structures, equipment, machinery, and furnishings of a county school system.

Plumber I: Personnel employed as an apprentice plumber and helper.

Plumber II: Personnel employed as a journeyman plumber.

Printing operator: Personnel employed to operate duplication equipment, and as required, to cut, collate, staple, bind, and shelve materials.

Printing supervisor: Personnel employed to supervise the operation of a print shop.

Programmer: Personnel employed to design and prepare programs for computer operation.

Roofing/sheet metal mechanic: Personnel employed to install, repair, fabricate, and maintain roofs, gutters, flashing, and duct work for heating and ventilation.

School bus supervisor: Qualified personnel employed to assist in selecting school bus operators and routing and scheduling of school buses, operate a bus when needed, relay instructions to bus operators, plan emergency routing of buses and promoting good relationships with parents, pupils, bus operators, and other employees.

Secretary I: Personnel employed to transcribe from notes or mechanic equipment, receive callers, perform clerical tasks, prepare reports, and operate office machines.

Secretary II: Personnel employed as school, office, or program secretaries to perform general clerical tasks, transcribe, prepare reports, receive callers and refer them to proper persons, operate office machines, keep records, and handle routine correspondence.

Secretary III: Personnel assigned to the county board of education office administrators in charge of various instructional, maintenance, transportation, food services, operations, and health departments, federal programs, or departments with particular responsibilities of purchasing and financial control.

Supervisor of maintenance: Skilled personnel not defined as professional personnel or professional educators responsible for directing the upkeep of buildings and shops, issuing instructions to subordinates related to cleaning, repairs, and maintenance of all structures, mechanical and electrical equipment of a board of education.

Supervisor of transportation: Qualified personnel employed to direct school transportation activities, properly and safely, and to supervise the maintenance and repair of vehicles, buses, and other mechanical and mobile equipment used by the county school system.

Switchboard operator-receptionist: Personnel employed to refer incoming calls, to assume contact with the public, to direct and to give instructions as necessary, to operate switchboard equipment and to provide clerical assistance.

Truck driver: Personnel employed to operate light or heavy-duty gasoline and diesel-powered vehicles.

Warehouse clerk: Personnel employed to be responsible for receiving, storing, packing and shipping goods.

Watchman: Personnel employed to protect school property against damage or theft. Additional assignments may include operation of a small heating plant and routine cleaning duties.

Welder: Personnel employed to provide acetylene or electric welding services for a school system.

GLOSSARY OF TERMS

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Certiorari: (To be more fully informed) An original writ or action whereby a cause is removed from an inferior to a superior court for trial.

Defendant: The person required to make answer in a suit; the party against whom relief or recovery is sought.

Habeas corpus: The name of a variety of writs having as their object to bring a party before a court or judge.

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.

In loco parentis: In the place of a parent; charged with some of the parents' rights, duties, and responsibilities.

Mandamus: A command from a court of law directed to an inferior court, officer, corporate body, or person requiring him or them to do some particular thing.

Plaintiff: A person who brings an action; he who sues by filing a complaint.

Prima facie: At first sight; prima facie evidence will prevail unless disproved by some evidence to the contrary.

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AN ANALYSIS OF THE LAWS AFFECTING PUBLIC SCHOOL ADMINISTRATORS, TEACHERS, SERVICE, AND AUXILIARY PERSONNEL IN WEST VIRGINIA

by

William Thomas McNeel

(ABSTRACT)

The purpose of this study was to examine provisions of the Constitution of West Virginia, enactments of the West Virginia Legislature, decisions of the West Virginia Supreme Court of Appeals, policies of the West Virginia Board of Education, opinions of the Attorney General, and interpretations of the State Superintendent of Schools to ascertain the legal status of West Virginia public school personnel in the employment process, in liability cases arising from tort actions, and in other areas where legal questions often arise. Federal Constitutional provisions, statutes, and court cases were also considered when of overriding importance or when West Virginia legal references were inadequate.

Legal research of the process of employment of public school personnel focused on the following areas: nomination for employment, discrimination, substantive and procedural due process, certification, probationary and continuing contracts, assignment and transfer, suspension and dismissal, resignations, employment term, and compensation.

Tort cases were classified by the author as either traditional or constitutional torts. Traditional torts reviewed included strict liability, assault and/or battery, defamation, and negligence. Of particular concern were assault and battery cases related to corporal punishment, the use of qualified privilege as a defense in defamation cases, and negligence cases alleging abridgement of the duty of school personnel to provide proper supervision, proper instruction in performing dangerous activities, and proper maintenance of equipment. Tort actions arising from abridgement of a person's constitutional rights by state or governmental authorities were classified as constitutional torts. It was found that successful plaintiffs have been able to secure injunctive relief as well as damages from school officials and boards of education, both now considered "persons" under Section 1983 of the Civil Rights Act of 1871.

Other legal provisions studied in relationship to West Virginia public school personnel included the following: curriculum and instructional matters, academic freedom, assignment of duties, personal leave and leaves of absence, fringe benefits, retirement, grievances, employee organizations, and collective bargaining.