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Case Summaries of Recent Education Decisions

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Primary and Secondary Education

Universities and Other Institutions of Higher Education

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Governing Boards

Action to reapportion school district in accordance with 15th amendment. Plaintiff's had successfully obtained a court order requiring submission of reapportionment plans for the 18 member school board in accordance with the one man one vote mandate. Plans were submitted by majority and minority factions of the school board and by the plaintiffs. All Plans retained 18 members on the board. A state statute authorized a school board of 5 to 15 members unless a larger board had previously existed. *Held:* None of the plans were acceptable. Both of the school board plans were incomplete. The plaintiff's plan was complete but marred by inaccuracies and on its face violated the one man one vote mandate. The court drew up its own plan based on a nine member

* This section contains digests of the significant cases in education reported in the National Reporter System in advance sheets dated from July 1, 1973 to June 30, 1974.

board and imposed it on the school district. *Bradass v. Rapides Parish Police Jury*, 376 F. Supp. 690 (W.D. La. 1974).

Action to declare school board reapportionment plan unconstitutional under one man one vote doctrine. The school board had adopted a plan which replaced the nine member board with a 15 member board and which provided that the nine present members would serve out their present terms on the new boards. Plaintiffs contended that substantial deviations from numerical equality among the districts made the plan unconstitutional. Plaintiffs appealed. *Held:* For plaintiffs. The deviation was found to be over 37% and clearly unacceptable. The provision that the present board members serve out their terms was also unacceptable as they had been elected from districts having a deviation of 100%. *Panoir v. Iberville Parish Sch. Bd.* 498 F.2d 1232 (5th Cir. 1974).

Action to have statute providing for the composition of the state board of education and prescribing qualifications for members declared unconstitutional. Members were to be appointed by the governor with the approval of the senate. Eight members were to be appointed from one judicial district, two members from each of the other judicial districts, and one member be selected at large. Plaintiffs contended that this violated the constitutional requirement that members be chosen regionally. The act also provided that no person "gainfully employed or administratively connected with" any school or college was eligible for appointment. Plaintiffs contended that this provision denied them equal protection, was vague, and conflicted with the mandate the teachers be chosen for their knowledge and experience in education. *Held:* For the state. A system of regional representation is not required to contain equal geographical representation, but may be weighted by population. No voting rights are involved so the equal protection test is that of reasonableness. The membership restriction is reasonably related to the purpose of reducing conflicts of interest. *Hoskins v. Walker*, 315 N.E.2d 25 (Ill. 1974).

Administration

Action to restore state school funds struck from the budget by the governor. After the Legislature had passed the appropriations bill, it sent the bill to the governor and adjourned. The governor then altered many of the appropriations reducing some to zero. Among these was the school budget which was reduced from 167 million to 0. The governor contended that his acts were justified by his power to disapprove or reduce items contained in the budget bill. *Held:* For the schools. The constitutional mandate that the legislature shall provide for free public schools was seen as putting the school budget beyond the governor's power to eliminate. While he could reduce the school budget his attempt to eliminate the school budget was ultra vires. The school budget and most of the other items were ordered restored to the bill. *State v. Blankenship*, 207 S.E. 2d 421 (W.Va. 1973).

Action by the Secretary of Labor alleging violation of the Equal Pay Act in the setting of wages for female custodial employees by a school board. This case re-

solved one of twenty two actions brought by the Secretary in which it was alleged that the various boards violated the Equal Pay Act by paying female custodial employees less than males for equal work on jobs which required equal skill, effort and responsibility and which were performed under similar working conditions. *Held:* For the Secretary. While some of the men performed additional tasks not performed by women such as grass cutting, carrying trash, making minor repairs, etc., not all of the men did so and all men were paid more than women regardless of the actual duties. It was noted that on occasion women had performed most of these duties without extra pay. Further these extra duties were performed only occasionally, and incidental or occasional tasks cannot justify a pay differential. The fact that men and women normally worked in different areas was of no consequence when both were expected to clean the same total area. The board could raise the defense that it had relied on state civil service classifications since any state law inconsistent with the Equal Pay Act was superseded by it, and, on close examination, that defense was not supported by the evidence. The board was ordered to pay each maid the difference between the salary actually received and that which would have been paid to a male of equal seniority for the full period of their employment after December 2, 1969. *Brennan v. Board of Educ., Jersey City,* 374 F. Supp. 817 (D.N.J. 1974).

Action to enjoin inclusion of an invocation and benediction in High School graduation ceremonies. Plaintiff's contended that such a benediction violated both the free exercise and establishment clauses of the first amendment. *Held:* For the school board. The graduation ceremony was not a required school function and attendance was voluntary. The plaintiff's failed to show any coercive effect on their practice of religion and thus failed to show a free exercise infringement. Turning to the establishment question the court noted dicta in *Zorach v. Clauson,* 343 U.S. 306 to the effect that not every technical infringement on that clause need be enjoined. The court held that the practice in question was a "permissible accommodation between church and state." *Wiest v. Mt. Lebanon Sch. Dist.,* 320 A.2d 362 (Pa. 1974).

Action to enjoin the holding of a high school graduation in a church. The senior class had been given the responsibility to conduct their graduation, at which attendance was voluntary, and they chose over the objections of a few students to hold it in a Catholic church. When suit was brought by dissenting students to enjoin the board from holding the graduation in the church, the board argued that it was not their responsibility, that only a few students objected and that attendance was voluntary. *Held:* For the students. Graduation is a school function and any state activity which creates religious tension between public school students violates both the first amendment and the traditional purposes of the public schools. School administrators cannot allow a school function to be performed in an unconstitutional manner by a nongovernmental body to which it has been delegated. The voluntary nature of the ceremony was immaterial because an objecting student was put in the cruel situation of

choosing between following the dictates of his conscience or participating in an important event in his life. *Lemke v. Black,* 376 F. Supp. 87 (E.D. Wisc. 1974).

Action challenging state expenditures for education in private schools. Three individual and four organizational plaintiffs brought suit to have a statute providing educational materials and services to private schools declared unconstitutional under the establishment and free exercise clauses of the first amendment. Under the statute, the state intermediate school district was to supply the same services and materials to the students and private schools as were provided for the public schools. The services included guidance counseling remedial and therapeutic services and others which were to be rendered, not as part of the instructional program, but individually as needed. The materials included textbooks which were to be supplied to the children, and instructional materials and equipment not suited for individual use which were to be supplied to the schools. All such materials were to be secular in nature and approved for use in the public schools. The act applied only to schools certified under the state's mandatory attendance program and was intended to further the state policy that all children be educated for functional adult citizenship.

Held: For the state in part. The organizational plaintiffs were seen by their nature to have no standing to raise the free exercise clause. The objections of the individual plaintiffs were seen to be political rather than religious in nature and they were denied standing. All plaintiffs had standing under the establishment clause. The court applied the test from *Lemon v. Kurtzman,* 403 U.S. 602 (1971). Plaintiffs conceded that the statute had a legitimate secular purpose. After analyzing the cases decided under the primary effect test the court concluded that aid to education does not have the primary effect of advancing religion if it is clearly identifiable as nonreligious in nature or if its use is effectively restricted to secular activities. All of the services and materials were seen to pass this test except movie projectors and other equipment which could be used with religious films and material. The excessive entanglement test was seen to be satisfied if, from the nature of the services or materials, it would not be necessary for the government to become involved in the internal operations of the school to ensure that only a secular use was made of them. The court saw no evidence that the presence of the therapists in the schools would involve them in the schools' religious mission or require any greater supervision than in the public schools. The secular materials were seen to be "self-policing" except for some equipment. The dissenting opinion was as thorough and scholarly as the majority opinion. *Meek v. Pittinger,* 374 F. Supp. 639 (E.D. Pa. 1974).

Action challenging constitutionality of statute providing for textbook loans to pupils attending non-public schools. The statute provided that each school district should purchase and loan free to pupils all needed textbooks regardless of school attended. "School" was defined as any "elementary or secondary school, public or non-public, non-profit" in which a resident could fulfill the state compulsory school attendance requirements. It was argued that the act violated the state constitutional prohibitions against establishment of religion and use

of public funds for non-public purposes. *Held:* The act violated the state constitution. The state constitutional provisions concerning the separation of church and state are more restrictive than the establishment clause of the Federal Constitution. The provision of textbooks to students in church run schools is aid to those schools and violates the constitutional mandate that no public moneys may be used in aid of any religious purpose. *Paster v. Tussey,* 512 S.W.2d 97 (Mo. 1974).

Action to have state textbook loan program declared constitutional. The legislature passed an act empowering local school boards to purchase textbooks to be loaned to children at private schools. Plaintiffs requested a loan of textbooks to their children which was refused because of the dubious constitutionality of the act. *Held:* The act was unconstitutional. Although the books went to the children the purpose of the act was to aid the private schools. The state constitution clearly prohibited the use of public funds to aid nonpublic schools in any way, shape or form. *Gaffney v. State Dept. of Educ.,* 220 N.W.2d 550 (Neb. 1974).

Action by state attorney general to compel the secretary of the state department of administration to release funds needed for a state program in which handicapped students were enrolled in private educational services. The secretary contended the statute establishing the program was unconstitutional as violative of state and federal constitutional provisions. The purpose of the statute was to ensure that each child with exceptional educational needs would receive at public expense an education suited to his needs. The act provided that, if a child's needs could not be met by any public agency of the state or of another state, the school district could contract with a private educational service in order to meet those needs. Such action must be approved by the state superintendent of education who was to ensure that such was one "whose governing board, faculty, student body and teachings are not chosen or determined by any religious organization or for any sectarian purpose. *Held:* The act was constitutional. The three pronged test of *Lemon V. Kurtzman* was applied. The act was obviously secular. The screening required by the superintendent would ensure that no aid went to a pervasively sectarian service thus preventing the act from having a primary effect of advancing religion. Such initial screening was seen to preclude the need for continued state surveillance, and therefore no excessive state entanglement with religious organizations was involved. For similar reasons the act did not violate the state constitution. *State v. Nusbaum,* 219 N.W.2d 577 (Wis. 1974).

Action on behalf of handicapped child for expenses of special education in private school. The child had been placed in a private school as there were no public facilities available and her tuition and expenses had been paid by various county and state agencies. When her parents moved out of the state a dispute arose as to which agencies were then responsible for her tuition and maintenance expenses. The threshhold question of whether she had a right to a free education was raised. *Held:* For the child. Failure to provide a free education

for handicapped children violated state constitutional requirement that free public schools be open to all children and another constitutional provision that no class of citizens shall be granted any privilege not granted to all. (The court noted that handicapped persons who had been denied education in the past might have a claim to compensatory educational effort.) It was observed that the same result might be achieved under the Federal Constitution because of the potential total deprivation of education. The question of which agency should pay was decided on the basis of residency prior to location in the private school. *In interest of G.H.,* 218 N.W.2d 441 (N.D. 1974).

Action for state maintenance of handicapped child placed in special educational institution. The state conceded that the child's handicap was such that he could not be educated in the public school and that the state was bound to pay his tuition in a private school. The state contended that the support of the child was primarily a parental responsibility and that the parents, should they be able, pay for their childs room and board at the private school. The parents raised equal protection arguments. *Held:* For the state. While the cost of education of the children had been placed on the community, the basic obligation for support remains with the parents, subject to special considerations for blind and deaf children. The legislative determination that blind and deaf children should get maintenance while children with other handicaps should not was seen as reasonably within the legislative discretion. In a postscript the judge pointed out that a recent appellate court decision, *Matter of Daire,* 355 N.Y.S.2d 399, was consistent with his opinion. *In Re Logel,* 356 N.Y.S.2d 775 (Fam. Ct. 1974).

Action by parent of handicapped child to secure payment of educational expenses. The child qualified for special educational services at public expense, but the family court judge ruled that payment should not be made because the parent had not applied for payment until a year after the expenses were incurred. *Held:* For the parent. The public policy that handicapped children be educated free took precedence over any inconvenience to the state caused by a late application. Furthermore, the state had lost plaintiff's prior, timely application. *In re Vlado,* 358 N.Y.S.2d 72 (App. Div. 1974).

Action to compel provision of free textbooks to indigent high school students. The plaintiffs contended that the Arizona Constitution gave children a right to a free high school education which included the provision of textbooks, and, alternatively, that the failure to provide free textbooks to indigents denied the equal protection of the law. *Held:* For the school district. The constitutional mandate that common school education was to be provided free was construed to apply to grades one through eight. The constitutional provision that instruction in other schools "shall be as nearly free as possible" does not compel the furnishing of free textbooks. As education is not a fundamental right and wealth is not a suspect classification, the equal protection test of the reasonableness was applicable. The court concluded that the framers of the constitution felt that a free common school education was all that was necessary for informed

electoral choice and that any legislative discretion not to provide free education above that minimum was per se reasonable. *Carpio v. Tucson High Sch. Dist. No. 1 of Pima Cty.*, 524 P.2d 948 (Ariz. 1974).

Class action to have textbook rental policy declared unconstitutional. The class was composed of all those who assertedly could not afford the textbook rental fees. It was contended that the Indiana Constitution's provision commanding the general assembly to "provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all" prohibited any charge being made for any textbooks and other necessary items. The trial court found that rental could be charged, but that the schools could take no action against any student who could not afford books. On appeal the school stipulated that it had ceased applying any such sanctions, and the issue of whether free textbooks must be provided was squarely presented. *Held:* For the schools. After a review of judicial interpretations of similar state constitutional provisions the court found that neither the term "common schools" nor "tuition" necessarily included free textbooks. That the rental policy was one of long established useage was seen as creating a presumption of constitutionality which plaintiffs had not overcome. *Chandler v. South Bend Community Sch. Corp.*, 312 N.E.2d 915 (Ia. Ct. App. 1974).

Action to dismiss claim that school fees violated state and federal constitutional provisions. It was alleged that certain class and activities fees charged by the public schools violated the equal protection of indigent students causing them frustration and humiliation. The defendant school board moved for dismissal contending that there were adequate state administrative and judicial remedies which plaintiffs had failed to pursue, and that the federal court should abstain because of unsettled questions of state law. *Held:* For plaintiffs. While there is no requirement to seek state judicial relief before resorting to the federal courts, the Supreme Court has never said that the pursuit of state administrative remedies may not be a prerequisite to a §1983 action where future deprivations of rights are concerned. However, in this case the state administrative avenues did not provide adequate relief, so there was no requirement of exhaustion. Abstention was not proper as no resolution of unsettled state law could meet the constitutional claims. *Canton v. Spokane Sch. Dist. #81*, 498 F.2d 840 (9th Cir. 1974).

Action by teachers to compel the school district to continue issuing a single contract covering both curricular and extra-curricular activities. The district proposed to change its policy of issuing one contract covering both types of activities to that of issuing one contract for curricular work and pay and a supplemental contract for extra-curricular work and pay. Under the new system only the basic curricular contract was to be subject to the state continuing contract law. Plaintiff teachers maintained that the continuing contract law gave them a vested interest in their old single contracts covering both forms of activity. *Held:* For the school district. A teachers right to hold special assignments is in no way vested. Such assignments are not part of the required curriculum,

require no certification, and are not directly related to their primary assignment. As they are not protectable under the continuing contract law, they may be contracted for separately. *Kirk v. Miller,* 522 P.2d 843 (Wash. 1974).

Action by citizens to void school board's selection of a school site. Plaintiffs contended the selection was void because the board had unlawfully delegated the selection to an agent, had held secret selection meetings in violation of the open meeting law, and had prevented plaintiffs from being heard in public meetings and from attending private meetings. The school board maintained that it had made its selection at public meetings, that it had not prevented people from being heard except by restraining disorderly demonstrations, and that selection of school sites could properly be made at private meetings. *Held:* For the school district. There was no evidence to support the alleged delegation. While private meetings had been held, the preliminary and final decisions had been made in public. As there were no allegations of abuse of discretion the decision was allowed to stand. *Eggiman v. Wake Cty. Bd. of Educ.,* 206 S.E.2d 754 (N.C. Ct. App. 1974).

Labor Relations

Action by educators association to enjoin school board's refusal to bargain in good faith. The school board was dissatisfied with the prior year's negotiations and refused to bargain unless the teachers association agreed to a set of ground rules to control the bargaining. The teachers association was willing to accept most of these but balked at a provision requiring the association to present all its demands at the initial meeting. The association maintained that this was an unlawful condition precedent to their statutory right to bargain collectively and complained that it would prevent them from pursuing new issues which might arise during the course of negotiations. The board contended that it was necessary for it to know the full range of demands in order for it to bargain realistically within the limits of its tax resources. The board also argued that mandamus rather than injunction was the associations proper remedy. *Held:* For the board. The statute made it mandatory for one party to begin good faith negotiations upon the request of the other. Mandamus is the proper remedy to enforce performance of a ministerial duty which does not involve discretion. The court has no jurisdiction to achieve this purpose through injunction. *Capital Educators Association v. Camper,* 320 A.2d 782 (Del. Ct. Chanc. 1974).

Action by school board appealing decision that staff size was a term and condition of employment subject to negotiation. Held: For the teachers association. In a memorandum decision the court upheld the lower courts determination that staff size was negotiable. A dissenter argued that staff size, like class size was a basic element of educational policy and that arbitration of the dispute should be stayed because of a school board had no power to contract away its duty to determine staff size. *Susquehanna Valley Central Sch. Dist. v. Susquehanna Valley Teachers Ass'n.,* 358 N.Y.S.2d 235 (App. Div. 1974).

Action by school board to enjoin teachers association from arbitration. The association sought to arbitrate a grievance on behalf of six departmental chairmen who in the past had been exempt from home room duty. The school board eliminated the five minute homeroom period and assigned the functions to first period teachers. Since the departmental chairmen taught first period classes the association contended that the action changed the terms and conditions of their employment and was thus an arbitrable item. The school board maintained that the class schedule was a matter of educational policy which was not arbitrable. *Held:* For the association. The change in schedule itself was not the issue, but the new duties of the departmental heads under the schedule. These new duties were subject to arbitration. *Board of Educ. of West Orange v. West Orange Educ. Ass'n.,* 319 A.2d 776 (N.J. Super. Ct. 1974).

Action by school board to vacate an arbitrator's interim award. The arbitrator determined that the board had violated the collective bargaining agreement by consolidating three supervisory positions. The board contended that it had no authority to enter into a collective bargaining agreement guaranteeing that it would maintain certain positions. The association contended that appeal before the arbitrator's final order was improper. *Held:* For the association. Review was proper because the question of legality was a threshold question for the courts, and because the interim award was determinative of the controversy. However, the intent of the statute authorizing collective bargaining was that all terms and conditions of employment would be within the scope of collective bargaining agreements unless specifically excluded by statute. There was no statute which precluded a school board from guaranteeing that it would maintain certain positions. *Board of Educ. v. Half Hollow Hills Teachers Association,* 358 N.Y.S.2d 285 (Sup. Ct. 1974).

Action by school board to stay arbitration of a grievance. The legislature has passed a law changing the probationary period of a teacher to five years. A question was presented concerning the status of probationary teachers who had been hired with a one to three year probationary period under the previous law. The legislature answered this question by an amendment which provided that the new statute would not apply to these teachers. A teacher was terminated pursuant to this amendment and her education association called for arbitration on grounds that the board had not complied with the procedures for dismissal set forth in the collective bargaining agreement. *Held:* Under state law the arbitrator was the sole judge of arbitrability of the issue. However, as the timing of the amendment had precluded the board's compliance with the agreement, the court limited any relief ordered by the arbitrator to an additional year's probation. *Central Sch. Dist. No. 2 v. Livingston Manor Educ. Ass'n.,* 355 N.Y.S.2d 834 (App. Div. 1974).

Action by a school board to stay arbitration of a pay dispute. Plaintiffs claimed that they were entitled to military service allowance. They started work in September, but did not raise the claim until December. The school board argued that arbitration should be stayed because of plaintiffs' failure to raise their

claim within the twenty day period set forth in the collective bargaining contract and for failure to comply with the statutory time limit. *Held:* For the Plaintiffs. Questions of substantive or procedural time limits are seen as conditions precedent to arbitration. The applicable statute had been superseded by the contract provisions which were seen as procedural rules rather than conditions precedent to arbitration. *Guilderlan Cent. Sch. Dist. v. Guilderland Cent. Teachers Ass'n,* 356 N.Y.S.2d 689 (App. Div. 1974).

Action by school district to enjoin strike. Strike by school teachers were authorized by statute provided that the collective bargaining process set forth had been completed to no avail. Such strikes were not to be enjoined unless a strike created a clear and present threat to the health safety and welfare of the public. An injunction was issued by the trial court which listed many threats to the public welfare including the possible loss of state school funds because the strike made it impossible to complete the mandatory 180 day schedule of classes. The teachers association appealed. *Held:* For the school board. The loss of state school funds was enough threat to the public welfare for the injunction to issue. The other reasons were not in themselves enough, but might have become so in time. A strong dissent by two judges pointed out that the 180 day class schedule was not mandatory and the loss of state funds not inevitable. The other threats to the welfare were inconveniences which flowed naturally from a strike. The court did hold that the trial court erred in giving the school district unilateral power to reschedule classes at the close of the strike. *Bristol Township Educ. Ass'n v. School Dist. of Bristol Township,* 322 A.2d 767 (Pa. Cmwlth. Ct. 1974).

Contempt action for violation of injunction against teacher's strike. When negotiations failed to produce a contract the teacher's association called for a strike. The board obtained a temporary injunction against the strike on the basis of a statute forbidding strikes by public employees. When the strike went forward various officials and teachers were found in contempt. The officials were fined $250 each and the teachers $100 each. When the strike ended quickly the fines were reduced by one half. Plaintiffs contended that the findings of contempt were criminal in nature, and that they had been wrongfully found guilty in proceeding which did not comply with the standards of criminal justice. They also contended that the statute which forbade strikes by public employees was unconstitutional. *Held:* For the plaintiffs in part. In civil contempt a fine must be coercive or remedial rather than absolute. The standards of criminal justice should have applied. Since the statute served a compelling state purpose it was upheld against first and fourteenth amendment attacks. New trials were ordered. *McTigue v. New London Educ. Ass'n.,* 321 A.2d 462 (Conn. 1974).

Action by teachers union to reduce penalty imposed for illegal strike. The Board of Education had filed a complaint with the Public Employment Relations Board (PERB) alleging that an eight day strike conducted by the Yonkers Federation of Teachers had violated the civil service law. The federation con-

tended that provocation by the board of education mitigated their responsibility. PERB found the strike illegal and penalized the federation. *Held:* For PERB. Substantial support for PERB's determination that the strike was illegally used as a negotiating election was found in the facts that the federation voted on December 20th to go on strike January 3rd if its demands were not fully met, and that the strike did occur January 3rd when the demands were not met. *Yonkers Fed. of Teachers, Local 860 A.F.T. v. Helsby,* 357 N.Y.S.2d 141 (App. Div. 1974).

Action by minority teacher's union to enjoin unfair labor practice of school board. The school had granted the majority union exclusive access to certain school communications channels. The minority union attacked this as an unfair labor practice, and on constitutional grounds and requested injunctive relief. The majority union intervened and moved to dismiss. The motion to dismiss was denied by the district court which then found for the minority union on the merits and granted an injunction against the school board's denying the minority union equal access to the school communications channels. The majority union appealed. During the pendency of that appeal the state created the Indiana Education Relations Board with jurisdiction over unfair labor practices. *Held:* The federal judicial process should be stayed to permit the Indiana Education Relations Board to exercise its jurisdiction. The court felt that it should require the plaintiff to exhaust its state remedy and vacated the district court's order to allow plaintiff to do so. *Michigan City Federation of Teachers, AFL-CIO v. Michigan City Area Schools* 449 F.2d 115 (7th Cir. 1974).

Action by education association and teachers to obtain salary benefits for military service. The school district had a policy which gave teachers who had served in the military up to two years of credit on the salary schedule. The district resolved to end this policy and denied pay credit to plaintiff teachers who were subsequently hired and who had served in the military. The education association and the teachers contended that the resolution to end the military credit was void because it contravened an agreement between the district and the association which required the district to negotiate with the association and to read the text of any proposed policy change at two public meetings before implementing such changes. Plaintiffs contended that if the policy was still in effect the denial of credit had violated equal protection. *Held:* For the district. A school district may be bound only by written policy. The policy in question had been oral and could create no legal right protectable by the equal protection clause. *Mulkiteo Educ. Ass'n. v. Mulkiteo Sch. Dist. No. 6,* 524 P.2d 441 (Wash. Ct. App. 1974).

Teachers with Tenure

Action by teacher's association and teacher's to enjoin suspension without pay prior to hearings. The teacher's were suspended without pay for alleged use of excessive physical force upon students. The actions were pursuant to regulations issued by the Commissioner to Education to cure due process defects in the

disciplinary statute which had been found in a previous case. Plaintiffs contended that the commissioner had no authority to issue such regulations and that the suspensions violated due process. *Held:* For the plaintiff's in part. The teacher's association had not been injured by the suspensions and was dismissed as a party. The Legislature had delegated broad quasi-legislative authority to the commissioner which could be exercised to give effect to the general policy and legislative intent of the education laws. The contested regulations were a valid exercise of this power. The charges in question justified removal of the teachers from class pending a hearing but their pay could not be withheld until a due process hearing upheld the charges. *Hodgkins v. Central Sch. Dist. No. 1,* 355 N.Y.S.2d 932 (Sup. Ct. 1974).

Action by tenured teacher to enjoin his suspension without pay. The teacher had been paid for the first four months of his suspension, but his pay was terminated before the hearings were complete. He contended this was a deprival of property without due process. *Held:* For the school board. The state constitution forbids gifts of public money. Were plaintiff to be paid while suspended and then dismissed if the charges were substantiated he would receive a gift of public money. As plaintiff will be reimbursed for his back pay if the charges are not substantiated he is not deprived of any property. *Wolfson v. Board of Educ.,* 358 N.Y.S.2d 272 (Sup. Ct. 1974).

Action by tenured teacher to compel issuance of pay warrants. During her eleventh year of teaching plaintiff was offered and accepted employment as a permanent school teacher. During the summer her husband was elected to the school board which then voted unanimously to increase teacher salaries and benefits. Before the vote he notified the board of his conflict of interest. Plaintiff maintained that being tenured her right to employment and compensation was statutory not contractual and that her contract was not void because of a provision of the education code which permitted reasonable contracts to be made despite a conflict of interest which was made known to a school board prior to the decision. The trial court issued a writ of mandamus compelling issuance of the pay warrants on the ground that her tenure gave her the right to employment and pay regardless of her contract status. The superintendent appealed. *Held:* For the teacher. The education code specifically provided that conflicts of interest would be exclusively governed by that code, and the court held that this provision did not conflict with sections of the state constitution concerning special laws. Under the school code plaintiff's contract was not void because of the conflict of interest. *Coulter v. Board of Educ.,* 114 Cal. Rptr. 271 (Ct. App. 1974).

Action by tenured teachers not on contract to obtain salaries equal to tenured teachers on contract. Under Illinois law a tenured teacher may return to work without a contract and receive the previous years salary. Several teachers refused to sign their contracts which provided for salary increases because of a provision that they would refrain from participation in a strike or other work stoppage. The teachers contended that they could not be denied a salary in-

crease because of their refusal to sign a contract containing provisions irrelevant to salary and terms of employment. *Held:* For the school. The board gave all teachers the option of signing the new contracts and was not arbitrary in only paying those who signed them the increased pay provided therein. However, the board was required to pay the plaintiffs the pay increases provided under their former contracts. *Davis v. Board of Educ.,* 312 N.E.2d 335 (Ill. Ct. App. 1974).

Action by tenured teacher to enjoin as unconstitutional proceeding to remove him for cause. The teacher alleged that the proceedings against him violated due process because the statutory definition of cause was vague and the statutory proceedings did not provide for a fair hearing. The statute provided for removal for "insubordination, immoral character or conduct unbecoming a teacher" and "inefficiency, incompetency, physical or mental disability, or neglect of duty." The procedure involved a primary determination by the board of probable cause, a hearing by a neutral board which reports its findings to the commissioner of education who then forwards a hearing report to the school board which then takes final action. Plaintiff contended that this procedure denied him a meaningful hearing before the body that was to decide his case. *Held:* For plaintiff in part. While conceding that the statute might be vague at its outer limits, the court held that it was not vague as to plaintiff whose alleged misconduct (excessive corporal punishment) was squarely within the hard core of conduct proscribed, however, the procedures denied due process because they failed to ensure that the board's decision would be based on the evidence elicited at the hearing rather than ex parte considerations and because they did not result in an adequate record for review. *Kinsella v. Board of Educ.,* 378 F. Supp. 54 (W.D.N.Y. 1974).

Action for reinstatement by tenured teacher dismissed for cause. The teacher applied for a sabbatical under a statute that allowed leave conditioned upon residential study, travel or some other activity deemed by the local school board to be beneficial to the school board. She was advised that her application would probably be rejected unless she applied for the purposes of study. Prior to this time the board had not required applicants to specify how they would spend their time. Plaintiff submitted a plan for 30 hours of resident study at a state college which was accepted. However, she remained at home and took only a few courses from a night extension college while drawing her salary. The board brought charges, held a hearing and dismissed her. Plaintiff appealed contending that she had not been properly notified that her conduct could be cause for dismissal, and that she had been singled out and made to enter the type of application that she entered because of her union activities. *Held:* For the board. The board had read plaintiff the statute providing for removal for failure to follow the plan when it approved her application. There was no evidence that she had been singled out for union activities. *Pittel v. Board of Educ.,* 315 N.E.2d 179 (Ill. App. Ct. 1974).

Action by tenured teacher for reinstatement following discharge for immorality.

Plaintiff had been married one month, but was eight months pregnant when she requested maternity leave. Prior to her return from that leave the board voted to discharge her for irremedial immorality. She requested and was given a hearing, but the board voted again to dismiss. She contended that the findings were procedurally defective and against the manifest weight of the evidence. *Held:* For the teacher. The board failed to support its finding of irremediability of the grounds for dismissal by evidence on the record that there was damage to the school, faculty or students which was not correctable. This was a procedural defect because the court was precluded from effectively reviewing the decision. Turning to the charge of immorality itself the court held that it like any other cause for dismissal must be supported by evidence of harm to faculty, students or the school. The evidence did not show such damage. *Reinhardt v. Board of Educ.,* 311 N.E.2d 710 (Ill. Ct. App. 1974).

Actions by teacher, construction engineer and others for reinstatement. Five persons had been discharged by various state agencies for cause. The school teacher had been discharged for certifying that he was sick when he was absent to attend meetings of the New York University Senate. The school board construction engineer had been discharged for receiving unlawful gratuities. All of the persons had had their punishment reduced from discharged to suspension without pay by lower courts. The Court of Appeals consolidated the cases on appeal. *Held:* For the administrative agencies. The court first reviewed the applicable statutes and prior decisions and found that judicial review of administrative disciplinary hearings was limited to determining whether they complied with due process requirements. Reviewing the individual cases by this standard, the court concluded that the lower courts had erred in overruling the discharges. *Pell v. Board of Educ.,* 356 N.Y.S.2d 833 (Ct. App. 1974).

Action by tenured teacher for reinstatement alleging religious discrimination. Plaintiff joined the World Wide Church of God which had holy days which conflicted with his teaching duties. His requests for religious leaves of absence were denied, and he was warned that action would be taken against him if he did not meet his contract obligations. When plaintiff took the days off anyway charges were brought against him for neglect of duty and insubordination. A full adversary hearing before the teacher tenure panel resulted in a recommendation of dismissal and the school board terminated his contract. Instead of taking judicial appeal as provided by law, plaintiff complained to the civil rights commission which found that he had been unlawfully discriminated against because of religion. The school board appealed on the merits and also contended that res judicata precluded plaintiff's action in appealing to the civil service commission. *Held:* For the school board. The proceedings before the teacher tenure panel gave plaintiff full opportunity to raise all the factors that were raised before the civil service commission. He was therefore estopped from making a collateral attack in the second forum. To hold otherwise might put before a reviewing court appeals from contrary decisions both of which would conceivably have to be upheld as supported by substantial evidence. As the

decision of the civil service commission was void and plaintiff had taken no appeal from the decision of the teacher tenure panel his dismissal stood. *Umberfield v. School Dist. No. 11,* 522 P.2d 730 (Col. 1974).

Action by tenured teacher for reinstatement on grounds that decision to discharge him was not supported by the weight of the evidence. The teacher had come under criticism, and after a series of evaluations his principal recommended that he not be rehired. The teacher was given a hearing before the board which decided not to renew his contract. He contended that he had de facto tenure derived from a policy pamphlet published by the board and thus a right to a due process hearing. He further contended that the hearing given him did not comply with due process in several respects. In plaintiff's first suit the court found that he had tenure and that the hearing was deficient in that the evidence against him was made by deposition denying him opportunity to cross examine witnesses. In addition the decision not to renew his contract was not supported by substantial evidence. The court ordered a due process hearing be held. After this hearing the board voted again not to renew the contract and plaintiff appealed. *Held:* For the school board. The hearing comported with due process and the decision was supported by substantial evidence. *Thomas V. Ward,* 374 F. Supp 206 (M.D. N.C. 1974).

Action by teacher to restore his continuing contract status. Charges were brought against plaintiff alleging that he had violated school policy by leaving school during school hours, that he repeatedly violated other policies and official directives, and that he performed inefficiently. After a hearing the district board found the charges to be true and chose to reduce plaintiff's contract status from continuing to probationary. On appeal the Commissioner of Education upheld the board. Plaintiff then brought suit alleging denials of due process in that evidence that the charges were made in retaliation for union activities had been excluded, that prejudicial hearsay had been improperly admitted, and that the Commissioner had failed to make proper findings of fact and conclusions of law. *Held*: For the commissioner. Plaintiff failed to show that he had any evidence concerning improper motivation. The hearsay was not so prejudicial as to make the administrative decision arbitrary in the light of all the evidence. The Commissioner had made findings of fact and conclusions of law sufficient for judicial review although they were not formally stated. *Wilson v. Board of Educ.,* 511 S.W.2d 551 (Tex. Ct. Civ. App. 1974).

Action by tenured teacher with dual certification to compel reassignment as counselor. Plaintiff had originally been hired as a counselor, but when that position was abolished for lack of funds, plaintiff was transfered to teaching duties. When new funds became available the counseling position was reestablished and plaintiff requested the position. Another person was hired for that position and plaintiff brought suit claiming a tenure right to the position. *Held:* For the school district. Tenure is acquired through longevity of employment in a certified position regardless of actual positions held. It protects the general right to employment rather than any particular position and should not

infringe upon a district's right to make assignments within the range of a person's qualifications. A dissenter argued that since plaintiff, if discharged when her position had been abolished would have had a priority when the position was re-established, she should have the same priority although retained as a teacher. *Lacy v. Richmond Unified Sch. Dist.,* 115 Cal. Rptr. 882 (Ct. App. 1974).

Teachers without Tenure

Action by nontenured teacher to obtain reasons for nonrenewal. The teacher was notified that her contract would not be renewed. When the board refused her request for reasons she appealed unsuccessfully to the state commissioner. Plaintiff's petition for judicial review was confined to the question of whether a nontenured teacher is entitled to a statement of reasons for her nonretention by a school board. *Held:* For the teacher. The majority found no statutory nor constitutional issues were involved and decided the case on questions of fairness and public policy. A requirement that a board give reasons for nonrenewal was seen as neither infringing upon the board's freedom not to renew a contract nor imposing a substantial administrative burden. On the other hand a requirement for notice of reasons would allow a teacher to improve as a professional, would squelch false rumors and impressions, and would prevent action by a board that was arbitrary or taken for impermissable reasons. Two dissenters disagreed with the finding that no statutory issues were involved. An amendment to the notice statute which removed a requirement to give reasons was seen as controlling legislative intent. *Donaldson v. Board of Educ. of City of N. Wildwood,* 320 A.2d 857 (N.J. 1974).

Action by teacher to be given a bill of particulars concerning incompetency charges. The teacher contended that the charges lodged against her were not sufficiently explicit to satisfy the due process requirement of notice. She had unsuccessfully petitioned the hearing panel appointed by the school board for either a bill of particulars or dismissal of the charges. When this was denied she sought review in the courts. *Held*: For the school board. The trial court ruled that the charges were sufficiently explicit and dismissed. On appeal the dismissal was upheld on different grounds. The panel's denial of her petitions were not a final action in her case and was not subject to judicial review. *Lovett v. School Dist. No. 1, Denver,* 523 P.2d 153 (Col. Ct. App. 1974).

Action by teacher for reinstatement on first amendment grounds. Plaintiff, a social studies teacher, taught several controversial units on current topics. When complaints were received, he was checked closely by his supervisors. He cooperated with them and cleared his materials with them. When he heard that a group of parents would attend a school board meeting to demand his discharge, the plaintiff attended. The parents did not show up, but plaintiff requested to meet with the board to discuss the situation. The board suggested that he stick to the text and avoid controversial issues and plaintiff replied that it was impossible to do that in a high school senior class on current events.

Plaintiff continued his teaching and one parent reviewed his materials, concluded they were propagandistic and launched a compaign to have plaintiff discharged. Soon after plaintiff was discharged for insubordination. The Commissioner of Education reviewed the discharge and found no insubordination but ruled that he had no power to order reinstatement. Plaintiff brought suit against the school board and the parents. *Held:* For plaintiff. There was no insubordination and plaintiff's presentation of the controversial topics was balanced and conducted within professional standards. The board violated both his first amendment rights and due process in discharging him. However, several years had passed and the court denied reinstatement on the ground that to do so would only revive antagonisms. Plaintiff was awarded $20,000 in general damages. *Sterzing v. Fort Bend Independent Sch. Dist.* 376 F. Supp. 657 (S.D. Tex. 1972). Plaintiff appealed the denial of reinstatement and it was held that, when first and fourteenth amendment rights are violated, it is impermissable to deny reinstatement on the basis of possible antagonism. *Sterzing v. Fort Bend Independent Sch. Dist.,* 496 F.2d 92 (5th Cir. 1974).

Action by nontenured teacher alleging that her dismissal was in violation of the open meeting law. The state open meeting statute provided that school districts could hold closed sessions to consider dismissals of employees, but that any final action must be taken in public. Plaintiff contended that no roll call vote was taken when the board returned from an executive session in which it was decided not to renew her contract, and that the final action had been taken in executive session. *Held:* For the board. The trial court's determination that a roll call vote had been taken after the return from executive session was upheld. Such a roll call vote was seen to be final action for purposes of the open meeting law because it allowed the public to know the positions taken by the board members and thus hold them accountable for their actions. *Jewell v. Board of Educ.,* 312 N.E.2d 659 (Ill. Ct. App. 1974).

Action by nontenured teacher for reinstatement alleging that his dismissal was impermissably based on his appearance. The teacher was recommended for renewal by his principal, but the board voted not to rehire him giving as reason complaints of students that they did not understand his instructions and explanations. The teacher alleged that the true reason was his dress and beard. *Held:* For the school board. Assuming that the school board had decided not to renew the teacher for his dress and appearance, he had no cause of action. While a person's right to dress and appear as he wants is included in the liberty protected by the Constitution, it is considered subordinate to the public interest in many instances. In this case the school board was seen as the protector of the interest of the parents and the children that the children not associate with persons they might consider undesirable. As the children are compelled to attend school, only the school board is capable of protecting this interest. The court refused to substitute subjective judgment for that of the school board which had closer ties to the community. *Miller v. School Dist. No. 1, Cook Cty.,* 495 F.2d 658 (7th Cir. 1974).

Action by teacher for damages arising from school district's refusal to allow sick leave for incapacity caused by childbirth. The teacher was absent fifteen days due to childbirth. She had accrued sufficient sick leave to cover the absence, but her request to use her sick leave for this purpose was denied by the superintendent. This denial was affirmed by the defendent board members. Suit was brought under 42 U.S.C. 2000e-2, alleging that defendant discriminated against her on the basis of sex in the determination of employment benefits. The school board members contended they were not employers for purposes of 42 U.S.C. 2000e-2. On the merits they contended that maternity was not an "illness or injury" and that plaintiff had not been denied sick leave because of her sex but because she had not been sick. *Held:* For plaintiff. Under Oregon law the power to employ is exercised by the board members as agents for the district and they are employers. They have a qualified immunity for acts done by them in good faith within the scope of their duties, but good faith is not defense to charges of discrimination. The court adopted EEOC guidelines that placed incapacity due to childbirth in the category of illness for purposes of benefits. The defendants were also found to have denied plaintiff equal protection under the test of rational relationship to a valid state interest. *Hutchinson v. Lake Oswego Sch. Dist.* 374 F. Supp. 1956 (D. Ore. 1974).

Action by nontenured teacher to have school district's maternity leave regulations declared unconstitutional. When plaintiff informed the district she was pregnant she was informed that under the district's rules she would have to submit a resignation to become effective when she was no longer able to teach. Such resignation would void her credit toward tenure and she would have to start over as a probationary teacher if she resumed teaching. Plaintiff appealed to the state civil rights division which found that the policy discriminated on the basis of sex, awarded her attorney's fees and enjoined many of the district's policies. The school district appealed contending that there was no sex discrimination because the resignation provision applied only to nontenured teachers, that the award was improper, and that the injunctions were overbroad. *Held:* For the teacher, in part. The distinction between tenured and nontenured teachers made no difference. Sex discrimination is present when pregnancy is singled out from all other physical incapacities as the basis of a regulation. However, the civil rights division had no power to award attorney fees, and the injunction was improperly overbroad where it dealt with policies not in controversy. *School Dist. No. 1 v. Nilson,* 523 P.2d 1041 (Ore. Ct. App. 1974).

Action by a nontenured teacher to obtain recognition of tenure. Plaintiff started a three year probationary period as a science teacher. After his first year he requested transfer to a social studies position. The request was granted but the principal advised him that the transfer would subject him to a new three year probationary period. In his fourth year in the school plaintiff was advised that he would not be renewed. He maintained that he had tenure. The school board argued that its departments were distinctly organized by subject matter and that it could require three full years probation in each department. *Held:* For the teacher. The court saw nothing wrong with "vertical" tenure in subject

matter areas in theory, although, it did note that it might be manipulated to defeat the purpose of tenure. However, the school's vertical tenure system had never been formally adopted thus denying plaintiff sufficient notice. The court ruled that such a system could only be implemented pursuant to statute or a regulation issued by the state board of regents. *Baer v. Nyquist,* 357 N.Y.S.2d 442 (1974).

Action by nontenured teacher for reinstatement and back pay. Plaintiff had been employed in the school district for nineteen years. During her last three years the grade schools in the district began to employ team teaching methods and complaints were made about her performance. Her performance was observed by her principal and supervisors over a two year period in two separate schools in the system before it was recommended that her contract not be renewed. She refused an offer for a hearing and the board voted not to renew her contract. She then asked for a hearing which was held after much delay and resulted in an affirmation of the decision to discharge. Plaintiff then brought suit alleging that she had been discriminated against because of race, that the hearing given her did not comply with due process, and that she had a right to a due process hearing because of stigma which attached to the nonrenewal and because of de facto tenure. *Held:* For the district. There was cause to discharge plaintiff and there was no evidence whatsoever of racial motivation. De facto tenure does not arise from longevity of employment and plaintiff pointed to no other source which would establish an expectancy of re-employment. No reasons for discharge were given such that would stigmatize plaintiff sufficiently to infringe her liberty to seek other employment. *Cannady v. Person Cty. Bd. of Educ.,* 375 F. Supp. 689 (M.D.N.C. 1974).

Action by a teacher for reinstatement alleging de facto tenure. Plaintiff had been suspended with pay and his contract had not been renewed following charges of misconduct made against him by female students. Plaintiff claimed a right to a due process hearing because of the school policies and practices gave him an expectation of reemployment. *Held:* For the board. Although several teachers thought that the school board had adopted the state's continuing contract scheme, the court found that it had not. The contract provisions clearly specified a one year term as did the policy manual issued by the board. Plaintiff had been told by a previous superintendent when he was first hired fifteen years earlier that he could expect to be reemployed if he performed satisfactorily. Similar statements had been made to him over the years of his employment. However, the court found that none of these statements had been made by the board or by any authority granted by the board. They were thus not sufficient to bind the school district. *Moore v. Knowles,* 377 F. Supp. 302 (N.D. Tex. 1974).

Action for reinstatement by nontenured teacher alleging infringement of first amendment rights. The teacher had been employed for twenty years on one year contracts. During the last several years parents had complained to the board about her teaching. After her last contract had been awarded, plaintiff angered the superintendent by complaining to board members about her prin-

cipal who whas subsequently replaced. The superintendent wrote her stating that he would not recommend her for renewal because of these acts and because of recent complaints about her teaching. However, the superintendent, acting at the request of the new principal, did recommend to the board that plaintiff be renewed. But he withdrew that recommendation when several board members questioned him concerning parental complaints about her, and the board subsequently voted not to renew her contract. *Held:* For defendants. Dismissal for the plaintiff's acts in complaining to the board would have been impermissable, but it was not demonstrated by the facts. When the superintendent withdrew his recommendation he limited his criticism to plaintiff's teaching. Plaintiff had no liberty or property interests which would mandate a due process hearing. *Doscher v. Seminole Sch. Dist.,* 377 Supp. 1166 (N.D. Tex. 1974).

Action by teacher for reinstatement claiming unlawful discharge. Plaintiff had been hired without a teaching certificate and had never sought nor received such a certificate. When he was discharged he claimed that his years of service gave him tenure with the corresponding right to be discharged only by vote of the school committee after a due process hearing. *Held:* For the school. Under state law all school teachers must have a certificate. As plaintiff was never certified he was never legally employed and could claim no tenure. *Luz v. School Committee of Lowell,* 313 N.E.2d 925 (Mass. 1974).

Action by probationary teacher for reinstatement. The teacher was notified that she would not be rehired prior to the statutory notice deadline and requested the hearing provided by statute. Her hearing was continued past the notice deadline and upheld her dismissal. She appealed maintaining that the action was arbitrary on the merits and that the statute required notice of a final decision before the deadline. *Held:* For the school in part. The courts had ruled that notice of a final decision must be made before the deadline. However, plaintiff was deemed to have waived that right because the continuance had been granted as much for the convenience of her counsel as for the convenience of the hearing officer. The trial court, however had erred in applying the substantial evidence rule to its review of the merits. In California the proper standard of judicial review of an administrative decision affecting fundamental rights or vested interests is an independent judgment on the evidence to see if the decision was supported by the weight of the evidence. Under the applicable statutes plaintiff, although only a probationary teacher, had a sufficient expectation of reemployment to give her a vested interest. The case was remanded. *Young v. Governing Bd. of Oxnard Sch. Dist.,* 115 Cal. Rptr. 456 (Cal. Ct. App. 1974).

Action by nontenured teachers for reinstatement alleging defective notice of intent not to rehire. Twenty nine school districts had consolidated their special education functions under a Tri-County Association. This association effectively ran the program and performed the functions of hiring and firing, but for legal purposes a member school district was assigned each year to handle administrative functions. The Tri-County Association voted to discontinue the plaintiff

teachers and the school district assigned as administrator sent out the notices of non-renewal more than 60 days before the end of the school term as required by statute. However, the board of the administrative school district did not ratify the nonrenewals until less than 60 days remained. The plaintiffs urged that this made the notices defective. *Held:* For the school board. The Tri-County Association's decision was the meaningful one as the administrative district had no discretion to disapprove the nonrenewals. The notices thus served their statutory purpose of warning teachers in a timely fashion of their non-renewal. *Seim v. Board of Educ.,* 315 N.E.2d 282 (Ill. App. Ct. 1974).

Action by teacher for damages alleging breach of contract. The teacher had not been notified of non-renewal as required by statute, but when he reported to work he was told that he had not been rehired. He did not teach during the following year and then brought suit for breach of contract. The school board contended that its failure to give notice of non-renewal had only the legal effect of an offer of continuing employment which a teacher must accept by written notice within a given time and that there was no contract because the teacher had made no such acceptance. *Held:* For the school board. The statute clearly supported their position. *Huso v. Bismarck Public Sch. Bd.,* 219 N.W.2d 100 (N.D. 1974).

Action for reinstatement by a school teacher alleging improper dismissal. The school board in anticipation of a substantial loss of revenues decided not to renew plaintiff's contract. It gave him timely notice that his contract would not be renewed and notified him that he had a right to a rehearing. The teacher allowed the statutory notice deadline to pass and "accepted" reemployment on the grounds that proper notice of non renewal had not been given him. When he was not rehired he sued for reinstatement. The school board argued that it had given proper notice and alternatively that reinstatement contracts for personal services should not be enforced. *Held:* For the teacher in part. The statute required that notice of a tentative decision not to rehire be given first followed by notice of final decision made after a hearing if requested. The only notice given was final in nature and was thus improper. While reinstatement was seen as improper, the court noted that mandamus could issue to compel a school district to offer a contract. However the school year had already passed and damages was now the only proper remedy. *Henley v. Fingel Public Sch. Dist. No. 54,* 210 N.W.2d 106 (N.D. 1974).

Action by school board challenging judicial review de novo of a teacher's discharge as unconstitutional. A teacher had been dismissed for cause and appealed to the superior court for a hearing de novo as provided by statute. The trial judge found that the charges brought against the teacher were not established by a preponderance of the evidence and ordered relief. The board appealed contending that the effect of a trial de novo was to vest non-judicial, administrative power in a court and was thus an unconstitutional legislative expansion of the court's constitutionally fixed powers. The board relied on a state supreme court holding that decisions of the state personnel board were non-judicial in

nature and were not reviewable on their merits. *Held:* For the teacher. The court of appeals noted that the decision relied on by the board had been based on a historical interpretation of judicial power which it felt to be wrong. However, the court distinguished the issue before it as being a contract dispute which was historically subject to judicial review. *Francisco v. Board of Directors,* 525 p.2d 278 (Wash. Ct. App. 1974).

Other Personnel

Advisory opinion to the governor of Florida on the subject of his power to suspend the employment of school superintendent hired by a district school board. The governor contended that the state constitution gave him authority to suspend from office any "state officer" not subject to the impeachment power and any county officer on certain, specified constitutional grounds. The court posed the question as whether a superintendent of schools was a state officer within the suspension provision of the constitution. *Advised:* Only the employer school board may suspend or remove its employed superintendent when the county electorate has chosen to employ the superintendent in accordance with a constitutional provision which grants exclusive local control over such decisions to the local board. This grant of local control is of other control as no man can please two masters. *In re Adv. Op. to the Govn'r,* 298 So.2d 366 (Fla. 1974).

Action by a tenured high school principal for relief following dismissal for cause. Charges had been brought and plaintiff was dismissed after a hearing. He then brought a §1983 action against the superintendent and president of the the school board and against the school board itself. Plaintiff claimed that he was denied due process because two witnesses were not compelled to attend the hearing. He also alleged that the dismissal was impermissably based upon his personal rather than professional conduct. *Held:* For the board. The court chided counsel for naming a school board as a defendant in a §1983 action and dismissed the board as a defendant. The complaint that the dismissal was predicated upon plaintiff's personal activities was not supported by any facts showing that the remaining defendants were so motivated, and it was dismissed. Defendants had no power to obtain the presence of witnesses through compulsory process, and such compulsion of witnesses was not seen as necessary for due process in a school board dismissal hearing. *Howell v. Winn Parish Sch. Bd.,* 377 F. Supp 816 (W.D. La. 1974).

Action by nontenured teaching principal for reinstatement. The principal had been recommended for reemployment by the superintendent, but several teachers in the school petitioned for his discharge. At a closed meeting held without public notice the board considered the recommendation and the petitions and voted not to renew plaintiff's contract. The principal contended that the dismissal was void because the board had violated statutory requirements that such meetings be open and held after public notice. The board contended that the dismissal was valid as the meeting fell within the statutory exceptions

to open meetings for executive sessions, hiring of persons, or matters likely to adversely affect a person's reputation. *Held:* For the principal in part. The statutory definition of executive sessions did not allow the taking of a final vote. The legislative scheme was designed to protect public employees from improper official conduct by compelling the government to make public the considerations upon which its actions rested. In this context hiring is limited to those not presently employed. The court rejected a contention that the procedural violation was harmless because such a holding would subvert the legislative scheme. The court refused reinstatement because the school year was over and remanded for a trial on damages. It was noted that the trial court might properly order a public hearing should the principal desire to be reinstated for the coming year. *Stoneman v. Tamworth Sch. Dist.*, 320 A.2d (N.H. 1974).

Action by appointed school superintendent for declaration of rights. Under state law the school board was empowered to make appointments of one, two, three or four years to the position of superintendent. The original appointee resigned after ten days and Mr. Dotson was appointed for the remainder of the first year. Later Mr. Pruitt was appointed to fill the last three years of the term, but prior to his taking the position the board changed its mind and appointed Dotson to finish the term. Pruitt brought suit. *Held:* Dotson was the legally appointed superintendent. Under Kentucky law vacancies exist in the term of office rather than in the office itself. When the school board made the original appointment they were irrevocably committed to a four year term. Even though Dotson's original appointment was ineffective as a matter of law. *Childers v. Pruitt* 511 S.W.2d 233 (Ky. Ct. App. 1974).

Action by school board to remove principal. The principal had been recommended for reappointment by the superintendent, but the board voted not to renew his contract. The principal appealed to the commissioner of education contending that he was not under contract and thus could only be discontinued on the recommendation of the superintendent. The commissioner held for the principal and the board appealed. The principal challenged the courts jurisdiction over decisions of the commissioner. *Held:* For the principal. The court had jurisdiction because the decision of the commissioner rested squarely on his construction of a statute. However, his finding that the 10 month contract alleged by the board was not sustainable because the statute authorized contracts of no less than 12 months was correct with the consequence that the principal could not be discontinued by the board acting without the recommendation of superintendent. *Board of Educ. v. Nyquist,* 357 N.Y.S.2d 370 (Sup. Ct. 1974).

Action by tenured principal for reinstatement following attempted transfer. Plaintiff was advised on March 5, that the school board was interested in transferring him from his position as principal of the county's largest high school to a position as directer of vocational education because they felt the high school would function more efficiently under different leadership. On April 7th the

board voted to transfer plaintiff. In July it was learned that funds would not be available for the position as vocational director. However, by that time plaintiff had accepted a position as principal in an adjacent county, and the board treated this action as a resignation. Plaintiff brought suit under §1983 alleging that as he had formerly held the most prestigious position in the county any transfer would be a demotion affecting his property interest and could not be effected without a due process hearing. *Held:* For the board. The transfer was not seen to be punitive in nature nor clearly a demotion. Plaintiff's property right was thus not affected. *Coe v. Bogart,* 377 F. Supp. 310 (E.D. Tenn. 1974).

Action by nontenured assistant principals for reinstatement. Plaintiffs are four tenured teachers who were promoted to assistant principal when the school board adopted a policy of assigning an extra assistant principal to each school in the district. When the board later resolved to abolish the position of the "second Assistant Principal" in each school, plaintiffs had not yet acquired tenure in their positions and were returned to their former tenured positions. The school justified the action as an abolishment of certain positions for purposes of economy. The plaintiffs relied on a statute concerning the job security of tenured teachers promoted to higher positions which provided for demotion from such positions only in accordance with the statute concerning removal of probationary teachers. That statute provided that probationary teachers could not be removed except upon recommendation of the superintendent. As there had been no such recommendation the demotions should be void. *Held:* For the school district. The statute concerning removal of probationary teachers applies only to teachers. The school board acted legitimately to save money by abolishing positions. There was a well reasoned dissent. *Palone v. Jefferson Parish Sch. Bd.* 297 So.2d 208 (La.Ct. App. 1974).

Action by tenured guidance counselor to enjoin the school board from preferring charges against him. Plaintiff was charged with immoral conduct for sleeping with a recent graduate of his high school and for lying to school authorities in denying that he did so. He maintained that the investigation into his personal sexual activities violated his right to privacy. He also contested his suspension without pay as a deprival of property without due process. *Held:* For the school board. As only two months had passed since the girl had graduated, it might be inferred that their relationship had developed while she was under plaintiff's guidance. Such inferences might undermine the confidence of parents and students in plaintiff and thus directly affect his ability to perform his duties. There was thus a compelling reason which justified the invasion of privacy. The court put a thirty day limit on the suspension without pay and held that a suspension so limited did not deny due process. *Goldin v. Board of Educ.,* 357 N.Y.S.2d 867 (App. Div. 1974).

Student Conduct and Discipline

Action by parent to have children reinstated in public school. When discussing her son's three day suspension with the assistant principal the parent became

enraged and struck the assistant principal. Assault charges were brought against the parent and the children were permanently suspended. The parent plead guilty to the assault charges, but brought suit contending that the suspension of her children violated the basic precept that punishment should follow only from personal guilt. *Held:* For the parent. "Freedom from punishment in the absence of *personal* guilt is a fundamental concept in the American scheme of justice." A lengthy suspension is punishment which can only be imposed by the due process of law. *St. Ann v. Palisi,* 495 F.2d 423 (5th Cir. 1974).

Action on behalf of school children to enjoin corporal punishment and for damages. The action was brought under 42 U.S.C. §§1981–1988. It was directed at corporal punishment as administered in the county school system rather than at the state statute which authorized corporal punishment. It was alleged that the punishments as administered violated the eighth amendment's prohibition of cruel and unusual punishment, the due requirements of the 14th amendment and the rights of parents and children to prohibit corporal punishment by school officials. The district court gave a directed verdict in favor of defendants finding that instances of severe punishment took place in only one school. Appeal was taken. *Held:* For plaintiffs in part. While the regulations promulgated by the school board comported with both due process and the eighth amendment, it is the actual administration that matters most. As actually administered in one junior high school corporal punishment violated the eighth amendment because it was degrading to the students and was disproportionate to the offenses charged. The proceedures in this school also violated due process. While it made no judgment as to the liability of the defendants for these violations, the court noted that there was no indication in the record that defendants made any effort to control or moderate the unconsitutional system of punishment practiced at the school. Several recent Supreme Court decisions were noted as bearing on the rights of parents to control the corporal punishment of their children, but the court did not have sufficient evidence to rule on this issue. The case was remanded. *Ingraham v. Wright,* 498 F.2d 248 (5th Cir. 1974).

Action by high school student for reinstatement in the National Honor Society. The plaintiff was observed drinking a beer by a teacher who was a member of the faculty council of the society. The teacher initiated action to dismiss plaintiff from the society and after a series of hearings and meetings plaintiff was dismissed by a vote of the faculty council. Suit was brought under §1983 alleging that the dismissal violated due process and placed a stigma on his interest in liberty. *Held:* For the student. There was sufficient nexus between the public school and the honor council to make the dismissal state action. The dismissal would become a part of plaintiff's permanent record and could adversely affect his future education and employment and therefore infringed his liberty. Due process was denied in that the accusing witness had also passed judgment and in that several procedural rules of the society had been violated. A permanent injunction was issued directing expungement of all record of the dismissal and prohibiting all defendants from communicating the events to anyone. *Warren*

v. National Ass'n. of Secondary Sch. Principals, 375 F. Supp. 1043 (N.D. Tex. 1974).

Other Student Rights and Responsibilities

Action by student to suppress the use against him in criminal proceedings of evidence taken from him in a search conducted by an assistant principal. The assistant principal was informed that plaintiff was offering to sell capsules to other students. He called plaintiff into his office and conducted a partial search finding a vial of capsules. He took these to the principal who called in the police. Plaintiff contended that the assistant principal was an agent of the government and was required to observe fourth amendment restrictions when conducting searches. As he had not, it was urged that the search was illegal and the evidence should be suppressed. *Held:* For the state. The assistant principal had acted as a private citizen, and, as the fourth amendment only protects against government intrusion, the evidence need not be suppressed. *Commonwealth v. Dingfelt,* 323 A.2d 145 (Pa. Super. 1974).

Action by high school student adjudicated a delinquent to set aside the adjudication as resulting from an illegal school search. The student, who was suspected of dealing drugs, was seen entering a toilet room with another student twice within an hour. He was then taken to the principals' office and searched by a teacher who was the school security coordinator. Dangerous drugs were found and an adjudication as a delinquent followed. *Held:* For the student. "High School students are protected from unreasonable searches and seizures, even in the school, by employees of the state whether they be police officers or school teachers." Because of the great duty of school officials to protect other students a search in a school environment may be conducted under a lesser standard of probable cause. However, the events leading up to this search were not sufficient cause even in a school environment. The search was thus illegal and the adjudication based on its fruits was set aside. *People v. D.,* 358 N.Y.S.2d 403 (N.Y. Ct. App. 1974).

Action to enjoin operation of a state high school athletic association's regulation prohibiting sexually mixed interscholastic competition. After the local school board sanctioned mixed competition in non-contact sports, plaintiff tried out for the cross-country team and proved competitive with the boys on the team. However, school authorities would not let her compete because of fear of sanctions by the state association which forbade mixed competition. Plaintiff brought suit against the association alleging a denial of equal protection based on sex. *Held:* For plaintiff. The association was clearly acting under color of state law for purposes of §1983. The court felt that recent Supreme Court decisions had made the equal protection test more elastic and stated the test as a balancing of three factors—the character of the classification, the individual interests affected, and the government interests asserted. The court found the character of the classification, sex, to be suspect. The individual interest while not an absolute right was still a substantial benefit available to others. The

government interest asserted that of maximizing benefits to all by ensuring equitable competition among classes was not seen as applicable where there was no competition available within plaintiff's class. *Gilpin v. Kansas State High Sch. Activities Ass'n,* 377 F. Supp. 1233 (D.Kan. 1973).

Action to set aside determination that students were ineligible to compete in high school athletics. Plaintiffs had been declared ineligible for competition in accordance with a regulation of the Commissioner of Education which limited athletic competition to eight consecutive semesters after entry into ninth grade. There was an exception for hardship cases involving illness or other circumstances, but plaintiffs did not attempt to claim a right to exemption. They attacked the regulation as arbitrary. *Held:* For the commissioner. The regulation was within the commissioner's power. The declared purpose was to prevent the "redshirting" of students whereby they were held back in school for a year without competing so that they would be more mature and more efficient. As "redshirting" increased the danger of injury to younger, less developed students the regulation prohibiting it served a reasonable state purpose. *Murtaugh v. Nyquist,* 358 N.Y.S.2d 595 (Sup. Ct. 1974).

Torts

Action by parent for damages alleging injury arising out of his child's being assigned to read an obscene book in eighth grade music class. The book was alleged to contain vulgar references to parts of the body and sexual acts, and to picture group sex as desirable for teenagers. The parent alleged psychological damage to his child and attendant damage to his parental relationship with her. He also requested a declaratory injunction that furnishing such material to a junior high school student constituted a violation of state law and requested an injunction against furnishing materials to students without knowledge of their contents. *Held:* For the school district. The complaint alleged injury from negligence rather than willful or malicious acts which was necessary both to overcome the defense of sovereign immunity and for tort recovery based on psychological injury. The declaratory judgment asked for would be improper as legislative and advisory in nature. As for the injunction the court noted there were other remedies available and stated that it would not issue such equitable relief absent a clear showing of continuing willful conduct causing continuous and irreparable harm. *Carroll v. Lucas,* 313 N.E.2d 864 (Ohio, Common Pleas 1974).

Action for damages from wrongful death of child struck by motorist after leaving school bus. The school bus driver let two children, ages 6 and 10, off of the bus across the highway from their destination and drove away. This was a violation of a regulation issued by the state board of education which provided that a bus driver must remain on the side of the road until the children pass in front of the bus and cross the road. The trial judge instructed the jury that violation of an administrative regulation was not negligence per se. The jury returned a verdict for the defendant bus driver and the plaintiff's appealed.

Held: For the defendant. An administrative regulation does not have the force of a statute and a violation does not create negligence per se. The questions of negligence and proximate cause were properly presented to the jury. *Price v. Manistique area public schools.*, 220 N.W.2d 325 (Mich. Ct. App. 1974).

Action for damages on behalf of child whose eye was injured by a spitball on a school bus. The child was injured during a spitball battle that lasted some twenty minutes. The identity of the child who caused the injury was not known. Plaintiff contended that the contract carrier was liable for failure to recognize and stop potentially dangerous conduct on the part of the passengers. The defendant bus company named as codefendants all the children who participated in the battle. The jury found liability on part of the bus company but absolved the student defendants. The bus company appealed. *Held:* For the bus company in part. The bus company's negligence was no more than a concurrent cause and the student defendants had been wrongfully absolved. A new trial was ordered to determine the right of the bus company to indemnification or contribution from the student defendants. *Sommers v. Hessler, 323 A.2d* (Pa. Super Ct. 1974).

Action by student for damages for injury in shop class. Plaintiff received a severe cut on his right hand while using a bench saw in shop class. He brought suit alleging that the school was negligent in installing and maintaining the saw. The trial court awarded him $95,000. The school appealed raising procedural points and contending that the award was excessive and precluded by sovereign immunity. *Held:* For the student. Error was found in one of the five procedural points raised, but it was found to be nonprejudicial. In view of the severe deformity of plaintiff's hand, the continuing pain which it gave him, and its effect on his employability the award was not excessive. The claim of sovereign immunity was disposed of on precedent. *Scott Cty. Sch. Dist. v. Asher,* 312 N.E.2d 131 (Ia. Ct. App. 1974).

Action for damages on behalf of child injured on school grounds. After the tort claim had been tried on the merits the school board raised the defense of defective notice. Under New York law notice of claim against a public coroporation must be made in 90 days. Claim in this case was made in 92 days. The plaintiff asked for relief from late filing. *Held:* For the short board. Relief from late filing is only available within one year from the event and must be made prior to the commencement of the action. However, because the school board had allowed the case to be heard on the merits before raising the question of notice, all costs were assessed against the school board. The court called for a revision of New York law to achieve a more equitable balance between a public corporation's need for prompt notice of claims and an injured parties interest in just compensation. *Camarella v. East Irondequoit Cent. Sch. Bd.,* 356 N.Y.S.2d 553 (ct. App. 1974).

Action by substitute teacher injured after school hours for workmans compensation benefits. Plaintiff was employed as a substitute teacher working on a day to day basis in various schools within the district. While working in one

school she learned of a style show being sponsored by the girls club and volunteered her services. With the permission of the principal and the faculty sponsor she worked on the style show after her substitute duties ended at 3:15 p.m. While so occupied in the school auditorium at about 4:30 p.m. she was injured by a falling door. The school board denied liability contending that as her substitute duties and compensation ended at 3:15 she was a mere volunteer at the time of her duty. *Held:* For the teacher. The board did not overcome the presumption of employment on the part of one rendering services. The lack of compensation for the services was immaterial as regular teachers are not paid for their extra duties. A regular teacher would be entitled to compensation for injury while performing extra work after school hours and when injured plaintiff was assisting a regular teacher to conduct a school sponsored activity *Maurice v. Orleans Parish Sch.Bd.*, 295 So.2d 184 (La.Ct.App. 1974).

Miscellaneous

Action by parent to enjoin his child's expulsion from school because of the parent's refusal on religious grounds to have him vaccinated. When the school board threatened to expel his child the parent sought relief under the provision of the immunization law that a child may be excused from immunization for religious reasons at the discretion of the local school board. When this relief was denied and the child expelled, plaintiff brought suit contending that the statute was void because it was vague and standardless. *Held:* For the school board. The statute on its face was vague and standardless; and their was no clear legislative intent, judicial interpretation, or administrative guide lines to remedy the deficiency. That portion of the statute was invalid as it denied due process and had the potential for a denial of equal protection. However, that portion could be excised without invalidating the rest of the statute, and plaintiff had not raised the question of whether an immunization statute without a religious exemption was constitutional. The statute as excised allowed no excuses and plaintiffs child must be vaccinated to attend school. *Avard v. Dupuis,* 376 F. Supp 479 (D.N.A. 1974).

Action for neglect against parents who chose to educate their children at home. Both parents were college educated. The father had been both a school teacher and a college professor. They chose to keep their children at home on their farm and make their education an informal part of the everyday routine. However, several hours a day were devoted to formal education under the tutoring of the wife. The state contended that this home education was inadequate and the parents were guilty of neglect. *Held:* For the state. Proof that a child is not attending a school in the dictrict in which the parent resides establishes a prima facie case of neglect which places a burden on the parents to show that the child is receiving required instruction elsewhere. While the judge found that the parents were qualified to instruct their children, their program failed in several respects to meet the educational requirements of the state. An order of protection was issued directing that the children attend public school. *In re H,* 357 N.Y.S.2d 384 (Fam. Ct. 1974).

Action protesting annexation of district by city. Suit was brought by residents of the annexed area alleging the annexation on several grounds including the contention that it would bring the residents within an "unconstitutional" school district. *Held:* For the city. The court quoted *Hunter v. City of Pittsburgh,* 207 U.S. 161 (1907) to the effect that there was nothing in the Federal Constitution which bore on the power of a state to establish the change its political subdivisions as it saw fit. The other grounds were likewise rejected. *State v. City of Memphis,* 510 S.W.2d 889 (Tenn. 1974).

Universities and Other Institutions of Higher Education

Governing Boards

Action by state podiatry society to enjoin state board of regents and education commissioner from asserting supervision over the society's continuing education courses. As a requirement for re-registration podiatrists were required to present evidence that they had attended "education programs conducted by the podiatry society . . . or the equivalent of such educational programs as approved . . . in accordance with the commissioners regulations." The society maintained that the requirement of approval only applied to equivalent programs and that the legislative intent was that it have full power over its own programs. *Held:* For the commissioner. Rules of statutory construction favored the construction that the approval requirement applied to both types of programs. The construction urged by the society would result in an unconstitutional delegation to the society to establish standards for the licensing of its members. *Podiatry Society v. Regents,* 358 N.Y.S.2d 276 (Sup. Ct. 1974).

Administration

Action by student to compel payment of funds due under statute providing grants to students attending private institutes of higher learning. The student sought reimbursement of expenses incurred under the statute. A warrant was issued but the state treasurer refused to sign it contending the statute violated the state and federal constitutions. *Held:* For the treasurer. Although the funds were paid to the student the court found that they were intended for the benefit of private universities all but two of which were sectarian. Evidence of this intended benefit was seen in the way that grants were keyed to tuition at the recipient student's college and in the legislative history. There was no provision in the statute that the funds could not be used for sectarian purposes. Thus the statute violated state constitutional prohibitions against use of public educational funds in aid of any sectarian college, or any educational institution not owned and controlled by the state. The act was also found to violate the state equivalent of the equal protection clause in that it discriminated against some students by age and against any colleges founded after passage of the same act. The act also violated the Federal Constitution. *State v. Swanson,* 219 N.W.2d 726 (Neb. 1974).

Action by two professors at a medical college to enjoin the university from limiting the number of abortions performed and from denying them part time status. The board of regents limited the number of non-therapeutic abortions which could be performed to fifteen which was felt to be the minimum number that would enable the university medical school to fulfill its teaching function. The board also passed a motion prohibiting full time professors from performing abortions outside the hospital. Plaintiffs applied for part-time status so that they could perform abortions outside the hospital. They were granted temporary part time status but were denied permanent part time status when the temporary period expired. *Held:* For the Board in part. As the university hospital was a state agency providing general health care it could not infringe upon a patient's right to abortion without showing a compelling state interest. Such an interest inhered in the university's need to control the types of patients for instructional purposes. However, setting the number of abortion patients at the minimum instructional level while regulating all other patients at maximum instructional levels did not further this compelling interest and was not justified. The prohibition against performing abortions outside the hospital could not stand alone, but was upheld as within the scope of an established prohibition against full time professors performing any treatment outside the hospital. The professors had no right to a part time position and failed on the facts to show that the board discriminated against them in refusing to grant their application. *Orr v. Koefoot,* 377 F. Supp. 673 (D. Neb. 1974).

Action by area community college to compel county tax officials to remit proceeds from property tax. The state had consolidated all community colleges and technical schools into seven regions each with their own board but partially controlled by various state boards and statutory provisions. The funding scheme included among several revenue sources a property tax of up to one mill to be levied by counties within each district. State money was available to make up budget deficits only if the full one mill tax was imposed. The county treasurer refused to turn over proceeds of the tax claiming that the funding statute violated the state constitutional prohibition against levying property taxes for state purposes. *Held:* For the county. The community college districts served both state and local purposes, but the state purposes predominated. Therefore that part of the statute calling for property taxes was unconstitutional. *State v. Tallon,* 219 N.W.2d 254 (Neb. 1974).

Professors with Tenure

Action by faculty association seeking equitable relief from the college's actions against its tenured members. Claiming financial exigency the college dismissed thirteen tenured faculty members and placed the rest of the tenured faculty on one year terminal contracts. During the same year the college hired twelve new professors. The college policy on tenure permitted only "demonstrably *bona fide*" terminations in "extraordinary circumstances due to financial exigency." It further provided that only "extraordinary circumstances" would permit re-

ductions for financial reasons to be made at the same time that new persons were hired. The college argued that the actions taken were part of a new curriculum orientation necessitated by declining enrollment. It further argued against reinstatement on grounds that specific performance should not be granted for a contract for personal services. *Held:* For the faculty association. The financial exigency was seen as a subterfuge for an attack on the tenure system. Financial analysis revealed that the college had disposable assets sufficient to allay the financial crisis for the foreseeable future. The placing of all tenured faculty on one year contracts could not be explained by financial reasons nor could the dismissal of tenured rather than non-tenured professors. The granting of specific performance of a contract for personal services was seen appropriate because the college had expressed no dissatisfaction with the services rendered and because the remedy at law for breach of a contract of indefinite duration was seen to be uncertain. *American Assn'. of University Professors v. Bloomfield College,* 322 A.2d 846 (N.J. Super Ct. 1974).

Action by tenured professors for a preliminary injunction requiring that their employment be continued unless or until they are afforded minimal due process. Due to a reduction in the budget of the university system 38 tenured professors were notified in May of 1973 that their positions could not be funded past June of 1974. Because the tenure statute provided employment cannot "be terminated involuntarily except for cause upon written charges," the terminations were characterized as "lay-offs" by the defendant board of regents. The regents provided for appeal of the decisions which placed upon the professors the burden of showing that the material considered in the decision to lay them off was insufficient to justify that decision in any case. Plaintiff's requests that university officials who participated in those decisions appear for questioning were denied. *Held:* For the regents. A tenured teacher in a state university is protected only against a termination for a constitutionally impermissable reason or which is arbitrary or unreasonable. The appeal allowed by the regents gave them fair opportunity to establish a violation of equal protection. *Johnson v. Board of Regents of Univ. of Wis. System,* 377 F. Supp. 227 (W.D. Wis. 1974).

Action by tenured college professors for reinstatement following dismissal for lack of funds. The legislature reduced the college's appropriation thereby making it necessary to lay off eleven professors. The college drew up guidelines for the selection of those to be discharged and reached its decision without notice that the discharges were being considered. Two professors brought suit claiming a right to a hearing under the college by-laws. The court ordered hearings upheld the dismissals although some aspects of the colleges guidelines were criticised. Plaintiffs then brought suit alleging that the decisions were arbitrary and that the mere fact of dismissal was a stigma that infringed upon their liberty to seek other employment. *Held:* For the college. The selection process was fair and reasonable. The college had been very careful not to reflect upon the plaintiff's qualifications in any way. Under *Roth* mere nonretention is not such a foreclosure of opportunity as to be considered a deprivation of liberty.

Levitt v. Board of Trustees of Neb. State Colleges, 376 F. Supp 945 (D. Neb. 1974).

Action by seven junior college instructors to correct various wrongs allegedly done them by the college. Four faculty members only one of whom was tenured did not have their contracts renewed because of a personnel reduction. They contended that the nonrenewals were improperly based on subjective criteria. Three others who were retained claimed that their constitutional rights had been violated by the placing in their files of a memorandum charging neglect of duty. *Held:* For the college in part. The case of two instructors became moot when they were rehired. The nontenured instructor had no grounds for complaint as the college could dismiss him for any reason not constitutionally impermissable and he failed to allege any such reason. However, the tenured instructor had a right to a due process hearing on whether the decision to dismiss him was pursuant to the college's announced criterion. The three retained instructors were held to have received no constitutional injury by the entry in their file. *Collins v. Wolfson,* 498 F.2d 1100 (1974).

Action by college professor for reinstatement. In previous proceedings it was established that the professor had tenure status. This proceeding dealt with the question of whether due process had been provided the professor in the hearing the college provided prior to termination. Plaintiff alleged that the university was required to give him a hearing in accordance with the procedures in the faculty hard book and that the hearing held denied him due process. The college contended that sovereign immunity barred the suit, that the professor had waived his rights to the procedures prescribed in the hand book, and that the hearing given comported with due process. *Held:* For the college. The college was stopped from raising sovereign immunity at this point in the proceedings. The plaintiff waived his rights to the procedures set forth in the handbook when he agreed to the hearing that was provided. That hearing comported with due process and the decision to dismiss the professor was supported by substantial evidence. *Chung v. Park* 377 F. Supp. 524 (M.D. Pa. 1974).

Professors without Tenure

Action by nontenured professor alleging a due process violation in his nonretention without hearings. The professor was appointed an associate professor without tenure, but was given to understand that he would have been appointed with tenure except for a statute which denied tenured appointments to aliens. He was subsequently treated as a tenured faculty member in all respects even to the point of sitting at meetings of the tenured faculty and voting on the tenure status of other professors. After four years he became a citizen, but two years later he was notified that his appointment would not be renewed because of the quality of his teaching. He was denied a hearing. *Held:* For the professor. In the circumstances the professor had an expectancy of reemployment and a right to a due process hearing despite his nontenured appointment. He was awarded back pay until an appropriate hearing was conducted. The court

carefully noted that the constitutionality of the statute denying tenure to aliens was not before it. *Soni v. Board of Trustees of Univ. of Tenn.,* 376 F. Supp. 289 (E.D. Tenn. 1974).

Action for reinstatment by college professor claiming an expectancy of re-employment derived from tenure provisions. The regulations stated that the probationary period for those in plaintiff's class were five years and that a person who had served two years probation was entitled to twelve months notice of non-renewal. The regulations further stated that tenure was not automatic but could only be conferred by positive action of the board of regents. In the spring of her fourth year plaintiff was given a contract for a fifth year of employment and given notice that her contract would not be renewed after that year. The university moved to dismiss for failure to state a cause of action. *Held:* For the university. There had been no positive grant of tenure. Plaintiff could not claim an expectancy of employment under the regulations as the twelve month notice requirement had been met. *Sheppard v. West Virginia Bd. of Regents,* 378 F. Supp. 4 (S.D.W.Va. 1974).

Action by a part time college speech teacher to set aside his dismissal without hearing. The teacher maintained that he was dismissed because of his political views and that he was a probationary teacher and could not be dismissed without a hearing. The college argued that he was a temporary teacher and could be dismissed at will. *Held:* For the teacher. The fact that plaintiff taught part time for four and one half years without complaint gave him the expectation of employment which the legislation intended to protect in its classification scheme. A statute which provided that part time teachers must work 60% of a full time load to qualify for probationary status did not apply to plaintiff as he had obtained such status prior to its enactment. The school district's practice of annually dismissing all part time instructors regardless of performance and then rehiring them was a charade which could not be allowed to circumvent the classification scheme. As a probationary teacher plaintiff had a right to a hearing to vindicate his rights. *Balen v. Peralta Junior College Dist.,* 114 Cal. Rptr. 589 (1974).

Action by a nontenured college professor for reinstatement alleging an infringement of free speech. The professor interrupted a faculty meeting in an attempt to discuss a newspaper article which quoted the acting college president as calling the younger faculty members "punks". He was ruled out of order and entered into a dialogue with the chairman, but did not become abusive or use obscene language. His contract was initially renewed, but when he applied for a leave of absence, it was denied and he was given notice of non-renewal. No reason for non-renewal was given. He maintained that the action was in retaliation for his conduct at the meeting. The College maintained the action was part of a necessary staff reduction and that plaintiff's non-professional conduct at the meeting was sufficient reason for non-renewal. Plaintiff answered that if the non-renewal was part of a personnel reduction, the college had not met statutary notice requirements. *Held:* For the professor in part. The pro-

fessor's action at the faculty meeting was protected speech for which he could not be dismissed, and the statutory requirements of notice were applicable to the non-retention of probationary professors in a personnel reduction. The court deferred judgment until a referee could determine unresolved factual matters. *Mabey v. Reagan,* 376 F. Supp. 216 (N.D. Cal. 1974).

Action by nontenured college professor for reinstatement alleging the non-renewal was impermissably based on his exercise of free speech. The tenure committee voted to give plaintiff a terminal contract because of his failure to complete a manuscript for which he was given support, and several other reasons some of which were protected by the first amendment. But the tenure committee made it clear that it would reconsider should the professor finish and publish his work. The professor published an article based on the work and obtained a promise of publication for his manuscript which was partially finished. The tenure committee reconsidered, but chose not to give him an appointment citing the failure to complete the work and several other reasons none of which dealt with plaintiff's free speech. *Held:* For the University. Even though some of the minor objections to during the original consideration were impermissable, the final consideration was controlling and plaintiff did not show that impermissable factors had been considered at that time. *Watts v. Bd. of curators, Univ. of Mo.,* 495 F.2d 384 (8th Cir. 1974).

Action by nontenured college professor for $500,000 damages upon being refused tenure. The professor had several arguments with a colleague and a student and sought support from various university officials. When she was first considered for tenure these appeals were criticised along with her attendance, teaching and academic qualifications. At the meeting which resulted in the refusal of tenure only her teaching and academic qualifications were discussed. When she requested reasons for the decision, the chairman of the tenure committee sent her a letter summarizing the points which were raised. The teacher contended that the refusal to confer tenure was based upon her appeals for support which were protected by the first amendment. *Held:* For the university. Plaintiff had the burden of proof to establish that her discharge was in retaliation for the exercise of first amendment rights. She offered no convincing evidence to sustain this burden. *Frazier v. Curators of the Univ. of Mo.,* 495 F.2d 1149 (8th Cir. 1974).

Action by nontenured college professor for reinstatement and damages. After she married a fellow faculty member, plaintiff was given only temporary appointments because of the college's nepotism rule. Plaintiff was later discharged when she applied for a maternity leave of absence. She contended that the nepotism rule as administered discriminated against her because of sex. *Held:* For the plaintiff. Evidence should that there were 27 cases of nepotism at the college and in all cases the men were given term appointments and most of the women were given temporary ones, although some were given temporary appointment. The application of the rule was found to be both arbitrary and discriminatory. Plaintiff was reinstated and the case remanded for trial on damages. *Sanbonmatsu v. Boyer,* 357 N.Y.S.2d 245 (App. Div. 1974).

Action by nontenured Junior College teacher to compel re-employment. Plaintiff had been hired to teach in an apprentice training program run by his college for the Navy. During his third year the Navy informed the college that it planned to reduce enrollment in the program by 15% in the coming year. The college notified plaintiff that it planned to terminate his employment because he was the most junior faculty member in the department. Plaintiff requested a hearing but withdrew the request when his supervisor advised him that it might prejudice his application for a position elsewhere in the college. When that application was unsuccessful plaintiff contended that he had a right to a hearing under the state law which provided procedures for reductions in personnel made necessary by enrollment reductions. He also contended that he should not have been released when nontenured teachers with less seniority were retained in other departments. The school board contended that the case fell under another statute regulating personnel reductions caused by a decision to discontinue a certain type of service which did not provide for a hearing. *Held:* For the college. The reduction was not due to an overall loss of enrollment, but in response to the Navy's decision to reduce a particular kind of service. Plaintiff had no right to a hearing, nor did he have a right to be retained in preference to other non-tenured instructors junior to him. The statute which called for retention by seniority applied only to tenured teachers. *Krausen v. Solano Junior College Dist.,* 114 Cal. Rptr. 216 (Ct. App. 1974).

Action by a nontenured college professor for reinstatement alleging damage to his reputation. The professor had not been rehired because his "professional relationships with individual students failed to meet minimum standards." He brought suit contending that this statement deprived him of liberty by forclosing other employment opportunities as a professor. The district court ordered reinstatement until such time as plaintiff was given a due process hearing and the university appealed. *Held:* For the university. While the statement might damage plaintiff's reputation in the academic community the court did not feel that *Roth* required a due process hearing. *Blair v. Board of Regents of the State Univ. and Community College System of Tenn.,* 496 F.2d 322 (6th Cir. 1974).

Student Conduct and Discipline

Action by college students for reinstatement alleging that the regulations under which they were suspended are unconstitutional. The students were summarily suspended by the president of the university because of a political demonstration in the library. This incident and two other incidents involving the right of free speech and assembly became the basis for a suspension of over one year ordered by the disciplinary board. The president's summary suspension power was attacked on due process grounds, the regulation dealing with student demonstrations was attacked as a prior restraint upon first amendment rights, and other regulations were attacked as vague and overbroad. *Held:* For the students. The students had a right to due process before any suspension except in emergency situations. The court outlined requirements for preliminary and

final hearings. College students have full first amendment rights, and the regulations dealing with demonstrations involved an impermissable amount of prior restraint and were overbroad. Two of the other regulations dealing with student conduct were both void and overbroad, but one was upheld. Reinstatement and expungement of the record was ordered. On a motion for rehearing the university was held to be a proper defendant to a §1983 action because it was a public corporation rather than a munincipal corporation or a political subdivision of the commonwealth. §1983 was held to be as applicable in Puerto Rico as in a state. *Marin v. University of Puerto Rico,* 3nn F. Supp. 613 (D.P.R. 1974).

Action to enjoin expulsions of college students alleging an infringment of first amendment rights. The students sought a temporary restraining order enjoining the expulsions alleging irreparable damage. They alleged that their first amendment rights were violated because the stated reason for their expulsion was a pretext and that the expulsions were in retaliation for the exercise of their first amendment rights. The university maintained that the court had no jurisdiction. *Held:* For plaintiffs. The university was a private institution and court found no jurisdiction under §1983. However, the court found jurisdiction under §1985 because there was a substantial probability that plaintiffs would be able to establish a conspiracy among the defendants to deprive them of their civil rights. The court found irrepable injury would occur and issued a temporary restraining order. *Brown v. Villanova Univ.,* 378 F. Supp. 342 (E.D.Pa. 1974).

Action by medical students to enjoin their suspensions for cheating. The three plaintiffs were repeating their freshman year in Med school because of failing grades on the freshman comprehensive examination. When all three of them passed the exam with grades higher than had been made in five years, they were accused of cheating and given a hearing by a college committee which found that they had cheated and ordered their expulsion. Plaintiffs obtained a temporary injunction and argued for a permanent one contending the expulsion was arbitrary and thus violated due process. The university contended that the expulsions were not arbitrary and the proper standard of review was whether the committee's findings were supported by some evidence. *Held:* For the University. While there was no direct evidence of cheating the voluminous circumstantial evidence satisfied the due process test of some supporting evidence. Plaintiff's contention that the proper test was any substantial supporting evidence was rejected as inconsistent with Supreme Court decisions. The court noted that the cases relied on by plaintiffs dealt with disciplinary actions which infringed upon student's first amendment rights and might properly be more closely scrutinized. *McDonald v. Board of Trustees of Univ. of Illinois,* 375 F. Supp. 95 (N.D. Ill. 1974).

Action by dismissed graduate fellow for a formal hearing. Plaintiff's fellowship was discontinued for unsatisfactory performance. He was represented by a legal intern at an informal hearing conducted by the academic complaint

committee, and when the result was unfavorable, he appealed to the dean of the graduate school. An assistant attorney general had represented the college at the hearing but was unable to attend the dean's hearing. The dean upheld the dismissal and advised Plaintiff that his next recourse would have to be in a court of law. Plaintiff then filed a petition for judicial review under a statute which authorized appeals only from formal proceedings. He subsequently retained an attorney who requested that the college grant a formal hearing provided for by statute. The college denied this request as the statute required that such a request be made within ten days of the termination of informal review. The college then moved to dismiss the petition for judicial review because there had been no formal hearing. Plaintiff contended that, because he had justifiably relied on the dean's advice that his next recourse was to the courts, the college was stopped from moving for dismissal on grounds that no formal hearing was held. *Held:* For the college. The statute under which plaintiff brought his appeal was a legislative limitation on the subject matter jurisdiction of the courts. Subject matter jurisdiction cannot be confered on a constitutional court by consent, waiver or estoppel. In well considered dicta on the merits of the estoppel claim the court concluded that any reliance on the dean's legal advise had not been justified. *Rust v. Western Washington State College,* 523 P.2d 204 (Wash. 1974).

Action by cadet to enjoin his expulsion from West Point as violative of due process. The cadet had been found guilty of an honor code violation and expelled. He contended that substantive due process was denied because there was only one remedy (expulsion) for all honor code violations regardless of the severity of the offense and that procedural due process was denied on several grounds. *Held:* For the government. The substantial due process argument had been rejected in a prior decision, *White v. Knowlton,* 361 F. Supp. 445 (1973). The procedures more than met the due process requirement established for cadets in *Hagopian v. Knowlton,* 470 F.2d 201 (1972). The injunction was denied and summary judgment given for West Point. *Roberts v. Knowlton,* 377 Supp. 1381 (S.D.N.Y. 1974).

Other Student Rights and Responsibilities

Action by college student to have the rules for determining residency status declared unconstitutional. The student had been in the state for four years and had become a registered voter. He contended that voter registration was conclusive of citizenship under the 14th amendment and precluded his being classified as a nonresident. He also attacked the state's definition of residency. As the student had not tried to prove residency under the regulations, the university moved for dismissal for failure to pursue his administrative remedy. *Held:* For the University. As the plaintiff attacked the constitutionality of the remedy there was no need for him to pursue it. The 14th amendment defines state citizenship in terms of residence alone. And in Kentucky voter registration alone is not conclusive of the right to vote, a person must also be able to show he is a resident. Voter registration is therefore no proof of citizenship or resi-

dency for any purpose. The residency requirement of continuous physical presence and a present intent to remain permanently was seen as reasonable. *Hayes v. Board of Regents of Kty. State Univ.,* 495 F.2d 1325 (6th Cir. 1974).

Action by college student for damages arising from requirement that he pay out of state tuition. The student alleged that he had been deprived of due process by the state statute which provided that no person could establish state residency while a student at any institution of learning in the state. *Held:* For the student. The statute establishes an irrebutable presumption of non-residency of the sort which the Supreme Court has recently declared a violation of due process. The student was awarded the difference between the fees paid and resident tuition. *Bauer v. Board of Regents of the Univ. of Neb.,* 219 N.W.2d 236 (Neb. 1974).

Action by students to have residency requirements for tuition purposes declared unconstitutional. The university regulation provided that persons must have continuous state residency for six months to qualify for in state tuition but that enrollment for more than eight semester hours in a state institution during that time precluded qualification for residents who qualified for in state tuition after six months regardless of enrollment in a state institution. Plaintiffs contended the regulation violated both due process and equal protection. *Held:* For the students. The regulation created an irrebutable presumption and violated due process. The exception for spouses discriminated against single people without rational basis and violated equal protection. *Blair v. Wayne State Univ.,* 220 N.W.2d 203 (Mich. Ct. App. 1974).

Class action by students to have residency requirements for tuition purposes declared unconstitutional. The university's regulations provided that persons must have continuous in state residency for six months prior to enrollment as a resident student but that enrollment in a state institution for more than three semester hours during that time precluded qualification as a resident. The students attacked the regulation as an irrebutable presumption that denied them due process and asked for retroactive reimbursement of tuition paid in excess of in state tuition. The university opposed retroactive reimbursement as inequitable and contended that plaintiffs had no standing to bring the action because of their failure to exhaust administrative remedies. *Held:* For the students in part. The students had standing as it was apparent the administrative remedies offered no relief. The regulation was struck down as an irrebutable presumption. However, by analogy to *Lemon II* the court found retroactive reimbursement to be inequitable. The university had not shown bad faith in reliance on its regulation and would bear a heavy burden if such relief were granted. *Hays v. Regents of Univ. of Mich.,* 220 N.W.2d 91 (Mich. Ct. App. 1974).

Class action by married women in three state universities to have residency regulation declared unconstitutional and for the restitution of fees. Plaintiff's represented a class of married women students who had allegedly been discriminated against on the basis of sex by a series of regulations which had re-

sulted in their paying out of state tuition. The first rule was that the domicile of a wife was that of her husband with an exception allowed for women who married while enrolled in college. The next two rules created rebuttable presumptions that a woman's domicile was that of her husband. Restitution of fees paid in excess of in state tuition was asked. Defendant universities, university officials and state officials attacked the jurisdiction of the court, the administration of the class, the availability of restitution. They also raised the defense of sovereign immunity and defended on the merits. *Held:* For the women. While there was sufficient nexus between the universities and the state to make those institutions state actors for the purposes of §1983, there was insufficient control by the state to make them instrumentalities of the state. They were thus primarily private institutions and persons under §1983. Not being instrumentalities of the state they could lay no claim to sovereign immunity. The regulations were seen to have placed upon married women alone the burden of proving that their relationship to another person did not disqualify them for in state tuition. While the state had a legitimate reason to require a showing of residency, the administrative convenience of operating under a presumption did not justify applying such a presumption only to married women. The further operation of any such rules was permanently enjoined. The remedy of restitution was seen as proper provided that plaintiff's could show unjust enrichment. However, as to restitution there were no questions of law and fact common to the class. The judge decertified the class so that each aggrieved person could come forward separately to show that they were entitled to pay in-state tuition but had paid out of state tuition because the regulations had been applied to them. Those who carried this burden could claim restitution. *Samuel v. University of Pittsburgh,* 375 F. Supp. 1119 (W.D.Pa. 1974).

Action to enjoin a university regulation requiring certain students to live in dormitories. On one campus statewide university regulations requiring on campus residency which had been previously held constitutional was applied but with an exception for students 23 and above. Plaintiffs were students between 21 and 23 years of age who contended that the regulation as applied was arbitrary and denied them the due process of law. The students maintained that they too should be exempted. *Held:* For nobody. Drawing the line at 23 was arbitrary. However, instead of enjoining the university from denying plaintiffs permission to live off campus, the court enjoined the university from granting any exemptions on the basis of age. *Cooper v. Nix,* 496 F.2d 1285 (1974).

Torts

Action by community college student for damages arising out of injury in shop class. The student had his fingers mashed while operating a cutting machine in welding class. He was successful in a jury trial and the college appealed. *Held:* For the college. The instructor on two different occasions had cautioned the students against putting their hands or fingers beyond the guardrail. In addi-

tion he had expressly warned the students of the dangers inherent in shearing a short peice of metal and had demonstrated the proper technique. As this is what plaintiff was doing when injured the court ruled that he had been adequately warned as a matter of law and absolved the defendant shop teacher of liability. The plaintiff was also found to be contributorily negligent on the basis of his own testimony which must be given credibility as a matter of law when it is adverse to his interest. *Kiser v. Snyder,* 205 S.E.2d 619 (N.C.Ct. App. 1974).

Action by college student for damages arising out of injury at baseball practice. Plaintiff was acting as "catch up man" for a student coach who was hitting "fungoes". He was injured when the "fungo" bat slipped out of the coach's hand and struck him in the face. He brought suit alleging common law and statutory negligence. He contended that an applicable statute imposed liability on fault alone where the fault directly caused the injury. Assumption of risk was raised as a defense. *Held:* For defendants. The injury arose from plaintiff's voluntary participation in the baseball practice. Being hit by a bat released by a fellow participant is a foreseeable risk of such participation which plaintiff assumed. *Richmond v. Employers' Fire Ins. Co.,* 298 So.2d 118 (La.Ct. App. 1974).

Action for damages incurred by college student taking horseback riding lessons for college credit. Suit was brought by plaintiff against both the academy and the college alleging tort liability for the damages. Both defendants raised assumption of risk and contributory negligence. The college further urged that it should not be held vicariously liable because the academy was an independent contractor not subject to their control in giving lessons and that they had no notice of negligent operation of those lessons. The jury found that plaintiff had assumed the risk, but had not been contributorily negligent and plaintiff moved for a new trial. *Held:* For the plaintiff in part. While the jury's findings were not necessarily inconsistent, the instructions had set forth overlapping criteria in light of which they were seen to conflict. A new trial was awarded, but the college was excused as a defendant. *Stephenson v. College Misericordia,* 376 F. Supp. 1324 (M.D. Pa. 1974).

Miscellaneous

Action by vocational school to enforce tuition contract against a student who withdrew from the course. When the defendant applied for enrollment in a computor course he was given an aptitude test and told that he had a good chance for success. He enrolled in the course and did badly on the first two tests, but the school encouraged him to continue. When his performance did not improve defendant withdrew after completion of 7% of the program. The school sued for the balance due on the contract. Defendant maintained that the contract was unconscionable and counterclaimed for part of the tuition already paid. *Held:* For defendant. In determining that the contract was unconscionable the court noted the disparity of education between plaintiff and defendant and defendant's poor command of English. More emphasis was placed on the

use of the aptitude test to induce defendant to enroll. The manner in which it was used was considered a deceptive practice under two different state administrative regulations. The final factor making enforcement of the contract unconscionable was the encouragement to continue once it was clear that he did not have the ability to complete the course. The defendant was awarded $97.90 on his counterclaim which was the difference between what he paid and what he would have owed had he withdrawn earlier given proper counseling. *Albert Merrill Sch. v. Godoy,* 357 N.Y.S.2d 378 (N.Y. City Ct. 1974).