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## School Boards—A Mandate For Enlightenment Unfulfilled

Edgar L. Lindley\*

IT HAS BEEN SAID that school boards are agents of the state for the purpose of carrying out the affairs of state.<sup>1</sup> It must be recognized that in the eyes of both students and other citizens our educators are the working parts of the otherwise inanimate public institutions called schools. It must also be recognized that nearly everyone is cognizant of the fact that the teachers and administrators of our public schools are paid from public funds. Consequently, the people tend to view our public educational system, together with the educators in it, as a physical manifestation of government. School drop-outs, operating levy failures, disturbances, disruptions, demonstrations, assaults against teachers, school closings and multiplying litigation are all evidence that large segments of our population are disenchanting with this phase of their government.

Boards of education, whose members are elected to their public office; whose members are, collectively, the employers of educators; and whose members are, collectively, the governing authority responsible for the educational policies in their school district, have a duty far greater than merely serving as a vehicle for the purpose of carrying out the affairs of state. Because school activity constitutes the first sustained contact of governmental authority with our youthful citizens, school boards have the highest degree of responsibility to represent the sovereign and majestic power of government in the most enlightened manner possible.

If, as is commonly believed, maintenance and advancement of our free civilization depends upon our educational system,<sup>2</sup> the occasion should be rare indeed when our citizens would need to invoke the aid of the judiciary to protect themselves against actions of this phase of government. One might expect to find school board members among the most enlightened of community leaders in all matters pertaining to its school-teacher, school-student, and school-public relations. These are, after all, the contacts by which the public confidence is gained or lost. Regrettably, this expectation is all too frequently unfulfilled, sometimes ignored, and occasionally treated with such contempt that hypocrisy is the public's only lasting memory from its contact with the school system.

Perhaps the greatest single factor contributing to this lack of fulfillment is a misunderstanding and misapplication of a rule of construction which states that creatures of statute possess such powers,

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<sup>1</sup> 48 OHIO JUR. *Schools* § 59 (1966).

<sup>2</sup> Cf. *State v. Gans*, 168 Ohio St. 174, 151 N.E. 2d 709 (1958), *cert. denied*, 79 S. Ct. 722 (1959).

and only such, as have been expressly conferred upon them by statute or are necessarily implied from the duties so imposed. A typical usage of this rule may be found in *Verberg v. Board of Education*<sup>3</sup> where it was recited to support a conclusion that the statutory retirement age could not be lowered by board rule.

Under existing statutes there are only two circumstances in which this rule is properly applicable in school affairs. The first is when a board of education attempts to exercise its governmental authority in areas outside the government of itself, its employees, its students, and persons on school premises. This application was adroitly illustrated when the Attorney General ruled in 1963 that a board of education was without authority to furnish transportation, under the then existing statute, to private and parochial schools.<sup>4</sup> The second instance is where a board so abuses its discretion that its action may be set aside as arbitrary, capricious, or unrealistic. Such actions may be set aside without reference to the rule as occurred in *Birkbeck v. Wadsworth Board of Education*,<sup>5</sup> but the rule would be applicable where the action constituted a self-appropriation of jurisdiction beyond the limits of government of itself, its employees, its pupils, and its schools.

Nevertheless, the rule is applied in other instances. In two of these, namely, when a board attempts action contrary to a specific statute or when a board attempts action contrary to a constitutional provision, it can only be said that such action is neither more illegal nor more unconstitutional by reason of its application. The rule adds nothing, but at least its application is harmless. Here it may be noted that the conclusion reached in the *Verberg* case by the use of the rule was also reached in *Daly v. City of Toledo*<sup>6</sup> and *Reed v. Youngstown*<sup>7</sup> without use of the rule, although the syllabus of the *Daly* case was later reversed for reasons unrelated to our subject.<sup>8</sup>

Unfortunately, to the indoctrinated the rule sounds important, precise, pontifical, and inexorable; it ceases to be a rule; it becomes *THE RULE*. As such, *THE RULE* is indiscriminately utilized by superintendents, administrators, and board clerks, and worst of all, by their ever handy source of advice, the agents of the Auditor of State. The result is that their employers, the boards of education, become philosophically negativistic and their policies overly concerned with prohibitions and penalty impositions.

It is such negativism which prompts boards of education to adopt rules such as in the *Birkbeck*<sup>9</sup> case purporting to limit the use of sick leave in cases of illness and death in an employee's immediate family. It induces the mistaken belief that the state policy to be implemented

<sup>3</sup> 135 Ohio St. 246, 20 N.E. 2d 368 (1939).

<sup>4</sup> 1963 OP. ATT'Y GEN. OHIO 530.

<sup>5</sup> 17 Ohio Misc. 245, *aff'd*, No. 393, Medina County Ct. App. (Oct. 29, 1969).

<sup>6</sup> 142 Ohio St. 123, 50 N.E. 2d 338 (1943).

<sup>7</sup> 173 Ohio St. 265, 181 N.E. 2d 700 (1962).

<sup>8</sup> State *ex rel.* Canada v. Phillip, 168 Ohio St. 191, 151 N.E. 2d 722 (1958).

<sup>9</sup> 17 Ohio Misc. 245, *aff'd*, No. 393, Medina County Ct. App. (Oct. 29, 1969).

by a board is solely concerned with money and totally unconcerned with reasonably humane treatment of its employees. Likewise, negativism prompts other boards to re-litigate the same type of policy<sup>10</sup> rather than accept a court decision as a mandate to pursue an enlightened course. It prompts attempts to limit the definition of immediate family even to the extent of excluding one's mother,<sup>11</sup> notwithstanding the Attorney General's Opinion of seventeen years' standing that the language of the statute in issue should be liberally construed.<sup>12</sup> Occasionally, it may even prompt a board to deny its power to negotiate with its employees. Indeed, such was the basis of a motion to dismiss in *Cincinnati Teachers Association v. Board of Education*,<sup>13</sup> notwithstanding the fact that the movant and the majority of its sister boards of education throughout the state are parties to existing collective bargaining agreements, and further notwithstanding the fact that such agreements have been enforced even in the absence of a statute specifically authorizing them.<sup>14</sup>

This negativism may be due, in part, to the fact that some early opinions of the Attorney General apparently failed to recognize the limitation on the applicability of the rule of construction mentioned earlier, and thereby created an impression that its utilization depended upon some form of balancing of interest. Such instances are frequently recognizable by a recitation of the rule followed by a caveat that there is, however, another equally well settled rule that where the power to act is granted to a board of education the board has wide discretion in its exercise which should not be subjected to interference.<sup>15</sup>

Typically, the erroneous application forms the basis of "findings" by agents of the Auditor of State which are prefaced with a statement that no authority exists or no authority is found for a certain action. Representative examples are "No Authority Found for Allowing Expenses of Mediation Panel"<sup>16</sup> and the anomalous conclusion that teachers and other employees of a board of education may be required to submit to chest x-ray under § 3313.71, Ohio Revised Code, which may be paid for by the board because the statute mentioned does not require the teacher or employee to bear this expense, coupled, in the same "ruling" with a statement that § 3313.20, Ohio Revised Code, is authority for a board to require a periodic complete physical examination of its employees but is not authority for the board to pay for such a required examination.<sup>17</sup> Presumably the rule of construction was applied in the latter but not the former instance, thus arriving at dia-

<sup>10</sup> *Brobeck v. Columbus Bd. of Educ.*, No. 239,637, Franklin County C.P. Ct. (July 17, 1970).

<sup>11</sup> *Fannin v. Bd. of Educ.*, No. 24878, Fayette County C.P. Ct. (filed June 25, 1970).

<sup>12</sup> 1954 OP. ATT'Y GEN. OHIO 128.

<sup>13</sup> No. A-253546, Hamilton County C.P. Ct. (filed Dec. 16, 1970).

<sup>14</sup> *Eg., Green Educ. Ass'n v. Board of Educ.*, No. 286281, Summit County C.P. Ct. (Jan. 6, 1971).

<sup>15</sup> *Cf.* 1945 OP. ATT'Y GEN. OHIO 545 at 548.

<sup>16</sup> *Auditor's Messenger* (Ohio), Vol. XIV, Nos. 5-6, May-June, 1970.

<sup>17</sup> *Auditor's Messenger* (Ohio), Vol. XIII, Nos. 3-4, March-April, 1969.

metrically opposed results from an identical foundation, i.e., a complete absence in either statute of any indication as to who is expected to pay for x-rays or physicals required by the board.

Except for those instances wherein a school board may attempt to govern something other than its employees, its students, and its schools, or acts in such unreasonable manner that its action may be set aside as an abuse of discretion, the restrictive rule of construction has little validity because of the power which the General Assembly has vested in boards of education:

The board of education shall make such rules and regulations as are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises. . . .<sup>18</sup>

This grant of authority has been described as broad or extensive,<sup>19</sup> almost unlimited,<sup>20</sup> and plenary.<sup>21</sup>

It was this plenary authority which formed the basis for the Attorney General's ruling that a school board could prescribe a closed lunch period notwithstanding that to do so precluded the students taking their meals under the supervision of their parents;<sup>22</sup> that a board could require its employees to be fingerprinted,<sup>23</sup> that a board may authorize interscholastic sports outside the physical education program, supervise student participation therein, and make rules regarding the expenditure of athletic funds;<sup>24</sup> and under which the Supreme Court of Ohio ruled that a board could authorize one of its schools to become a member of an athletic association under conditions whereby it was obligated to conduct its athletics in accordance with the constitution, rules, by-laws, interpretation, and decisions of the Athletic Association.<sup>25</sup> Indeed, this is a very sweeping authorization in view of the obvious fact that the policies of the Athletic Association might be inconsistent with the desires of the school.

This statutory delegation of power is, in itself, most interesting. It is a plenary grant of discretionary authority mandating the making of any necessary rule for its own government and the government of its employees, students, and others on its premises. By implication any exercise of sound discretion would preclude the making of unnecessary rules. A careful observance of this directive would obviate many of the boards' most serious problems, for it is in the area of regulation for the sake of regulation that most abuses of discretion are to be found.

The necessity of a regulation may be examined from two aspects. First, there are those regulations which may be likened to an exercise

<sup>18</sup> OHIO REV. CODE ANN. § 3313.20 (Baldwin's, Jan. 1, 1971).

<sup>19</sup> Greco v. Roper, 145 Ohio St. 243, 61 N.E. 2d 307 (1945).

<sup>20</sup> Stinson v. Bd. of Educ., 17 Ohio App. 437 (1923).

<sup>21</sup> Harrison v. Bd. of Educ., 60 Ohio App. 45, 19 N.E. 2d 522 (1938).

<sup>22</sup> 1962 OP. ATT'Y GEN. OHIO 1005.

<sup>23</sup> 1961 OP. ATT'Y GEN. OHIO 724.

<sup>24</sup> 1963 OP. ATT'Y GEN. OHIO 249.

<sup>25</sup> State ex rel. Ohio High School Athletic Ass'n v. Judges of the Ct. of C.P. of Stark County, 173 Ohio St. 239, 181 N.E. 2d 239 (1962).

of the state police power, the purpose of which is to maintain the health, safety, and welfare of those in the schools. The sum total of these is generally characterized as the maintenance of a favorable learning climate. Essentially, this type of regulation is prohibitive in character and is reflected by codes of conduct, dress codes, and similar devices. Unfortunately, the autocratic complex frequently causes the regulatory authority to lose sight of the necessity requirement with the result that such prohibitive rules become completely unrealistic. Classic among these are the dress codes that permit female students to wear slacks on days when the temperature is below a certain predetermined level, but not otherwise. The immediate student reaction is one of rebellion for if the wearing of slacks on cold days does not detract from a suitable learning climate what reason exists to suppose that it would do so merely because the temperature may be a few degrees higher. Such a rule goes beyond the necessary and becomes regulation for the sake of regulation. Another classic example of unrealistic regulation is the type which is inherently self-defeating, such as that which prescribes suspension as a penalty for truancy. Any general examination of board rules with three questions in mind (a) "Is it necessary?" (b) "Is it reasonable?" (c) "Is there a more realistic alternative?" must certainly lead to extensive modification of existing prohibitory rules.

The second aspect of the examination of necessity of regulation is less frequently understood or implemented because it stems from the responsibility which requires affirmative action. This responsibility presents the greatest potential for fulfillment of the board's mandate for enlightened leadership. In the fulfillment of this mandate, school boards must turn away from prohibition and penalties. The tenor of the board rules must become positive, they must identify that which teachers, students, and the public may expect of their schools, they must define what they will contribute toward advancement of free civilization. School boards are failing in this respect, and in doing so, become progressively less sensitive to their responsibility until they unwittingly become the generator of the very disruption and disorder they so abhor. This failure was alluded to by Justice Jackson, when he said that school boards:

... are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account.<sup>26</sup>

As a result of the numerous students-rights cases dealing with suspensions, expulsions, haircuts, dress codes, and similar matters and the teacher-rights cases dealing with employment rights, working conditions, and employee welfare some progress has been made. For example, after the granting of the preliminary injunction in *Lawton v. Nightingale*,<sup>27</sup> the board of education involved adopted a new policy pertaining to suspension of students with provisions for due process.

<sup>26</sup> Board of Educ. v. Barnette, 319 U.S. 624 (1943).

<sup>27</sup> No. C-70-343, N.D. Ohio (Nov. 1970), *appeal pending*, No. 71-1084, 6th Cir.

But forced compliance with the mandated role of enlightenment will never satisfy today's needs. If school boards are to restore the public confidence in their schools, they must stop expending their time and substance on the unnecessary. They must recognize their mandate. In matters pertaining to the governance of their employees, students, and schools, they must substitute "we can improve" for "no authority is found." They must learn to rely upon legal advisors for legal advice and to relegate non-legal advisors to their administrative and clerical functions. They must resist the indoctrinated who live only by and for *THE RULE*. Above all, they must recognize that courts do not seek litigation and do not seek opportunities to interfere with school administration. Courts act only when called upon to act. The increasing volume of litigation of school issues is, therefore, indicative of growing public dissatisfaction. Failure to do these things, failure to move to dispel the public dissatisfaction, can only result in greater judicial involvement in school administration.