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FOCUS SECTION

HISTORICAL OVERVIEW OF CATHOLIC EDUCATION LAW: HOW DID WE GET WHERE WE ARE?

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Private school law is a relatively new phenomenon in legal research. This article serves as a primer in case law for private schools, reviewing the most significant decisions of the past 30 years and articulating several important distinctions for Catholic educators. After examining the foundational cases, the author concludes with a look at several hot topics that educators are facing in the courts.

Private school law, in particular as it applies to Catholic schools, is a legal teenager ready to come of age. This article will examine the last 30 years or so of private education law applicable to Catholic education, especially Catholic schools. The primary emphasis will be on those early cases which provide the foundation for the interpretation of law today.

SELECT CASES

The law relating to public schools has been in an almost constant state of development since 1960, but there were relatively few private school cases prior to the 1980s. Private school cases increase each year, but there is a marked judicial reluctance to interfere in cases that may involve religious matters. Also, the United States Supreme Court has never heard a private school case involving student dismissal. *Rendell-Baker v. Kohn* was a 1982 U.S. Supreme Court case that involved teacher dismissal and remains the only such case in history. Since case law for private higher education developed more rapidly than did case law for private elementary and secondary schools, the body of law affecting private higher education is slightly larger

than that affecting private elementary and secondary education. Private higher education law helped to establish legal principles that guide elementary and secondary school legal decisions today.

Prior to 1960 courts were reluctant to interfere in public school cases to any great degree. Practicing the doctrine of judicial restraint, the courts decided very few cases against the institution. The legal doctrine of *in loco parentis* held that schools, colleges, and their administrators acted in the place of parents. In theory, if a court determined that a reasonable parent *could* (not *would*) make a decision similar to the one made by school officials, that court would find in favor of the institution. Courts generally allowed school officials to discipline students and to dismiss them without even telling the students the reasons for their actions (*Anthony v. Syracuse University*, 1928; *Curry v. Lasell Seminary Co.*, 1897; *Gott v. Berea College*, 1913; *Stetson University v. Hunt*, 1924). The landmark public university case *Dixon v. Alabama* (1960, 1961) broke judicial restraint and won procedural due process for public college students. A student must be told what the charges are (given notice) and must be allowed a hearing at which the student can present his or her side of the story; and the hearing must be held before an impartial tribunal, with school officials considered impartial.

By 1974, public secondary and elementary students had firmly established their rights. The 1969 landmark case *Tinker v. Des Moines Independent School District* involved public elementary and secondary students who wore black armbands to protest the Vietnam War. After refusing to obey the principal's directive to remove the armbands because of a possible disruptive effect, the students were suspended. The students sued, citing a violation of their First Amendment rights to freedom of speech. The United States Supreme Court agreed with the students and held, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the [public] schoolhouse gate" (p. 506). The First and Fourteenth Amendments' protections were thus extended to public school students facing suspension and expulsion. For the first time, persons under the age of 18 were considered persons under the Constitution. Previous decisions, relying on principles of English common law, viewed children as property.

In 1975 the United States Supreme Court heard the public school case of *Goss v. Lopez*, which involved high school students suspended for a minimum of two weeks without any kind of Constitutional due process. The Supreme Court held that such action was not "a minimal disruption" of the educational process and that students' Fifth Amendment substantive and procedural due process rights had to be protected. *Tinker* had already established that public school students have Constitutional rights that cannot be arbitrarily violated. *Goss v. Lopez* and its progeny established the tenets of Constitutional due process rights in public schools.

Wood v. Strickland (1975), heard the same day as *Goss*, established the fact that, although students do not have an absolute right to an education, they cannot be deprived of an education without procedural due process. *Wood v. Strickland* is perhaps best known because of its finding that school officials could not claim immunity from prosecution for violation of student rights if they knew or should have known the right procedures or if they acted out of malice.

In 1980, noted legal scholar Kern Alexander offered a definition of substantive due process that remains a good statement of the law today: "Substantive due process means that, 'If a state is going to deprive a person of his life, liberty or property, the state must have a valid objective and the means used must be reasonably calculated to achieve the objective'" (p. 343). Substantive due process can also be defined as fundamental reasonableness or fairness. Substantive due process involves moral as well as legal ramifications: Is this action fair and reasonable? Substantive due process applies wherever property or liberty interests can be demonstrated.

Property interest (Black, 1990) has been defined as:

that which is peculiar or proper to any person; that which belongs exclusively to one.... The word is also commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, real or personal...and includes every invasion of one's property rights by actionable wrong. (p. 1216)

It is important to note that the object owned can be intangible, such as the right to a public education or the right to tenure in a public institution. A liberty interest is held in Constitutional rights and in certain rights conferred by state laws. Liberty interest is sometimes defined so as to include the right to reputation. But certain conditions must be met before a property interest such as tenure can be advanced. A litigant must be able to prove that he or she has a particular right before the court can uphold that right and before any administrator can be held responsible for protecting the right; he or she must demonstrate that he or she would have been rehired, for example, if the Constitutionally protected activity had not occurred (see these "free speech" cases: *Givhan v. Western Line*, 1979; *Mt. Healthy v. Doyle*, 1977; *Pickering v. B.O.E.*, 1968).

Teachers and other employees in the public sector may not be disciplined without due process of law. School districts may decide not to renew the contracts of non-tenured teachers without due process because non-tenured teachers do not have "a legitimate claim of entitlement to" renewal of contract.

No Constitutional protections existed in the past or exist now for those in private educational institutions. The Constitution is concerned with what the

government can and cannot do, not with what private entities can do. Because the private school is not an extension of the state, students and teachers cannot generally claim Constitutional protections. Although well established by law, this reality is not commonly known. This author has spent 17 years on the speaking circuit and generally uses a true or false pre-test, the first item of which is usually, "Students and teachers in Catholic schools do not have the same rights that students and teachers in public schools have." The vast majority of teachers and parents classify the statement as false when it is true. The fact that the rules are very different in the public and private sectors provides the foundation for case law.

Catholic educational administrators can prohibit behaviors that the public school cannot prohibit. For example, a Catholic school or religious education administrator can forbid the wearing of objectionable items or the writing of materials that espouse beliefs, such as pro-choice or euthanasia positions, because such positions are contrary to the teachings of the Catholic Church. A public institutional administrator cannot prohibit such actions, because the right to take such action is protected by the First Amendment of the Constitution, and affirmed by the *Tinker* (1969) decision.

In early rulings the doctrine of separation of church and state protected church-sponsored schools from being sued successfully. The last 20 years have seen a rise in the number of cases brought by private school students and teachers. The reticence that once seemed to preclude a church member suing a church authority has largely disappeared. Since the majority of private schools are church-related, it follows that the majority of private school cases would come from church-related schools.

As previously stated, teachers and students in private schools do not possess the Constitutional protections that their public school counterparts do. The primary law governing private schools is that of contract law. Since the proper outcome of a contract case is damages and not reinstatement, persons may be reluctant to go to the expense of bringing suit if they are dismissed from a private school.

The rights of the private school to exist and of parents to send their children to private schools were established by the 1925 landmark case of *Pierce v. Society of Sisters*:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. (p. 535)

LAWS GOVERNING PRIVATE SCHOOLS

To understand what rights are protected in the private school and what rights are not protected, it is necessary to understand the public school rights, rooted in the United States Constitution, as enumerated above. Generally, there are four types of laws governing schools in the United States: 1) Constitutional law, which applies almost exclusively to the public sector; 2) state and administrative regulations; 3) common law; and 4) contract law. The latter three govern both public and private education. Contract law is the major source of the law affecting private institutions.

STATE ACTION: THE DECIDING FACTOR IN PRIVATE EDUCATION CASES

Before a private institution can be required to grant constitutional protections to teachers and students, the substantial presence of state action must be demonstrated: The court must determine that the state is significantly involved in a specific contested private action to such an extent that the action can be said to be that of the state.

Generally, four theories are advanced to prove state action in a private school. Faccenda and Ross in 1975 identified three: state funding, state control, and tax-exempt status of the private institution. The fourth theory is the public function or benefit theory that holds that if an institution performs a public function, such as education, the private institution can be held to the same standards. The public function theory has been virtually abandoned in legal decisions.

There are three cases involving private schools, two of which involve Catholic schools, that provide much of the foundation for legal decisions today. The first case was the 1970 *Bright v. Isenbarger*, in which dismissed students alleged that state action was present because of state regulation of the school and the school's tax-exempt status. The court rejected the claim: "Accordingly, under the authority of the *Powe*, *Browns*, and *Grossner* decisions, this court holds that because the State of Indiana was in no way involved in the challenged actions, defendants' expulsion of plaintiffs was not state action" (p. 1395).

The facts of *Bright* are as follow. Two students were dismissed for the remainder of the school year for a second violation of a rule forbidding visits to a nearby public school. The students maintained that since the school was certified by the state of Indiana, was governed by state school law, and received state and federal grant monies, the state action requirement was met and, therefore, constitutional rights were theirs. The court disagreed, holding as stated above, that the state has to be somehow involved in the actual decision resulting in the expulsion. Since there was no evidence that the state had

anything at all to do with the disciplinary actions of the school, state action could not be found and no constitutional rights existed.

In a 1976 expulsion case, *Wisch v. Sanford School, Inc.*, a student maintained that the federal funding present in the private school through various governmental programs constituted state action. The court, however, disagreed:

Plaintiff must show that there was more than "some" state action in this case; not every involvement by the state in the affairs of a private individual or organization, whether through funding or regulation, may be used as a basis for a [Section] 1983 or Fourteenth Amendment claim. The involvement must be "substantial." (p. 1313)

In a 1979 case, an expelled student and his father brought suit against a Catholic high school in *Geraci v. St. Xavier High School* and alleged the presence of state action. Once again, the court found that even if state action were present it would have to be so entwined with the contested activity, dismissal of the student, that a symbiotic relationship could be held to exist between the state and the school's dismissal of the student. If no such relationship can be established, state action is not present and constitutional protections do not apply:

Other than ascertaining that the school meets minimum state standards for a high school, the state exercises no control over the school whatsoever. This is certainly not the sort of pervasive state involvement required for a finding of symbiotic state action. (p. 148)

The one case involving a private school teacher contesting dismissal was heard by the United States Supreme Court in 1982 in *Rendell-Baker v. Kohn*. This case is significant because, although the school received over 90% of its funds from the state, the Supreme Court declined to find the presence of state action significant enough to warrant Constitutional protections. Previous lower court decisions had suggested the difficulty of proving significant state action present in teacher dismissals in the private school (*Lorentz v. Boston College*, 1977).

Rendell-Baker (1982) indicates that, unless the state can somehow be shown to be involved in the contested activity affecting a teacher, the court will not intervene in the action. Thus, it seems that the state action argument is useless when a private school student or teacher attempts to claim Constitutional protections in the private setting. Exceptions to the *Rendell-Baker* decision might lie in the area of discrimination, particularly as the Thirteenth Amendment abolished slavery. The 1983 case *Bob Jones University v. United States* illustrates. Bob Jones University lost its tax-exempt status because it discriminated on the basis of race. Similarly, a

Catholic school that dismissed an unmarried pregnant teacher but allowed male teachers who were known to be engaged in sexual activity outside marriage to remain on the faculty was found liable for sex discrimination (*Dolter v. Wahlert*, 1980). The reader should note, however, that the remedy for such injustices and for contract violations is not reinstatement, but is generally damages.

BREACH OF CONTRACT

Teacher cases rising from the private schools usually involve breach of contract, which can be defined as occurring "when a party does not perform that which he or she was under an absolute duty to perform and the circumstances are such that his or her failure was neither justified nor excused" (Gatti & Gatti, 1983, p. 124).

A 1973 case, *Weithoff v. St. Veronica's School*, is an example of breach of contract. A teacher was dismissed for marrying a priest who had not been laicized and she incurred the penalty, which was Church practice at the time, of excommunication from the Church. It is easy to understand why such an individual might be considered unfit to teach in a Catholic school. However, the teacher had signed a contract binding her to the "promulgated policies" of the parish. The parish school board had enacted a policy requiring all teachers to be practicing Catholics; the policy, however, was kept in the secretary's files and never promulgated to the teacher. The court found for the teacher because the school did not meet its obligation of promulgation. The plaintiff also wanted the court to rule on whether she was indeed excommunicated from the Catholic Church. Relying on the principle of judicial restraint, the court declined to enter into internal disciplinary actions relating to Church beliefs and practices.

The 1978 case of *Steeber v. Benilde-St. Margaret's High School* involved a Catholic schoolteacher whose contract was not renewed after her remarriage without an annulment. The court ruled in favor of the school because the school did have a rule that had been properly promulgated.

Weithoff (1973) and *Steeber* (1978) illustrate that the courts will look to the provisions of contracts in breach of contract cases, basing decisions on what the parties involved have agreed to do and not on what they should have agreed to do or on any other factor.

Courts have upheld the right of private schools to make rules of conduct for teachers and students that would not be permitted in public institutions. However, the private school must have policies that prohibit certain types of conduct before it can dismiss a teacher for misconduct (*Weithoff*, 1973).

The 1982 case of *Holy Name School of the Congregation of the Holy Name of Jesus of Kimberly v. Dept. of Industry, Labor and Human Relations and Mary P. Retlick* illustrates. Retlick's contract was not renewed because

she married a divorced Catholic man who had not obtained an annulment of his first marriage. The school sought to prove that she was not entitled to unemployment benefits because she willfully violated her contract. Retlick, however, was able to demonstrate that the only policy the school had regarding divorced and remarried teachers concerned religion teachers. Further, the principal had encouraged the teacher to live with the man rather than marry him if she could not marry within the Church, so the school's defense that the marriage was immoral could not withstand judicial scrutiny and Retlick received unemployment.

Courts will consider the characteristics and behavior of the parties involved in a contract. Just as the principal's behavior in *Holy Name* (1982) discredited the allegation of immoral behavior in the teacher's action, in a different case a teacher's behavior led the court to find that the teacher should have known that his conduct did not meet the norms of the sponsoring school. In the 1982 case *Bischoff v. Brothers of the Sacred Heart*, a former Catholic seminarian who had been twice divorced and remarried without the appropriate annulments was held to have been responsible for knowing what the school required. Once the school learned of his marriages, the school rescinded its contract, and Mr. Bischoff sued. The court ruled, "Plaintiff testified he was aware of Catholic dogma regarding divorce and we conclude, as did the Trial Jury, that the plaintiff's bad faith caused error and the contract was void *ab initio*" (p. 151).

Historically courts have been reluctant to intervene in disputes involving church-related schools and programs because of separation of church and state. The 1982 case of *Reardon v. LeMoyne* drew much attention from the public and the press because it involved four Roman Catholic sisters whose contracts were not renewed after 5 to 12 years of employment. The sisters sued the parish school board, the superintendent of schools, and the bishop. The sisters alleged that their contracts had been violated. They had signed the same employment contracts as had lay personnel, and statements in the contract and in the school's handbook gave a dismissed teacher the right of a hearing and an appeal. At the direction of the superintendent, the sisters were not allowed a hearing. The trial court declined to intervene, holding that such intervention would be a violation of separation of church and state. On appeal, the state supreme court ruled that a court could intervene in non-doctrinal contract disputes and ruled in favor of the sisters who were not reinstated; an out-of-court settlement was negotiated.

The crux of the *Reardon* (1982) problem seemed to be the language of the employment contract. The language was, at best ambiguous: the contract indicated that it would terminate at the end of the contractual year; another clause, clearly contradicting the first clause, stated that retirement of the employee was to occur at the end of the school year during which the employee attained his or her 70th birthday. The policies also stated that if a

contract was not to be renewed, the employee was to be notified in writing and given well-documented reasons for the non-renewal. The contract contained a further provision allowing appeal to the diocesan school board. The sisters then went to court asking the court to construe their employment contracts:

In the petition, they [the sisters] first sought a declaration that the defendants' decision to end their respective employment relationships constituted a "dismissal" which entitled them to the procedural safeguards outlined in their contracts. Second, they asked the court to find that the defendants had violated their constitutional rights to due process and equal protection of the law. Third, they sought a ruling based on substantial evidence, and that the cause in this case was not sufficient. Finally, in the event that the trial court found that defendants' action constituted "non-renewal" of the contracts, the plaintiffs asked the court to declare that the reasons given by the diocesan superintendent, in his January letter to the plaintiffs, were "not sufficient." (*Reardon*, 1982, p. 431)

The trial court found that the court could only exercise jurisdiction over the lay members of the school board and not over the superintendent and the bishop because of separation of church and state. The trial court also stated that the plaintiffs would not prevail against the school board.

On appeal, the state supreme court found that the doctrine of separation of church and state did not preclude jurisdiction in non-doctrinal contract matters:

Religious entities, however, are not totally immune from responsibility under civil law. In religious controversies involving property or contractual rights outside the doctrinal realm, a court may accept jurisdiction and render a decision without violating the first amendment.... It is clear from the foregoing discussion that civil courts are permitted to consider the validity of non-doctrinal claims which are raised by parties to contracts with religious entities. This requires the courts to evaluate the pertinent contractual provisions and extrinsic evidence to determine whether any violations of the contract have occurred, and to order appropriate remedies, if necessary. (*Reardon*, 1982, pp. 431-432)

In essence, the state supreme court found that the trial court should have accepted jurisdiction over the bishop and the superintendent as well as over the school board members. Further, the state supreme court held that the trial court should have ruled on the requests made by the sisters and should have analyzed their legal rights.

Reardon (1982) illustrates the extreme importance of contract language. One cannot allow anyone, including members of a religious congregation, to sign an employment contract and then not expect to be held to the provisions

of that contract. The school board should have granted the sisters a hearing because that is what the contract said the board would do when it was requested to do so.

The above cases involving church schools illustrate that administrators cannot hide behind the First Amendment as a cover for any actions they wish to take. The courts have made it clear that they have jurisdiction over the non-doctrinal elements of a contract made with a religious entity.

The *Holy Name* (1982) case illustrates that, while courts will not rule on the rightness or wrongness of a given religious doctrine, they will look to see whether the action based on the doctrine is reasonable and consistent. The *Weithoff* (1973) case illustrates the need for clear policies that are disseminated to all. The *Dolter* (1980) case established the right of the courts to intervene in sex discrimination cases. The *Bob Jones* (1983) case demonstrates that, since Congress has made racial discrimination a matter of public policy, courts will intervene in racial discrimination suits. These cases helped to establish the fact that persons in the private sector do have rights that will be protected by the courts. Administrators are required to know what those rights are and to provide protection. Legally sound written policies and guidelines greatly facilitate both the knowledge and protection of rights.

TORTS

Torts represent one of the most common types of legal action brought under statutory and regulatory law. A tort, according to Black (1990), is "a private or civil wrong or injury...for which the court will provide a remedy in the form of an action for damages" (p. 1489). Historically, torts are generally classified in education law in four categories: corporal punishment, search and seizure, defamation, and negligence. The law governing torts is virtually the same in both the public and private sectors.

CORPORAL PUNISHMENT

Corporal punishment is less of an issue today than it was in 1977 when in *Ingraham v. Wright* the U.S. Supreme Court ruled that students in public schools do not have the protection of the Eighth Amendment when subjected to corporal punishment, even if the punishment can be considered "cruel and unusual." In 1984 very few states outlawed corporal punishment; today the majority of states forbid its use. New areas of concern have surfaced in the last 30 years. Corporal punishment has been enlarged to include any bodily touching that can be construed as punitive. A related issue is that of mental or emotional abuse. Claims of mental abuse do not seem to have received serious consideration in the '70s and '80s; today, it is not uncommon for teachers to be accused of mental abuse.

SEARCH AND SEIZURE

Search and seizure problems occur when a student alleges injury from a search of person or property. Early cases delineated differences between probable and reasonable cause. Probable cause is a stricter standard than reasonable cause and will be held to exist when a school official has reliable knowledge about the whereabouts of dangerous or potentially dangerous material on campus. Reasonable cause is a suspicion with some basis in fact. A phone call, a note, or a suspicious appearance can comprise reasonable cause.

Historically, case law indicated that once a public school administrator involves the police in a search or turns seized items over to the police, Fourth Amendment protections do apply and improperly seized evidence can be excluded from a trial if criminal convictions are later sought (*People v. Scott D.*, 1974). In the 1984 case *Massachusetts Petitioner v. Osborne Sheppard*, the Supreme Court held that improperly seized evidence must not always be excluded from criminal proceedings. Thus, an improper search could be a violation of a student's constitutional rights and administrators can be held liable for damages as perpetrators of Constitutional torts. The rationale for holding public school administrators to a less strict standard than are other public officials in search and seizure situations is primarily based on the in loco parentis doctrine in which school officials have the right to act as a reasonable parent would if he or she suspected a child to be in possession of some illegal or dangerous substance.

In 1985 the United States Supreme Court heard the search and seizure case of *New Jersey v. T.L.O.* The Supreme Court ruled that public school officials should be held to a reasonable, rather than probable cause, standard. Thus, public school officials are not under the same strictures as are police officers. Since Constitutional protections do not exist in private schools, administrators are not even held to a "reasonable suspicion" standard. Nonetheless, they should have some kind of policy for searching students and seizing their possessions. Searching a student should require more cause than searching a locker.

Private school educators could be subject to private tort suits if a student claims to have been harmed by a search. Like public school officials, private educators could be charged with the torts of assault and battery and invasion of privacy. The search's level of intrusion determines the court's degree of scrutiny. Asking a student to empty his pockets would require a less strict degree of scrutiny than would a body search.

DEFAMATION

Defamation is the violation of a person's liberty interest or right to reputation. It is the utterance of words in spoken or written form that are detrimental to

the subject's reputation. Defamation can encompass a wide range of remarks; almost anything negative said about someone could be construed as defamatory since it could affect a person's reputation or the esteem in which others hold the person.

The potential for defamation to be alleged certainly exists in administrators' relationships with students and teachers. Administrators should be factual in their comments, whether written or oral, about the conduct of teachers or students. The news media report defamation cases in which the defendant asserts an affirmative defense of truth. School officials are often held to a higher standard than is the average person because the school official holds a position of trust and damage to reputation, rather than truth of the allegation, determines the outcome.

NEGLIGENCE

Negligence, the most common tort, is "the unintentional doing or not doing of something which wrongfully causes injury to another" (Gatti & Gatti, 1983, p. 246). Case law indicates that teachers and administrators are expected to act as reasonable persons; when their action or lack of action results in injury to a student, a finding of negligence can be made. Four elements must be present before negligence can exist. These elements defined by many legal writers are duty, violation of duty, proximate cause, and injury. If any one of the four elements is missing, no legal negligence and hence no tort can be found to exist. Since negligence is the unintentional act which results in an injury, a person charged with negligence is generally not going to face criminal charges or spend time in prison.

An understanding of each of the four elements necessary to constitute a finding of negligence is essential for today's educator. Previous defenses such as charitable immunity (e.g., an institution doing a charitable work is immune from liability for negligence) are no longer available. Every Catholic educator should know that the days of people being unwilling to sue the Church and its programs are over; litigants and lawyers often view the Church as a wealthy, desirable defendant able to pay large sums in damages.

The first element is duty. The person charged with negligence must have had a duty in the situation. Students have a right to safety and teachers and administrators have a responsibility to protect the safety of all those entrusted to their care. Teachers have a duty to provide reasonable supervision of their students. Administrators must have developed rules and regulations that provide for safety. Teachers will generally not be held responsible for injuries occurring at a place where or at a time when they had no responsibility. A student injured on the way to school, for example, will not be able to prove that school officials had a duty to protect him or her.

Administrators must be aware that simply stating that the school does not accept a given responsibility does not necessarily mean that the school has no

responsibility. The situation of students arriving well before the opening of school and staying after school when no supervision is present is one example. Even today many principals believe that writing a rule that states, "There is no supervision before 7:30 a.m. or after 3:00 p.m." absolves them from liability for any injuries students may sustain while on school property before or after school. However, over 30 years of case law indicate that administrators can be held liable for such injuries, even if there is a stated policy that no supervision will be provided.

In the 1967 case *Titus v. Lindberg*, an administrator was found to be liable for a student injury occurring on school grounds before school because he knew that students arrived on the grounds before the doors were opened, he was present on campus when students were, he had established no rules for student conduct outside the building, nor had he provided for supervision of the students. Although the principal had notified parents that no supervision would be provided, the court found that he had a reasonable duty to provide such supervision when he knew students were on the property as a regular practice. Understandably, concerned principals may ask, "Am I expected to provide 24-hour supervision?" The answer is "no," the court will look at the reasonable nature of the administrator's behavior. Probably no court would expect a supervisor to be present on school premises at 6:00 a.m.; however, the court will expect some policy as to when students may arrive, what the rules are, what kind of supervision will be provided and when it is provided, and what the penalties for non-compliance are. Many other cases followed the reasoning in *Titus* (1967). Current law seems to be shifting much responsibility for student behavior from the parent to the school staff.

The second element that must be present for a finding of negligence is violation of duty. Negligence cannot exist if there has been no violation of duty. Courts expect that accidents and spontaneous actions can occur. If a teacher is properly supervising a playground and one child picks up a rock, throws it, and so injures another child, the teacher should not be held liable. However, if a teacher who is supervising recess were to allow rock-throwing to continue without attempting to stop it and a student is injured, the teacher would probably be held liable.

Courts have stopped short of requiring that teachers be physically present at all times. Courts understand that emergencies can happen that necessitate the teacher's leaving a class unattended for a short period of time. But, the court will always apply "the reasonable person" test—did the teacher act in a way that a reasonable teacher would act?

The third requirement of negligence is that the violation of duty must be the proximate cause of the injury. In other words, would the injury have occurred if proper supervision had been present? The court must decide whether proper supervision could have prevented the injury. The tragic case of *Levandoski v. Jackson City School District* (1976) illustrates. A teacher failed to report that a 13-year-old girl was missing from class; thus, the

administrators had no knowledge that the student was absent, and parents were not notified. The child's body was later found some distance from the school. The child's mother filed suit against the school district and alleged that, if the child's absence had been reported, the murder would not have happened. The court found that no evidence existed to show that if the absence had been properly reported, the murder could have been prevented. It should be easy to see how a slightly different fact pattern, such as one in which the student was found murdered on the school grounds, would have produced a finding of liability against the school. The *Levandoski* (1976) court simply found that, in this particular case, the violation of duty was not the proximate cause of the injury.

The case of *Smith v. Archbishop of St. Louis* (1982), involving a Catholic school, illustrates the concept of proximate cause. A second-grade teacher kept a lighted candle on her desk every morning during the month of May to honor the Mother of God. She gave no special instructions to the students regarding the danger of a lighted candle. A student, dressed in an untreated crepe paper costume, walked too close to the fire and the costume caught fire. The child sustained facial and upper body burns such that during the five years the litigation was in process, she was subjected to several operations and painful treatments. She sustained psychological as well as physical injuries and competent physicians testified that she would likely experience psychological problems for the rest of her life. The Archdiocese of St. Louis appealed the holding. The appellate court upheld the award and the finding of negligent supervision against the Archdiocese. The court also discussed the concept of foreseeability, which generally holds that a person can be found negligent only if injury were foreseeable: "To recover, plaintiff need not show that the very injury resulting from defendant's negligence was foreseeable, but merely that a reasonable person could have foreseen that injuries of the type suffered would be likely to occur under the circumstances" (*Smith*, 1982, p. 521). The plaintiff did not have to prove that the defendant could foresee that a particular injury, such as crepe paper catching fire, might occur; the plaintiff merely had to establish that a reasonable teacher would have foreseen that injuries could result from an unattended lighted candle in a second-grade classroom when no safety instructions were given.

The fourth element of negligence is injury. No matter how irresponsible the behavior of a supervisor, there is no negligence if there is no injury. If a teacher were to leave 20 first-graders unsupervised near a lake yet no one was injured, there can be no finding of negligence.

Most negligence cases occur in the classroom because that is where students and teachers spend most of their time. However, shop and lab classes and athletic activities carry more potential for injury. Case law indicates that courts expect supervisors to exercise greater caution in these areas than they would in ordinary classrooms.

HOW DOES LEGAL HISTORY AFFECT CURRENT CASE DEVELOPMENTS?

An understanding of the historical basis for private school legal decisions is essential for administrators of private schools and educational programs. Today's important issues, while different in some ways than those of past decades, are much the same in others. A brief discussion of the most current hot topics in education law will illustrate.

CONFIDENTIALITY

A growing number of cases allege that a teacher's failure to report a student's suicidal threats or ideation before the student successfully took his or her life is negligence. Journal writing is one potentially problematic example. In the 1995 case of *Brooks v. Logan and Joint District No. 2*, a public school student wrote in his journal, "I went into a medium depression and wrote poems to two special people.... I told them it was too bad that I had to say good-bye this way like that, but it would be the only way and I felt better" (p. 81).

The teacher did not report the student's writings to his parents or to school officials. Subsequently, the student took his life. When the student's writing surfaced after his death, his parents brought suit against the teacher. The court ruled that the teacher could be required to face trial for involuntary manslaughter. While the legal arguments underpinning this finding can be found in tort law, much of the reasoning also seems to rely on common sense. Which is more important—the student's right to have confidences respected or the student's right to live? Education officials should require that all teachers tell their students, "I will keep your confidence so long as no one's life, health, or safety is at stake. Once life, health, or safety is at stake, I cannot honor confidentiality."

There are only two confidentiality privileges left in this country: priest and penitent, which is absolute, and attorney-client, which is not. Even an attorney is required to act if a client threatens harm to self or others. So there is no privilege that protects keeping confidences that if revealed might have prevented serious harm.

VIOLENCE AND GANGS

The rise in school violence has alarmed educators. Sarah Watson in her article "My Brother's Keeper: Violence and School Liability" in this issue ably discusses the legal ramifications of this topic.

BOUNDARY ISSUES

While the overwhelming majority of cases involving boundary issues have not reached courts of record, teachers have lost both their reputations and

employment potential. Other teachers have found themselves subject to restraining orders. Teachers must remember that they are professionals rendering a service in much the same manner as physicians and attorneys. Strong emotional involvement with students should be avoided. Teachers must be aware that they need to avoid even the appearance of impropriety in student-teacher relationships. If a student alleges improper behavior by a teacher, the teacher will face many problems even if the allegation is eventually proven untrue.

CONCLUSION

The third millennium holds new legal challenges for Catholic educators. Law is not ministry, but it is a boundary around ministry. As the law is a dynamic, growing, reality, educational leaders need to be diligent in pursuing ongoing information, inservice, and staff development opportunities for teachers and administrators. As private education law grows into adolescence, it is vital that the knowledge of private school leaders grows along with it.

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