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SCHOOL LAW IN CONTEMPORARY SOCIETY. Ed. by M.A. McGhehey. Topeka, KS: National Organization on Legal Problems of Education. 1980. Pp. 290. Hardbound. $13.50.

Reviewed by Richard J. Loftus, Jr.*

This book is really not a book at all, but rather a compilation of articles by the National Organization on Legal Problems of Education first published in SCHOOL LAW IN CONTEMPORARY SOCIETY during 1979. It cannot and should not be viewed as anything but a collection of periodical articles which treat a wide array of school law issues.

This collection is necessarily dated since the articles focus on evolving contemporary and controversial issues and the cases relating to those issues may no longer be current. Notwithstanding this deficiency, the book does a very adequate job of introducing the current legal issues that are being faced by public schools in this country and generally informs the reader of the law concerning those issues.

The editor of this collection unpretentiously introduces it as merely a collection of papers. Indeed, the first page of the book has the word "disclaimer" in approximately 20 point type and the message there indicates that the publisher takes no policy position concerning these controversial subjects. Nevertheless, nearly all of the chapters reflect an employer's perspective of the issues discussed. The target audience for this collection is difficult to ascertain. It apparently attempts to address attorneys, school administrators, teachers and board members, and, in doing so, fails to be consistent.

Each article composes a chapter and chapters may be classified into four major areas by the issues addressed. Several sections treat student issues, such as the discipline of stu-

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dents (Chapter 1), sex discrimination in athletics (Chapter 4), foreign and illegal alien students (Chapter 10), handicapped students' rights (Chapter 11), extracurricular activities (Chapter 13), educational malpractice (Chapter 14), and discipline of special education students (Chapter 17). Some chapters touch on legal issues regarding teachers: reductions in force (Chapter 2), constitutional rights to due process (Chapter 5), collective bargaining and the scope of negotiability (Chapters 6 and 7), and the Age Discrimination in Employment Act (Chapter 12). Another set of chapters could be described as discussing constitutional issues: desegregation (Chapter 3), due process (Chapter 5), and first amendment rights (Chapter 8). Additionally, two chapters discuss school board attorney issues: ethics and due process (Chapter 9) and the presentation of a Public Law 94-142 administrative hearing (Chapter 15).

It is not possible to review this collection of articles as a whole because the subjects are diverse and only generally related. The authors are different for each chapter and their styles and abilities vary greatly. Comment can, however, be made concerning the appropriateness of the selection of articles and the editing of those articles in this compilation. The quality of the articles is uneven. While most of the articles are informative and worthwhile presentations of timely subjects, many suffer from superficiality as the topics require more than 10 to 20 pages of discussion to adequately cover the topic undertaken. In defense of the authors, that deficiency must be accepted by one who undertakes to read a compilation of periodical articles.

Unfortunately, the editor can be criticized for not culling a couple of chapters in this book as they are markedly below the writing quality of the other chapters. The editor should have recognized and repaired the deficiencies prior to including them in the book. These weak chapters are offset, however, by a few outstanding chapters which would alone justify wading through the average and below average articles and which make reading this compilation worthwhile.

Chapter One is a brief discussion of discipline by grade reduction and grade denial based on attendance and, although this chapter has a very narrow scope, the author adequately covers the subject undertaken. More importantly, the article also serves as an introduction to the body of law concerning

students' rights, from its inception in 1969 with the United States Supreme Court decision in *Tinker v. Des Moines*,[1] to the eclectic fettering of school teachers' and officials' control over students as it exists today.

The chapter, thus, traces more than the evolution of certain tools in the handling of the truancy of students, as it provides a very lawyerly analysis of the development of a body of law concerning the application of constitutional principles to the rights of students. The chapter is well organized, and the cases, although the principles discussed are complex, are carefully explained. The chapter is a real asset to the book and could be valuable to school attorneys as well as to board members and administrators.

The second chapter suffers primarily from the attempt to give national treatment to a subject which is essentially covered by state law. Although reduction in force is clearly a contemporary and appropriate subject for discussion, the chapter tries to cover too much ground by discussing the reasons, authority and statutes which allow reductions in force in all of the states. The author makes an admirable effort at attempting to organize this cacophony of case law, but this much-litigated concept defies organization. Each case is but an exception to another case. Each statute has been assailed by litigation so often that the pockmarked results no longer resemble the original concepts.

This chapter does have one redeeming quality: as an anthology of issues that arise with regard to reduction in force cases, it evidences a nationwide consistency with respect to the litigation spawned by the contraction of school systems. In that regard, it may serve as a reassurance to governing boards that their problems are not unique.

Chapter Three addresses desegregation, a subject which cannot be adequately treated in the space allowed in this article. Fortunately, the author recognized that handicap and instead drafted an essay concerning recent developments in desegregation which both serves as an historical perspective of the legal issues and problems involved and tracks the evolution of desegregation issues through several cases.

The resulting analysis of desegregation developments is necessarily superficial, but the author charts a twisting course

1. 393 U.S. 503 (1969).

of vacillating judicial fiat that leaves the reader as inevitably confused as the authors of those decisions seem to be. The article understates the case by saying that it is "troublesome" to draw a distinction between "incremental segregatory effect" and "cumulative violations."[2] The article does not say, but clearly leaves the impression, that these distinctions illustrate the ludicrous extremes to which the courts have gone in order to fashion remedies and conjure rationale in areas where there are distinctions without differences. The article correctly suggests that the "differences" are really semantic.

In short, although there are many more complete and thorough analyses of the evolution of judicial thought in this area of the law, this chapter serves as a suitable overview that, while simplistic, reveals the complexity of a body of law that may have no common thread. As the author says in conclusion, "it is difficult to ascertain any stable principles that can be used for guidance."[3]

Chapter Four attempts to track the lurching efforts of courts and legislatures to "de-sex" sports. This subject is very contemporary and could be intriguing. Unfortunately, this chapter is poorly written and awkward in its construction. Its best quality is its brevity. The chapter lacks organization, and the author allows personal opinion to creep in: "had the case been argued on [a different] theory . . . the decision would probably have been different."[4] Unlike the desegregation chapter, which ably draws the picture of confusion where confusion exists, Chapter Four confuses a subject that could have been fairly straightforward. It gets bogged down in details of regulation without the advantage of theme or apparent direction.

The discussion of teacher constitutional rights that appears in Chapter Five, "A View From Mt. Healthy," is probably the most readable chapter in the book if read by a school lawyer or a patient non-lawyer. It discusses the Burger Court's treatment of this area of the law:

> Indeed, the Burger years appear to represent, in a legalistic microcosm, the struggle taking place in society at large

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2. McCarthy, *Recent Desegregation Developments—Dayton and Columbus: A Tale of Two Cities*, SCHOOL LAW IN CONTEMPORARY SOCIETY 56 (M. McGhehey ed. 1980) (hereinafter cited as SCHOOL LAW).

3. *Id.* at 57.

4. Gregory, *Sex Discrimination in Athletics*, SCHOOL LAW, *supra* note 2, at 65.

> between two conflicting forces: the collectivist goal of promoting equality of attitude and experience in an effort to advance social uniformity and national cohesion, which confronts the growing desires of many of our citizens for freedom of choice consistent with the cultural diversity of a pluralistic society.[5]

The author takes this theme and explores the struggle through analysis of *Mt. Healthy City School District Board of Education v. Doyle*.[6] This case involves the saga of the denial of tenure rights to a Cincinnati teacher, Fred Doyle, who was terminated because he: 1) communicated the contents of a principal's memorandum concerning a dress code to a local radio station, and 2) made an obscene gesture to two female students while on duty as a cafeteria monitor.

Mt. Healthy is a bellweather if only because it was an unanimous opinion of the Burger Court concerning the constitutional principles involved with education and the first and fourteenth amendments. Not only was the decision unanimous, but it also enunciated an understandable test that can be applied to teachers' rights concerning the first and fourteenth amendments.

> The test which the court developed required that the plaintiff show that his conduct was constitutionally protected and that it constituted the motivating factor for the government's adverse decision. It is then the government's burden to show by a preponderance of the evidence that the same decision would have been reached in any event.[7]

Unfortunately, the author dwells too long on the difficulty that the plaintiff would have in sustaining his burden of proof under this test. He jumps to the conclusion that the courts will be strict in applying the test. This standard is not very different, however, from the standard that the Court has accepted and used under *McDonnell Douglas Corp. v. Green*[8] to show discrimination in employment. The author's criticism, then, seems misplaced. Further, the author criticizes what *Mt. Healthy* does not say about due process. Although the Califor-

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5. Gee, *Constitutional Rights: A View From Mt. Healthy*, SCHOOL LAW, *supra* note 2, at 73.

6. 429 U.S. 274 (1977).

7. Gee, *supra* note 5, at 85.

8. 411 U.S. 792 (1973).

nia cases involving the rights of public employees preempt this concern in this state, it is unfair to expect the Supreme Court to address an issue that was not really before it. The irony of *Mt. Healthy*, the clearest and most definitive constitutional decision of the Burger Court, is that the lower courts have largely ignored the test it enunciated.

The chapters on collective bargaining and the scope of negotiation (Six and Seven) evidence entirely different approaches to the same subject. Chapter Six is a thoroughly readable selection of current collective bargaining issues. It is obviously a survey of popular topics and no issue is discussed in depth. This chapter provides a fair assessment of the direction in which public school collective bargaining is heading and furnishes a national overview. The discussion is dated, however, as the evolution continues.

Chapter Seven, which attempts to discuss the scope of bargaining, provides another example of attempting to do too much with too little. The result is an incomplete and dated list with very limited usefulness as a research resource. Although the article covers many subjects and cases, it cannot cover every state on each subject nor the changes which occur daily in this area. Additionally, the chapter is not set out in a readable form; it becomes a mere outline of the issues and cases as the author tries to pack in as many decisions as can fit in the pages allowed.

Nonetheless, the chapter does make the point that, on almost any issue selected for review, different states have ruled differently as to whether or not the issue is a mandatory or permissible subject for negotiation. The severely limited discussion of these cases cannot recite the dissimilarities in statutes or facts which give rise to the diverse judicial results. Further, in at least one instance, the author cites a 1974 California case,[9] although a new collective bargaining statute was passed in 1976.

The next chapter attempts to review seven cases that have been litigated recently concerning censorship and first amendment rights in the schools. This review has two notable shortcomings. First, the topic selection itself resulted in an indecipherable collection of cases that can only evidence the idi-

9. Jones, *Scope of Negotiability: Index of Recent Case Law and Administrative Rulings*, SCHOOL LAW, *supra* note 2, at 119.

osyncratic judicial opinions found in censorship cases. Second, the chapter curiously lacks a main theme, which makes it merely a tabulation of case results. A theme would have transformed this chapter into a salient survey with a focus. Instead, the reader is presented with the problems faced by practitioners in this field unaided by any real conclusions or solutions. Thus, the reader returns, full circle, to the starting point, after a fruitless search through the cases.

Chapter Nine is difficult to read as it contains long quotations from the American Bar Association's Canons of Ethics, making the initial pages tedious. The article discusses the ethical restrictions imposed by the Canons on attorneys, and the resultant conflict of interest and due process problems faced by school board attorneys, who are regularly confronted with schizophrenic decisions as to whom they represent. The author draws a convenient parallel between the corporate attorney who is torn between the representation of the shareholder, boardmember, and the executives. Despite the apt analogy, the discussion seems truncated. The issue is drawn, the analogy is raised, but the discussion seems less than satisfying. The author recites a variety of situations where due process and ethics come into play and concludes that there are "no clear answers." Arguably, there are some answers. The author could at least outline what appear to be the rules. He raises some good questions and clearly sketches the dilemma, but that does not give much guidance to the practitioner. The analogy to corporate counsel's ethical problems is appropriate, but the discussion lacks completeness.

The rights and laws of this country as they pertain to foreign and illegal alien students are briefly discussed in Chapter Ten. A significant portion of the chapter is devoted to discussion of Texas Education Code section 21.031, which denies the illegal or documented alien free public education in Texas. The chapter discusses the plethora of federal cases challenging the constitutionality of this statute. Since no other state has a similar statute, this discusson would have limited appeal except that the United States Supreme Court is scheduled to consider the issue. The Court has granted an application to vacate an order of the court of appeals' injunction preventing Texas education officials from complying with the statute.[10] If

10. Certain Named and Unnamed Non-Citizen Children and Their Parents v.

the Court ultimately finds the Texas statute constitutional, that decision may spawn similar statutes in other states, thereby increasing the relevance of this article.

The Education of the Handicapped Act is discussed in Chapter Eleven. The chapter is a lucid and readable explanation of the statute that "may ultimately alter the scope and identity of our educational system."[11] The article first discusses the procedures required and pitfalls encountered in the exhaustion of administrative remedies, an integral part of the processing of any claim under the Education of the Handicapped Act. Next, it clarifies the "appropriateness" of an educational program designed for a handicapped child. The article describes both the statutory requirements and the cases that have interpreted them. Finally, the chapter discusses the financial responsibilities and damages that can occur to a school district because of this law. The chapter serves as an excellent preface for the lawyer unfamiliar with the issues which have already developed under this new statute while also giving a good orientation and clear analysis of the cases.

Chapter Twelve is a well-written discussion of the new Age Discrimination in Employment Act, with notation of the few educational cases that have arisen under the statute. This section provides good background information for board members and others not familiar with the statute and its evolution. Nevertheless, the inclusion of a discussion of this statute, when other similar statutes (such as Title VII) are excluded, is inexplicable.

The discussion of the law of extracurricular activities in Chapter Thirteen is marred by shallow analysis, a choppy style, and an irritating number of footnotes. The first part of the chapter is very technical and difficult to read. The discussion in the second half of the article fails to follow the constitutional issues outlined in the first part. The author's treatment of the cases is unsatisfying. Moreover, it is difficult to digest the constitutional analysis of due process and equal protection with a distracting number of footnotes reciting school cases which have treated or touched upon these constitutional issues. (The multiple footnotes to CJS or Am. Jur.

Tex., 101 S.Ct. 12 (1980).

11. O'Donnell, *The Education of the Handicapped Act: Some Recent Case Developments*, SCHOOL LAW, *supra* note 2, at 215.

are offensive to the legal purist.) Further, the chapter contains a sterile recitation of cases which involved extracurricular activities and constitutional issues without providing a tie-in to the underlying legal theories which gave rise to the decisions.[12]

Chapter Fourteen discusses educational malpractice. This chapter may prove Marshall McLuhan to be right. It has 83 footnotes in 21 pages ranging from the Indianapolis Star to Dickens' *Hard Times*. Often the footnotes either have no relationship or relevance to the subject being discussed in the text or are just plain inaccurate. The discussion evidences a ludicrous misunderstanding of the law, lawsuits and cases which it purports to analyze. The authors confuse an educational malpractice suit with a legal malpractice suit. It may be a lawyer's bias, but the non-lawyers who wrote this chapter take an intriguing subject and disappointingly treat it with a string of quotes and footnotes. The N.O.L.P.E. should be embarrassed to have this chapter in its book. This section is nothing more than an unintelligible, garbled defense of education peppered with less than brilliant insights, such as "[t]here is virtually no law in the area of educational malpractice. However, the legal basis for this kind of action will be constructed from general principles of tort, contract law and mandamus."[13] The authors further note, not surprisingly, that "[i]f educational malpractice suits are successful they may cause school districts great monetary damage."[14] And the article finally admits, "[i]t may not be much help to say so, but the future of the educational malpractice concept is hazy."[15] The reader can only agree that such statements are not much help.

Chapter Fifteen stands out in this book because it is the only "nuts and bolts" chapter directed at lawyers. It is almost a "how to" check list of things for a lawyer representing a school board to do at an administrative hearing challenging the Individualized Educational Program designed for a handi-

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12. One example of the author's failure to clearly delineate legal theories can be found in this one sentence paragraph: [B]ut some of the more recent decisions have held married student activity rules to be impermissible and violative of the Fourteenth Amendment." Abbott, *The Developing Case Law of Public School Extra-Curricular Activities*, SCHOOL LAW, *supra* note 2, at 242-43.

13. Harris and Carter, *Educational Malpractice: The Concept, The Public, The School and The Courts*, SCHOOL LAW, *supra* note 2, at 255.

14. *Id.*

15. *Id.* at 263.

capped student in the school district. Clearly, the author is attempting to instruct the advocate on how to handle this case. Unfortunately, the advice is so practical and one-sided that it becomes offensive.

The chapter outlines how to stack the deck against the handicapped child and his family who believe that they are not being fairly treated under the law. The author bluntly asserts, "Bias of the hearing examiner is important. This can be gleaned from the information of personal life . . . . The basic goal is to determine whether the examiner is school or student oriented."[16] Readers are further advised to "[p]repare the witnesses, as experience suggests that educators are too kind, that is, they do not want to hurt feelings."[17] The author finally reminds lawyers that "[y]our expert witness is not expected to be 'unbiased' no matter how educators perceive their role. You paid for your expert. His opinion is your case. Let the judge be unbiased. Nothing is as difficult as an expert witness whom you have hired, who wants to be a neutral, unbiased expert in his own terms, 'a friend of the court'."[18]

In this chapter, the author says, in effect, "the emperor is not wearing clothes." If one is not offended by that approach, the discussion is very practical for a school board attorney.

Chapter Sixteen is an exceptionally well written and cogent piece concerning competence testing. It presents the dilemma that although no test is perfect the need to test still exists in order to sort and teach students. This readable and understandable analysis of the principles of testing points out that testing has developed a bad reputation in the courts because it has traditonally been utilized to segregate. This bias would bode a bleak future for testing but for *Board of Curators, University of Missouri v. Horowitz*.[19] This pivotal case, which held that student measurement was not per se unlawful, breathes new life into testing. The article also traces the evolution of the Florida Educational Accountability Act and challenges to that statute. The author implies that student measurement is difficult to accept and, therefore, will probably always be challenged as inherently unfair.

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16. Fisher, *The Administrative Hearing Under P.L. 94-142*, SCHOOL LAW, *supra* note 2, at 267.

17. *Id.* at 268.

18. *Id.*

19. 435 U.S. 78 (1978).

The last chapter of the book, which discusses the very difficult problem of discipline of special education students, may be the most important article for school board members. This section outlines the sensitivity courts have shown to such discipline and the constitutional and statutory right of such students to a free, appropriate public education under the Education of the Handicapped Act. The chapter delineates the provisions of two consent decrees which could be used to develop a policy concerning discipline of special education students in any district. The need for such a policy is clear, especially in light of potential personal liability of school board members for failure to comply with their legal obligations regarding the education of handicapped students. As one federal judge remarked when noting the "extremely poor advice" a school board had received on these issues, "[i]n July 1977, there *may* have been some justification for lack of information concerning the Trustee's legal obligations. There is no like justification now."[20] This insightful admonition alone is worth the purchase price of the book.

As with any collection of articles, some are better than others; but as a whole, these articles are very good and reflect the high quality of work that is normally published in the SCHOOL LAW AND CONTEMPORARY SOCIETY periodical. Most school board attorneys would find this book valuable and most school board members would find it interesting.

20. Martin, *Discipline of Special Education Students*, SCHOOL LAW, *supra* note 2, at 289-90, *quoting* Howard S. v. Friendswood, 454 F. Supp. 634, 638 (S.D. Tex. 1978).