

Maine Policy Review

Volume 1 | Issue 3

1992

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Recommended Citation

Shaw, Brian C. . "The Legal Implications of Values Education." *Maine Policy Review* 1.3 (1992) : 37 -47,
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The legal implications of values education¹

Maine Policy Review (1992). Volume 1, Number 3

by Brian C. Shaw, Jensen Baird Gardner & Henry

As Rushworth Kidder noted in the preceding article, the mere mention of values education creates a stir among its advocates and detractors. Brian Shaw, a Portland attorney whose practice focuses in part on public school law, was asked by Maine Policy Review to address the legal issues involved in values education in public schools. The following article includes an overview of those issues and, by way of illustration, a case study from a Maine school district.

Introduction

The topic of "values" has developed a high profile in recent public discourse. The Los Angeles riots, the Dan Quayle- Murphy Brown incident, a history of low voting turnouts, condoms in schools, sexual harassment, gay rights legislation - all have overtones of personal or societal values.

Americans traditionally have looked to the public schools to play a significant role in transmitting society's values from generation to generation. That role has been questioned by some for various reasons, including concern about usurping the family's role, ambivalence as to which values should be emphasized, legal questions about the separation of church and state, and questions about the wisdom of imposing yet another social responsibility on public schools.

I admit to a strong disposition in favor of values or character education. Schools can hardly be neutral on core values such as integrity, diligence, self-respect, personal responsibility, citizenship, or courtesy. In light of modern society's particular temptations and threats to young people, and the decline of other social institutions such as families and close-knit neighborhoods, public schools cannot abdicate their traditional responsibility.

Current approaches to values education include the following:

- *Curriculum.* Schools can purchase or develop curriculum materials emphasizing particular values. Such curricula are produced by The American Institute for Character Education (San Antonio, Texas) and the Thomas Jefferson Research Center (Pasadena, California), among others.
- *Identification and Emphasis.* Schools can identify specific values to promote. This approach typically involves broad community input in identifying consensus values. For example, a broad-based task force of the Baltimore County Public Schools Department in 1984 identified 24 key values to promote, including justice, due process, tolerance, integrity, and self-respect.

- *Leadership by Example.* Some schools are examining school procedures and the conduct of school personnel, which inevitably send students a message about fairness and respect for others, whether positive or negative.
- *Community Service.* Many schools are developing either mandatory or voluntary community service programs, under the philosophy that students learn by doing. The Sanford (Maine) School Department is one of a number of school districts throughout the country with mandatory community service programs.

Values education is not inherently linked with any side of the political spectrum. As was demonstrated by Madison High School's highly publicized Tolerance Day program a few years ago, the potential political fallout depends on which values are endorsed. The case arising out of the Madison incident is used here as a case study illustrating some of the issues involved in values education.

The role of the school in transmitting values

Legal justification and mandate for values education

On various occasions the United States Supreme Court has emphasized the role of the nation's schools in inculcating basic values, describing schools as conveying "fundamental values necessary to the maintenance of a democratic political system" (Ambach v. Norwick, 1979). Moreover, the Court has stated that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values, be they social, moral or political" (Board of Education v. Pico, 1982).

For many years Maine has had a statute mandating the teaching of virtue and morality (Title 20, Maine Revised Statutes Annotated, Section 1221). The statute was revised most recently in 1983 and currently states:

Instructors of youth in public or private institutions shall use their best endeavors to impress on the minds of the children and youth committed to their care and instruction the principles of morality and justice and a sacred regard for truth; love of country, humanity and a universal benevolence; the great principles of humanity as illustrated by kindness to birds and animals and regard for all factors which contribute to the well-being of man; industry and frugality; chastity, moderation and temperance; and all other virtues which ornament human society; and to lead those under their care, as their ages and capacities admit, into a particular understanding of the tendency of such virtues to preserve and perfect a republican constitution, secure the blessings of liberty and to promote their future happiness.

Maine statutes also contain a section mandating teaching about our nation's flag:

It shall be the duty of instructors to impress upon the youth by suitable references and observances the significance of the flag, to teach them the cost, the object and principles of our government, the inestimable sacrifices made by the founders of our Nation, the important contribution made by all who have served in the armed services of our country since its inception

and to teach them to love, honor, and respect the flag of our country that costs so much and is so dear to every true American citizen (20-A MRSA, § 4805(1)).

Many people believe that schools have failed in their efforts to inculcate basic values in students. One discerning commentator, Michael A. Rebell, has written that the failure of the schools in value education "may reflect a fundamentally insoluble values crisis at the core of contemporary society. The loss of traditional institutional anchors may have cast society irremediably adrift." He continues, however, that such pessimism is only justified if schools and other social institutions have tried all means possible to transmit substantive values. This requires that we confront critical questions such as "Can our public school system enumerate, and have accepted by the community, a common core of values?" and "Can values be endorsed in our community without endangering individual freedom?" (Rebell 1989: 276-277).

The role of the local school board

In Maine, the task of identifying which values are to be taught and their role in the curriculum is entrusted mainly to local school boards. Maine's education statutes provide that the local school board "shall direct the general course of instruction" (20-A MRSA § 1001 (6)). The Maine Supreme Judicial Court agrees that a local school board "has wide latitude in managing the curriculum of its schools..." (Solmitz v. MSAD 59, 1985). Therefore, even to the extent that values have been identified by statute, as a practical matter the local school board determines how those values will be incorporated into the curriculum.

Some values are established at the national level, rather than at the state or local levels. The U.S. Constitution sets forth many important values such as one-person, one-vote, our republican form of government, freedoms of speech and religion, due process, equal rights, and so forth. Again, however, the manner in which such national values are emphasized and inculcated is left largely to the discretion of local school units.

Legal constraints on values instruction

In light of the broad discretion given to local Maine school boards in determining curriculum and managing the schools, the starting point for our analysis is to assume that schools are free to teach or promote a particular value unless a specific legal constraint applies. Among those constraints are:

Religion

The First Amendment to the U.S. Constitution specifically prohibits government from establishing religion or prohibiting the free exercise of religion. The clauses addressing these prohibitions are known as the Establishment Clause and the Free Exercise Clause -

Establishment Clause. Establishment issues generally are analyzed under a three-prong test enunciated by the U.S. Supreme Court: In order to be permissible, the government action (1) must have a secular purpose; (2) must have a primary effect that neither advances nor inhibits

religion; and (3) must not foster an excessive entanglement with religion (*Lemon v. Kurtzman*, 1971).

Therefore, any organized or officially sanctioned prayer or devotional Bible reading is prohibited (*Engel v. Vitale*, 1962). School-sponsored invocations or benedictions at graduation exercises are illegal under a 1992 case decided by the Supreme Court (*Lee v. Weisman*). Statutes allowing periods of silence will be unconstitutional if it is determined that they had a religious purpose (*Wallace v. Jaffree*, 1985). A Maine statute authorizes a school board to require a moment of silence "for reflection or meditation" (20-A MRS § 4805 (2)).

Whenever a particular item in the curriculum or any school action is arguably motivated by religious considerations, a legal challenge can be expected. In an interesting recent case, a Missouri school board's rule prohibiting school dances was declared unconstitutional by a federal district court, which determined that the rule was based on the community's religious objections to dancing. The 8th Circuit Court of Appeals, however, reversed the district court on the ground that the school board did not necessarily have a religious motivation, thus, the dancing ban was upheld (*Clayton v. Place*, 1990).

From the other side, some plaintiffs have contended that public schools are impermissibly hostile to religion. Under establishment clause jurisprudence, government action should neither advance nor inhibit religion. Some religious parents have asserted that a school has "established" anti-religious doctrine. Significantly, no case has yet held that a particular curriculum impermissibly establishes secular humanism as a quasi-religion or non religion. Such an argument appears to be analytically sound, but would require unusual and compelling facts in order to be ultimately successful.

Free Exercise Clause. If a student asserts that the school is interfering with the student's free exercise of religion, courts generally utilize a three-prong examination as to whether: (1) the individual is motivated by sincere religious belief; (2) the governmental action significantly burdens free exercise of religion; and (3) a compelling government interest justifies the governmental actions. If a significant burden on the individual's religion is present, the government should employ the least restrictive means of achieving the compelling government interest.

Courts are very reluctant to step into the quagmire of policing every statement that could be construed as contrary to the religious teaching of any particular sect. The Supreme Court has said: "If we are to eliminate everything that is objectionable to any of the (religious bodies of the United States) or are inconsistent with any of their doctrines, we will leave public education in shreds" (*McCullum v. Board of Education*, 1948). Thus, mere exposure to ideas that contradict or offend religious belief does not impermissibly burden the freedom of religion.

If a parent or student contends that a component of the curriculum is contrary to his or her religious beliefs, the key legal issue is likely to be whether the school has any legal obligation to provide an alternative to accommodate the student's religious beliefs. As an example, members of the Plymouth Brethren, an old order church that prohibits exposure to practices deemed sinful, recently challenged New York's mandatory AIDS curriculum. New York's highest court set aside

summary judgment in favor of the school district and thus permitted a trial as to whether the students should be given an exception (*Ware v. Valley Stream High School District*, 1989). Except in such unusual circumstances, most courts would be reluctant to mandate accommodation to the student's particular religious belief. However, when a strong religious objection is made to a particular book or activity, the school district might well decide to provide an alternative or allow an "opt out," either to avoid legal challenge or in the interest of accommodation.

Freedom of Speech

Students' rights to freedom of expression were strengthened in the landmark 1969 Supreme Court decision in *Tinker v. Des Moines Independent Community School District*. In ruling that a school could not suspend students for wearing black armbands in protest of the Vietnam War, the Court stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The standard applied was whether the speech *materially disrupts* classwork or invades the rights of others.

The tension between a school board's ability to inculcate values and a student's First Amendment rights came to a head in the 1985 case of *Bethel School District v. Fraser*. A high school student was suspended for using sexually suggestive speech while nominating another student for office at a school assembly. The lower federal courts declared the suspension unconstitutional under the *Tinker* "material disruption" standard. However, the Supreme Court upheld the student's suspension, ruling that the school appropriately could inculcate the "habits and values of civility" that not only are individual character values but also promote the political values of respect for others and civil discourse.

A somewhat different situation is presented by codes of conduct that prohibit speech offensive to minorities or other designated groups. Regardless of the values of nondiscrimination and tolerance that underlie such codes, courts have found such limitations on speech to be unconstitutional at the public university level. Secondary and elementary schools might have greater latitude than universities to restrict such offensive speech, under the rationale of the *Fraser* case that schools have a responsibility to inculcate the value of civil discourse and to shield younger students from indecent speech. However, a public school interested in banning racist or other offensive speech runs a serious legal risk of violating freedom of speech rights unless the school can establish a likelihood of material disruption under the *Tinker* case, or harm to other students.

In assessing the various Supreme Court cases involving students' freedom of speech, one commentator concluded:

Taken together, [the Supreme Court cases] not only articulate a qualified application of the First Amendment free speech doctrine to the schools, but they also provide prime illustration of the important complementary role that courts and local school communities should play in values formulations. The Supreme Court has established a preeminent national value that First Amendment free speech rights must apply within the schoolhouse gates, but it has left to each

state and each local school board broad discretion to balance that right with other local community values inculcation priorities (Rebell 1989: 309-310).

No student affirmation of values taught

In oft-quoted language, Justice Jackson of the U.S. Supreme Court wrote in the 1943 *Barnette* case that "[if] there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by words or act their faith therein" (West Virginia State Board of Education v. Barnette). Under this principle, public schools can teach particular values to its students but cannot require students to personally affirm those values. As an example, many state statutes continue to mandate the Pledge of Allegiance, and courts have upheld such statutes so long as students and teachers who dissent for any reason are permitted to stand aside or leave the room (Russo v. Central School District, 2d Cir, 1972).

Although schools cannot require students to personally endorse values or ideas, schools can require that students conform their behavior to certain rules essential to an orderly school environment, regardless of a student's stated philosophical objections to the rules. Courts in different jurisdictions vary in their approaches to student hair and dress codes. The United States First Circuit Court of Appeals, which covers Maine, has ruled that dress codes require less justification by school officials than do hair codes.

An interesting application involves mandatory student service obligations as a graduation requirement, which has been adopted by a growing number of school districts and recently required for all high school students in the state of Maryland (New York Times, July 29: 1992: B7). Mandatory student service was proposed in a 1983 report by the Carnegie Foundation for the Advancement of Teaching, as a way to instill citizenship values. Community service requirements have been challenged as involuntary servitude in violation of the Thirteenth Amendment, and as an enforced imposition of values in violation of the First Amendment. In a case currently on appeal, a Pennsylvania federal court upheld a mandatory service requirement (Steirer v. Bethlehem School District, 1992).

Parental Rights

The exact parameters of parental rights with respect to their children's education are not clear. The Supreme Court has determined that parents have the constitutional right to send their children to private schools and that Amish parents may withhold their children from secondary school for religious reasons. However, the management of public schools is entrusted to school officials rather than parents. With respect to parental authority, one commentator has written:

Parents' rights to enforce the teaching of their own values are reinforced each time the schools are successfully charged with a failure to teach values or with enforcing wrong or bureaucratically perverted values. It is not altogether clear, however, how paramount the parental rights can be when they are faced with the legitimate claims of the state. Inquiry into the legitimacy of claimed parental rights become even more intense when those rights are confronted

with the rights of the children themselves....[Thus,] the rights of parents to impose their values on their children are no longer iron clad (Bereday, 1977: 594, 597).

School districts commonly make some accommodation to parental objections to particular textbooks or topics of instruction (such as sex education). The extent to which such accommodation is legally required is uncertain, but reasonable accommodation frequently makes sense both to avoid possible legal challenge and to maintain support for the public schools.

A federal statute provides parents certain rights concerning the psychological evaluation of a student. The Hatch Amendment prohibits schools from requiring psychiatric or psychological examination, testing or treatment in which the primary purpose is to reveal information concerning certain specified categories such as political affiliations and sexual behavior and attitudes (20 U.S.C. § 1232h (b)).

Potential legal problems arise from the Hatch Amendment regulations which give quite broad definitions to psychiatric and psychological examination, testing or treatment:

1. "Psychiatric or psychological examination or test" means "a method of obtaining information, including a group activity, that is not directly related to academic instruction and that is *designed to elicit information about attitudes, habits, traits, opinions, beliefs or feelings.*"
2. "Psychiatric or psychological treatment" means "an activity involving the planned systematic use of methods or techniques that are not directly related to academic instruction that is *designed to affect behavioral, emotional or attitudinal characteristics of an individual or group.*" (Emphasis supplied.) (34 C.F.R. § 98.4)

The regulations appear to go beyond the intent of the statute and can be interpreted as applying to a very wide range of accepted classroom and disciplinary activities. Many educators are now familiar with photocopied form letters from parents referring to the Hatch Amendment and demanding that the school obtain parental consent before carrying out a laundry list of specified activities, such as "discussions of situations involving moral issues."

Teachers' Academic Freedom

Just as a school board cannot impose a curriculum that violates the establishment clause, teachers are similarly prohibited from promoting a particular religion or any religion in the classroom.

The ultimate authority over the curriculum rests with the school board rather than with individual teachers.

Some recent cases hold that teachers' First Amendment rights to freedom of speech do not extend to in-class conduct and teaching methods (See, for example, *Bradley v. Pittsburgh Board of Education*, 3d Cir., 1990). The Supreme Court has not decided whether a public school teacher has a First Amendment right of academic freedom in classroom discussion or selection of instructional materials, although some decisions suggest teachers have certain rights to freedom of expression in the classroom that could limit the authority of school boards in controlling the

curriculum (See, for example, *Keyishian v. Board of Regents*, 1967; *Sweezy v. New Hampshire*, 1957; and *West Virginia Board of Education v. Barnette*, 1943). Legal commentators are divided as to the scope of academic freedom rights, if any, in elementary and secondary schools.

Employee Rights

Public schools might desire to promote values by requiring employees to comport their behavior to community values. The discretion of schools in this regard is limited not only by employees' freedom of speech but by other constraints on employee discipline. In Maine, teachers can be dismissed during the term of their employment only if the teacher is "unfit to teach" or "the teacher's services are unprofitable to the school" (20 MRSA § 13202). Superintendents and principals may be dismissed only for cause. School employees do not have similar statutory protection against the non-renewal of their contracts upon expiration, but collective bargaining agreements or individual employee contracts commonly impose a requirement that non-renewal or termination of employment be only for cause. In such circumstances, an arbitrator may be the ultimate judge of whether discipline or termination of employment is permissible.

Neither federal law nor the Maine Human Rights Act prohibits employment discrimination based on sexual preference, but it is unlikely that an arbitrator would sustain any disciplinary action based on sexual preference against an employee protected by just cause provisions, and some courts prohibit discrimination against homosexuals on the grounds that the discrimination is arbitrary and capricious.

Inappropriate sexual conduct between a teacher and a student, depending on the particular facts of the case, can support dismissal or discipline. For example, a recent New Jersey case upheld terminating a teacher for writing overtly sexual letters to a student (*State v. Parker*, 1991). However, off-campus conduct by school employees which is considered immoral and contrary to the school's message, but which does not involve students, is much less likely to support termination of employment. In order for a school district to prevail in such circumstances, at the very least the misconduct would have to be notorious and either disruptive or directly contrary to clear school policy. A recent case in Oregon sustained the dismissal of a teacher for acquiescing in her husband's use and sale of marijuana in their home (*Jefferson County School District v. Fair Dismissals Appeal Board*, 1991).

Off-campus activities by students

School efforts to regulate off-campus student speech will bear a difficult legal burden as evidenced by a 1986 case in which a Maine federal district court judge ruled that a school board could not discipline a student for "giving the finger" to a principal at a local shopping center parking lot in view of other students (*Klein v. Smith* 1986). However, not all school rules are necessarily limited to school property. A recent Minnesota case upheld a school policy that prohibited student athletes from attending parties where alcohol was served. (*Bush v. Dossel-Cokato Board of Education*, 1990).

A case study: Solmitz v. MSAD No. 59

In 1985 the Maine Supreme Judicial Court decided the case of Solmitz v. MSAD No. 59. The case, which attracted much publicity in Maine and across the nation, presents an interesting case study of one effort to inculcate values in the schools. In ruling that the local school board acted permissibly in canceling a proposed seminar on tolerance arranged by a teacher, the court touched on a number of important legal points and did not find it necessary to reach others that are still unresolved.

In the fall of 1984, David Solmitz, a teacher at Madison High School, began planning an all-day symposium on tolerance in reaction to the tragic drowning of a Bangor homosexual by three Bangor High School students. The program, which became known as Tolerance Day, was designed to bring into the school-setting representatives of a number of different groups who experienced prejudice in society. It was planned to replace scheduled classes throughout the school day. Concerned over possible disruptions and complaints from parents, school administrators advised Solmitz that he should not invite a homosexual to speak on Tolerance Day. With the involvement of attorneys on both sides (including the author as co-counsel for MSAD No. 59), Solmitz and Superintendent of Schools Robert Woodbury reached a compromise whereby an invited lesbian speaker, Dale McCormick, could participate. Under the compromise, the program was to be modified to take up less than the full school day and to give students options about which speakers they might choose to hear (or alternatively to attend a study hall). News of the proposed program appeared in the local papers and school administrators received 50 or more telephone calls and visits from people critical of McCormick's scheduled appearance. Some callers suggested that picketing might occur, some parents threatened to keep their children out of school or to attend school themselves to monitor the program, and a few phone calls warned the school board to expect bomb threats and the sabotage of the school furnace.

As a result of the telephone calls and visits, the school board voted unanimously to cancel Tolerance Day because of concerns about possible disruption at the school and the adverse educational impact. Dale McCormick, David Solmitz, and a student filed suit against MSAD No. 59, in which they claimed that the school board violated plaintiffs' constitutional rights by canceling the Tolerance Day program.

The court addressed each of the plaintiffs' claims separately. With respect to David Solmitz, the court determined that whatever a teacher's academic freedom rights may be, they do not permit a teacher to insist upon a given curriculum for the whole school. The court noted that the school board's action did not infringe "in any way upon his right to teach his assigned courses as he deemed appropriate, or to express himself freely on tolerance, prejudice against homosexuals, or any other subject."

The court specifically accepted the trial court's findings that the decisive factor in the school board's decision was concern about the disruption of educational activities, not a desire to suppress ideas.

With respect to the student, the court concluded that students have no right to demand a curriculum of their own choice. The court again specifically noted that the program was canceled for safety, order and security reasons, not in an attempt to cast an impermissible "pall of orthodoxy" over the school.

As for the invited speaker, Dale McCormick, the court ruled that Madison High School was not a public forum or a limited public forum, thus outside speakers had no legal right to attend.

The Solmitz case illustrates a number of the issues that might arise concerning values education:

- The program was an attempt to promote a specific value, tolerance.
- The program met with opposition from some parents and citizens. Opponents may have disagreed with the endorsed value of tolerance (either in general or as applied to homosexuals), or may have been concerned that the program's message might go beyond tolerance and endorse a sexual lifestyle at odds with the community's values. It can be expected that people will disagree on the purpose and likely effect of a values program.
- Had it been so inclined, the school board could have approved the program without significant risk of successful legal challenge. The tentative compromise, allowing students freedom to choose among speakers (or to attend study hall) mitigated potential criticism that the school board was mandating or endorsing a controversial value.
- The fact that the program was proposed by a teacher and rejected by the school board raised the question of academic freedom. The Court clearly ruled that a teacher's rights do not extend to schoolwide programs. Left unresolved is the question of whether the school board would have had the right to cancel such a program if it had been scheduled solely for David Solmitz' classroom.
- The Court reaffirmed the broad discretion of school boards, and analyzed plaintiffs' claims "in the context of the broad discretion granted school boards in discharging their responsibilities for the curriculum in public schools." In matters concerning curriculum, the presumption will be in favor of the authority of the school board.
- The trial court's factual findings, that the school board was motivated by concerns of disruption of educational activities rather than objection to the content of the program, made the case relatively easy to decide, as reflected by the court's unanimous vote. Had the court found that the school board was acting on other motivations, the legal issues would have been more difficult. Since the determination of appropriate values to be inserted into the curriculum is generally a matter for the school board rather than for a teacher, would the school board have been allowed to cancel the program on the ground that it chose to promote the value of transmitting community sexual attitudes rather than the value of tolerance toward homosexuals? Inherent in the concept of allowing local determination of values is a possibility that the values chosen by one school board might be different than those selected by another school board or a court.
- Assuming that the school board has the right to promote community sexual attitudes, must it allow speech contrary to that value? The inference from the court's opinion is that the school board cannot prevent the teacher from making his personal statements concerning the value of tolerance, but it is less clear whether the teacher would be able to bring in an outside speaker to promote a value that the school board does not want to support.

- Values or objectives can conflict. Many members of the school board in the Solmitz case approved the concept and value of the Tolerance Day program, but under the particular facts of the case decided that its benefits would be outweighed by the potential disruptive effects to the educational process.

Conclusion

The long tradition of teaching society's values in the public schools is needed now more than ever, with the decline of other social institutions. Individual students and society as a whole will benefit. Also, as a strong supporter of public education, I fear that indifference to values education by public schools will only encourage concerned parents to seek other options.

Teaching values in the public school implicates a number of legal issues, many of which are unresolved. However, a strong values education program certainly can withstand legal scrutiny if well considered and thoughtfully implemented.

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"Service Rule Stirs Debate in Maryland," *The New York Times*, July 29, 1992.

Endnote:

1. This article discusses some of the major legal issues implicated in efforts to teach or inculcate values in the public schools. It is intended to be a general survey of the field rather than a detailed treatise.

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Full cite: Shaw, Brian C. 1992. *The legal implications of values education.* Vol. 1(3): 37-47.