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Dr. Richard S. Vacca, Editor; Senior Fellow, CEPI

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SCHOOL BOARD CURRICULAR DECISION-MAKING: 2009-2010

Overview

Today's professional literature is beginning to include articles and essays predicting the potential legal and policy ramifications of our nation's current and dire economic situation on educational decision-making. In several of these pieces local public school boards and administrators often are characterized as working in a cost-cutting, budget-trimming atmosphere where decisions are driven by (1) a shrinking pot of public funds and (2) a corollary need to establish fiscal efficiency as the main ingredient of taxpayer accountability. In the wake of this growing philosophy more and more school systems are being forced to reduce their professional work force (building administrators, counselors, classroom teachers, support staff), and to eliminate courses offered as well as whole program options for students. In other words contemporary writers are telling us that the school's curriculum is falling victim to an accountant's red pen.

While the legal and policy ramifications of the new wave of cost-cutting measures have yet to ripen into litigation, it is not too early to speculate as to what form future challenges might take. Recently I came across a curriculum-oriented case from a federal district court in California. The case, Esquivel et al v. San Francisco U.S.D. (N.D. Cal. 2008), is instructive in two ways. First, it involves a local public school board's decision to eliminate a whole program (for which student enrollees received academic credit) from the school's curriculum, resulting in allegations of First Amendment viewpoint discrimination. Second, the court's focus and reliance on several "old chestnut" student First Amendment speech and expression cases offers a follow-up to last month's commentary and yields important implications for local school system policy makers.

The Curriculum. As my colleague Professor Bosher and I point out early in our text, "[t]he silence of the Federal Constitution, coupled with the language of the tenth amendment… bestowed upon state government the legal responsibility for the establishment of public school systems." Vacca and Bosher (2008) However, we also make it clear that the state's legal authority for supervising and controlling individual local public school systems within the state ultimately passes down to and vests in local board's of education. This authority includes the enactment and implementation of all policies and procedures governing the overall maintenance and operation of the local school system. Vacca and Bosher (2008)

Because children come to school to learn, the curriculum represents the *sine qua non* (indispensable facet) of local school system operation. As a general rule, while state law requires that specific subjects be studied by all students in each grade, local public officials are granted the discretionary authority to offer other subjects as a part of the school system's curriculum. Russo (2004) To put it another way, local school officials are (within the bounds of state law) granted the discretion to determine the curriculum most suitable for students and the teaching methods to be employed. As Alexander and Alexander remind us, "[a]s a general rule school officials have the authority to prescribe the method of teaching, decide on what curriculum shall be offered, and what books shall be used." Alexander and Alexander (1995) And, as the United States Court of Appeals for the Third Circuit has opined, "those responsible for directing a school's educational program must be allowed to decide how its limited resources can be best used to achieve the goals of educating and socializing its students." Seyfried v. Walton (3rd Cir. 1981)

Much to the surprise of many students of education law, the authority of local school boards over the curriculum has been challenged in only a small percentage of the hundreds of court cases involving public education. And, where such cases have come into a federal court they involve allegations of First Amendment violations committed by school officials and/or teachers. Textbook selection, assigned readings and research projects, required daily exercises (e.g., the Pledge of Allegiance, moment of silence), plays and musical productions in the auditorium, and others all have had their day in court. It must be kept in mind, however, that school officials not judges make curricular decisions. Epperson v. Arkansas (1968)

Esquivel et al v. San Francisco U.S.D. et al (N.D. Cal. 2008).

Facts: In 2006, a local public school board (hereafter referred to as the Board) decided to terminate the Junior Reserve Officers Training Corps program (hereafter referred to as JROTC) in the high schools of the school district. JROTC is a leadership program (for which student enrollees receive academic credit) sponsored by the United States Army and exclusively taught by active duty or retired members of the Army.

The Board's action to terminate JROTC was the result of a motion introduced by two board members and called for a two-year phase out of the JROTC program. The Board stated that its reason to do so was "based on several pedagogical concerns." More specifically, these concerns were: (1) instructors were not properly credentialed to teach classes offered for physical education course credit, (2) the existence of JROTC at some of the district's high schools but not at others creates a disparity in funding among the schools, (3) students enrolled in JROTC can get physical education credit—yet, the costs of the program are paid both by the Army and the school district through its central budget and not by individual schools through school-site budgets, (4) schools that did not have JROTC must pay for their own physical education classes through their school-site budgets thus creating a fiscal disparity, (5) the JROTC program violated the school system's policy against contracting with third party providers that discriminate based on sexual orientation, and (6) the presence of the JROTC program gives an unfair advantage over other education or private sector recruiters.

In 2007, the Board extended the termination date to the end of the 2008-2009 school year in an effort to allow for sufficient time to develop and implement alternative course offerings for JROTC students. One of the alternatives considered was a program designed by an organization named the Teach Peace Foundation—which plaintiffs later in their law suit characterized as showing bias on the part of the Board.

United States District Court Action. Students enrolled in JROTC and their guardians went into federal district court seeking remedy under 42 *U.S.C.* 1983. In their suit they claimed that the Board's decision to terminate JROTC was a form of viewpoint discrimination and, as such, violated the First Amendment. To support their

arguments plaintiffs relied on such landmark United States Supreme Court decisions as: West Virginia Board of Education v. Barnette (1943); Griswold v. Connecticut (1965); Ambach v. Norwick 1979); Tinker v. Des Moines (1969); and Board of Education v. Pico (1982). In response school officials filed a motion to dismiss.

In the court's view the JROTC decision was not a funding decision that discriminated on the basis of viewpoint discrimination. Rather, the Board's decision to terminate the program was based on pedagogical concerns and the Board's own stated policy to eradicate discrimination based on sexual orientation and its adherence to conflict resolution strategies that promote nonviolent behaviors.

Court's Rationale and Decision. In fashioning its rationale the district court relied on and quoted directly from Tinker v. Des Moines (1969); Bethel School Disrtict v. Fraser (1986); Hazelwood v. Kuhlmeier (1988); Board of Education v. Pico (1982); and Rosenberger v. Rector and Board of Visitors, University of Virginia (1995), which, in the district court's view, clearly require that a student First Amendment issue analysis must be placed into the unique setting of public schools. In Tinker (1969), the Supreme Court established that First Amendment rights are available to teachers and students. However, Fraser (1986) made it clear that "the constitutional rights of students in public schools are not coextensive with the rights of adults in other settings." In Hazelwood (1988) the Supreme Court stressed that limitations placed on student speech are allowed "even though the government could not censor similar speech outside of school." Rosenberger (1995) made it clear that when public school officials determine the content of the education provided, it is those officials (i.e., government) speaking, and government is permitted to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. Thus, while school officials may not discriminate against private persons based on viewpoint discrimination, the speech of school officials is controlled by different principles. In Esquivel the forum analysis did not apply.

In its rationale the district court voiced a reluctance to "convert every school board decision to one of constitutional dimension." More specifically, in the district court's view, "[a]ll decisions regarding courses and programs to offer are by their very nature based on viewpoint and/or content." And, "[i]n light of limited resources—both financially and temporarily in terms of the school day—school boards must engage in both content and viewpoint discrimination." In this case the decision to eliminate the JROTC program was based on "pedagogical concerns and stated policy."

The First Amendment, said the district court, "does not limit the government's ability to speak, and in this case the Board is speaking when it makes curricular decisions." Citing Pico (1982) the court concluded that because JROTC is offered for academic credit it is part of the school's curriculum and it therefore follows that the Board has wide discretion in making curricular decisions.

Finally, the district court refused to dictate which sort of program should be adopted as an adequate option for JROTC students. It also refused to express an opinion regarding the values espoused by the JROTC program.

A motion to dismiss was granted to school officials.

Policy Implications

The current financial situation in our nation has and will continue to cause local public school systems to make many cost cutting, budget-trimming decisions—including a reduction in the number of classroom teachers and support personnel employed, the cancellation of field trips, cutting back on interscholastic athletic activities and schedules, as well as the elimination of course and program options available to students. Future legal and

policy issues and the implications of such drastic acts made by local school boards in the name of establishing fiscal efficiency and accountability are likely to emerge.

Recognizing that one court decision does not answer all questions and settle all disputes, the federal district court's rationale in the Esquivel case is nonetheless instructive—especially when existing case law on point is thin. Some suggestions for policy can be gleaned from the court's rationale and might prove helpful to local public school officials as they consider implementing cost-cutting measures that involve the school's curriculum.

Local school board (the Board) policy must make it clear that:

- The Board is vested with legal authority to make all final decisions regarding the school's curriculum.
- The school system's budget and the school's curriculum are inextricably linked.
- The school board shall decide how limited resources can be best used to achieve its goal of educating all students in the school system.
- All final decisions regarding the school's curriculum shall be made based on pedagogical concerns.
- All courses and program offerings (curricular, extra-curricular, co-curricular), shall be regularly reviewed as to their educational and fiscal viability and their compatibility with school system policy.
- Where course and/or program offerings are eliminated from the curriculum the Board shall seek to establish suitable alternatives and to make these alternatives available to all students—especially students directly effected by course and/or program elimination.

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Richard S. Vacca
Senior Fellow CEPI

Note: The views expressed in this commentary are those of the author.