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## ABSTRACT

School administrators face increasing risks in the field of school communications. While a school administrator acting in the line of duty and without malice is protected by conditional privilege against libel and slander, it is easy to step outside this protection, and become liable for false or misleading statements. Knowing the results of the cases cited herein can hopefully prevent some wrong steps. Additionally, in recent years, a constitutional dimension has been added to the administrator's need to know more about the law of communications. The U.S. Supreme Court, in Tinker and subsequent cases, has held that neither teachers nor students shed their right to freedom of expression at the schoolhouse gate. What this new dimension will grow into is still open to conjecture. (Author/JF)

MAY 13 1974

# A Legal Memorandum

NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS

1904 Association

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## SCHOOL COMMUNICATIONS: DUTIES AND DANGERS

Among the changing attitudes of the American people in recent decades has been a growing willingness -- if not outright eagerness -- to turn to the law and the courts for protection of their rights against infringements. One area in which much legal action has arisen involves the right of persons to protect themselves against the statements of others. This has certainly been the case as it applies to school administrators and other educators.

Many have asked: What can I say about a teacher? About a student? To whom? When? What if it is only my opinion? Must it be in writing? Isn't truth always a defense?

This memorandum is intended to provide some answers to these questions and some general guidelines for principals and other educational administrators in dealing with their day-to-day need to communicate.

Communication -- either written or spoken -- is defined by law as information or knowledge shared by one person with another, or others. Written communication that results in defamation of character is a libel; if spoken, it is a slander. Communication is considered defamatory if it harms the reputation of someone by exposing him to public ridicule, by lowering him in the estimation of his fellows, or by deterring third persons from dealing with him. In a court of law, the question of whether a communication is in fact defamatory is for the jury to decide on instructions from the court. Ordinarily, the plaintiff seeks financial compensation for any actual damage to his status or reputation, but the awarding of punitive damages is not unknown.

A libel may consist of either a statement of fact, a report of a particular act or omission, or an opinion; or it may be an indirect statement or imputation, even if given in jest. Hence, satire, irony, and innuendo may be defamatory if they destroy someone's reputation, even though it is not so intended.

### *Protected Communications*

On the other hand, there are two large categories of situations which are protected against suit. The first involves communication passing between persons who stand in a confidential relationship, such as those between husband and wife, attorney and client, or priest and penitent. These communications the law will neither permit to be divulged, nor allow to be inquired into in a court for the sake of public policy and the good order of society. As a general rule, school administrators are not protected under the mantle of confidentiality, although a state legislature could extend that protection to include school administrators if it chose to do so.

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Even where confidential relationships are not involved, however, certain communications have been accorded legal protection called privilege. An absolutely privileged communication is one made in the interest of the public service, such as statements made in legislative halls or judicial proceedings.

A qualified or conditional privilege is one which protects the communicator acting in good faith and in the line of duty, hence conditional on these factors being present. This is the kind of privilege most often afforded to educators. For example: A university which offered a doctorate upon attendance of a four week course in Florida at a motel in Sarasota and compliance with certain guidance by mail brought an action for libel against the commissioner of education in the state of New York, charging defamation with respect to statements and conclusions expressed by the commissioner unfavorable to the plaintiff's program and operation. The court held that the commissioner, who had the duty of looking after the quality of the institutions operating within the state, was acting in the line of duty and without malice; that his statements were, therefore, protected by privilege so long as he was thus operating. Laurence University v. State of New York, 344 N.Y.S. 2d 183 (1973).

Although school administrators are concerned primarily with protecting themselves against charges of libel or slander, they sometimes have cause to press charges against another party for defamation of character. A good example occurred in Maryland where a newspaper decided to rate the county's high school principals for its readers. Eight principals were given "outstanding" marks, eight were rated "good," four were judged "poor," and two were called "unsuited."

One of the two principals in the "unsuited" category sued the newspaper, its editor, and the reporters who wrote the story, for damages, claiming defamation of character. Said his attorney: "They destroyed a man to make money, to sell newspapers." The jury agreed, and awarded the principal the sum of \$356,000 in damages. Dunn v. Morkap Publishing Co. (Circ. Ct. Frederick County, Md., Dec. 1973). This case should be watched with some interest by principals who feel that their reputations may have suffered through adverse publicity.

#### NASSP Involvement in Libel Suit

In the recent case of Dunn v. Morkap Publishing Company, Circuit Court, Frederick County, Md., Dec. 1973) the plaintiff principal was an NASSP member. Upon notification of a claim under our professional liability insurance policy, it was decided that the extraordinary danger presented to all of our members by newspaper attacks of the kind presented in this case warranted special action by NASSP. With permission of the plaintiff, the Association sought to enter the case as a "friend of the court" and filed briefs and motions as if it were itself a party. The jury verdict of \$356,000 against the newspaper, its publisher, editor and the reporters who prepared the story was one of the largest recently awarded against journalists. It is no surprise therefore that the defendants are seeking further review of the case, and have succeeded in securing court ordered reduction in damages of \$75,000, pending a full appeal.

One of the main issues in the case was whether or not the defendants had shown malice by their acts. Such a showing is required for the award of damages to a public official in a libel suit under the leading Supreme Court case in the field. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). The implication in the Dunn case is that a school principal may be regarded as a public official when he sues for libel, though he is never so regarded in a tort suit when seeking governmental immunity as a defendant.

### *Ministerial v. Discretionary Duties*

Ordinarily, the courts will not hold administrators liable for the negligent performance of their discretionary duties (those which involve a choice), but they do hold them liable for negligence in their ministerial duties (those which involve no exercise of discretion), so long as they act within their sphere of authority. A California case is in point:

A special announcement was sent by mail to several members of the general public, a portion of which read as follows:

At a special meeting to be held Tuesday, November 24, 1959, in the Caruthers High School gymnasium at 7:30 p.m., the Caruthers High School Board of Trustees, the administration, teachers and sponsors of the Los Angeles band trip will bring the public in full focus of the serious violation of manners, morals and discipline that occurred in Los Angeles as a direct result of interference by the Elder and Fries boys who are now suspended from school.

The case focused on whether the action taken was ministerial or discretionary. Since the California Education Code prohibited giving out any personal information, except under certain limited conditions, the act was held to be more than a good faith mistaken action. Elder v. Anderson, Cal. Rptr. 48 (1960).

The Court said:

In this case, defendants violated a code section prohibiting dissemination of personal information concerning pupils, and thus stepped outside the protection of their office.

A New York court emphasized the principle that when board members or administrators step outside the usual line of duty, they incur the possibility of liability for damages in communications:

When a school officer or member of a board of education does a wrongful or negligent act, whereby injury to another results, he is liable therefor, not because he is a school official or board member, but because he is the person doing the act. Bassett v. Fish, 75 N.Y. 303.

Teachers may also be liable if they wrongfully aggrieve a student through a written communication. A teacher, who knew that his class register would go to

the clerk of the board and would be, in fact, read by other board members, nonetheless made the following notation in the register opposite a student's name: "Drags all the time; ruined by tobacco and whiskey." The teacher was judged to have stepped outside his "line of duty" and was held liable in damages. Dawkins v. Billingsley, 172 Pac. 69 (Okla. 1918).

Similarly, a California court held that the following publication in a newspaper by a teacher in a normal school was not protected:

By her conduct in class, by her behavior in and around the building, and by her spirit, as exhibited in numberless interviews, she has shown herself tricky and unreliable, and almost destitute of those womanly and honorable characteristics which should be the first requisites of a teacher. Dixon v. Allen, 11 Pac. 179 (Cal. 1886).

Certain words can be actionable per se, that is, by or in themselves. In the paragraph above, the words "tricky" and "unreliable" were held to have been actionable per se and the plaintiff did not need to go to the trouble of having to prove loss of reputation as a result of their publication. Since no worthy purpose was served by the teacher in writing the words, the plaintiff was entitled to damages sufficient to restore her to her original condition.

*Publication: A Necessary Factor*

To be actionable, words must not only be defamatory; they must also be "published" or communicated to someone other than the person alleging the harm. The communication need not be intentional, however. Words overheard or read by someone can be a source of legal action. Words between two persons, however, where there are no eavesdroppers present, cannot constitute publication, hence no slander. Ordinarily, publication means release of information to someone who has no right to the knowledge in line of duty -- that is, the message is indiscriminately broadcast or printed. The administrator can protect himself against this charge by releasing information only to those who have a legal right to receive such messages.

Student Transcript Material for Colleges

NASSP has just released a Curriculum Report, Vol. 3, No. 5 presenting detailed guidelines for the form and content of transcripts of student information to be sent to colleges. These guidelines were developed by a task force of representatives of eight professional associations whose members are involved in the application/admissions process.

With regard to information on a student's personal characteristics, the task force recommends that, "Written comments should be limited so far as possible to observed events, existing conditions, and other non-judgmental evidence that relate closely to college admissions,..." p. 11, Guidelines.

See also NASSP's Legal Memorandum on The Confidentiality of Pupil School Records. (September, 1971).

An illustration will help. A school administrator made statements before the board of education to the effect that a certain teacher left the classroom unattended, lacked ability as a teacher, and did poorly in certain courses at teachers' college. The teacher brought suit for damages, alleging that the statements were untrue, and since they formed the basis for her discharge, that they were defamatory in nature.

The court did not agree. So long as the school administrator (1) had made the remarks in the line of duty, (2) to persons having the right to receive such information, and (3) without malice or harm intended, his communication was conditionally privileged. McLaughlin v. Tilendis, 253 NE 2d 85 (Ill. 1969).

What you say can certainly be used against you but what you do not say can also be used against you. For example: Where a principal negligently failed to alert a substitute teacher to a potential danger from misconduct of an incorrigible student who assaulted another student, the court held that the school district must pay for the negligence of the principal. Ferraro v. Bd. of Education, City of New York, 212 N.Y.S. 2d 615 (1961).

### *Restraining Freedom of Expression*

The field of communications will be permanently affected by the famous decision of the U.S. Supreme Court: Tinker v. Des Moines School Board, 393 U.S. 503 (Iowa, 1969). The case arose when students wore black armbands to school in contravention of a rule against the wearing of such symbols. The Supreme Court held that wearing armbands to protest the war in Vietnam was symbolic speech akin to "pure speech" and therefore was protected under the First Amendment.

Despite wide publicity of the Tinker decision, a principal in Ohio still would not permit a student to wear a black armband in school, although there was no disruption or invasion of the rights of others. The student was awarded monetary damages and court costs for "deprivation of his right of symbolic speech." He received \$150 plus costs. According to the American Civil Liberties Union, which represented the student, the money damages were sought because the Supreme Court's ruling in Tinker was not proving to be a sufficient deterrent to school officials' "interference" with First Amendment rights. The judge also enjoined school officials from "directly or indirectly interfering with the rights of free speech" of any student. ACLU News, July, 1973, p. 8.

Student "symbolic" speech extends to many media. But in Tennessee, a federal court affirmed judgment in favor of school authorities who suspended a student for refusal to stop wearing a Confederate flag patch. The court found that there was substantial disorder at the school throughout the year to such an extent that the school was closed on two occasions, much of the controversy centering on the use of the Confederate flag. The principal's label of "provocative" for the flag was agreed to by the court, and the judge directed that the student either remove the patch or leave the school. Melton v. Young 465 F.2d 1332 (Tenn. 1972).

A board was also upheld in limiting the use of the ecology and peace symbols in schools. Genosick v. Richmond Unified School Dist. 479 F.2d 482 (Cal. 1973). School authorities were held to have acted wrongly, however, in suspending public school students who brought signs on campus protesting the dismissal of a well-liked English teacher from the faculty. Karp v. Becken, 477 F. 2d 171 (Ariz. 1973).

Teachers, in some instances, can be limited in their freedom to express sentiments concerning controversial topics in school. One court held that, where the school district and teaching staff had engaged in a long labor dispute, a board memorandum to teachers that they should not discuss in class any aspect of the strike was not depriving teachers of First Amendment rights; and the teacher's dismissal for violating the memo was legally accomplished. Nigosian v. Weiss, 343 F. Supp. 757 (Mich. 1971).

Prior restraint of the exercise of free speech is always closely guarded by the courts, but it has been permitted in the case of a student newspaper allegedly printing obscenity and libel. However, limitations for reasons such as "advocacy of illegal actions," and "gross insult of a group or individual," have been held to be so vague and broad as to be unenforceable. Baughman v. Freienmuth, 343 F. Supp. 487 (Md. 1972). Aff'd, 478 F2d 1345 (4th Circ. 1973).

The judiciary has steadfastly construed the concept of freedom of expression broadly rather than narrowly as a means of promoting vigorous, robust debate, and has resisted efforts to restrict the First Amendment rights of whole classes of individuals, whether students (Tinker), campus speakers (Brooks v. Auburn Univ., 412 F2d 1171, 1969), school newspaper editors (Scoville v. Bd. of Education, 425 F2d 10, 1970), student organizers (Healy v. James, 408 U.S. 169, 1972), or teachers (Pickering v. Bd. of Educ., 391 U.S. 563, 1968).

Such a right, say the courts, must also extend to administrators, who have a stake in seeing that their communications protection from the Constitution is equal to that of the groups with which the administrator deals.

An Illinois administrator was dismissed when a memorandum he had written about the school's ethnic studies program was released for publication by persons unknown. The release so offended the board of education that it took action to fire the administrator without a hearing. The court ruled that because his standing in the community would be adversely affected by the board's charges, he was entitled to a hearing on the substance of these charges. Lack of such a hearing amounted to a deprivation of his "liberty" to go elsewhere. The board had accused him of misrepresentation, supplying false information, and withholding important information from them. He also had built up a "property" right, inasmuch as his contract was terminated by the board before it ran out. In remanding the case to the court below for further action, the Circuit Court of Appeals held that the administrator had been denied First Amendment rights to freedom of expression and his Fourteenth Amendment right to due process of law. Hostrop v. Bd. of J.C. Dist. No. 515, 471 F2d 488, (Ill. 1972).

#### *Stigmatization that Results from Communication*

A new class of suits is currently being brought where certain labels stigmatize some children as inferior, or work to narrow their social and/or occupational options in school. Ranking high school seniors in terms of academic standing, for example, may amount to "stigmatization," especially where such a list is widely circulated. Biased communications, such as one in which the school principal preferred a white to a black teacher, may be the object of court action. Suppression of evidence which might be helpful to a defendant may also constitute conspiracy, labeling, or stigmatization. People v. Walker, 504 P.2d 1098 (Col. 1973).

If the school principal is to play the role of "child advocate" as envisioned in the in loco parentis relationship, all communication relating to the child should be

scrupulously scrutinized for possible libelous statements. Student files may contain such libelous statements as "this boy would be all right if it weren't for his father." Since such statements add nothing to the file, and perhaps are not aimed at corrective measures, the principal should not include them.

Finally, letters to parents should be completely open and in the interests of the students' rights. In Pennsylvania, a school district proposed to mount a program aimed at identifying and helping potential drug abusers among eighth graders. Parental consent was required. In a letter home to the parents, no mention was made that the label of potential drug abuser might become a self-fulfilling prophecy, nor result in scape-goating.

The court reprimanded the school administrator for this error. "The attempt to make the letter requesting consent similar to promotional inducement to buy, lacks the necessary substance to give a parent the opportunity to give knowing, intelligent and aware consent," said the court in holding that the program would also invade students' privacy. Merriken v. Cressman, U.S.D.C. E.D.Pa. Sept. 28, 1973).

### *Summary and Conclusions*

School administrators face increasing risks in the field of school communications. While a school administrator acting in the line of duty and without malice is protected by conditional privilege against libel and slander, it is easy to step outside this protection, and become liable for false or misleading statements. Knowing the results of the cases cited above, hopefully can prevent some wrong steps.

- Critical comments reported about students or teachers should be narrowly confined to specific actions personally observed by the administrator. General terms of an opprobrious nature should be particularly avoided as they may be actionable even without proof of harm.
- When an administrator believes that a comment, observation or evaluation which might be defamatory must be reported in the line of duty, every precaution should be taken that the report is made only to the person or persons to whom that duty requires it to be made.
- Truth is not always a sufficient defense against a charge of defamation. Even if true, a statement may be actionable unless it can be shown that it was made with good intentions and justifiable ends.

In recent years, a constitutional dimension has been added to the administrator's need to know more about the law of communications. The U.S. Supreme Court, in the Tinker case, held that neither teachers nor students shed their right to freedom of expression at the schoolhouse gate. The case has, therefore, a very real and important implication for the modern secondary school administrator in the 1970's.

What this new dimension will grow into is still open to conjecture. No doubt it will mean that schools must be more open to communication by students and teachers alike. Student rights to freedom of speech and of the press will need to

be respected, and it may even be necessary to recognize a right of students to communicate with management in the development of policies that govern their everyday lives in school.

To this extent, school administration has entered a new era of the law concerning communications within and around the public schools of the nation.

The contributing editor of this Legal Memorandum is M. Chester Nolte, Chairman, Educational Administration, University of Denver 80210. Portions of the Memorandum were borrowed with the consent of the Parker Publishing Company, West Nyack, N.Y. 10994, from a recent book entitled Duties and Liabilities of School Administrators.



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