

May School Boards Function as “Morality Police”?



SCSBA ANNUAL CONVENTION

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Teachers As “Role Models”

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Justice Lewis Powell (former Chairman of the the Richmond School Board):

“A teacher serves as a role model for his student, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course material in example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen’s social responsibilities. This influence is crucial to the continued good health of a democracy.”

Ambach v. Norwick (1979)

Questions to be Considered

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- What role does a teacher fill **outside** the classroom?
- Does a teacher sacrifice his/her private life outside the “school house gate”?
- Should a school board be able to dictate what a teacher does in his/her spare time, or with whom he/she associates after the school house doors have closed?

Questions to be Considered (con't)

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- If the law permits inquiry into a teacher's morality, what limits, if any, should be imposed?
- What is "morality," or the absence of "morality," or rather "immorality"?
- Should the definition be different from community to community as toleration levels vary?

Immorality or Immoral Conduct?

- One court stated: “Immorality is an imprecise word which means different things to different people. In essence, it connotes conduct not in conformity with accepted principles of right and wrong behavior. It is contrary to the moral code of the community... .”
- Another court has written, tautologically: “Immoral conduct contemplates behavior sufficiently contrary to justice, honesty, modesty, or good morals”

“Immorality” such as “Unfitness to Teach”

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- S.C. Employment and Dismissal of Teachers Act (“EDTA”), Section 59-25-430: “Any teacher may be dismissed at any time... who shall... manifest an **evident unfitness** for teaching... by such conduct as... **gross immorality**... .”
- Some states by statute (e.g., South Carolina) or by court decision have avoided unconstitutional vagueness by reading a narrowing construction, such as a “fitness to teach” requirement, into the definition of “immorality”

Need for a “Nexus”; Defining “Nexus”

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- Majority of jurisdictions require that a “nexus” exists between the off-duty conduct and a teacher’s duties or the learning environment, before allowing termination of the teacher based on immorality
- “Nexus” is a “connecting link” between the teacher’s act and that teacher’s ability to perform the job assigned to him/her (relationship to the teacher’s “fitness to teach”)

South Carolina Requires Nexus

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- South Carolina has codified the nexus requirement in Section 59-25-430 in that - - “evident unfitness for teaching” is defined to include, among other things, “gross immorality”
- Under the EDTA, the Board makes the determination initially, but there is legal recourse for the teacher in the courts

Old (Pre-Nexus) Case

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- Evelyn Horosko, an elementary school teacher in a small Pennsylvania community, was married to a restaurant owner; the establishment was across the street from the school where she taught.
- The establishment served beer, had pin ball and slot machines, and held dice games.
- Horosko acted as a waitress and, occasionally, as a bartender in the restaurant, sometimes shaking dice with customers and instructing them how to play a pin ball machine.

Horosko (con't)

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- Although there was no charge or evidence as to gambling or other criminal conduct on Horosko's part, she was dismissed by the school board for immorality.
- The Pennsylvania supreme court affirmed the termination, stating: "Immorality is not essentially confined to deviation from sex morality; it may be such a course of conduct as offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and to elevate."

Horosko v. School District of Mt. Pleasant Township (1939)

Origins of the “Nexus” Requirement

Morrison v. State Bd. of Educ. (Cal. 1969)

- Marc Morrison, a tenured teacher, over the course of one-week, engaged in a non-criminal homosexual relationship with Fred Schneringer, a fellow public school teacher, while both were “experiencing severe emotional distress.”
- Morrison had never received any complaints about his performance as a teacher, and, with exception of this incident, “no one suggested that his conduct outside the classroom was other than beyond reproach.”

Nexus Origin (con't)

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- Approximately one year after the incident, Schneringer reported it to the district superintendent, and Morrison resigned.
- Nineteen months later, the State Board of Education held hearings concerning revocation of Morrison's teaching license.
- Although no evidence was presented that Morrison ever engaged in "any act of misconduct whatsoever while teaching," the Board revoked Morrison's license on the basis that his conduct constituted immoral and unprofessional conduct and an act of moral turpitude.

Morrison v. State Bd. of Educ. (Cal. 1969)

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- The California Supreme Court overturned the Board’s decision, holding that the applicable statute only allowed the dismissal of those teachers whose immorality, unprofessional conduct, or moral turpitude rendered them “unfit to teach.”
- The Court reasoned that “without such a reasonable interpretation the terms would be susceptible to so broad an application as possibly to subject discipline to virtually every teacher in the state.”
- The statute, “unless narrowed by clear and well-known standards, affords too great a potential for arbitrary and discriminatory application and administration.”

No Proof of “Nexus” Needed (or Adverse Effect Presumed to Exist)

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- “Per se Immorality” – misconduct, particularly of a sexual nature, involving students
- When “public notoriety” occurs, examples:
 - Teacher who had sex change operation between school years
 - Openly homosexual teacher
 - Others – see later discussion

No Proof of “Nexus” Needed (or Nexus Presumed to Exist)

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- But what if the conduct is “unduly publicized”? – the rule seems to be that if the school board is responsible, even unintentionally, for “undue notoriety” then the teacher likely will be reinstated.
- However, this rule presumably will apply only where there is no showing of an adverse impact on the learning environment other than that created by the publicity.
- The fact that the teacher becomes the focus of a well publicized community controversy does not mean that the teacher may automatically be dismissed without a showing of harm to the effectiveness of the teacher in the classroom.

Constitutional Limitations on Disciplining Teachers for Moral Misconduct

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- Despite their position/influence as role models, teachers “are not relegated to a watered-down version of constitutional rights.”
- Constitutional rights that may be implicated:
 - Due process (procedural and substantive)
 - Privacy
 - Freedom of speech
 - Freedom of association
 - Equal protection

Scenario – Drug Use/Possession/Trafficking

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- District discharged a tenured, fourth-grade teacher on grounds of immoral conduct who had been arrested and charged with possession of cocaine and drug paraphernalia.
- Teacher was granted an accelerated rehabilitation and was never convicted of any crime.
- Board claimed the criminal activity had compromised the teacher's effectiveness as a role model and an employee; teacher claimed his addiction was a disability and that the termination violated federal and state constitutional and statutory law.
- What did the court conclude?

Drug Use/Possession/Trafficking

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- Board found teacher's misconduct was felonious activity, leading to an arrest that, despite the disability (drug addiction), would have disqualified him from employment or justified his termination.
- Court found teacher's possession of narcotics was causally related to his addiction; it was the arrest that triggered his termination; however, the arrest was not causally related to the addiction; thus the Board's action was justifiable and unrelated to the teacher's disability.

Gedney v. Bd. of Educ. (Conn. 1997)

Scenario – Extra Marital Affair

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- In a teacher certificate revocation case, a male teacher/wrestling coach had an adulterous affair with another teacher off-campus.
- There were no facts suggesting that the affair was conducted at school or during school hours.
- Teacher was well regarded, had been forgiven by his wife and the student body, and maintained the respect of the community.
- What did the court decide?

Adulterous Affair

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- Court stated that a teacher occupies a sensitive position, since students are taught by example as well as lecture, and a teacher's out-of-school conduct may affect his classroom fitness.
- However, court concluded that the admitted adultery was insufficient in itself to establish unfitness to teach – no nexus found.

Erb v. Iowa State Bd. of Pub. Instr. (1974)

Scenario – Unmarried Cohabitation

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- Unmarried female teacher lived with her boyfriend in a trailer park located in a rural school district community, i.e., a trailer park where many students and teachers also lived.
- There was evidence of the teacher's deep affection for her students, overall superior performance, and that interest in the school and rate of learning by students had markedly improved subsequent to her arrival.
- How did the court rule?

Unmarried Cohabitation

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- The court held that the teacher's conduct affected her fitness to teach and that it occurred on school property (the mobile home was provided by the district) and that a majority of the students and teachers, who also lived in the same trailer park, were aware of the teacher's behavior.
- Adverse impact presumed.

Sullivan v. Meade County Ind. Sch. Dist. (So.Dak. 1975)

Scenario – Pregnancy out of Wedlock

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- Unmarried pregnant teacher was forced to take a leave of absence under a personnel policy that required her to get married, take a leave, or resign.
- District's position was that being allowed to teach while single and pregnant would “set a bad example” for her students.
- How did the court rule?

Pregnant and out of Wedlock

- Court first held that the right to bear a child out of wedlock is protected by the Constitution under the right to privacy.
- Court then concluded that the right to privacy outweighed the school's interest in a "coerced" leave of absence, rejecting the claim that the mere sight of an unmarried, pregnant teacher would have a sufficiently undesirable influence on school children to justify exclusion from the classroom.
- There is no danger that the teacher's single, pregnant status could be perceived as representing a district-sponsored statement regarding the desirability of pregnancy out of wedlock.

Ponton v. Newport News Sch. Bd. (Vir. 1986)

Scenario – Potential Sexual Misconduct

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- Teacher, a middle-aged divorcee, lived by herself in a one-bedroom apartment in a small town.
- Her son lived in a neighboring community, and on several occasions, young ladies, married couples, and young men who were friends of her son stayed over night at the teacher's apartment due to unavailability of motel rooms.
- District non-renewed the teacher for “unbecoming conduct outside the classroom,” since her actions allowing over night guests in her home could potentially lead to sexual misconduct.
- How did the court decided?

Potential Sexual Misconduct

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- Court held that the dismissal was arbitrary and capricious because the board did not accuse the teacher of immoral conduct and there was no proof of improper behavior.
- The district was only able to infer a potential for misconduct an idle speculation does not support the board's conclusory inference.

Fisher v. Snyder (Neb. 1973)

Sexual Misconduct-Counselor's Sexually Explicit Advice Book

- High school counselor/girls basketball coach self-published a short book of adult relationship advice entitled “It’s Her Fault.”
- In the book counselor repeatedly discusses sexually provocative themes and uses sexually explicit terminology.
- Book was inspired by years of counseling and interaction with women, including from his high school counseling job, to which reference was frequently made.

Sexual Misconduct-Counselor's Sexually Explicit Advice Book

- Although there was some “garden-variety” advice, the book contained sexually explicit passages advising women on how they could use “sex appeal” to gain power in their relationships with men, also encouraging women to engage in “a certain level of promiscuity before marriage” but not to go “hoeing [sic] around the world.”
- Counselor described himself in the book as “beyond the highest caliber of men,” but still confessed “a weakness for cleavage” and other parts of the female anatomy.

Sexual Misconduct-Counselor's Sexually Explicit Advice Book

- When administrators learned of the book and received concerns from the community, district recommended discharge on three grounds – book had caused disruption in the community, it created a hostile educational environment, and the counselor failed to represent himself as a positive role model.
- What did the court decide?

Sexual Misconduct-Counselor's Sexually Explicit Advice Book

- Court found that the book dealt sufficiently with subjects of general interest to the public to be entitled to First Amendment protection.
- However, the court went on to rule that the district was justified in discharging the counselor because district's interest in restricting this speech outweighed counselor's free speech interest.
- District's "assessment of how [counselor's] students, in particularly his female students, would respond upon reading or hearing about the hypersexualized content of his book looms large in our analysis."

Sexual Misconduct-Counselor's Sexually Explicit Advice Book

- “We can easily see how female students may feel uncomfortable seeking advice from [counselor] given his professed inability to refrain from sexualizing females”; “knowing [counselor’s] tendency to objectify women, [the district] could readily anticipate that some female students would feel uncomfortable reaching out to [counselor] for advice.”
- Court rejects the counselor’s “heckler’s veto” argument that the community’s reaction should not be considered as the cause of his predicted ineffectiveness.

Scenario – Gay/Lesbian-Sexual Orientation

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- High school teacher was dismissed from her teaching position on the basis of “immorality” for being a homosexual under the state statute providing that immoral conduct is grounds for dismissal of teachers.
- Court struck down the statute as being unconstitutionally vague because it failed to give fair warning of what conduct was prohibited and permitted “erratic and prejudice exercises of authority.”
- Instead of applying a narrowing construction by reading in a “fitness for teaching” requirement, court concluded that statutes this broad make those charged with enforcement the “arbiters of morality for the entire community,” and in so doing “subject the livelihood of every teacher in the state to the irrationality and irregularity of its judgments.”

Gay/Lesbian-Sexual Orientation

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- High school male teacher had acknowledged his homosexual tendencies for over 20 years and had been a practicing homosexual for several years prior to his discharge.
- His homosexual activities came to the attention of his district when a former student suggested that he was homosexual.
- The teacher was confronted and admitted that he was a practicing homosexual and was publicly known to be such.
- Did the court uphold the discharge?

Gay/Lesbian-Sexual Orientation

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- Court concluded that the evidence supported board's concern that teacher's continued presence after he voluntarily became known as a homosexual would result in "fear, confusion, suspicion, parental concern, and pressure on the administration by students, parents, and other teachers."
- Court considered immorality to be a personal choice and found that the teacher's ability to perform his job was impaired because his homosexual lifestyle became publicly known, and further that retaining him created the danger "of encouraging expression of approval and imitation."

Gaylord v. Tocomo Sch. Dist. (Wash. 1977)

Gay/Lesbian-Sexual Orientation

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- Gay first-year elementary teacher, who had a partner, had been a substitute teacher for two years prior to receiving his full-time position, where he received excellent reviews for his substitute work.
- During the first semester of the full-time position, teacher received a low score related to conformity to professional standards. His principal told him that he was indiscrete about his private lifestyle, though the teacher claimed he never received any warning that he had committed an indiscretion.
- Teacher later was told about a rumor circulating around the school alleging that the partner came to a class function and the two were seen holding hands.

Gay/Lesbian-Sexual Orientation

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- There was no administrative investigation into the rumor but the teacher was informed that his partner could not come back to school.
- During the second semester school administrators increased their classroom observations of teacher and he was warned about poor behavior management skills.
- This was the stated reason for not being offered a contract for the following year.
- Board upheld the non-renewal, but teacher brought legal action alleging discrimination based on his sexual orientation, claiming violation of Equal Protection.
- What did the court do?

Gay/Lesbian-Sexual Orientation

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- Court stated: “Homosexuals, while not a suspect class for equal protection analysis, are entitled to at least the same protections as any other identifiable group which is subject to disparate treatment.”
- Court found that board’s argument that teacher had a behavior management problem was a pretext, and the real reason for the decision was the teacher’s sexual orientation. Court ruled that there was no rational basis for the decision to dismiss.

Glover v. Williamsburg Local Sch. Dist. Bd. Of Educ.
(Ohio 1998)

Butt-Painting Art; Beer/“Crazy Bitch Bingo”; Stripping -- Internet Cases

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Murmer v. Chesterfield County (VA) School Board (2007)

- High school art teacher in Virginia appeared in a You Tube clip --posted without his consent -- in which he, under a pseudonym, discussed and demonstrated his artistic technique of painting with his buttocks, while wearing a thong and a Groucho Marks disguise.
- He did not personally post the video to You Tube but was terminated solely because of the video and students' and teachers' alleged reaction to it, and not for any reasons relating to his performance as a teacher.
- ACLU filed suit on behalf of the teacher; the case was eventually settled for \$65,000, approximately two year's of the teacher's salary.

Butt-Painting Art; Beer/“Crazy Bitch Bingo”; Stripping -- Internet Cases

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Payne v. Barrow County Sch. Dist. (GA 2009)

- Georgia teacher was allegedly coerced into resigning after school officials received a complaint about pictures on her Facebook page and a post that said she was going to play “Crazy Bitch Bingo” (a popular game at an Atlanta restaurant bar).
- In the pictures teacher was photographed with beer while visiting the Guinness Brewery on her vacation in Ireland.

Butt-Painting Art; Beer/“Crazy Bitch Bingo”; Stripping -- Internet Cases

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- She claimed she had set her Facebook page to be private and did not “friend” students or parents.
- Lower court has denied her state law and due process claims, and the teacher’s appeal is pending.

Butt-Painting Art; Beer/“Crazy Bitch Bingo”; Stripping -- Internet Cases

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Webb v. NY Department of Education (2014)

- Highly regarded guidance counselor who worked for 12 years at a NYC high school was fired after photos of her in lingerie and bikinis from her earlier career as a model were seen on the Internet even though she disclosed her past career when first hired.

Butt-Painting Art; Beer/“Crazy Bitch Bingo”; Stripping -- Internet Cases

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Webb v. NY Department of Education (con't)

- The photos, many Photoshopped or altered, kept popping up without the counselor's permission on sleazy sites even though she demanded their removal.
- A three-member NY Chancellors Committee ruled 2-1 that the “inappropriate photos were accessible to impressionable adolescents” and that the “behavior has a potential adverse influence on her ability to counsel students and be regarded as a role model.”
- Lawsuit pending.

Lessons to Take Away

- Societal attitudes and mores are changing; what was “immoral” yesterday may not be today.
- Except in cases of per se immorality (such as misconduct involving students), before taking adverse employment action administrators must be prepared for a hearing and be able to testify as to how the teacher’s off-duty conduct has had, or can clearly be predicted to have, a negative impact on the operation of the school or the learning environment.
- When board members decide to terminate, they should make specific findings of the nexus between the conduct and the teacher’s effectiveness.

Lessons to Take Away (con't)

- If a teacher is involved in acts outside of school that reflect unfavorably on the teacher and/or the school, and all of a sudden there is a “big buzz” in the community, the question becomes whether the buzz was result of what the school did to the teacher or a direct result of the teacher’s misbehavior? The cases suggest that school officials must present evidence that some of the bad publicity can be attributed to someone other than administrators or the board.
- Courts will not uphold adverse actions that violate a teacher’s constitutional rights, such as the right to due process, privacy, freedom of speech, freedom of association, and equal protection.