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Case Summaries of Recent Education Decisions

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Supreme Court Review

Primary and Secondary Education

Universities and Other Institutions of Higher Education

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Recent Decisions

Board of Education of the City School District of the City of New York v. Harris, #78-873. Ruling below: 584 F.2d 576 (2d Cir. 1979). Affirmed, __ U.S. __, 100 S. Ct. 363, 48 L.W. 4035 (1979).

The Supreme Court affirmed the Court of Appeal's opinion which addressed the issue of eligibility of a school district for federal financial assistance under

* This section contains digests of the significant cases in education reported in the National Reporter System in advance sheets dated from October, 1979 to January, 1980.

the 1972 Emergency School Aid Act.[1] The Court's analysis was directed towards interpretation of a section of the Act which renders certain educational agencies ineligible to receive such assistance.[2] The respondent used statistical studies to make the eligibility section operational.

Justice Blackman's opinion examined the Congressional intent which led to the statute's drafting. He found their concern was to seek a remedy to *de facto* segregation in schools. The Act is designed to provide financial assistance as an enticement to encourage voluntary elimination of *de facto* segregation. Blackman stated that at the time of ESAA passage the Congress believed courts could not reach this discrimination but only *de jure*. The solution was "to encourage the voluntary elimination, reduction, or prevention of minority group isolation."[3]

The Court stated that the statute means what it says: that it applies to *de facto* as well as *de jure* segregation. The rules providing for ineligibility by an educational agency are based on the actualities and consequences of its current practices and policies. The Court further held that the discriminatory impact which measures eligibility for ESAA may properly be made through a statistical study.

Justices Stewart, Powell and Rehnquist dissent.

*Review Denied***

Rogers v. Brochette, #78-1616. *Certiorari*: denied, ___ U.S. ___, 100 S.Ct. 52, 48 L.W. 3218 (1979). Ruling below: 588 F.2d 1057 (5th Cir. 1979).

The Fifth Circuit Court of Appeals affirmed, in substance. The summary judgment given the respondent in this action challenging as unconstitutional a Texas statute[4] which required certain school districts described therein to participate in a federally subsidized breakfast program.[5] The court first determined that the school district had standing to bring the suit, although several other plaintiffs were not proper parties.

The issue of standing was resolved by an analysis of general principles developed in the Supreme Court. The court found a distinct and palpable injury to petition which alleged the expenses and costs of the startup and

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[1] 20 U.S.C. 1001-1619.

[2] Section 706(d) (1) of the Act provides that an educational agency is ineligible for assistance if at June 23, 1972, the date of the Act, such agency applied a policy or practice which caused disproportionate utilization of its personnel based on race, color or national origin.

[3] 48 L.W. 4035, at 4041.

** A petition for *certiorari* is a request that the Supreme Court review a particular case. It requires the assenting vote of four justices before *certiorari* is granted. Denial of a petition for a writ of *certiorari* is not a ruling on the constitutional issues.

[4] Tex. Educ. Code Ann. Title 2 §21.914 (Vernon) provides, *inter alia*, that if at least 10 percent of the students of a school are eligible for free or reduced price breakfasts under the national school breakfast program then the governing board of that school's district shall make the benefits of the program available to eligible students.

[5] 42 U.S.C. §§ 1771, 1779 provide for one of several school breakfast programs. Schools, school districts, and states may participate in this program. Participating schools must agree to abide by federal regulation relating to the quality and availability of the breakfasts; the schools receive subsidies for breakfasts served to children eligible for reduction in price or free meals.

continuation of the breakfast program. The litigation presented a true case of controversy even though the respondent could, by other action, discontinue the petitioner's existence.

The Court upheld the trial court's summary judgment finding that the Texas statute was consistent with the federal school breakfast statutes and regulations and that it was therefore constitutional.

Marengo W. Board of Education v. Lee, #78-1673. *Certiorari*: denied, __ U.S. __, 100 S. Ct. 57, 48 L.W. 3218 (1979). Ruling below: 588 F.2d 1134 (5th Cir. 1979).

The Supreme Court refused to review this appeal from an order remanding the school desegregation case to the federal district court for the southern district of Alabama. The Court of Appeals found the trial court's original desegregation plan not to be effective and ordered it remanded for further consideration.

McLutcheon v. Chicago Board of Education, #79-125. *Certiorari* denied, __ U.S. __, 100 S. Ct. 144, 48 L.W. 3218 (1979). Ruling below: January 19, 1979, United States Court of Appeals for the Seventh Circuit.

Petitioner's suit alleging civil rights violations by respondent which she contends resulted in her dismissal from a position when respondent was reassigned to the same trial judge before whom petitioner has another suit pending against respondent. In that suit petitioner alleged sex discrimination against respondent. The Court held the appeal from the reassignment order not to be an appealable order.

(Ed. note: Neither of these suits has been tried on the merits—so we'll probably see these parties again!)

Skehan v. Board of Trustees of Bloomsberg State College, #78-1719. *Certiorari*: denied, __U.S. __, 100 S. Ct. 61, 48 L.W. 3218 (1979). Ruling below: 590 F.2d 470 (1978).[6]

Petitioner is denied review of this opinion in which the trial court's findings and order from a hearing based on this Court's remand order is itself affirmed in part and remanded in part. The Court held that petitioner failed to establish that he was relieved of his position because of his activities which he contends were protected under the First Amendment. The court found his termination was based, *inter alia,* on his failure to comply with departmental rules, to contribute to departmental operations and to meet his classes at their scheduled times.

Prior to petitioner's termination he had requested a grievance hearing as allowed under his contract. He was not afforded this hearing and damages were allowed to him. The respondent asserted its defense of sovereign immunity against the judgment. The Court remanded the case for a determination of an award of attorney's fees against certain of the respondents.

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[6] Prior decisions in this case: 353 F.Supp. 542 (M.D. Pa. 1973), 358 F.Supp. 430 (M.D. Pa. 1973), No. 72-644 (M.D. Pa., filed March 24, 1977) (unpublished opinion), 501 F.2d 31 (3d Cir. 1974), 538 F.2d 53 (3d Cir. 1976), 421 U.S. 983, 95 S.Ct. 986 (1975), *certiorari* denied, 429 U.S. 979, 97 S.Ct. 490 (1976).

Benner v. Oswald, #78-1722. *Certiorari* denied, __ U.S. __, 100 S. Ct. 62, 48 L.W. 3218 (1979). Ruling below: 592 F.2d 174 (3d Cir. 1979).

The Supreme Court declined to review the Court of Appeals opinion which affirms the trial court determination that there is no denial of equal protection to undergraduate students at Pennsylvania State University because they are ineligible to vote for university trustees. The court found sufficient state involvement with the university and trustee selection process to constitute state action. The student petitioners' constitutional challenge was reviewed under the "rational basis" test rather than under a strict judicial scrutiny standard. The court determined that although trustees are similar to other elected state officials, the trustees' duties did not reach the level of responsibilities required of elected public officials.[7] Judge Aldisert, waiting for the court, analyzed the history and statutes underlying the establishment of Penn State. He found a rational basis to the trustee selection process and held no denial of equal protection to undergraduate students.

[7] 592 F.2d 174, at 183 (1979).

Primary and Secondary Education

Governing Boards

Action rulings on motions in ongoing suit by elementary school children and parents challenging constitutionality of board of education's proposed "K through sixth" bible study curriculum program. The board contends that substantial historically and culturally important knowledge may be taught in an elementary school program without violating the constitutional ban on religious study in public schools. Motion by school board asking court to approve proposed plan. *Held*: For the board. With the exception of a lesson outline proposing to teach of the resurrection of Jesus Christ as recounted in the New Testament, the central statement of the Christian faith, the proposed curriculum plan passes constitutional analysis. The plan was found to be carefully limited to an objective and nondevotional treatment of biblical literature, history, and social custom. *Wiley v. Franklin*, 474 F. Supp. 525 (E.D. Tenn. 1979).

Action by members of parent-teacher association against school board challenging the closing of a junior high school. The association contends that in deciding to close the school, the superintendent and the school board violated the Florida Sunshine Act. The superintendent contends that in an effort to avoid the uproar that would inevitably attend the public airing of a major redistricting, he concluded that conversation between the staff and a single board member would *not* be a "meeting" under the Act; consequently he so met with the board members prior to the public announcements of the final resolutions. *Held*: For the parent-teacher association. The court agreed that normally a meeting between the staff and a single member of the school board does not fall within the scope of the Act. However, the court found that in the instant case, the discussions between the superintendent and individual school board members were in contravention of the Sunshine Act since the discussions were repetitive in content, were in rapid-fire seriatim, were of obvious official portent, and thus resulted in *de facto* meetings by two or more members of the board at which official action was taken. *Blackford, Etc. v. School Board of Orange County*, 375 So.2d 578 (Fla. App. 1979).

Appeal by defendant Philadelphia school district of lower court determination that plaintiff was, in fact, a professional status employee and that the district had improperly eliminated plaintiff's position as part of overall budgetary cutback scheme. Held: For the school board. The record was devoid of any evidence substantiating plaintiff's claim to professional status. The appellate court concluded, therefore, that the lower court had exceeded its authority. The case was remanded to the lower court for presentation of substantiating evidence on the professional status claim. *School District of Philadelphia v. Rochester*, 405 A.2d 1142 (Pa. Cmwlth. 1979).

Action by plaintiff school district, joined by parents and taxpayers residing in that district, to enjoin State Treasurer and Secretary of Education from dispensing funds to any school district under provision of Public School Code of 1949, as amended in 1977. The amended School Code determines state aid to school districts by means of complex formula which, among others, includes a factor keyed to prediction of school districts ability to generate tax revenue. Plaintiffs allege that such factor bears no rational relationship to the district's ability to raise revenues and that, therefore, distribution of Commonwealth funds by this formula is arbitrary and capricious thereby violating the Pennsylvania and U.S. Constitutions. *Held*: For the Commonwealth. The record established that the school funding formula bore a rational relationship to promoting equal educational opportunity and therefore the action failed to state a claim and was therefore dismissed. *O'Connel v. Casey*, 405 A.2d 1006 (Pa. Cmwlth. 1979).

Appeal by Department of Public Instruction (DPI) from a lower court ruling that special education students in the school system can be expelled. The DPI challenges the school district's standing to seek judicial review contending the school district cannot demonstrate a "specific, personal, and legal interest" in the subject matter of the decision. The DPI also contends the school district's expulsion authority is overridden by a statute establishing duties to special education students. It alleges the district's duty to provide special education students with placements based on the principle of the least restrictive alternative defeats its right to expel them. *Held*: For the school district. This case does not involve a petition for judicial review based on a subordinate dissatisfaction with a superior agency's reversal of an adjudication of a matter entrusted by statute to agency discretion; instead it involves a question of the nature and extent of the subordinate's statutory powers. This is sufficient to give the school district a "specific, personal, and legal interest" which has been "specially and injuriously affected by the DPI decision." The statutory power of school districts to expel any scholar from school includes the power to expel a special education student, but in such cases expulsion procedures must include reevaluation of the child by diagnostic-educational team, a report and recommendation by that team to the school board, and, after a full hearing, determination by the school board as to whether an alternative place will meet the needs of the child and the district. Expulsion should be resorted to only when no reasonable alternative placement is available. *Southwest Warren Community School District v. Department of Public Instruction*, 285 N.W.2d 173 (Iowa 1979).

Private school sought writ of mandate to compel school district to permit it to compete equally for lease for vacant school district property. Private educational agencies engaged in the conduct of required educational programs for pupils who are subject to compulsory school attendance laws were specifically restrained by local board regulation from leasing board of education property. *Held*: For the private school. The resolution by the board restraining private schools from bidding on the lease was unconstitutional as violative of equal protection and due process and not justified by arguments that leasing

to private schools would lead to decrease in public school enrollment, result in loss of state revenues to school district and interfere with desegregation plan. *Binet-Montessori v. San Francisco Unified School District*, 160 Cal. Rptr. 38 (App. Ct. 1979).

Administration

Suit by former elementary school principal seeking payment of salary from date of his termination and reinstatement to his position. Pressed by the "budget crunch" and flagging student enrollment, the school district decided to eliminate the elementary school principal's position along with another one. The circuit court found the principal entitled to be employed from date of order for remaining term of his contract, but the appellate court reversed. *Held*: For the principal. Failure to file a notice of claim pursuant to Education Law did not bar principal's action to enjoin termination of his position and for damages for breach of contract. The Education Law provides that when board abolishes a position, the services of teacher or administrator having least seniority in system within tenure of position abolished shall be discontinued. Principal's rights under his three-year contract are not destroyed by use of a seniority system. Order reversed and case remitted to Supreme Court, Special Term for assessment of damages. *Hanagan v. Board of Education, Commack Union Free School District*, 47 N.Y.2d 613, 393 N.E.2d 991, 419 N.Y.S.2d 917 (1979).

Action for declaratory judgment by principals against board of education which adopted procedures establishing local community nominating committees to select principals instead of following statute which required a merit ranking eligibility list. The board presented the first five names from the eligibility list to the nominating committee which rated the candidates in order of preference, and the board attempted to honor the request. The lower court ordered that the rank order on the examination need not be the sole criteria of merit in the appointment of principals to individual schools. *Held*: For the principals. Pursuant to the doctrine of contemporaneous construction, statute, which directs school board to appoint principals for merit only, requires appointment to position of principal in rank order from principals' eligibility list prepared by board of examiners. Prior statute, which directs school board to appoint principals for merit only, and subsequent statute, which authorizes use of nominating committees in selection of principals, were not so inconsistent as they could not coexist in school code, and thus passage of subsequent statute did not repeal or amend requirement of rank order appointment as contained in prior statute. The 1917 legislature determined that rank order appointment in the Chicago Public School system was an appropriate solution to the problems which existed at that time. "If those problems no longer exist or if the solution is unsatisfactory today, it is the responsibility of the legislature to repeal that section of the statute." Reversed and remanded with directions. *Maiter v. Chicago Board of Education v. District 21 Parent Education Council v. Midwest Community Council*, 395 N.E.2d 1162 (Ill. App. 1979).

Action by principal against board challenging the termination of his employment. The teacher contends the board's decision to terminate his contract for

just cause was not supported by substantial evidence in the record. *Held*: For the school board. State statute requires that the reasons stated in notification for termination of all administrators except superintendents must be for "just cause." The court found "just cause" to include legitimate reasons relating to district's personnel and budgetary requirements as well as faults attributed to the administrator. While the substantiality of the evidence must take into account whatever in the record detracts from its weight, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. *Briggs v. Board of Directors of the Hinton Community School District*, 282 N.W.2d 740 (Iowa 1979).

Action by public school principal seeking reinstatement after his school district refused to renew his teaching contract. The principal was the owner of a substantial cattle enterprise for many years. In 1974 he added a retail dry goods store to his holdings. The board learned of the principal's acquisition after it had adopted and entered in its official minutes a motion to rehire the principal. The board called another meeting and decided not to renew the principal's contract. The principal brought suit alleging a denial of due process and of equal protection by arbitrarily and selectively enforcing the outside employment rule against him. *Held*: For the principal. Substantive due process was not violated by the school district's no-outside employment rule; however, the school district did deny the principal equal protection of law when it applied the policy in a discriminatory manner, by invoking it as to his operation of the dry goods store but not invoking the policy against other employees who engaged in business enterprises such as ranching. *Gosney v. Sonora Independent School District*, 603 F.2d 522 (5th Cir. 1979).

Action by superintendent against school board alleging the board violated the Freedom of Information Act (FOI) at a meeting and that the meeting should be declared void. The FOI provides that no resolution or motion "considered or arrived at in executive session will be legal unless following the executive session, the public body reconvenes in public session, and presents and votes on such resolution . . . or motion." The superintendent contends that the board, in executive session, considered or arrived at a motion or resolution specifying four charges against the superintendent, but the board did not follow up its action by reconvening in public session and voting on the measure. *Held*: For the board. The evidence was sufficient to support trial court's factual finding that board had not considered or arrived at motion or resolution in executive session and therefore had not violated the FOI. *Yandell v. Havana Board of Education*, 585 S.W.2d 927 (Ark. 1979).

Appeal by former assistant school principal from lower court decision holding he was not demoted when the assistant principal was transferred to the position of guidance counselor. Held: For the former assistant principal. The reduction in the assistant school principal's earnings of approximately 25% due to his transfer to position of guidance counselor was a major reduction and, thus, the transfer constituted a demotion within the meaning of the applicable state statute defining demotion and therefore the procedures required by the

statute providing for demotion of school administrators were required. *Cooper v. Board of Education of Somerset Independent School District*, 587 S.W.2d 845 (Ky. App. 1979).

Appeal by defendant school district of New York State Secretary's administrative ruling granting damage award and attorney fees to plaintiff school principal. The plaintiff was formerly the principal of a single school in the defendant district. The suit arose when plaintiff was transferred to a position as joint principal over two schools without the administrative aid of an assistant principal. Instead the plaintiff would share administrative authority with those same schools' former assistant principals now styled as associate principals. On the issue of attorney's fees the defendant argued that such fees were without any statutory support, which former decisions had demanded. *Held*: Split; for the principal on the damage issue, for the school district on the attorney fees issue. The court laid particular emphasis on the lower court's observation that a lessening in authority was every bit a demotion as a lessening in salary. *School District, City of New York v. Allison*, 406 A.2d 1196 (Pa. Cmwlth. 1979).

Labor Relations

Charge by school district filed with state PERB that teachers union engaged in ULP by refusing to bargain on district's negotiation proposal that 1) union waive its right to bargain on matters not specifically provided in the agreement, 2) monetary benefits negotiated are contingent upon sources of revenue and, when applicable, vote approval of the budget levy, and 3) unit members are not entitled to contractual benefits during periods when the school is closed because of lack of funds and the benefits will not be "made up" when school is reopened. Held: The union unlawfully refused to negotiate on matters within the mandatory scope of bargaining. The union claimed it could not be required to negotiate over "a waiver of basic statutory rights." The zipper clause proposed directly affects conditions of employment and is no less negotiable because it limits union rights. Similarly, the funding proposals directly affect conditions of employment and need not have a "positive" effect upon such conditions to be a mandatory subject. *Eugene School District N. 4J v. Eugene Education Association*, Oregon Employment Relations Board, Case No. C-165-78, 600 P.2d 425 (Or. App. 1979).

Petition to determine whether the school board is the employer of employees at the county library, whose funds are derived from the county, the school district, the state and the library's own efforts; salaries and fringe benefits are paid by the school district but reimbursed by the library. The library controls the work direction and general supervision of the employees. Although the library governs the hiring, firing and disciplining of employees, the school district has the ultimate approval of hiring and firing and the determination of fringe benefits. *Held*: The library board is a joint employer since it directly controls the hiring, firing and supervision of employees, but the school board is a joint employer since the hiring, firing and determination of fringe benefits is subject to its approval. The county and the state are not joint employers

since the "mere provision of funds, absent the exercise of control over an important aspect of the employment relationship does not provide a sufficient nexus to the collective bargaining process so as to render the County or Commonwealth employers." *In the Matter of the Employees of Erie City and County Library*, Pennsylvania Labor Relations Board, Case No. PERA-R-12, 224-W (1979).

Petition by union of school administrators to determine whether the board of education is required to negotiate on changes in administrators' duties made by the board in order to keep schools open during a strike by the teachers association (a different union). Held: The effects of the board's restructuring the educational program and reassignment of duties during the strike are negotiable. The Board argued that it must retain the degree of flexibility necessary to properly cope with an emergency. The PERC held, however, that the emergency circumstances, at the most, might defer negotiations until "after the fact" but they do not moot negotiations responsibilities, especially since strikes or other emergencies might recur. *Camden Administrators Council, Local 39* and *Board of Education of the City of Camden*, New Jersey, PERC No. 80-2 (1979).

Petition for declaratory judgment whether the school board, when the collective bargaining agreement has expired and a successor has not yet been consummated, must comply with provisions of the expired contract which require that transfers and changes in assignments be made on a voluntary basis whenever possible and which require arbitration of grievances. Held: Yes. The employer must maintain the status quo during this hiatus period with respect to wages, hours and terms and conditions of employment which are continuing, rather than cyclical, in nature. The grievance procedure must retain its vitality subsequent to the expiration of the agreement to compensate for the union's loss of the power to strike. "To conclude otherwise would be to promote disharmony at a time when harmony is most needed, during the negotiations for a successor agreement." *In Re Levy County School Board*, Florida PERC Order No. 79D-188 (1979).

Appeal by bus company from representation decision by the State PERB that it is a public employer because the extent of control retained by the school district demonstrates that the bus company is acting on behalf of the school district. Held: Affirmed. The critical factor distinguishing an "agent" from an independent contractor is the right to control the details of the work to be performed. This control was shown by the fact that the school district supplied the buses to the company, the buses could be used only for transportation of city school children, the school district remained responsible for compliance with state and federal regulations pertaining to equipment on the buses, the school district retained veto power over the hiring of any school bus driver, and the school district supplies all gasoline to operate the bus system. *Baker Bus Service, Inc. v. Keith*, Maine Superior Ct. Docket No. CV78-702 (1979).

ULP charge by teachers union against school board for not complying with arbitration award. The school board contended that in the public sector

there should be no presumption of arbitrability. Held: Since the application of the school's inclement schedule was arbitrable the school board engaged in a ULP for failing to comply with the arbitration award. However, "because of the existence of items which cannot be negotiated or arbitrated, . . . there is no presumption of arbitrability for public employee agreements" contrary to the private sector doctrine. As in *Acting Supt. of Schools of Liverpool Central School Dist.*, 42 N.Y.2d 509 (1977), it must first be determined whether the claim sought to be arbitrated falls within those matters which are allowed by statute to be negotiated. Second, it must be determined whether the parties have agreed in an arbitration clause to arbitrate the dispute raised. This two-step test should be considered first by the arbitrator to conserve time and minimize expense. *Hudson Federation of Teachers, Local 2263 v. Hudson School Board*, New Hampshire PERB Dec. No. 79013 (1979).

Appeal by school board from lower court's affirmance of state PERB's finding that school board committed unfair labor practice by implementing new teacher evaluation plan without prior discussion with the union. Held: Affirmed. Teacher evaluation plans are within the plain and ordinary meaning of working conditions since the factors involved "significantly touch and concern the everyday activities of school teachers." Since evaluation is a "discussable" matter, it was also a ULP for the school board to create an evaluation committee and to select members on it without consulting the union on the appointments. The committee contained no union members. *Evansville-Vanderburgh School Corporation v. Roberts*, 392 N.E.2d 810 (Ind. App. 1979).

Appeal by school board from permanent injunction against contracting out school bus services without first negotiating on the subject with the union representing the school bus drivers even though the union had failed to demand negotiations and even though the school buses already had been sold. Held: Affirmed. The subject of contracting out is neither expressly nor clearly implied in the language of the collective bargaining agreement, but it does empower the school board to eliminate positions. Contracting out is a negotiable subject which can be relinquished only by clear and unmistakable language. Contracting out involves substitution of non-*unit* drivers for unit drivers to perform essentially the same services and, therefore, does not involve elimination of positions. The bid solicitation by the school board and the cost analysis of the transportation system was insufficient notice to the union that the school had made a decision or that one was really imminent. Notice on such a fundamental matter cannot be accomplished through implication or rumor. The economic plight of the employer is no defense to circumventing the protections statutorily granted to employees. *General Drivers Union Local 346 v. Independent School District No. 704*, 283 N.W.2d 524 (Minn. 1979) [relying on *Van Buren Public School District v. Wayne County Circuit Judge*, 61 Mich. App. 6, 232 N.W.2d 278 (1975)].

Appeal by teachers union from stay of arbitration of grievance by teacher that evaluation of her performance did not comply with contractual requirement that it will be conducted openly and personally in the place of instruction

with full knowledge of the teacher. Held: Reversed. The grievance is arbitrable. The school board's statutory power to evaluate is not violated by the contractual limitation on the board's discretion as to the method of evaluation. *Board of Education of the Clarkstown Central School District v. Jones*, 102 LRRM 2600, 417 N.Y.S.2d 294 (App. Div. 1979).

Teachers with Tenure

Action by tenured teacher against defendant vocational school operating committee to reverse committee's nondisciplinary suspension of plaintiff from current faculty. Held: For the teacher. Statutory administration code established four exclusive bases upon which a suspension could be based, none of which were applicable where, as here, the reason for the suspension was budgetary only. Noting that the committee's action was wholly inconsistent with statutory procedures, the court ordered reinstatement with back pay and all other related entitlements. *Brinser v. Cumberland-Perry Area Vocational-Technical School, Joint-Operating Committee*, 405 F.2d 964 (Pa. Cmwlth. 1979).

Suit brought by blind tenured teacher charging the school district's hiring policies and practices unlawfully discriminated against him solely on the basis of the teacher's blindness. The school district presented evidence that the denial of promotion to an administrative position was based upon the teacher's lack of necessary administrative skills, such deficiency being compounded by the teacher's blindness. *Held*: For the school district. The record supported the defendant's argument that the teacher was without the administrative background necessary for the position. The teacher's blindness was a factor insofar as the teacher's inability to suggest to the school district how the foreseeable duties requiring the ability to see could be fulfilled in some alternative manner. It was the teacher's lack of consideration and planning in the area of compensating for the handicap that concerned the school district, not the fact of the handicap itself. *Upshur v. Love*, 474 F. Supp. 332 (N.D. Cal. 1979).

Action by tenured music teacher alleging school district's act in discharging him violated constitutional law, state statute and arbitration clause of state-adopted teacher-employment contract. The plaintiff sued for relief by way of: reinstatement to former status with full seniority and experience credit; expungement from his record of all data relating to the incident; damages for salary and private music lesson income lost; and damages for emotional distress and humiliation. The members of the school district board of education were named as the defendants in both official and personal capacities. The defendants claimed their actions were shielded by governmental immunity, inasmuch as the decision to discharge was made in the good-faith exercise of their official authority. *Held*: For the teacher. In a comprehensive opinion the court determined that: (1) consideration of activities protected under the First Amendment played a substantial role in reaching the decision to discharge the plaintiff; (2) decision to discharge plaintiff without reference to protected activities would have been totally unwarranted and in any event would have

violated Delaware teacher termination statute; (3) plaintiff entitled to reinstatement and expungement of employment record to full extent of plaintiff's request for relief; (4) monetary damages for lost income and emotional distress; and (5) joint/several liability for damages by the defendants in their official and individual capacities. The court made special note that school administrative officials are under an affirmative duty to be cognizant of the constitutional consequences of their decisions with respect to students and teachers. *Eckerd v. Indian River School District*, 475 F. Supp. 1350 (Del. 1979).

Dismissed public school teacher brought action against defendant's school board, board members, and school superintendent alleging that dismissal proceedings were conducted in a manner contravening her consitutional rights of due process and equal protection under the laws. Held: For the school board, et al. The record below was found to be totally devoid of support for plaintiff's allegations of unconstitutional conduct during the dismissal proceedings. The district court commented (in soto voice) that plaintiff's allegations were, in part, "oddly," answered within her own pleadings. *Barndt v. Wissahichon School District, et al.*, 475 F. Supp. 503 (E.D. Pa. 1979).

Appeal by defendant school district of lower court award of damages for injury to reputation and for back wages to professional category teacher. The school district argued two points: One, that the award for injury to reputation was not included in the exclusive remedy for demotion via illegal procedures under the Pennsylvania Public School Act of 1949 (Pa. PBSA). Two, that the plaintiff had not proved the proper amount of back wages pursuant to the statute. *Held*: For the school district. The court construed applicable statute as prescribing an exclusive remedy for improper demotion by an action in *assumpit.* Emphasizing the distinction between actions in *assumpit* and injury to reputation as being that between an injury to an expectation arising from a contract and an injury to a status arising from a contract, the court ordered a new trial. The issue at the new trial was restricted to the proper amount of back wages. *Jost v. Phoenixville Area School District*, 406 A.2d 1133 (Pa. Super. Ct. 1979).

Action to compel school district to reinstate, by appropriate relief, teacher who claims that suspension was not for one of four permissible basis enumerated in state statute and therefore in violation of state law. The school district argued that reduction in elective courses available to students was a "curtailment or alteration of program" within the statute, hence, specifically authorized. *Held*: For the teacher. The record disclosed the pivotal fact that the secretary of the state department of education had specifically informed the school district that the reduction in electives was not a "curtailment or alteration in program" under the state statute. The court, therefore, ordered the teacher's reinstatement and payment of an amount of lost pay equal to back pay less any earnings for the period from other sources. *Eastern York School District v. Long*, 407 A.2d 69 (Pa. Cmwlth. 1979).

Action by teacher against school board alleging she was involuntarily transferred to another school in retaliation for certain constitutionally protected

speech. The teacher contends the principal informed her that she was being transferred because "she had complained about school procedures . . . and that she was 'stirring up trouble' in the teachers' lounge." Teacher alleges she had discussed in the teachers' lounge her favoring a master collective bargaining contract. The school board contends that the teacher's statements impeded her classroom duties and interfered with the operation of the school and therefore were not constitutionally protected. The board also contends that the teacher's statement was not protected because it involved only matters of private concern. *Held*: For the teacher. The record supported the jury's finding that the speech was constitutionally protected and that the transfer was in retaliation and therefore violative of the First Amendment. *McGill v. Board of Education of Pekin Elementary School District No. 108 of Tazewell County, Illinois*, 602 F.2d 774 (7th Cir. 1979).

Action by teacher contesting her discharge by the school board. The teacher was employed by the school system from 1968 through 1973 and had attained tenure status. She resigned in 1973 and was reemployed by the board in 1975. The board refused to reemploy teacher for the school year 1977–78. The board contends that by resigning in 1973 the teacher waived or lost her rights to tenure and could therefore be discharged without cause. The teacher cited statute requiring 30-day notice upon resignation; the penalty for not complying was loss of tenure status. *Held*: For the teacher. Since teacher complied with the statutory notice provisions, she continued to have the rights of tenure she enjoyed prior to resignation. *Cox v. Perkins*, 585 S.W.2d 590 (Tenn. 1979).

Appeal by tenured teacher from decision of lower court affirming the school board's termination of his contract. The teacher was terminated by the board in the spring of 1977 and challenged this action in legal proceedings. However, since the proceedings were pending in the fall of the 1977–78 school term, the teacher was unable to resume his duties and another teacher was hired in his place. In late September, the board reinstated the teacher upon court order. In the spring of 1978 the board once again terminated the teacher, citing as cause a surplus in the teaching force and the low enrollment in the teacher's classroom. *Held*: For the teacher. "The clear intent of the Tenured Teacher Act is to guarantee a tenured teacher continued employment except for two justifiable circumstances: (1) discharge for a cause; and (2) reduction in the teaching force". *Witt v. School District No. 70*, 202 Neb. 63, 273 N.W.2d 669 (1979). Since the surplus teacher situation was created by the board's own action in hiring a probationary teacher for the position which the tenured teacher had previously held, and in effect the change of circumstances relied on by the board to discharge the teacher was a surplus of teachers created by the court-ordered reinstatement of the tenured teacher; the tenured teacher could not be terminated while the probationary teacher was retained under the reduction in force provision of the Tenured Teacher Act. *Moser v. Board of Education of School District of Humphrey*, 283 N.W.2d 391 (Neb. 1979).

Appeal by tenured teacher from lower court's affirmation of the school board's action in terminating his contract. The teacher was dismissed under a new statutory provision revising the procedure for termination of teacher's contract.

The statute required, *inter alia*, that the notification by the superintendent of intention to recommend termination "shall contain a short and plain statement of the reasons, which shall be for just cause." The teacher contends the board did not meet its burden of proof and did not show just cause in the termination of his contract. *Held:* For the board. The findings of the school board, that the nonprobationary teacher improperly handled the football program and that the program deteriorated as a result, were supported by a preponderance of competent evidence and such findings amounted to just cause for termination of his contract. *Board of Education of Fort Madison Community School District v. Youel*, 282 N.W.2d 677 (Iowa 1979).

Appeal by teacher from Teacher Tenure Commission decision that the board of education laid off tenured teacher in good faith due to financial necessity. The teacher contends that the board was in fact attempting to dismiss him because of his performance, leadership and influence in the teachers' union by use of the subterfuge of an economic layoff. He also contends the board manipulated class schedules to eliminate his position. *Held:* For the teacher. The record established that the board manipulated teaching schedules to effectively dismiss the teacher under the guise of necessary reduction in personnel in violation of the statutes governing teachers' tenure. The teacher was entitled to reinstatement with reparation of lost salary pursuant to statute. *Freiberg v. Board of Education of Big Bay De Noc School District*, 283 N.W.2d 775 (Mich. App. 1979).

Action by tenured teacher against board of education and education association for breach of contract. The teacher refused to comply with an agency shop clause of the collective bargaining agreement. The board discharged the teacher citing his failure to comply with the provision as reasonable and just cause for dismissal. On appeal, the State Tenure Commission upheld the teacher's discharge. No further appeal was taken and teacher commenced the instant suit in circuit court. The teacher contends that the agency shop provision was invalid and discharge for failure to comply with it was illegal. The board defends on the grounds of res judicata, collateral estoppel and failure to exhaust administrative remedies. *Held*: For the board. Where an issue has been finally decided in one action it cannot be relitigated in a separate action between the same parties. The issue of the validity of the teacher's charge was litigated before the State Tenure Commission. The teacher cannot now attempt to relitigate. *Dissent*: The majority opinion has overstated the breadth of the issue litigated by the teacher before the Commission. Teacher's appeal to the commission only concerned the issue of whether he was justifiably discharged under the tenure act requiring just and reasonable cause for dismissal. His subsequent suit in circuit court attacked the legal validity of the agency shop clause and alleged the consequent invalidity of his dismissal for failure to comply with that contractual clause. While both contentions relate to the question of whether the teacher was validly discharged, they are nevertheless separate legal issues demanding different legal analyses. *Viera v. Saginaw Board of Education*, 283 N.W.2d 796 (Mich. App. 1979).

Appeal by teacher from lower court's reversal of the State Tenure Commis-

sion's reversal of a school board decision to discharge a tenured elementary school teacher. Held: For the teacher. On appeal from decisions of State Tenure Commission, the sole function of reviewing courts is to determine from the record whether proof received by the school board or Commission, or both, supports finding on which the Commission decided for or against the appealing teacher. The precise standard is one of competent, material and substantial evidence on the whole record. The evidence in the instant case supported the conclusion of the commission that the school board had failed to sustain its burden of proof and that there was no reasonable and just cause for dismissal of the teacher. *Comstock Public Schools v. Wildfong*, 284 N.W.2d 527 (Mich. App. 1979).

Appeal by teacher from lower court's decision upholding school board's nonrenewal of her teacher's contract due to teacher's having attained the mandatory retirement age of 65 years. The teacher contends that the mandatory retirement age does not constitute "just cause" for termination under applicable statute. The teacher also contends that the school district's mandatory retirement policy is violative of the equal protection clause of the Fourteenth Amendment. *Held*: For the school district. Attainment of mandatory retirement age is an adequate basis relating to school district's personnel and budgetary requirement upon which to establish "just cause" for the end of the school year termination of a teacher's contract. In order to prove a violation of equal protection, the teacher must show no reasonable basis for the classification since no fundamental right or suspect class is involved. The school district's mandatory retirement policy which allows the district to plan for its administrative needs, to plan recruitment, to maintain a mixture of younger and more experienced teachers, etc. bears a rational relationship to valid government interests of maintaining quality of public education and regulating public employment and thus mandatory retirement policy is not violative of equal protection. *DeShon v. Bettendorf Community School District*, 284 N.W.2d 329 (Iowa 1979).

Action by tenured fifth grade teacher against a board of education claiming that termination of employment was impermissibly based on his exercise of First Amendment rights in connection with his teaching function. The incident igniting the controversy was a penmanship lesson in cursive writing wherein the class was assigned to write a letter to a designated "pen-pal," the plaintiff's fiance. The "pen-pal" responded to each child individually with a brief statement of political rhetoric in support of the Progressive Labor Party, an espoused communistic political entity. The defendant alleged that the termination was based on a willful violation of the Plainfield Board of Education By-Laws which specifically prohibit sectarian or partisan instruction other than as contained in an approved curriculum plan. *Held*: For the board of education. The record supported the Court's finding that the plaintiff's First Amendment right of political exercise was outweighed, in this instance, by the board's legitimate interest in tailoring the curriculum to the level of intellectual sophistication of each grade level. *Burns v. Rovaldi*, 477 F. Supp. 270 (Conn. 1979).

Tenured teacher brought suit challenging the decision of the board of education to dismiss him based on minority report of fact-finding panel. The board reviewed the majority report, found it to be "in error in numerous conclusions" and to have been influenced by staff members, adopted the minority findings and dismissed teacher. The lower court affirmed the dismissal. *Held*: For the teacher. It was improper for members of board to consider recommendations of the school staff. The report of the majority of the fact-finding panel was binding on board; thus, board had no alternative but to retain the teacher. Reversed and remanded. *Cordova v. Lara*, 600 P.2d 105 (Colo. App. 1979).

Action by teacher alleging reduction in salary when after her return from two consecutive one-year leaves of absence she was offered same salary contract as prior to her departure. Teacher signed contract under protest alleging that because of the progress of inflation, she was receiving a reduction in salary. She also sought to recover attorney fees incurred when school district initially failed to tender her any contract. The lower court directed verdict in favor of school district. *Held*: For the school district. Teacher's salary was not reduced in violation of statute, which did not require all salary range increases to automatically inure for benefit of teachers on leave. Teacher was not entitled to recover attorney fees incurred in negotiating and settling, short of a law suit, dispute with school district. Affirmed. *McEldowney v. Osborn School District No. 8 Maricopa County*, 600 P.2d 29 (Ariz. 1979).

Action by school board for review of administrative decision denying dismissal of tenured teacher. Several months passed after teacher's receipt of notice to remedy certain teaching deficiencies and teacher failed to remedy the deficiencies. After a hearing, in which particularized charges were exhaustively received, the hearings officer did not recommend discharge. An appeal to the circuit court resulted in a reversal in board's favor. *Held*: For the teacher in part. It was not incumbent upon school board to offer clear and convincing evidence, but only proof by a preponderance of evidence, that a pattern of deficiency existed with respect to lapses in student discipline and lesson planning and presentation by tenured teacher as cause for dismissal. Where hearings officer applied improper test to evidence, there were no findings in record subject to review, so that lower court should have remanded cause to hearings officer so that he might reconsider his decision in light of appropriate standard. Affirmed in part; reversed in part; remanded. *Board of Education of Minooka Community Consolidated School District No. 201 of Kendall, Will and Grundy Counties v. Ingels*, 394 N.E.2d 69 (Ill. App. 1979).

Petition for writ of mandamus by tenured teacher seeking reinstatement and award of damages. On appeal for dismissal for failure to state a claim, the appellate court reversed and remanded. The lower court ordered board to assign teacher as a full-time teacher and awarded her damages. *Held*: For the teacher. The wording of the teacher tenure act clearly requires a hearing before dismissal and the board had the duty to hold the requested dismissal hearing before the close of the school term for that school year. Because the board

failed to do so, the writ of mandamus was properly issued. Affirmed. *Smith v. Board of Education of East St. Louis School District No. 189 of St. Clair County*, 394 N.E.2d 41 (Ill. App. 1979).

Article 78 proceeding by school teacher seeking to vacate order of Commissioner of Education dismissing instead of suspending teacher. The teacher had slapped her employment supervisor and called him "a son of a bitch" and threatened to kick him in the crotch. The Commission determined teacher's behavior deserved punishment more severe than one year's suspension without pay and that dismissal was appropriate. *Held*: For the Commissioner. The dismissal of school teacher was not wholly disproportionate punishment for teacher's violent behavior. Under the Education Law, the Commissioner had the power to prescribe a different and more onerous punishment for school teacher than recommended by hearing panel selected to hear charges filed against teacher. Petition dismissed. *Mockler v. Ambach*, 420 N.Y.S.2d 111 (Sup. Ct. 1979).

Appeal by tenured music teacher from a lower court judgment finding that the action of the school committee was justifiable when it discharged him. The music teacher/band director repeatedly bypassed the school administration in making his complaints about the principal and faculty curriculum council and communicated directly with the school committee. The committee subsequently denied his salary increment which was based on improvement in quality of teaching. The teacher discontinued his band duties for the year, refused to sign following contracts for band and music and threatened to disrupt the music department. The lower court concluded there was ample justification for the dismissal. *Held*: For the school committee. The music teacher's refusal to sign a contract for his services as band director as an act of retaliation for a decision of the school committee to deny him a raise, knowing there was no practical way in which the dual functions of music teacher and band director could be divided without a detrimental effect on the music education of students, constituted insubordination. There was ample justification for school committee's decision to dismiss him. Judgment affirmed. *Lower v. North Middlesex Regional School Committee*, 395 N.E.2d 1310 (Mass. App. 1979).

Article 78 proceeding by school psychologist to compel her reinstatement to position of full-time school psychologist. The junior high psychologist position was reduced to half-time and an elementary psychologist position was created half-time but an additional person with less seniority was placed in it. The junior high psychologist demanded she be reinstated to full-time position and given both posts. The lower court dismissed the complaint as untimely. *Held*: For the psychologist. The 4-month statute of limitation within which school psychologist had to commence proceeding to compel her reinstatement to position of full-time school psychologist did not begin to run when psychologist was granted tenure and employed as full-time psychologist in junior high school, but rather, when she became aggrieved when school board reduced her position to half-time and appointed a person with allegedly less seniority to half-time position at elementary level allegedly in violation of Education Law.

Reversed and remitted. *Mulvey v. Board of Education of Scarsdale Union Free School District,* 420 N.Y.S.2d 934 (App. Div. 1979).

Complaint by teacher who after having given notice of resignation was assaulted and injured by a student and was the next day rated unsatisfactory in the performance report. Teacher learned of the unsatisfactory rating after his resignation became effective and demanded an investigation and hearing as required by the grievance and adjustment procedures but was denied a hearing on ground that since he was an ex-employee, he was no longer entitled to those procedures. The lower court granted him an alternate writ of mandate but granted a partial summary judgment to defendants with respect to other causes of action in his third amended complaint. *Held*: For the teacher in part. Plaintiff did not first have to establish judicially the wrongfulness of the district's denial of a grievance hearing before presenting to the district a claim for monetary damages flowing therefrom. Where there were no precedent remedies to exhaust, his cause under the 1871 civil rights statute for alleged breach of his contract in not providing the teacher with a safe place to teach and in not granting him a grievance hearing was barred by failure to timely file a claim. The teacher's claim for special disability pay constituted an allowance within meaning of Government Code section exempting, from requirement of filing claim against public entity, claims by public employees for fees, salaries, wages, mileage or other expenses and "allowances." Payment of full salary for limited period could itself be regarded as kind of worker's compensation benefits, exempted from claim filing requirement. One's ability to obtain employment within one's profession is a property right protected by Fourteenth Amendment and denial of grievance hearing on unsatisfactory rating, done under color of law, may constitute violation of 1871 civil rights statute. Partial summary judgment affirmed; partial summary judgment reversed; judgment granting alternative writ of mandate affirmed and case remanded. *Adler v. Los Angeles Unified School District,* 159 Cal. Rptr. 528 (Ct. App. 1979).

Teachers without Tenure

Appeal of lower court order dismissing plaintiff teacher's claim that her non-tenure employment contract was terminated without written adjudication containing findings of fact and reasons for adjudication as allegedly required by Pennsylvania state law. Held: For the teacher. The court found, as a matter of law, that the Pennsylvania Local Agency Act required more than the mere statement of a teacher rating and a recitation of a board of directors roll-call vote on a job action. Any such hearing must produce a written statement of factual findings supporting the job action. The case was remanded to a lower court for supervision of the production of the written fact-finding report. *Kadusick v. Board of Directors, Port Allegany School District,* 405 A.2d 1320 (Pa. Cmwlth. 1979). See also: *Shaler Area School District v. Salakas,* 406 A.2d 243 (Pa. Cmwlth. 1979); and *Cigarski v. Lake Lehman School District,* 407 A.2d 460 (Pa. Cmwlth. 1979).

Appeal by school board from a judgment entered upon a jury verdict awarding $10,000 damages to a teacher whose contract had not been renewed. The

teacher brought action in the lower court seeking an injunction and, in the alternative, damages. The suit was tried by jury. *Held*: The judgment was reversed. Since both damages and an injunction were sought, the parties were not entitled to a jury trial as to the damages claim because the damages claim was merely incidental to and dependent on the right to an injunction. Therefore, both parties would have to consent to a jury trial and since the school board did not consent, the judgment was reversed and the case remanded for a determination as to whether the procedural steps required by statute in a nonrenewal of contract situation had been followed. *Dobervich v. Central Cass Public School District No. 17*, 283 N.W.2d 187 (N.D. 1979).

Action by probationary kindergarten teacher who was a member of the Jehovah's Witnesses religion, challenging her proposed discharge for failure to adhere to prescribed curriculum as violative of her First Amendment right of religious freedom. The teacher refused to teach her students patriotic songs, the pledge of allegience or any other patriotic matters in the curriculum, basing her refusal on religious beliefs. *Held*: For the school district. Although the teacher had a right to her own religious views and practices, there is a compelling state interest in the choice of a suitable curriculum and adherence to that curriculum for the benefit of young citizens and society. A teacher may not disregard prescribed curriculum merely because of a conflict with her/his religious principles. A teacher has no constitutional right to require others to submit to his or her views and to forego a portion of their education they would otherwise be entitled to enjoy. *Palmer v. Board of Education of the City of Chicago*, 603 F.2d 1271 (7th Cir. 1979).

Action by nontenured teachers against school board challenging the board's authority to terminate their employment for economic reasons after ten days notice pursuant to contract. The teachers cited provision in the teacher's tenure act which required 60 days written notice to a nontenured teacher that his services were being discontinued. Teachers allege their termination is invalid since they failed to receive the 60-day statutory notice. *Held*: For the school district. The statute providing that probationary teacher "shall be employed" for ensuing year unless notified in writing at least 60 days before the close of the school year, although offering employment security in nature of protection from arbitrary and capricious dismissal, was not intended to give a statutory right to continuous employment throughout the school year regardless of any possible future development. Since the teachers were employed pursuant to a contract which provided for termination for economic reasons after ten days' notice, the termination was effective. This case overruled *East Detroit Federation of Teachers, AFT Local 698 v. East Detroit Board of Education*, 55 Mich. App. 451, 223 N.W.2d 9 (1974), to extent of inconsistency. *Boyce v. Board of Education of the School District of the City of Royal Oak*, 285 N.W.2d 196 (Mich. 1979).

Challenge by black junior high school teacher against Mississippi school district board of trustee's decision to deny plaintiff an offer to rehire for upcoming school year. Plaintiff alleges that board action was racially motivated and resulted in inhibition and violation of plaintiff's constitutional rights

of free speech and equal protection under federal and state laws. Defendant countered that failure to rehire was appropriate response to insubordination on part of plaintiff which severely diminished superintendent's and board's ability to effectively administrate. *Held*: For the teacher. The record established that dispute arose over politically active plaintiff's allegedly insubordinate act of absenting himself from school on election day, for the purpose of poll watching. Prior custom permitted such absence, but, defendant issued new ruling the evening before election day which barred such absence. Subsequent confrontation between plaintiff and defendant superintendent of schools escalated rapidly, culminating with televised demand by plaintiff for defendant superintendent's resignation and extension of plaintiff's contract for the upcoming year. The court cited the test announced by U.S. Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L.E.2d 811 (1968), as controlling. The *Pickering* test was framed by the court, here, as one determinative of whether a teacher's speech is constitutionally protected when the teacher makes a public statement criticizing a superior office or person. Balancing teacher's interest in speaking out on matters of public concern and school board's need for orderly administration, the court determined that plaintiff's statements were reflective of only plaintiff's truthfully held opinion and that the board had completely failed to show that plaintiff's statement had any noticeable adverse effect on effective administration by the superintendent or the board. The court issued a permanent injunction reinstating plaintiff to his former teaching position for the upcoming year without diminution in duties, salary or benefits of employment. *Jordan v. Cagle*, 474 F. Supp. 1198 (N.D. Miss. 1979).

Motion by teacher to set aside an adverse judgment in an employment dispute with school board on the ground that lower court lacked subject-matter jurisdiction to review by means of certiorari a ruling of State Board of Education. Originally teacher was charged with possible physical or emotional child abuse and her contract not renewed. A hearing by the local board affirmed non-renewal of contract, but the State Board reversed on ground of failure to carry statutory burden of proof. A superior court granted certiorari over teacher's motion to dismiss and reversed State Board's ruling. *Held*: For the teacher. State Board decisions were "of force and effect" only in county where state capitol located. Superior court which granted certiorari not being county where state capitol located, such court was without subject-matter jurisdiction. Judgment reversed. *Fuller v. Williams*, 258 S.E.2d 538 (Ga. App. 1979).

Petition by probationary teacher for writ of review with respect to proceedings before school board relating to the board's refusal to renew her employment contract. The teacher alleged that facts other than those in evidence at the hearing were determinative in the board's decision to not renew her contract. The circuit court granted the board's motion to quash and dismissed the petition; the appellate court affirmed. *Held*: For the teacher. The function to be performed by a district school board when a probationary teacher requests a hearing with respect to proposed nonrenewal of the teacher's contract is a quasi-judicial function and, in such a proceeding, the board is required to make

a decision or determination within the meaning of the statute relating to writs of review. In reviewing the board's decision or determination under a writ of review, the scope of review is limited to the procedures at the hearing and to the question whether notice of nonrenewal was timely given. Examination of the legislative history of the statute reveals that the legislature intended that the teacher have at least an opportunity at the hearing to offer evidence to contest the reasons for the nonrenewal and to demonstrate that the reasons were false, that the board would at least consider such evidence in good faith and that the board would then make a determination or decision whether to make final its previous intent not to renew the probationary teacher's contract. Reversed and remanded. *Henthorn v. Grand Prairie School District No. 14, Linn County*, 601 P.2d 1243 (Or. 1979).

Action by teacher seeking to void nonrenewal of her contract for alleged noncompliance with "sunshine law." Although notice of a regular board meeting was published in five local newspapers and printed in newsletters to all teachers, personal notice was not served on visual arts teacher that during that meeting her one-year contract would not be renewed. The lower court found for the school district. *Held*: Affirmed. The board of education rule, adopted pursuant to and complying with "sunshine law," allowing any person to request notification of upcoming regular or special meetings, precluded claim of teacher, who had not utilized such rule, that statute required board to personally notify her of upcoming board meeting at which her employment or dismissal would be considered in executive session during the meeting. *Amigo v. Board of Education, Cloverleaf Local School District*, 394 N.E.2d 331 (Ohio App. 1979).

Petition brought by board of education for judicial review of decision of lower court reversing board's termination of teacher's contract. The board refused teacher's request for an additional hearing in order to refute the findings and recommendations contained in the referee's report. The lower court granted teacher's motion for summary judgment, vacated board's termination of teacher's contract and ordered reinstatement with full pay of any salary lost as a result of termination. *Held*: For the board. Under statute, a terminated teacher had a right to either a hearing before an impartial referee or the board, but not both. Construing the statute to provide for only one hearing did not violate due process. Judgment reversed. *Jones v. Board of Education, Mt. Healthy City School District*, 395 N.E.2d 1337 (Ohio App. 1978).

Student Conduct and Discipline

Action by high school students to obtain preliminary injunctive relief to compell return of an allegedly obscene student publication and to bar defendant board of education from any disciplinary action against the plaintiffs, pending the outcome of a trial on the merits for the claim for permanent relief of equivalent nature. The defendant board of education argued that the publication was so lacking in any protected portion of an otherwise vulgar and obscene whole, that the injunctive relief was not warranted. *Held*: *Split decision*; for the board of education insofar as the denial of the request for an

order to turn over the seized papers; for the students insofar as the request for a bar on disciplinary measures pending trial. The record supported the finding that the potential loss of the publication could be balanced by an injunction bond. However, with regard to the contemplated disciplinary action, the Court found the better course to be to withhold disciplinary action until hearings on the merits. *Thomas v. Board of Education, Granville Central School District,* 478 F. Supp. 114 (N.D.N.Y. 1979). (See also pp 190–191).

Action by junior/senior high school students for declaratory judgment, injunction and damages arising from canine and full-body search during drug investigation conducted at the schools during school hours. Defendants argued that the extreme drug abuse problem at the incident schools required extraordinary measures. Further, the searches were conducted for seizure only and law enforcement officials had agreed to pursue no criminal investigation whatsoever. *Held*: Split decision; for the students on the issue of unconstitutionality of the body search; for the school officials on all other issues of constitutionality of the canine searches and damages.

The district court premised its findings on two significant points. First, constitutional rights of school children necessarily comport with diminished expectations of privacy, given the reduced freedoms of the students on attendance and during school hours. Second, the students' expectations of privacy under the Fourth Amendment must be balanced against the necessity of school officials to maintain order and discipline in their schools under the *in loco parentis* doctrine. Therefore, the sphere of privacy surrounding the right to be free from unreasonable search and seizure may be pierced by a school official standing *in loco parentis* without a warrant upon reasonable cause to believe that the student has or is violating school policy. The Court then issued six findings: (1) the prolonged delay of the children from leaving the homerooms for one and one-half hours was not unconstitutional; (2) entry by school officials and non-investigating law enforcement officers into classroom for five minutes was not a "search" under Fourth Amendment; (3) walking of leashed marijuana-sniffing canine along classroom aisles during school officials' "visit" to each homeroom was not unconstitutional; (4) ordering student to empty pockets and purse onto desktop at alert of canine was not violation of Fourth Amendment; (5) full-body search of student based solely on continued alert of canine was wholly unreasonable and unconstitutional in both premise and extent; and (6) defendant school administrators were immune from liability for monetary damages where drug investigation was conceived and executed in good faith within *in loco parentis* authority. *Doe v. Renfrow,* 475 F. Supp. 1012 (N.D. Ind. 1979).

Action, motions by defendants and plaintiffs following substitution of jury verdict by directed verdict thereby granting plaintiff's recovery for damages arising from unconstitutional search and seizure of plaintiff high school students by defendant high school teachers while in attendance at school during school hours. Defendant's motion requested reinstatement of jury verdict which had relieved defendants of liability for damages. Plaintiff's motion requested certification of suit as class action for declaratory judgment

so as to precipitate the court's issuing a general rule on teacher searches of students. *Held*: Motions of all parties denied. With respect to the defendant's motion, the court found no basis for the defendant's assertion that the whole body search of the plaintiffs were premised on good faith exercise of authority and a reasonable belief of a violation of school policy. The court determined that the searches were premised only on the belief that the plaintiffs had an opportunity to steal, not that the plaintiffs could reasonably be suspected to have exercised that opportunity. The plaintiffs' motion was without support of the record, the necessary commonality of issues of law and fact amongst multiple parties to suit not present. *M.M. v. Anker*, 477 F. Supp. 837 (E.D.N.Y. 1979).

Action by middle school student alleging that school district acted in violation of state and federal law when ordering 15-day suspension from school. The principal basis for student's claim sounded in state law, but the district court exercised its lawful power in hearing state law claims where the student stated claims premised on federal law. *Held*: For the student. The record supported the findings of the court which held: (1) where school officials attempt to suspend a student for more than five days, the Minnesota Public Fair Dismissal Act (MPFDA) requires an informal administrative hearing prior to any order compelling suspension in excess of five days; (2) home-study of assignments studied during period of suspension was a reasonable "alternative program" under MPFDA; (3) fact that school officials had commenced but not completed psychological evaluation prior to suspension did not bring into play state and federal regulations governing education of handicapped children, and (5) the student, not given the required informal conference before extension of five-day suspension to fifteen-day suspension, was entitled to have any reference to the suspension expunged from her records even if she would have been suspended in any event. *Mrs. A.J. v. Special School District No. 1*, 478 F. Supp. 418 (D. Minn. 1979).

Student Rights and Responsibilities

Action by five high school students against school board challenging their suspension for publishing allegedly "morally offensive, indecent, and obscene" publication alleging deprivation of their First and Fourteenth Amendment rights. The publication was printed outside school and no copies were sold on school ground. The only activities involving the publication within the school were the use of a school typewriter on one or two occasions and the storage of the publication in a teacher's classroom closet. *Held*: For the students. The court recognized that substantial discretion must be accorded professional educators in order for them to properly perform their responsibilities. However, the court also concluded that this deference rested upon the supposition that the school official's arm of authority does not reach beyond the schoolhouse gate. When an educator seeks to extend his dominion beyond the schoolhouse, he must answer the same constitutional commands that bind all other institutions of government. The use of the typewriter and closet were found to be *de minimis* and therefore the school officials had no power to

punish the students for their publication. *Thomas v. Board of Education of Granville Central School District*, 607 F.2d 1043 (2nd Cir. 1979).

Action by high school basketball player against the Alabama High School Athletic Association alleging that a section of the bylaws of the ASAA are unconstitutional as violative of his due process and equal protection rights. The bylaws provide that a member of a high school athletic team, who participates in an athletic contest as a member of a similar team in the same season is ineligible to compete on the high school team for the remainder of the season. The player had participated on church teams and was therefore declared ineligible to play on the high school team. *Held*: For the association. The bylaw does not violate the Constitution in the absence of some evidence that the student athlete has suffered some impairment of a property right, or that the acts of the association were the result of fraud. *Kubiszyn v. Alabama High School Athletic Association*, 374 So.2d 256 (Ala. 1979).

Action brought by students, parents and school employees challenging school board's assertion and implementation of alleged right to selectively bar reading material from school library. Students allege infringement and denial of free speech and due process rights under the U.S. Constitution. *Held*: For the school board. The First Amendment claims of students and parents centered upon the absence of any articularable standard for exclusion of reading material within the school board's stated policy. Noting *Presidents Council, District 25 v. Community School Board No. 25*, 457 F.2d 289 (2d Cir.) cert. denied 409 U.S. 998, 92 S. Ct. 308, 34 L.Ed.2d 260 (1972), the court found no constitutional issue presented by the notion of shelving or unshelving certain books or that there was trace of propriety to federal courts intervening to review the wisdom of board determination. The due process claims were summarily treated by the court's observation that inasmuch as the school board's policy created no independent right to a totally unfettered acquisition and purchase policy, there again was a lack of any constitutional issue. Finally, speaking to the due process and First Amendment claims of the school employees, the court described the infringement of any constitutional rights of the employee outside of any rights created by the school board's announced acquisition and review policy to be, at best, miniscule. The finding was said to be supported by the absence of any First Amendment right of a librarian to select the material for the library under an express First Amendment basis or an implied academic freedom basis. *Bicknell v. Vergennes Union High School Board of Directors*, 475 F. Supp. 615 (Vt. 1979).

Action by black and white Florida twelfth grade students challenging constitutional and statutory validity of Florida state high school graduation requirement of successful completion of Florida state student assessment test (SSAT II). The students made three separate claims: (a) the design and implementation of the SSAT II was racially biased and/or violative of the equal protection clause of the Fourteenth Amendment; (b) the implementation of the diploma awarding program keyed to the SSAT II has been done without adequate notice of the requirements or adequate time to prepare for the required exam in violation of the due process clause of the Fourteenth Amend-

ment; (c) the SSAT II and its enabling statutory authority have been used as a mechanism for the resegregation of Florida public schools through the use of remedial classes for those sutdents failing the examination in violation of the Fourteenth Amendment.

The students sought the specific relief of a declaratory judgment finding the SSAT II requirement for graduation a violation of due process and equal protection clauses of the Fourteenth Amendment. A further request was for an injunction barring the further operation of SSAT II program. The students finally sought an order both purging their academic records of SSAT II data and prohibiting further use of SSAT II data in curriculum planning. *Held*: For the students. The hearings produced a voluminous record of research studies and court findings which supported the following extensive holdings: (1) in view of the history of segregated public education in Florida, the test unlawfully discriminated against black students; (2) the test concept and design bore a rational relation to a legitimate state interest; (3) the students failed to establish that the test was racially or ethnically biased; (4) failure to apply the test to private schools was not unconstitutional in light of Florida's minimum relation of private schools and greater potential for achieving state goals where state had greatest regulative authority; (5) inadequacy of notice provided prior to announcement of diploma withholding provision, test objectives, and testing dates was violative of due process clause; (6) use of test to classify students for remedial curriculum tracking was constitutionally permissible; and (7) the state would be enjoined from requiring passage of SSAT II as requirement for graduation for a period of four years. *Debra v. Turlington*, 474 F. Supp. 244 (M.D. Fla. 1979).

Former untenured teacher's aide brought action alleging her employment was not renewed in retaliation for her exercise of free speech in public and private exchanges with immediate and executive superiors. The school official argued that aide's speech and conduct debilitated her superiors' abilities to maintain proper lines of administrative discipline and caused significant disharmony amongst her co-workers. *Held*: For the school district. The pivotal issue was the aide's job classification as a Teacher's Aide I which directly controlled her pay and duties. The court found that the aide's speech was not protected under the First Amendment where nature of communications related to immediate terms and conditions of her employment and only tangentially to matters of public concern. Noting that the present standard of judicial analysis of First Amendment-Teacher Employment claims requires a finding of sufficient grounds for non-renewal of a teacher's contract unrelated to the speech and conduct at issue, is court interpreted the record as sufficiently supporting that requirement. *Barbe v. Garland Independent School District*, 474 F. Supp. 687 (N.D. Tex. 1979).

Migratory school children attending junior/senior high school brought suit against local and state education officials alleging that educational programs and policies, when applied to children of migratory agricultural workers, are in violation of their statutory and constitutional rights. Controversy centered on children's unique circumstances wherein they must be

absent from their home school districts a substantial period after the commencement of the academic year. Students' action was premised on both equal protection/due process clause and Elementary and Secondary Education Act, Programs for Migratory Children non-compliance claims. *Held*: For the local and state educational officials. The equal protection and due process clause claims were disposed of quickly by way of summary judgment for lack of genuine controversy in favor of the defendants. The court focused on the Education Act for Migratory Children claim making two principal findings. The first finding was that the duty of the court with respect to the Education Act for Migratory Children was to measure the programs by a broad standard and only upon programs shown by the evidence in the record. The second finding was that the informal "catch-up" arrangement operated on a case by case basis was in substantial compliance with the Act, thereby making of formal intensive review program desirable, but not mandatory. *Valadez v. Graham*, 474 F. Supp. 149 (M.D. Fla. 1979).

Suit brought by junior/senior high school students and their parents to challenge board of education's directive to remove certain books from school library shelves and curriculum reading assignments. Defendant board argued that directive was validly issued under *in loco parentis* authority of the board. Further, neither political nor religious considerations played any determinative role in the withdrawing of the books. Rather, a concern for the effect of vulgarity and frankness in the withdrawn books upon the impressionable adolescent mind guided the board in making its decision. *Held*: For the board. The district court found the board's action constitutional against the students' claim for infringement upon rights of academic freedom and free expression. The record supported the defendant's position that neither political nor religious factors played any role in the order for withdrawal. On the academic freedom and freedom of expression issues the Court noted the absence of a clearly drawn threat to either right where neither teachers nor librarians were parties to the suit. No specific incident of any student's then present interest in any of the withdrawn books being cut off or encumbered was alleged. Absent such an allegation, the court found the board's directive as one properly within the authority given the board to foster the indoctrination of the students in basic values of community standards. *Pico v. Board of Education, Island Trees Union Free School District*, 474 F. Supp. 387 (E.D.N.Y. 1979)

Profoundly retarded/emotionally disturbed school children and their parents brought class action suit alleging Pennsylvania State Secretary of Education et al. violated the children's rights under the Education for All Handicapped Children Act of 1975 (EHCA) by denying them free publicly-funded education in excess of 180 days. The defendants argued that the regression in learning problem, central to the plaintiff's claim, could be effectively remedied within the traditional 180-day school calendar. *Held*: For the children. The record conclusively supported the allegation that, for a substantial number of mentally retarded/disturbed children, overwhelming regression in learned skills over the traditional two and one-half month interruption in educational programming be made meaningful progress for such children almost unattainable. The

court limited its holding to the invalidation of the 180-day rule, retaining jurisdiction for subsequent rule-making following further fact-finding. *Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Pa. 1979)

Appeal by student from lower court judgment upholding athletic association's ruling to suspend the student from interscholastic athletics for one year. Female student played soccer on boys' freshman team, failed to get on boys' junior varsity team, was told the deadline for the girls' varsity had passed, and subsequently received permission from local college to practice with the college team which practice was in violation of an athletic association eligibility rule for future participation in high school athletics. Student was unaware of such a rule and school unable to place any evidence in the record of her awareness of the rule. *Held*: For the student. In the absence of evidence that student knew of rule prohibiting high school students from practicing with colleage teams, it was an abuse of discretion to suspend her for one year because of her having practiced with a college team and served no purpose other than "to relegate an enthusiastic high school student to pariahdom, a result we may not support or condone." Relief granted, rescission of determination and penalty and expunction of any records relating to the ineligibility. *Robin v. New York State Public High School Athletic Association*, 420 N.Y.S.2d 394 (App. Div. 1979)

Article 78 proceeding by parents to prohibit the academy from refusing to grant student a diploma to which he was adjudged entitled. Due to differing curriculum, upon entry to the academy, the student was forced to repeat the 7th grade. After initially entering the academic program which required 40 units, the student, upon earning 32 units, transferred to the liberal studies program and requested that he be allowed to graduate. The academy refused his request, but the lower court concluded the faculty had abused its discretion and directed it grant student a diploma. *Held*: For the academy. The court had no power to review competence of educational institution making academic judgment as to whether student was entitled to a degree where determination was not arbitrary and capricious. Reversed and petition dismissed. *Fiacco v. Santee*, 421 N.Y.S.2d 431 (App. Div. 1979).

Action challenging constitutional validity of high school and athletic association's rule restricting membership on the sole volleyball team sponsored by the school to girls. Male student who had practiced with the girls' team sought an injunction against enforcement of the athletic association's rule which prohibited his playing on the team. Both a temporary restraining order and a preliminary injunction were denied. After a hearing on the merits, suit was dismissed for want of equity. *Held*: For the athletic association. Prohibition against boys were classifications based on sex but were justified because they preserved, fostered and increased athletic competition for girls and prevented unfair competition that would arise from male domination of the game. To furnish exactly the same athletic opportunities to boys as to girls would be most difficult and would be detrimental to the compelling governmental interest of equalizing general athletic opportunities between the sexes. The

athletic association rule did not violate due process of Fourteenth Amendment and did not violate state constitutional provision prohibiting state or its units of school districts from denying or abridging equal protection of the laws on account of sex. Affirmed. *Dissent*: Relying on *Orr v. Orr*, **440** U.S. **268**, **279**, 99 S. Ct. 1102, 1111, 59 L.Ed.2d 306 (1979) and *People v. Ellis*, 57 Ill.2d 127, 132–33, 311 N.E.2d 98, 101 (1974), in which the United States Supreme Court has stated that "classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives" and in which the Illinois Supreme Court said that the article I, sec. 18 of 1970 state constitution "requires us to hold that a classification based on sex is a 'suspect classification' which, to be held valid, must withstand strict scrutiny," the dissent objected to the school's deference to the rules of an athletic association rather than providing young students equal access to the rights and privileges of public education. *Petrie v. Illinois High School Association*, 394 N.E.2d 855 (Ill. App. 1979).

Appeal by parents of mentally retarded minor child seeking determination that year-round residential placement at a private facility was necessary for the child and that the school district was required to pay the child's tuition. The hearings officer found the placement necessary and appropriate and ordered the school district to pay the child's tuition for the year-round program and the school district sought review. The Deputy Superintendent of Education accepted the hearings officer's findings but concluded that the hearings officer and he were without authority to direct that the school district pay tuition. *Held*: For the parents. Under state and federal laws, handicapped children are entitled to receive a free appropriate public education which includes payment of tuition for the full-year program. The school district is required to pay tuition costs connected with the placement of the handicapped child in the private facility. The hearings officer and Deputy Superintendent of Education have the power to order payment of tuition as well as directing placement of the child. Reversed. *Mahoney v. Administrative School District No. 1*, 601 P.2d 826 (Or. App. 1979).

Article 78 proceeding by former high school seniors who had been required to repeat certain courses by reason of their having received failing grades to require athletic association to permit them to participate in varsity interscholastic football competition during that year. The students saw themselves as exceptions to the "red shirting" clause since their failure to enter the football program their senior year was caused by "other such circumstances," that is, the teacher's strike during their senior year. *Held*: For the athletic association. The athletic association had the primary responsibility of interpreting regulation of commissioner of education relating to competition in athletics, and, unless the court was able to characterize their determination as arbitrary or capricious, the court could not overturn their determination. The association's refusal to permit the students to continue in football competition, notwithstanding the fact that they had been denied one year's participation in football because of teachers' strike, was rational. Petition dismissed. *Burtt v. Nassau County Athletic Association*, 421 N.Y.S.2d 172 (Sup. Ct. 1979).

Appeal from a mandatory injunctive order of lower court requiring school district to provide an educational placement for handicapped child including an extensive psychotherapy program. A child, previously described as mildly mentally retarded and "mainstreamed" into several classes for nonhandicapped students, after nonsuccess and further educational evaluation at the parents' expense, was deemed functionally retarded as a result of a primary handicapping condition of severe emotional disturbance, schizophrenic process. At two levels of special education hearings, the officer found the child severely emotionally disturbed, but the school district refused to admit the child to a residential school. The lower court entered judgment in favor of the parents. *Held*: For the parents. Evidence sustained district court's finding that the child was functionally retarded as a result of a primary handicapping condition of severe emotional disturbance and the court properly ordered that child be placed in an educational setting including a psychotherapy program with school district bearing the costs as required by Education of All Handicapped Children Act (EPHCA). There was no impermissible dual procedure arising out of state regulations for special education programs as long as the superintendent of public instruction maintained that she was bound by the findings of hearing officers and courts in such cases. Affirmed in part and reversed in part. *Dissent*: Free psychiatric treatment is not mandated by EAHCA. *Matter of "A" Family*, 602 P.2d 157 (Mont. 1979).

Proceeding instituted on petition by father of handicapped child for reimbursement of education expenses for a child. The child suffered from mongolism and two years previous to the petition had received specialized residential schooling under the direction of the required medical-educational authorities. *Held*: For the father. The city could not rely on equitable doctrine of laches to obtain dismissal of petition for reimbursement of educational expenses for handicapped child by reason of untimeliness where alleged harm to city was indefinite and loss to petitioner as father of handicapped child was substantial. The ability of the father to contribute to cost of child's special education expenses was not a factor figuring in father's right to reimbursement for those expenses and was not a basis for an evidentiary hearing before family court on petition for reimbursement. Motions denied. *Matter of Charles M.*, 420 N.Y.S.2d 173 (Fam. Ct. 1979).

Other School Personnel

Action by probationary school bus driver challenging his termination by the board. Held: For the board. A letter from the parish superintendent constituted sufficient notice from the board of the driver's dismissal. The reasons given for recommending the dismissal constituted valid grounds. There was no statutory requirement that the dismissal be in any particular form or that the bus driver receive written notification. *Hayward v. Rapides Parish School Board*, 374 So.2d 1281 (La. App. 1979).

Action by former employee against school board alleging that a two-year filing period for disability retirement deprived him of due process and equal protection. The employee, a machinist's helper, slipped on the ice while

proceeding from one school to another and sustained permanently disabling injuries. He applied to the Board of Education Retirement System for retirement based on permanent disability, but was rejected due to failure to make application within two years of the happening of the accident as required by statute. The employee contended that the filing period did not begin to run until he discovered his disability was permanent. *Held*: For the retirement system. Since copies of the board's rules and regulations had always been available at the board's office, application of the two-year rule did not deny applicant due process. There was no denial of equal protection by imposition of the two-year rule even if the rule affected applicant differently than it did those employees who had immediate knowledge of the permanency of their disability. *Ornstein v. Regan*, 604 F.2d 212 (2nd Cir. 1979).

Action by employees of board of education contending that the board acted improperly in reducing their discretionary salary supplements. In 1977–78 the county school system encountered serious financial problems, requiring a loan of $730,000 to continue through the academic year. The bank agreed to make loans to the school system only if measures were taken to reduce expenditures so that the budget could be balanced. At an open meeting, the board adopted a resolution setting up a financial committee to determine and implement budgetary cuts and listed governing guidelines for the committee. Subsequently the committee prepared a draft of a resolution for budget cuts which was presented to the board at its special annual public meeting. After debate and modification the board adopted the resolution. As a result, the employee's salary supplement was reduced. The employee contends the action of the board was void as an unlawful delegation of authority of the board to a group who lacked legal qualifications to make these decisions. *Held*: For the board. The record supported finding that the county board of education did not improperly delegate its discretionary duties to the financial committee, but, rather, exercised its discretion when it reduced the employees' discretionary salary supplements. *Hargett v. Franklin County Board of Education*, 374 So.2d 1352 (Ala. 1979).

Article 78 proceeding by school typist seeking to direct her reinstatement to full-time typist position with school district and for back salary and other rights and privileges. Appointed from a civil service list to part-time employment, the typist was laid off when the school board abolished two half-time typist positions. The typist alleged she was not the least senior typist in the school district. The lower court dismissed the proceeding for failure to file a required notice of claim and did not consider the merits. *Held*: For the typist in part. Provisions of Education Law that a claim be filed with the district was applicable, notwithstanding the assertion that the layoff violated constitutional rights; however, the school district's failure to complain before the court of original jurisdiction of typist's failure to file a claim constituted waiver of such defense. Joinder of director of county personnel department was inappropriate. Dismissal of more junior employees who were retained following dismissal of typist, on reduction in force, was improper. Modified, affirmed as modified and remitted. *Coger v. Davidoff*, 420 N.Y.S.2d 517 (App. Div. 1979).

Torts

Action by high school student against church for injuries sustained by the student upon crashing through glass paneling while playing basketball in the church-school gymnasium. The student's injuries resulted in a twenty-five percent permanent disability in both his arms. The student alleged the church was negligent in installing breakable glass in a sidelight paneling so close to the gymnasium floor. The church contended that the student assumed the risk of injury. *Held*: For the student. The evidence was sufficient for the jury on the question of whether the church was negligent in the installation of the breakable glass. In order to support an assumption of risk defense, the church had to show that the student not only had knowledge of the existence of the danger and an appreciation of its character, but also that he accepted such risk; the church did not meet this burden. *Thomas v. St. Mary's Roman Catholic Church*, 283 N.W.2d 254 (S.D. 1979).

Personal injury action brought against school board by boy who, while playing softball during a physical education class, fell and injured his right knee while running from second to third base. Held: For the boy. School authorities had constructive knowledge of the softball field's dangerous condition, namely, a concrete slab which protruded about one inch above the surface of the ground and which was directly on the path or near it between the two bases. The slab constituted such a hazardous condition that it was a breach of the required standard of care on the part of the school board to allow it to exist on the playground. *Ardoin v. Evangeline Parish School Board*, 376 So.2d 372 (La. App. 1979).

Action by nine-year-old boy and his parents against school district and bus driver for damages for an illness suffered by the boy from chewing a piece of unwrapped mud-covered gum found on the floor of the bus. The gum is alleged to have been "coated with phencyclidine (PCP), better known as 'angel dust,' a dangerous and potentially lethal drug." Complaint charged driver and school district with negligence in failing to properly maintain the interior of the bus and to properly supervise infants. *Held*: For the school district. "The risk of such danger as occurred was not by the wildest stretch of imagination reasonably foreseeable." The presence of the gum on the floor did not in and of itself represent a dangerous condition. Complaint dismissed. *Hatlee v. Owego-Apalachin School District*, 420 N.Y.S.2d 448 (Sup. Ct. 1979).

Complaint by ten-year-old student against school board alleging willful and wanton conduct by and through teacher who appointed as bathroom monitor the leader of classmates who physically assaulted student in the bathroom. The student transferred into the school and several of her classmates threatened her with physical harm unless she made payments of money to them. She told the teacher about the threats and the identity of the leader; the teacher, subsequently, appointed the leader bathroom monitor and the girl was assaulted by others while the leader "monitored" the doorway to the bathroom. The lower court dismissed the fourth amended complaint for failure to state a claim. *Held*: For the school board. The school board and teacher were immune

from suits based on allegations of negligence. The student's allegations of "willful and wanton misconduct" did not allege facts from which the law would raise a duty and which would show that the intentional breach of the duty resulted in injury. Affirmed. *Dissent*: The majority opinion permits the board "to close its eyes to and turn its head from the problem of students preying on fellow students within school buildings after teachers have been made aware of extortion demands." *Booker v. Chicago Board of Education*, 394 N.E.2d 452 (Ill. App. 1979).

Action by student and his parents against school and manufacturer of circular saw which student was using at time of accident which resulted in loss of four of student's fingers. Ninth grader used saw during his study period to cut pieces of wood which his instructor intended to use in a 7th grade class later in the day. One of the guards on the saw was broken and, when the saw became stuck in a piece of wood, the student reached too near the blade and suffered the loss of four fingers. The instructor was in an adjacent room supervising a drafting class. The lower court ruled in favor of the manufacturer and against the school. *Held*: Affirmed. The trial court properly instructed jury that statutes governing operation of machine by minors applied if evidence proved either that machine was not properly guarded or that personal supervision was not provided at time of accident. *South Ripley Community School Corporation v. Peters*, 396 N.E.2d 144 (Ind. App. 1979).

Appeal by school district from a lower court decision granting minor student's application for leave to serve a late notice of claim against school district. The student sustained injuries during an inter-school soccer game when his foot struck a "hidden object which was protruding from the ground," but did not file notice of claim until 26 months later. *Held*: For the school district. The lower court lacked power to grant an extension for filing of notice of claim against school district beyond period of one year and 90 days after date of accident even though student was an infant at the time of accident. Period for application for leave to file later notice of claim was not tolled during infancy. Reversed. *Cohen v. Pearl River Union Free School District*, 419 N.Y.S.2d 998 (App. Div. 1979).

Action by parents to recover against school district for wrongful death of boy who fell from school roof. Decedent was one of three boys who, after leaving a school dance and being chased from the area, later returned to the school from a different direction and climbed upon the roof. Decedent, thirteen years old, fell from the roof, incurring injuries which resulted in his death. The lower court granted summary judgment to the school district. *Held*: For the school district. The school district could not be held liable under attractive nuisance doctrine, in light of fact that boy had been of sufficient age and intelligence to appreciate the clear danger of falling. School district could not be held liable on theory that it knew that school children could climb to the roof and had duty to eliminate or reduce the risk. Judgment affirmed. *Barnhizer v. Paradise Valley Unified School District #69*, 599 P.2d 209 (Ariz. 1979).

Miscellaneous

Action for declaratory and injunctive relief against racial quotas imposed by local school authorities on enrollments in connection with a desegregation plan voluntarily enacted to prevent de facto segregation in the public schools. The challenged desegregation plan ("Plan") established a ceiling on enrollments and imposed racial quotas with respect to admissions at two high schools. The plaintiffs are black children and their parents residing in one of the school's attendance areas. They contended that the "Plan" deprived them of their rights under the Constitution and Title 42 U.S.C. §§ 1981 and 1983, and under Title 20 U.S.C. § 1703(c) because it restricted the admission of minority students to these high schools solely on the basis of race. The board contended that the "Plan" was necessary to alleviate overcrowding and to promote integration at the schools, both of which had experienced an accelerated change in the size and racial compositions of their enrollments as a result of a concomitant demographic change in the residential neighborhoods encompassing the attendance areas of these schools. *Held*: For the board. Mechanics of integration are ordinarily a matter within the discretion of local school authorities, particularly in circumstances of voluntary remedial actions. The student racial stabilization code instituted by the board at the high schools in the district to prevent *de facto* racial segregation was statutorily and constitutionally permissible since, prior to implementation of the plan, the attendance areas for the schools were rapidly changing in residential occupancy from white to black and the trend in enrollments was toward a segregated student body. Voluntary state action directed toward prevention of *de facto* segregation is constitutionally permissible in view of compelling state interest in promoting integration and since racial quotas imposed by the plan provided all students residing in the areas with a meaningful opportunity to attend an integrated high school. *Johnson v. Board of Education of City of Chicago*, 604 F.2d 504 (7th Cir. 1979).

Action by parents of parochial high school student to prohibit public high school athletic association from further denying the parochial high school's admission to the athletic association. The plaintiff's sound their claim on the First Amendment freedom of religion, alleging that the denial of admission puts athletically-minded parochial students to a choice between parochial education with limited athletic competition or public education and extensive athletic competition. This alleged choice thus inhibits the children's free exercise of religion and denies them equal protection under the laws. *Held*: For the athletic association. The court found that: (1) the association's decision to deny admission to the student's school was not motivated by any constitutionally impermissible purpose; (2) the burden on plaintiff's free exercise rights, if any burden at all, did not rise to an impermissible level; and (3) the association's decision to deny admission was premised on a purpose rationally and reasonably related to a valid state interest in the prevention of high school athletic recruiting. Thus the action did not constitute an illegal discrimination against the plaintiffs. *Vacencia v. Blue Hen Conference*, 476 F. Supp. 809 (Del. 1979).

Action by directors, teachers and parents of child attending a montessori preschool facility to enjoin enforcement of Wisconsin school statute which excludes public and parochial schools from its regulation. The parties stipulated that compliance with statute would materially inhibit plaintiff's capacity to operate the facility according to montessorian principles. The defendant argued that the purpose for the distinction was to facilitate effective control of schools operated for profit and non-profit schools. *Held*: For the school. The record supported the plaintiff's contention that the distinction drawn was not rationally related to any legitimate state purpose. The Court issued a permanent injunction barring further enforcement of the statute. *Milwaukee Montessori Society, Inc. v. Percy*, 473 F. Supp. 1358 (E.D. Wis. 1979).

Action by plaintiff parents of school children attending defendant Denver, Colorado school district, to oppose defendant's proposed measures to affect compliance with on-going school desegregation order. Defendant noted, although not relying upon, an increase in "white flight" as a direct result of the desegregation plan. The school districts' proposals, however, were premised on mathematical compliance with desegregation decree. *Held*: Split decision; four of plaintiffs objections were accepted, and four of defendants proposals were accepted. The court took pains to note that mathematical precision was only a starting point in defining the necessary solutions. The fundamental measure for the court was defined as equality in educational opportunity, with no moment given to any notions of "white flight." *Keyes v. School District No. 1, Denver Colorado*, 474 F. Supp. 1265 (E.D. Colo. 1979).

Action by lower-bidding hospital to set aside municipal court decision substituting higher bidding church as approved purchaser of vacant, surplus public school property. Municipal court, below, ordered sale to church following determination that executed agreement between hospital and school board was premised on erroneously low appraisal of market value of the property. *Held*: For the hospital. The court noted that, although the bid of the church was $41,00 and, therefore, higher than the $36,000 bid by the hospital, the lower bid could be accepted where circumstances override the difference in price. Overriding circumstances were found where the hsopital, having recently embarked on a $6,000,000 expansion program, could proceed no further on the project due to city and federal requirements of set number of parking spaces. Further, inasmuch as the property was situated between the hospital and the church, provisions could be made for joint use, thereby meeting some of the needs of both parties. *Petition of Board of Public Education of Pittsburgh*, 405 A.2d 556. (Pa. App. 1979).

Action for injunctive relief and to challenge federal grants to religious institutions for employment of teachers and support staff in parochial school of defendant archdiocese of Milwaukee, Wisconsin. Plaintiff taxpayers argue that use of Title II—Comprehensive Employment Training Act funds is violation of establishment clause of First Amendment. *Held*: For the plaintiffs. Injunctive relief to be granted whenever: (1) plaintiffs irreparably harmed if injunction does not issue; (2) threatened harm to plaintiffs outweighs that

which injunction would inflict upon defendants; (3) plaintiffs have reasonable likelihood of prevailing at full trial of all issues; and (4) granting of injunction will not disserve public interest. In support of the granting of the injunction the court first noted that irreparable harm is assumed to flow from constitutional violation and that no proof beyond that of the violation is necessary. Second, if indeed the violation was shown, then no harm inflicted upon the defendant arose from any constitutionally protected interests of defendant archdiocese. The constitutional violation was shown by the "excessive government entanglement with religion" necessary to insure that the positions funded would play a strictly non-sectarian role. Third, the Court established a finding of a reasonable expectation that the plaintiffs would prevail upon full review of issues, necessarily arising from the finding of a constitutional violation. Finally, the public service in granting the injunction was found in the withdrawal of the federal presence from an overly excessive entanglement with religion. *Decker v. U.S. Department of Labor et al.*, 473 F. Supp. 770 (N.D. Wis. 1979).

Action by black school children claiming that defendant school board's failure to institute remedial program to aid children in bridging the linguistic gap between standard English and "black vernacular" resulted in an impediment to the children's equal participation in education thereby violating Equal Educational Opportunities Act of 1974 (EEOA). Expert testimony produced at special hearings strongly suggested that "black vernacular" was a dialect of English separable from standard English. Consequently, a "code switching" impediment to the acquiring of an ability to read standard was allegedly created by the school's failure to assist the children to bridge the gap. *Held*: For the children. In an extensive opinion the district court reviewed the history of the case and the empirical studies presented at the hearings. The record supported the children's claim and the court ordered the school board to institute a program to help teachers to recognize home language of the children and to use that knowledge in their attempts to teach reading skills and standard English. In a separate portion of the opinion the court emphasized that the legal standard of review was the reasonableness of the school board's response to the order in light of knowledge on the subject presented to the court. *Martin Luther King Jr. Elementary School v. Ann Arbor School District Board*, 473 F. Supp. 1371 (E.D. Mich. 1979).

Action by residents of eight school districts in Baltimore County for injunctive and declaratory relief to bar county and state education officials from closing or converting use of certain schools within the districts. The plaintiffs' principal theory sounds in substantive due process, alleging that the drop in property values consequent of the school closings constitutes an unlawful taking of property violative of the due process clause of the Constitution. The plaintiffs additionally attack the constitutionality of the state statute enabling the school officials to close the schools. *Held*: For the county and state school officials. The court ruled that diminution in real property values resulting from lawful state use of neighboring property did not constitute a taking for purposes of a constitutional claim. The record supported a finding that the school official

had followed the procedures relating to school closings/conversion of use. The interest of the state in modifying use of school properties was found to be constitutionally sufficient and the procedure therein reasonably calculated to obtain the objects of the statute. *Welch v. Board of Education of Baltimore County*, 477 F. Supp. 957 (Md. 1979).

Action for declaratory judgment brought by maternal grandmother of named infants to determine that school district's admissions policy was unconstitutional and invalid. Held: For the grandmother in part. The school district's policy with respect to admissions did not violate the Education Law but any interpretation thereof which had effect of limiting registration to only those children for whom legally appointed guardianship had been obtained in district was invalid and unenforceable. The duty of "causing the minor to attend" falls upon the person standing in a parental relationship to the minor, not limited to "parent or legal guardian." Motion granted in part. *Simms v. Roosevelt Union Free School District No. 8*, 420 N.Y.S.2d 96 (Sup. Ct. 1979).

Action by teachers union against school board and superintendent for declaratory and injunctive relief concerning board directive for discontinuance of "Success Card" program developed by union representatives. These cards were designed to be used in between the school district's issuance of grade reports and were to be used *only* for positive messages. *Held*: For the board. The directive of the board calling for discontinuance of the "Success Card" program developed by union representing teachers for purpose of communicating positive information to parents did not bar exchange of information, but merely prohibited an arbitrary, uniform and somewhat rigid device, technique of which was defined by a labor union, a body to whom functions of board had not been delegated. The directive did not constitute an invasion of teachers' constitutional right to freedom of speech. Motion denied, and summary judgment to defendants. *Mullin v. Board of Education of East Ramapo Central School District*, 421 N.Y.S.2d 523 (Sup. Ct. 1979).

Article 78 proceeding brought to compel city board of education to reinstate wives' decedents as teachers and to retire them as of date of their death, with all rights and privileges flowing therefrom. The lower court granted such relief. *Held*: For the board of education. Where claim against board to reinstate wives' decedents as teachers and to retire them as of date of their death, with all rights and privileges flowing therefrom, accrued in January 1967 and wives first filed claim in 1973, inordinate delay in asserting claims for reinstatement constituted laches and barred relief. Reversed. *Jaffe v. Board of Education of City of New York; Rubin v. Board of Education of New York*, 420 N.Y.S.2d 282 (App. Div. 1979).

Universities and Other Institutions of Higher Education

Labor Relations

Unfair labor practice charge by union of classified school employee that community college violated law by reducing salaries 6.25% and by freezing

annual salary step increments in view of the effect of Proposition 13 on the school district's budgetary legal requirements. Held: The school district engaged in a ULP by taking such unilateral action. The school district relied upon the argument that the state constitution prohibits public agency indebtedness, that the fiscal plight locked it into a position which created a business necessity which excuses unilateral action, and that it acted in good faith on the advice of its lawyers. An employer may be free to exercise its management prerogative to close all or part of its business for financial reasons, but it must still give the union notice and opportunity to negotiate over the effects of the decision. In addition, a party may defer negotiations, maintaining the status quo, until information is secured about the effects of a serious financial change. Unilateral change, even if in good faith, is prohibited because of its destabilizing and disorienting impact; it upsets the negotiating balance and it "may also unfairly shift community and political pressure to employees and their organizations, and at the same time reduce the employer's accountability to the public." *California School Employees Association, Chapter 33 v. San Mateo County Community College District*, California PERB Decision No. 94 (1979).

ULP charge by faculty union that community college must negotiate on minimum size of class below which the college may cancel the course. Held: The employer was obligated to negotiate on the minimum enrollment. Prior to the proposal the college had no minimum and deans had wide latitude in determining when enrollment did not justify continuation of a course. Although the proposal may affect the choice of curriculum offering and, therefore, educational policy, the college is not required to cancel the course and the instructor's terms and conditions of employment are obviously affected by some measure of predictability as to when his course is endangered. The proposal is no different than maximum class size which is negotiable. *Southwestern College Education Association v. Sweetwater Community College*, California PERB Decision No. HO-U-49 (1979).

Professors with Tenure

Petition for writ of mandate to compel state university officials to process a grievance of department chairman denied by lower court. Tenured professor in mathematics department was appointed department chairman with the understanding that his continuation in that appointment would be contingent upon favorable review each spring. After unfavorable results of a poll, he was terminated as department chairman. *Held:* For the university. Departmental chairmanship was "academic-administrative assignment," and thus a department chairman was not an academic employee and was not entitled to utilize grievance procedure for review of his removal even under recent statutory changes. Where tenured professor, following poll of faculty members, was not reappointed to the department chair, there was no serious damage to his reputation or career as to require notice and hearing as matter of constitutional due process. Judgment affirmed. *Cohen v. Board of Trustees of California State University and Colleges*, 158 Cal. Rptr. 814 (App. Ct. 1979).

Petition for writ of mandate by community college teacher against community college district and its governing personnel seeking classification as tenured part-time teaching employee and determination of salary differential due her. The lower court determined that teacher was entitled to be classified as part-time regular employee as to 35% of full-time assessment and to back pay with interest. Both parties appealed. *Held*: For the teacher. Since teacher had maximum work time prior to enactment of 1967 statute she could not be divested of tenure based on that percentage but was entitled to prorata pay based upon pay scale of her full-time counterparts not only for stipulated 35% of work time but also for all work time at rate specified in appropriate contract salary scale rather than at rate provided for temporary employees. Her employment under CETA program counted toward acquisition of full-time regular tenure. A document purporting to deny her right to elect to be compensated under arts and science salary rate was contrary to law. Reversed and remanded with directions. *Winslow v. San Diego Community College District*, 158 Cal. Rptr. 509 (Ct. App. 1979).

Professors without Tenure

Action by interior designer against university for reinstatement after she was laid off because of a decrease in appropriations. The hearings officer found that university had sufficient funds if they did not fill a vacant higher position. The personnel board and the lower court adopted hearings officer's findings but the lower court reversed the decision of the hearings officer which required the university to eliminate a position to establish funds to pay interior designer. *Held*: For the university. It is beyond the province of this court to decide that those funds may not be "recaptured" and spent elsewhere, but should be used even in part for a special purpose; in this case, to make up for the anticipated deficit which affects this interior designer. *University of Washington v. Harris*, 600 P.2d 653 (Wash. App. 1979).

Action brought by teacher against school trustees for breach of alleged contract of employment after he obtained a Ph.D. believing the degree would give him permanent employment. Both the head of department of humanities and the vice president of academic affairs allegedly made such representations to teacher whereby he would gain permanent employment after he obtained a Ph.D. The lower court granted summary judgment to school trustees. *Held*: For the trustees. The teacher could not maintain an action against the school for breach of contract on alleged representations to the effect that if he obtained the doctorate he would be promoted to associate professor, thereby gaining de facto tenure, since statutory general management power of school's trustees necessarily included power to hire faculty and such power could not be delegated unless expressly authorized by legislature. Head of department and vice-president of academic affairs did not have apparent authority to bind school to contract of employment and school trustees were not estopped to deny conditional representation of employment made by them. Judgment affirmed. *Hensen v. Colorado School of Mines*, 599 P.2d 928 (Colo. App. 1979).

Student Conduct and Discipline

Action for injunctive relief by christian college newspaper against defendant Ohio State University to bar defendant from selectively inhibiting free distribution of non-university student-oriented publications on the campus, such action based on First Amendment protection of free speech and exercise of religion. The defendant argued that the alleged restrictions were part of a campus wide anti-litter program, admittedly unpublished and unannounced. *Held*: For the christian student paper. The court rejected defendant's anti-litter justification as insubstantial when measured against the plaintiff's free speech and religion interests. When balanced against the interest of the plaintiffs and others similarly situated, the court found the need to preserve public college campuses as a marketplace for ideals and the robust exchange of differing points of view. The court, therefore, granted plaintiff's request for an injunction barring the defendants from further implimentation of their anti-litter program and ordered them to pursue less-restrictive means in service of an otherwise legitimate interest in preventing the campus from becoming a giant newsstand. *Solid Rock Foundation v. Ohio State University*, 478 F. Supp. 96 (S.D.Ohio. 1979).

Student Rights and Responsibilities

Action by students at Oregon State College for declaratory judgment against various administrative officers and faculty members seeking declaration that they were entitled to higher grades in a geology course. The students did not attend a field trip which was part of the course curriculum; thus, their grades dropped from the A or B range to the C or D range. The lower court rendered summary judgment for the faculty and administrative officers. *Held*: For the faculty and college. Since in conducting a grievance procedure the college was acting as a state agency subject to Administrative Procedure Act, any judicial remedies available to plaintiff were those provided by the Act. College president's memorandum requesting that instructor raise the students' grades did not constitute a "final order." A declaratory judgment suit was not a proceeding under that section of the Act authorizing a court, on petition, to compel an agency to act where it has unlawfully refused to do so. Affirmed. *McBeth v. Elliott*, 601 P.2d 871 (Or. App. 1979).

Action for breach of contract brought by former student against private college which had dismissed him from school. Student twice failed a physiology examination resulting in strict academic probation. After failing two courses the second semester, he was dismissed from the school. The student sought expunction of his dismissal from the school records, reinstatement, and an order compelling college to give due consideration and accommodation to his learning disability—slow reader. The lower court granted college's motion for judgment on the pleadings. *Held*: For the college. Even if, when the college was apprised of student's difficulty in pursuing standard curriculum without modification or deceleration, the college had informed student that he should not worry and that everything would be done to assist him, including figuring out some way to help him, such statement would not give rise to a binding and

enforceable oral contract. Affirmed. *Abrams v. Illinois College of Podiatric Medicine*, 395 N.E.2d 1064 (Ill. App. 1979).

Former law student brought suit for judgment declaring that he was entitled to a law degree. Student was twice disqualified from further study because of academic failure. Subsequently he convinced officials to allow him to return for a fourth year so he could be certified as having studied law for four years. (Such persons may take the bar exam even if they do not receive a law degree under California rules.) Although the university expressly advised the student both in writing and in person that his readmission was a limited opportunity and he would not be awarded a law degree even if he received straight "A's," when the student had completed more than the required courses and had raised his cumulative average to passing, he filed petitions requesting that he be granted a degree. The university unanimously denied his request. The lower court entered judgment for the student. *Held*: For the school. The law school, under all the circumstances, did not act arbitrarily or in bad faith when it allowed the academically disqualified student to return for a fourth year, for bar certification purposes, on the express condition that he would not be eligible for a law degree. There was no contractual interest that would entitle the student to a degree under the facts of the case. Reversed. Vacating 93 Cal. App. 3d 825, 156 Cal. Rptr. 190. *Paulsen v. Golden Gate University*, 159 Cal. Rptr. 858 (1979).

Appeal by board of regents from a judgment of a trial court ordering board of regents to refund out-of-state tuition paid by twin sisters. The sisters, upon return to college from home state after summer vacation, declared their intention of abandoning former domicile and making Arizona their new domicile. Statute requires a person to be domiciled in Arizona for one year to become eligible for in-state tuition. *Held*: For the board of regents. Once physical presence in the state has been established, the key factor in resolving the domicile issue is intent, and the existence of the requisite intent becomes a question of fact that is evidenced by the conduct of the person in question. There was substantial evidence to support the decision of the university appeal committee on fee status in its refusal to grant in-state tuition to students. The court of appeals quoted *Arizona State Board of Regents v. Harper*, 108 Ariz. 233, 495 P.2d 453, 56 A.L.R. 3d 627 (1972): "To permit a student to announce his intention of becoming a permanent resident of Arizona on the day of his arrival; to accept his biased and self-serving statement as the whole truth; and to permit him to reinforce his statement by registering his car in this state, and securing a driver's license in this state, would simply place a premium on deception." Reversed and remanded. *Webster v. State Board of Regents; Webster v. State Board of Regents*, 599 P.2d 816 (Ariz. App. 1979).

Torts

Action for damages for fraudulent representations brought under Torts Claims Act by student against community college. Student contacted representatives of college and was told that if he enrolled he would be taught advanced welding, including inert gas welding (MIG), tungsten inert gas

welding (TIG), and the operation of a milling machine. After attending three consecutive years and receiving no such training, student complained and was told equipment was still on order. The lower court granted college's motion for judgment notwithstanding the verdict in favor of student on his claim for fraudulent misrepresentation. *Held*: For the student. Representatives of college were not exercising a discretionary function when they falsely represented to a student that he would receive advanced welding training in certain techniques on various machines; thus, defense of governmental immunity was not available to community college. Trial court was not in error in instructing that the extent of damages only had to be proved by a preponderance of the evidence. The student was not improperly awarded damages on the basis of amount of wages he lost as result of enrolling and continuing in the college rather than having worked during such period of time. Reversed and remanded with instructions. *Dizick v. Umpqua Community College*, 599 P.2d 444 (Or. 1979).

Miscellaneous

Action by borrower-in-default to Federal Insured Loans to Students program claiming that Federal Government by letter of Higher Education Acts of 1965 (HEA) was limited to a six-year statute of limitations on reimbursement claims against such debtors-in-default, such period now lapsed. The Government argued that it was also accorded all common law rights by the HEA and could, therefore, sue at any time. *Held*: For the Government. The record supported a finding that the clear legislative intent was to accord the Government every avenue of recovery for default. Furhter, the lack of an explicit contractual relationship between the individual loan institutions and the debtors was irrelevant as a defense given the degree of functional symbiosis between the Government and the loaning institutions under the HEA. *U.S. v. Wilson*, 478 F. Supp. 488 (M.D. Pa. 1979).

*Appeal by Alabama Education Association (AEA) from an order of the lower court granting a preliminary injunction to prohibit enforcement of a provision of the education appropriation budget which conditioned appropriations upon universities providing, at employee's request, a dues check-off for certain "educator's * * * or labor organizations." Held*: Lower court injunction affirmed. The law violated the state constitutional provision that each law contain one subject, that a general appropriation bill can embrace only appropriations for ordinary expenses, and that enforcement would cause irreparable harm. *Dissent*: There can be no possibility to irreparable harm if it is apparent that the complainant has no possibility of prevailing on the merits. Since review of the issues raised and applicable law reveal no possibility of the universities prevailing on the merits, there can be no possibility of irreparable harm and the injunction should be dissolved. *Alabama Education Association v. The Board of Trustees of the University of Alabama*, 374 So. 2d 258 (Ala. 1979).

Action by lender against U.S. seeking repayment of defaulted student loans issued pursuant to Higher Education Act of 1965 (HEA). The lender made loans to students via the Federally Insured Student Loan Program under

which the federal government insures the repayment of loans that conform to the HEA. The government rejected 95 of the lender's claims for repayment of defaulted student loans on the ground that the lender disbursed the loan funds before it had received a certificate of insurance for each loan and thereby had failed to conform to the statute and relevant regulations. The lender contends that the government waived its requirement that the lender not disburse funds before receiving an "issuance of insurance" because subordinate employees stamped the loan applications for approval after the beginning of the term and made statements approving the lender's practice of disbursing money before approval. The lender also contends, in the alternative, that its compliance with the "Contract of Insurance" caused the insurance to be issued retroactive to the date of final disbursement for each loan. *Held*: For the government. Federal regulation prohibits any official, agent or employee of the Office of Education from waiving any provision of the office's regulations except through amendment by publication. Therefore, even if government employees purported to waive the requirement, they were acting outside the bounds of their authority and could not bind the government to repay the defaulted loans. Furthermore, estoppel cannot be asserted against the U.S. in actions arising out of the exercise of its sovereign powers in encouraging lenders to make student loans. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947). The issuance of insurance was not retroactive to date of disbursement of the loans since statute makes retroactive issuance of insurance discretionary with agency and the lender neither claimed nor proved that the agency had exercised such discretion. *Hicks v. Harris*, 606 F.2d 65 (5th Cir. 1979).

Private educational institution filed suit to enjoin an order of state department of administration prohibiting tuition grants. The tuition grant program had awarded residents attending private colleges in Alaska an amount generally equal to the difference between tuition charged by student's private college and the tuition charged by a public college in the same area not to exceed $2,500 annually. When the attorney general declared the grants to be invalid, the private colleges filed suit. The lower court granted summary judgment to the State. *Held*: For the State. The difference in tuition amounts awarded is not neutral and is, in its effect, direct benefit to private educational institution and therefore violative of state constitutional prohibition upon payment of money from public funds for direct benefit of religious or other private educational institutions. Affirmed. *Sheldon Jackson College v. State; Inupiat University of Artic v. State*, 599 P.2d 127 (Alaska 1979).

Appeal by state educational association from a lower court decision declaring statute establishing a student assistance program providing state grants for postsecondary education to be constitutional on its face. The statute provided for state grants to qualified students attending private colleges and universities in Alabama. The statute's stated purpose was to provide higher educational opportunities to residents of the state by utilizing the facilities of independent colleges in the state. The educational association contended the statute violated the First Amendment prohibition against excessive government entanglement with religion. *Held:* Affirmed. The court applied the three-prong test

set out in *Lemon v. Kurtzmen*, 403 U.S. 602 (1971) requiring: (1) the statute must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances or prohibits religion; (3) the statute must not foster excessive government entanglement. The court found the statute met the three requirements of the *Lemon* test and therefore was not violative of the First Amendment. *The Alabama Educational Association v. James*, 373 So. 2d 1076 (Ala. 1979).