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Book Reviews

SCHOOL LAW IN REVIEW: 1986, volume 2. Published by The Institute of Government, University of North Carolina.

*Reviewed by Laurie Mesibov**

The Council of School Attorneys of the National School Boards Association provides a national forum for discussion of the legal problems faced by local public school districts and their attorneys. Each year the Council publishes the proceedings of its school law seminar *School Law in Review—1986, Volume 2* contains the proceedings of the April, 1986 seminar. This book, like other Council publications, is designed primarily for attorneys, although other people who need to understand current developments in school law will find it useful. It covers a broad range of subjects relevant to the representation of boards of education with articles on employee speech by Susan B. Tabler; religion in the schools by Jeffrey A. Davis; the Fair Labor Standards Act by Ronald J. James; child abuse by W. Richard Fossey; searches of students by Richard A. Schwartz, Ann L. Majestic and J. David Farren; “handicapped” education (the appropriate term is “special” education) by Richard D. Kirk and Barbara D. Crowell; and a Supreme Court update by Gwendolyn H. Gregory.

These authors are all good reporters. They distill rulings in over 100 cases to describe the current state of the law, highlight new developments, and identify unresolved issues. Gregory even manages to explain the Supreme Court’s affirmative action decisions. In discussing religion in the public schools, Davis is able to accurately compress years of litigation into one sentence: “. . . if any discernible thread appears throughout the reported decisions, it is that the more government wants religion in the schools, the less likely efforts to that end will be successful.”

Several of the articles share a common structure. For example, Tabler explains *Connick v. Myers*, 461 U.S. 138 (1983), and then shows how it has been interpreted and applied in a variety of situations involving employee criticism of employer policy, symbolic speech, political affiliations, and sexual preferences. Schwartz sets out the requirements for searches of individual students by school officials established in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) and then discusses issues the case does not address or leaves open. These include strip searches, searches of lockers and

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cars, the applicability of the exclusionary rule to school searches, searches involving law enforcement authorities, drug-detecting dogs, and searches of groups of students. Leading cases for each topic are summarized, and their significance for school officials are defined.

Most articles also contain suggestions to ensure that school policies and practices are legal. This preventive approach serves well the target audience, the practicing attorney, although with the spotlight mainly on potential liability, other important concerns may receive scant attention. This viewpoint is most noticeable in the discussion of child abuse. Avoidance of liability, albeit a worthy goal, is stressed again and again, but there is little mention of the role school officials can, and should, play in protecting and helping children. Fossey says that "[P]ermitting the police or social agencies to use the schools to investigate child abuse brings a host of problems and exposes the school district to liability." In his zeal to shield the client school board, Fossey does not adequately distinguish between police investigations and protective services investigations, although the decision whether to allow a child to be interviewed at school, with or without a parent's consent, may depend on the purpose of the interview and who is conducting it. In handling child abuse by school employees, Fossey advises, "Every decision with regard to responding to child abuse by school employees should be made with the goal of minimizing community concern and the likelihood of civil litigation." A school district should be "very cautious about disciplining an employee's supervisor for failing to detect or report the employee's misconduct. Such actions may help make a plaintiff's case in the event a lawsuit is filed." These statements along with others about potential lawsuits for false imprisonment and unconstitutional searches and seizures (although school officials' cooperation with child abuse investigations have not been challenged on these grounds) may unnecessarily "chill" reasonable behavior.

As one would expect in a collection of essays, different authors make different assumptions about the readers. Some authors assume the reader has a background in school law. For example, in the special education article *Board of Education v. Rowley*, 458 U.S. 176 (1982) is cited several times, but the High Court's ruling is never set out. Although the case is almost six years old, it is still the single most important special education decision. Kirk notes that familiarity with *Rowley* aids the reader in understanding the more recent cases he does present. Davis mentions the usefulness of the three-part *Lemon* test (*Lemon v. Kurtzman*, 403 U.S. 602 (1971)) as the analytical vehicle for assessing claims of Establishment Clause violations nearly a dozen times before the three-prong test itself is set out in a footnote.

Topics such as child abuse and First Amendment protection of employee speech illustrate one limitation in writing about school law for a national audience. In each of these areas, as well as in others, the law varies from jurisdiction to jurisdiction. These articles can do no more than remind the reader of this situation. Attorneys understand this limitation and accept the book as a useful introduction to and summary of each topic.

The rapid evolution of the law in several areas examined in the book is striking. For example, the Supreme Court has just decided *Karcher v. May*, 108 S.Ct. 388 (Dec. 1, 1987), where the New Jersey statute requiring public elementary and secondary school officials to permit students to observe a moment of silence for quiet and private contemplation or introspection was ruled unconstitutional because it did not have a secular purpose. The Supreme Court dismissed the appeal for want of jurisdiction because the public officials who participated in the lawsuit solely in their official capacities were not proper parties to appeal an adverse judgment after they left office. The Third Circuit decision stands (780 F.2d 240 (1985)). In response to *Smith v. Robinson*, 468 U.S. 992 (1984) Congress passed the Handicapped Children's Protection Act, 100 S.Ct. 796 (1986) authorizing the award of attorneys' fees in special education disputes. The Supreme Court heard arguments this term in *Honig v. Doe*, 484 U.S. 305 (1988) in which the issue is disciplining handicapped students. In *Daniels v. Quinn*, (801 F.2d 687 [4th Cir. 1986]) the Fourth Circuit gives a very narrow definition of a "matter of public concern" protected by the First Amendment. The Fair Labor Standards Act is no longer in the headlines, and school officials must by now be well-versed in the act's requirements which are so neatly set out in James's article.

The speed with which the law changes and the very broad range of issues that come under the heading "school law" make it difficult for anyone to keep up with new developments. This is especially true for those attorneys who do a limited amount of school law work and/or have the board of education as only one of many clients. This ever-expanding scope and constant change in the school law field makes this handy guide and other Council publications and activities so useful. A reader looking for an examination of whether the law is as it *should be* will not find it here, but those individuals who need a clear picture of what the law *is* will find it in this book.

SEARCH AND SEIZURE IN THE PUBLIC SCHOOLS. By Lawrence F. Rossow, Topeka, Kansas; NOPLE (National Organization on Legal Problems of Education), 1987, pp. 40; Softcover.

*Reviewed by Karen E. Holt**

One of the most confusing areas of the law historically has been the scope and boundary of permissible searches under the Fourth Amendment to the United States Constitution. Even practitioners and legal scholars struggle under the perhaps unattainable task of predicting the kinds of searches which pass legal muster, and "[j]udicial interpretations are often locally contradictory," as Dr. Rossow understates. Despite this uncertainty, or perhaps because of it, the author has undertaken to provide a clear understanding of the standards presented by the United States Supreme Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and to suggest practical ways of applying search and seizure law to school situations.

Dr. Rossow begins with a brief history on the constitutional basis for search and seizure law, and the clarification provided by *T.L.O.* In that case, the Supreme Court held that the fourth amendment does apply to the school setting, and that its application operates to limit the search activities of school personnel and to protect students from unreasonable searches. However, the High Court imposed a less stringent standard than probable cause for school searches, recognizing that there is a need to maintain swift and informal disciplinary procedures in the schools. In those circumstances, a search would be evaluated in terms of reasonableness of suspicion and reasonableness of scope.

After this brief analysis of *T.L.O.*, Dr. Rossow uses the remainder of the booklet to provide guidelines for assisting school personnel in determining what is and what is not a permissible search. It is very difficult for in-house counsel to translate case law to advice for those in the trenches, and this is where Dr. Rossow's essay is of most value.

Dr. Rossow offers a mnemonic device, that a reasonable search equals TIPS, for applying search and seizure guidelines. "T" is the thing after which the searcher is seeking, "I" the sufficiency of the information or informant which led the searcher to believe a search was necessary, "P" the place or person of the search, and "S" the measures used in the search.

"The "T" and "I" letters describe the reasonable suspicion aspects, and the "P" and "S" the reasonable scope. In considering the thing being sought, Dr. Rossow explains that the potential danger to others and consideration of emergency circumstances decrease the suspicion required,

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and may even amount to an exception to the requirement of reasonable suspicion. The information available should be examined in terms of its source, its credibility and the plausibility of the information, and the specificity of detail. "P", or the place or person of the search, reminds the official that the more personal the search is, the more compelling the justification must be, "S", for search methods, e.g. pat downs, sniffing dogs and/or strip searches. After each letter and its subject is examined, Dr. Rossow provides concise guidelines for that area. He concludes with a brief discussion of potential liability of school officials, common errors in applying guidelines, and the role of the police in school search and seizure.

This booklet should be extremely helpful to school administrators and personnel, as well as their legal counsel. Dr. Rossow clearly explains the complex legal issues involved, and translates the case law into practical application. Persons familiar with the law nonetheless will appreciate the difficulty of implementing it, and Rossow's booklet covers many possible scenarios. While he is occasionally guilty of stretching points so they fit into his "TIPS" format, and some of the illustrations, particularly Figure 3, a compliance model for determining reasonable scope, are more confusing than illuminating, this booklet should be read and understood by everyone with responsibility for student conduct.

LAW IN THE SCHOOLS. 2nd ed. William D. Valente. Merrill Publishing Co., Columbus, Ohio, 1987. 659 pages. ISBN 0-675-20399-6.

*Reviewed by Mary Angela Shaughnessy**

William D. Valente's second edition of *Law in the Schools* appears six years after the first edition. As Valente observes in the Preface to this second edition: "Six years is usually an insubstantial period for changes in law, but in that interval since the first edition of this book, the pace of school law developments has not been normal, but hectic" (p. iii). The author directs the reader's attention to the new Supreme Court cases found in the text. The inclusion of updated cases certainly increases the book's usefulness as a school law text. Also, he states that new federal and state statutes and case decisions are impacting every segment of the school population.

In the opinion of this reviewer, Valente's second edition is still an excellent choice for a school law text and deserves a place in the libraries of universities and of those who study school law, although I have some criticism of it.

For persons familiar with Valente's first edition, the second edition holds no major surprises. Much of the text is taken word for word from the first edition. The changes are minor, as noted below. This reviewer believes Valente could have strengthened his work by expanding his treatment of topics in the light of recent legal developments.

The second edition, while some 100 pages longer than the first, retains the chapter divisions and format (including sections of pertinent cases) of the first edition. The initial two chapters, "Education under the American Legal System" and "Public Education in the Legal Structure," are almost identical to their first edition counterparts.

The third chapter, "The Law Governing School Organization," includes two recent cases—most notably *Board of Education v. Pico*, 457 U.S. 853 (1982)—but otherwise is substantially equivalent to the 1980 chapter. The chapter "Religion and Public Education" includes more recent cases such as *Wallace v. Jaffree*, 472 U.S. 38 (1985) and *Widmar v. Vincent*, 454 U.S. 263 (1981). The author introduces a short section on sex education which was not part of the earlier edition.

The outline of the fifth chapter, "Professional Personnel," is exactly the same as the first edition chapter, but new cases have been added, such as the Supreme Court cases of *Conwick v. Myers*, 461 U.S. 138 (1983); *Perry Ed. Assn. v. Perry Local Ed. Assn.*, 460 U.S. 37 (1983); *Ellis v.*

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Railway Clerks, 466 U.S. 85 (1984); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

In the chapter, "Student Rights and Discipline," Valente discusses two topics not included in the earlier edition, rights of separated parents and student rights against physical punishments and restraints. Excerpts from the text of the landmark search and seizure case, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) are included. Valente updates his comments on search and seizure in the light of *T.L.O.*

Valente has added two sections to the chapter, "Equal Opportunity in Public Education:" sex discrimination with regard to students in admissions and academic courses and, with regard to teachers, improper treatment. The sub-headings under the topic of "handicapped and gifted" have been significantly changed; new additions are:

- a. The appropriate public education requirement;
- b. Procedural and noninstructional requirements;
- c. The interaction of Education of the Handicapped Act and Section 504;
- d. Supplemental state support of handicapped children.

Three recent Supreme Court cases are included in this chapter, perhaps most notably, *Hendrick Hudson District B.O.E. v. Rowley*, 458 U.S. 176 (1982). Another addition is the inclusion of Federal Civil Rights Statutes at the end of the chapter.

The only change in the "Tort Liability" chapter is the last section concerning state civil rights statutes. A lengthy footnote gives "... [a] sampling of state law authorities and compilations on specific discrimination subjects . . ." (p. 458). The addition of a 1984 California Supreme Court case *Hartzell v. Connell*, 679 P.2d 35 is the only change in the chapter, "Financing Public Education."

There are a few changes in the last chapter, "Private Education." The author adds a discussion of religious discrimination and state antidiscrimination laws to his consideration of antidiscrimination law in private schools and a brief comment on dual enrollment schemes to his discussion of private school finance. *Aguilar v. Felton*, 473 U.S. 402 (1985) and *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985) are added to the excerpted cases.

The only other addition to the 1987 volume is a glossary at the end of the text which briefly defines "Legal Phrases Drawn from Latin and French" and "English Terminology Having Special Meaning in the Law." The glossary will be helpful to the person beginning a study of school law.

A weakness of the book is the author's failure to revise the first edition's data tables. The reader is advised that all tables must be updated

for possible changes in each state since 1979. This reviewer believes the inclusion of updated tables would have strengthened the text.

Valente remains one of the major names in school law. This reviewer hopes that Valente will continue to write in the field and will provide his readers access to his opinions concerning new developments in school law.