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# School Law Update - Preventive School Law

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## BOOK REVIEW

**SCHOOL LAW UPDATE—PREVENTIVE SCHOOL LAW**, edited by Thomas N. Jones and Darel P. Semler. Topeka, Kansas: NOLPE, 1984. Pp. 191. \$17.95.

*Earl J. Ogletree\**

*School Law Update* is a collection of fifteen papers delivered at the annual convention of the National Organization on Legal Problems in Education (NOLPE). The book focuses on the practice of preventive litigation in the schools. The edited volume is both thematic and diverse. The topics include teacher riffing,<sup>1</sup> first amendment claims by public employees, group insurance, bonds and annuities, school finance, private school tax exemptions, seniority rights, child abuse, asbestos litigation, cultural bias in special education, and public relations. The theme that ties these areas together is the avoidance of litigation. However, the book also discusses what preventive techniques are available to control costs and obtain objectives once a lawsuit has been filed.<sup>2</sup>

William C. Bednar sets the tone of the text. He recommends "legal checkups," "legal audits," and "legal planning" for school districts.<sup>3</sup> Bednar views preventive law like preventive medicine: stop the problem before it starts. He focuses on why preventive law has yet to become fully accepted in the field of school law. One reason, according to Bednar, is that the schools and school systems are arms of the government: "public agencies whose limited fiscal and legal resources have tended by design . . . to be absorbed by crises, such as litigation, administrative hearings, federal compliance reviews, . . . and the press of routine school business having legal implications."<sup>4</sup> Bednar suggests that school districts should allocate more resources to preventive law, even if such a program is financially burdensome in the short run. He argues that the long-run benefits are worth the expense, time and effort.

Bednar's solution centers on the traditional attorney-client relationship. He believes that before any preventive law program will be successful, school

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1. "Riffing" is a term used to describe the process whereby a school system reduces the number of teachers it employs. It is derived from "rif," which stands for "reduction in force."

2. *SCHOOL LAW UPDATE—PREVENTIVE SCHOOL LAW 7* (T. Jones & D. Semler ed. 1984) [hereinafter cited as *UPDATE*].

3. *Id.* at 1-7.

4. *Id.* at 9.

officials must overcome their suspicions of lawyers. According to Bednar, many school boards view attorneys either as stop-gap technicians and consultants or as "miracle workers." Bednar argues that good attorney-administrator communication is essential, and calls for a "reassessment" of the way educators and lawyers view one another.<sup>5</sup> If effective preventive law planning is to occur, he argues, the school attorney must be involved in school district operations from the beginning and on a regular basis. A close relationship between administrators, school boards, and attorneys would enable both parties to understand the basic purposes and goals of the school district. Bednar suggests that the result would be the emergence of legally defensible and more cost-effective plans of action.

In the area of "reduction in force," commonly referred to as "riffing," preventive law requires knowledge of the issues, statutes and current case law. In "Current Issues in Reductions-in-Force," author Gerald A. Caplan urges the necessity of an awareness of issues such as teachers' due process rights, the pretextual or misuse of reduction-in-force against tenured teachers, and state statutes and school policies regarding the technical/practical qualifications of tenured versus non-tenured teachers in a riffing situation. A more thorough knowledge of these areas will give school boards more flexibility in making riffing decisions. Therefore, they will arguably be less likely to violate the statutory and constitutional rights of riffed tenured teachers.<sup>6</sup>

Reduction-in-force problems are magnified by the recent shrinkage in the United States' school age population. High school districts with more than one school have been forced to consolidate and close various facilities. The situation is further aggravated by the Reagan administration's policies of overall fiscal "belt-tightening." To avoid further fiscal headaches in the form of litigation costs, administrators must handle teacher dismissals with the utmost care, especially those involving tenured teachers.

In addition, familiarity with current case law such as *Connick v. Myers*<sup>7</sup> will give school boards greater flexibility in teacher terminations. Caplan discusses dismissals where teachers have spoken out critically in a companion article to his riffing piece. Specifically, Caplan focuses on problems that arise when a school employee alleges that the termination "was motivated by a statement he or she made, orally or in print, with which the board of education or a supervisory administrator disagreed."<sup>8</sup> The United States Supreme Court has distinguished first amendment, public concern, protected speech or criticism, and unprotected, merely "private employee disputes."<sup>9</sup> *Connick* provides guidelines for the determination of when an employee's

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5. *Id.* at 12.

6. *Id.* at 15.

7. 461 U.S. 138 (1983).

8. UPDATE, *supra* note 2, at 23.

9. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

words and conduct will be found to be a matter of "public concern." To make this determination, the entire context must be examined, including the employee's motives. *Connick* held that government employees can be dismissed for merely personal criticism between employees and supervisors, since such matters are not of public concern. Thus, a fair reading of *Connick* justifies "summary dismissal of the meritless claim arising from the attempt to constitutionalize what is merely a private employee dispute."<sup>10</sup>

Although educators have never lost a malpractice suit, there is increased demand by the public to hold government officials and professionals legally accountable. Parents are now suing schools for neglecting to educate their children. Although educators occupy a unique position in the law, they must evaluate their professional practices to prevent malpractice litigation. In "How to Avoid an Educational Malpractice Suit," Arlene H. Patterson recommends that educators "identify good professional practices, improve present practices, and eliminate practices which have the potential for liability for educational malpractice."<sup>11</sup>

Due to the increase in the reported incidence of child abuse, school personnel must recognize their responsibilities and potential liability for failing to identify and report suspected cases of abuse and neglect. Thirty-two states impose criminal liability for failure to report;<sup>12</sup> five have provisions for civil liability;<sup>13</sup> and twelve states have created a duty to report, but have imposed no penalty.<sup>14</sup> Other states have adopted a negligence standard for civil liability based on proof of wilful misconduct.<sup>15</sup> In general, Caplan

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10. UPDATE, *supra* note 2, at 27.

11. *Id.* at 91.

12. *Id.* at 40 n.20. See ALA. CODE § 26-14-13 (1975); ARIZ. REV. STAT. ANN. § 13-3619 (1978); ARK. STAT. ANN. § 42-816(a) (1977); CAL. PENAL CODE § 11162 (West 1982); COLO. REV. STAT. § 19-10-104(4a) (1978); FLA. STAT. ANN. § 827.07(11) (West 1976); GA. CODE ANN. § 74-111(e) (Supp. 1985); IND. CODE § 31-6-11-20 (Supp. 1980); IOWA CODE ANN. § 232.75(1) (West Supp. 1985); KAN. STAT. ANN. § 38-720 (1981); KY. REV. STAT. § 199.990(7) (1982); LA. REV. STAT. ANN. § 14:403(l) (West 1986); MICH. COMP. LAWS ANN. § 722.633(2) (West Supp. 1986); MINN. STAT. ANN. § 626.556(6) (West Supp. 1986); MO. ANN. STAT. § 210.165 (Vernon 1983); NEB. REV. STAT. § 28-15 (1975); NEV. REV. STAT. § 200.508 (1979); N.H. REV. STAT. ANN. § 169-C:39 (Supp. 1985); N.J. STAT. ANN. § 9:6-8.14 (West 1976); N.M. STAT. ANN. § 32-1-15(F) (Cum. Supp. 1980); N.Y. SOC. SERV. LAW § 420(1) (McKinney 1983); N.D. CENT. CODE § 50-25.1-13 (1985); OKLA. STAT. ANN. tit. 21, § 846(A) (West Supp. 1985); PA. STAT. ANN. tit. 11, § 2212 (Purdon 1985); R.I. GEN. LAWS § 40-11-6.1 (1984); S.C. CODE ANN. § 20-7-560 (1985); S.D. CODIFIED LAWS ANN. § 26-10-10 (Supp. 1986); TENN. CODE ANN. § 37-1-412 (1984); TEX. FAM. CODE ANN. § 34.07 (Vernon Supp. 1986); UTAH CODE ANN. § 78-3b-10 (Supp. 1985); WASH. REV. CODE ANN. § 26.44.080 (1986); W. VA. CODE § 49-6A-8 (Supp. 1984).

13. UPDATE, *supra* note 2, at 40 n.21. See ARK. STAT. ANN. § 42-816(b) (1977); COLO. REV. STAT. § 19-10-104(4b) (1978); IOWA CODE ANN. § 232.75(2) (West 1985); MICH. COMP. LAWS ANN. § 722.633(1) (West Supp. 1986); N.Y. SOC. SERV. LAW § 420(2) (McKinney 1983).

14. UPDATE, *supra* note 2, at 40 n.22. These states are Alaska, Hawaii, Idaho, Illinois, Maine, Maryland, Mississippi, Montana, North Carolina, Ohio, Oregon, and Wyoming.

15. UPDATE, *supra* note 2, at 40 n.24. See ARK. STAT. ANN. § 42-816(b) (1977); COLO. REV.

believes that educators are obligated to report suspected child abuse cases that are based on reasonable suspicion.<sup>16</sup>

The author of "Legal Responsibility of Educators in Child Abuse," Eric S. Monoschein, lists some physical and behavioral indicators of child abuse, and provides some guidelines to help school districts establish sound child abuse policies and procedures.<sup>17</sup> All teachers and administrators should read this chapter. Recently, nursery schools and day care centers in Los Angeles and Chicago have been closed amidst charges of sexual improprieties by the supervisors. Even grammar and high school teachers and principals have been charged and indicted for child abuse crimes. Child abuse is a serious problem, and educators must be alert to possible cases of abuse and/or molestation by both parents and school personnel.

*School Law Update* provides legal advice for all school personnel. Its emphasis on preventive law makes it particularly valuable to policy and decision makers. The book will place teachers and administrators "on their toes" as to their potential liability for particular conduct. Preventive law policies are cost effective. Failure to implement such policies can lead school administrators to realize that "[y]ou can pay less for legal advice now, or you can pay more for litigation later."<sup>18</sup>

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STAT. § 19-10-104(4b) (1978); IOWA CODE ANN. § 232.75(1) (West 1985); N.Y. SOC. SERV. LAW § 420(2) (McKinney 1983).

16. UPDATE, *supra* note 2, at 41.

17. *Id.* at 42-44.

18. *Id.* at 13.