

**QUARTERLY REPORT**

**October - December 1995**

The **Quarterly** Report provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676.

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## COLLECTIVE BARGAINING

P.L. 340-1995, Sec. 53 created a student achievement and school improvement mechanism for a school corporation “located in whole or in part in the most populous township in a county having a population of more than seven hundred thousand (700,000)” and “serves the largest geographical territory of any school corporation in the township.” There is at present only one school corporation which meets this criteria--the Indianapolis Public Schools. The new article is found at I.C. 20-3.1. The new article requires the governing body generally to develop a plan which would increase parental involvement and support; establish performance objectives for educators and students in each school; provide for an effective evaluation of each school; develop performance awards; and provide a range of remediation opportunities. An affected school corporation under I.C. 20-3.1 would also have increased flexibility in the allocation of funds and would enjoy increased freedom from certain rules and statutes governing curriculum and instructional time, pupil/teacher ratios, textbook adoption and selection, and construction/remodeling. There are also provision for “academic receivership” for schools which fail to meet expected performance levels and objectives, opportunities to lease certain school services, and increased parental choice. The more controversial provision is found at I.C. 20-3.1-15-1(2),(3):

(2) I.C. 20-7.5 does not apply to matters set forth in this article. The matters set forth in this article may not be the subject of collective bargaining or discussion under I.C. 20-7.5.

(3) An exclusive representative certified under I.C. 20-7.5 to represent certified employees of the school city, or any other entity voluntarily recognized by the board as a representative of employees providing educational services in the schools, may bargain collectively only concerning salary, wages, and salary and wage related fringe benefits. The exclusive representative may not bargain collectively or discuss performance awards under I.C. 20-3.1-12.

This controversy lead to an interesting challenge in Marion County Superior Court No. 11 in Indiana State Teachers Association, Indianapolis Education Association, and Joyce Macke v. Board of School Commissioners of the City of Indianapolis, Cause No. 49D11959 CP1494. Judge John Price’s 46-page decision was rendered on December 19, 1995, finding in favor of IPS. The following is a brief, abridged summary of the arguments presented and the judge’s rulings.

### *Ex Post Facto Laws*

Article 1, §24 of the Indiana Constitution provides simply: “No ex post facto law, or law impairing the obligation of contracts, shall ever be passed.” There had been a contract from

1991-1994 between IPS and the IEA, but the agreement expired in August of 1994. P.L. 340, Sec. 53 became effective May 11, 1995. ISTA and the IEA argued that the '91 - '94 agreement should remain in effect until a new agreement is reached. If the agreement is still in effect, then I.C. 20-3.1 is an "ex post facto" law which impairs current contractual obligations. The court rejected the "status quo" argument because to adopt such a theory would effectively prevent the legislature from taking any action regarding a right created wholly by statute (collective bargaining). The court added that the fact IPS has a legal duty under statute to bargain, converting this legal duty under statute to an obligation under contract would be unavailing. The legislature exercises power over schools and is not precluded from attempting various and varying methods for improving the schools. Follett v. Sheldon, 144 NE 867, 873 (Ind. 1924). The court also noted that public employees' rights are subject to state regulation; consequently, "[p]ublic employees must expect to have their circumstances affected by legislative action" (at p. 27).

Even assuming P.L. 340, §53 (I.C. 20-3.1) did impair existing contractual obligations, "The legislature may enact statutes that impair contractual obligations if they serve to protect public health, safety, and welfare." Further, the court added, "A state may exercise its police power to impair contracts if the legislation that does so is reasonable and necessary to serve a legitimate or important public purpose" (at p. 28). In the court's opinion, I.C. 20-3.1 is an exercise of the legislature's police power, and was reasonable and necessary to address a legitimate state interest--public education (p. 29).

#### *"One Subject" Acts*

Article 4, §19 provides: "An act, except an act for the codification, revision or rearrangement of laws, shall be confined to one (1) subject and matters properly connected therewith."

P.L. 340 contained over 100 sections and was entitled as "An Act to amend the Indiana Code concerning state and local administration and to make an appropriation." I.C. 20-3.1 had originated in the Senate as a Senate Bill. It did not receive a third reading in the House but was included in HEA 1646, which became P.L. 340. ISTA and IEA argued that §53 of P.L. 340 was not related to the subject matter of the Act but was the result of "logrolling" failed Bills (p.18). The court disagreed, holding that an analysis of Art. 4, §19 is "not [a] strict or technical [one] but one of reasonableness" (p. 15). P.L. 340, §53 (I.C. 20-3.1) was "linked by the common subject of state and local administration, including school corporations" (p. 16). The court concluded that "A bill does not violate the Indiana Constitution simply because of the generality of matters which are placed into it" (pp. 18-19). A court will give broad interpretations of the one-subject requirement, thereby allowing "legislative combinations of matters which, at first blush, might appear quite diverse" (p. 19). The test will be whether there is any reasonable basis for the grouping.

#### *Equal Protection/Disparate Treatment*

Article 1, §23 provides: “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.”

Disparate or preferential treatment can occur through legislation if this treatment is reasonably related to inherent characteristics which distinguish the unequally treated classes, but all members within the class must be treated equally. ISTA and IEA noted that the new law would only apply to I.P.S. and that the law as written based upon a report of poor performance throughout I.P.S. However, the new law does not reference I.P.S. and does not preclude application to other school corporations which may, at some future date, meet the statutory requirements which, at present, only apply to I.P.S. The court did not find relevant the poor performance reports from two other Indiana School districts which did not receive preferential treatment from the legislature despite a seemingly demonstrative need for such attention. Citing to McDonald v. Bd. of Election Comm’rs of Chicago, 394 U.S. 802, 809; 89 S.Ct. 1404, 1409 (1969), the court held: “[A] legislature traditionally has been allowed to take reform one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind” (at p. 35).

## **CHILD ABUSE**

One issue which arose during the recent lawsuit over statewide assessment involved “sensitive papers” or “alert papers.” These papers contained student non-responses to questions, but the non-responses were cause for concern that the student was either abused or endangered. Nearly 25,000 students participated in the pilot for IPASS. Twenty-nine (29) papers were returned to the Indiana Department of Education by the scorers. Of these 29 “alert papers,” fifteen (15) were forwarded to the principals of the schools where the students attended. The 29 papers were reviewed internally by the Indiana Department of Education by a group of four people from student services, assessment, and legal. Indiana law requires the reporting of suspected child abuse or endangerment. See I.C. 31-6-11-3(b). Failure to report suspected child abuse is a Class B misdemeanor. See I.C. 31-6-11-20(b). Each state has similar reporting requirements, and generally provides immunity to those who make such reports so long as the reports are not made in bad faith. The following are recent cases from other jurisdictions:

### *Reporting Requirement*

1. Marquay v. Eno, 662 A. 2d 272 (N.H. 1995). School employees who have supervisory responsibilities over students and who step into the role of parental proxy are subject to liability where such employees acquire actual knowledge of abuse or who learn of facts which would lead a reasonable person to conclude a student is being abused, particularly where the employees’ level of supervision is unreasonable and is the proximate cause of a student’s injury (three students alleged abuse by three teachers, and claimed other school personnel knew or should have known of the abuse).

2. Morris v. Texas, 833 S.W. 2d 624 (Tex. App. 1992). Teacher was convicted for failure to report child abuse. Two teacher aides used the washroom in her pre-kindergarten class to punish a severely mentally retarded boy who soiled himself. The ran hot water over his hand until it blistered. The teacher did not stop the aides, but suggested they cover the boy's mouth so his screams couldn't be heard. In sustaining the teacher's conviction for failure to report, the court noted that the Texas law requiring the reporting of suspected or actual abuse was not unconstitutionally vague. "These statutes give a person of ordinary intelligence four notice that he is required to file a report with the appropriate agencies when he has cause to believe that a child is being abused" (at 627).
3. Tenenbaum v. Williams, 862 F. Supp. 962 (E.D. N.Y. 1994). A kindergarten student with "elective mutism" (she wouldn't speak to people outside her home) allegedly communicated to her teacher through gestures and one or two-word statements that her father sexually abused her. The teacher, following school procedure, reported the incident to her supervisor who, in turn, reported it to the local social services agency. Two caseworkers visited the child's home but misrepresented their roles: Through their ruse, the interviewed the parents and obtained releases for medical records. A caseworker met with school staff and later took the child into protective custody. She was taken to an area hospital for a physical examination which did not substantiate the existence of abuse. Social services did not get a court order for the examination, and informed the parents only after the child was in protective custody. Although the court found fault with the social service agency, the school officials were acting pursuant to its requirements under law. The social service agency did not need the school's approval to remove the student and the school's employees had no right to obstruct the removal. The school did not infringe upon the parents' constitutional rights.

### *Investigation Requirement*

1. Picarella v. Terrizzi, 893 F. Supp. 1292 (M.D. Pa. 1995). State law requires certain individuals to report possible child abuse when they have "reason to believe" a child is abused. Failure to report could result in criminal liability. In dismissing the parents' claims against school officials for interrogating their daughter regarding suspected abuse, The court held that the Forth Amendment prohibition against unlawful search and seizure would not apply to interrogations related to suspected abuse because (1) failure to inquire so as to make a determination could result in criminal liability of school personnel; (2) it is unreasonable to expect an abused child to approach an adult; and (3) without inquiry and determination, the legislative purpose to prevent child abuse is defeated (at 1300). A determination as to "reason to believe" is not the same as a determination of "founded" or "unfounded."
2. Doe v. Bagan, 41 F.3d 571 (10th Cir. 1994). Nine-year-old boy was suspected by a Colorado social service agency of sexual assault upon a five-year-old girl. A caseworker called the school and arranged to interview the boy in the principal's office. The

interview involved only the caseworker and the boy, and lasted about ten minutes. The caseworker next interviewed the boy's mother and asked for permission to have the boy tested for sexually transmitted disease (STD), which had appeared in the five-year-old victim. The test proved negative, but the boy's name appeared as a child abuser on the state's registry. Although the student suffered humiliation because of these activities, the court did not find a denial of due process under the Fourteenth Amendment because the interview by the caseworker was minimal, the victim had named the student as her attacker. The interview was reasonably based upon the requirement under law to investigate the complaint, and the student was never restrained or otherwise taken into custody such that *Miranda* rights needed to be detailed.

### *Expert Testimony*

In Gier v. Educational Service Unit No. 16, 66 F.3d 940 (8th Cir. 1995), the circuit court upheld the granting of summary judgment to the school on claims brought by various children with disabilities who were alleged to have been emotionally, physically or sexually abused while attending the special school. The allegations were based upon testing and evaluation procedures of one psychiatrist and two psychologists whose "methodology lacked sufficient indicia of reliability" (at 942). The district court precluded testimony by these experts, which effectively prevented the plaintiffs from proving their case. The court's decision was based upon Daubert v. Merrell Dow Pharmaceuticals, Inc. 113 S. Ct. 2786 (1993), which requires the court to assess whether a methodology or reasoning underlying the proffered testimony is scientifically valid and whether that methodology or reasoning can properly be applied to the facts in issue. (See also Frye analysis under "Facilitated Communication" *infra*.) In this case, the court held suspect the use of psychological evaluations as a means of establishing abuse. The use of "vague psychological profiles and symptoms" to establish abuse also effectively precludes cross examination or refutation. "An expert using this methodology may candidly acknowledge any inconsistencies or potential shortcomings in the individual pieces of evidence she presents, but can easily dismiss the critique by saying that her evaluation relies on no one symptom or indicator, and that her conclusions still hold true in light of all the other available factors and her expertise in the field. In such a case, the expert's conclusions are as impenetrable as they are unverifiable" (at 943). In this case, the experts relied upon a "Child Behavior Checklist"(CBC) which had not been validated for use in determining abuse; the psychologist did not comply with the clinical interview protocol; and the clinical interview protocol was lacking significantly in guidance. In upholding the district court, the circuit court added that any reliability of such psychological assessments would be relevant to a course of psychotherapy for the children but would be inadequate as a part of fact-finding in an investigation.

2. Steward v. Indiana, 636 N.E.2d 143 (Ind. App. 1994). Police officer was convicted of molesting two minors. One issue raised on appeal was whether the trial court committed error by admitting expert testimony regarding "child sexual abuse syndrome." The appellate court upheld the admissibility of the testimony, noting that such testimony does not relate to the credibility of the victim witness but is related more proving that the

victim was abused. “[T]he notion that a victim’s mental condition is probative of sexual assault is not novel to this state” (at 146). The expert testimony was designed to show that the victim’s behavior was consistent with the behavior of other victims of child abuse: problems with peer and family relationships, low self-esteem, guilt and expression, suicidal feelings and a decline in school performance, with general improvement following disclosure that such acts occurred.

## **FACILITATED COMMUNICATION**

In a recent residential placement dispute under 511 IAC 7-12-5 (Article 7 Hearing No. 769-94), the school district had conducted its education evaluation of a ten-year-old severely autistic boy by using facilitated communication (FC), a controversial and now largely disparaged communication theory which employs a “facilitator” for non-verbal, usually autistic individuals. The resulting evaluation results estimated the student’s abilities at the second or third grade levels. More reliable--and more professional--evaluations actually placed the students’ abilities in the two-year-old developmental state. However, significant damage and mistrust resulted from the school’s use of FC in this fashion. An expert called by the Indiana Department of Education not only related the lack of scientific bases for FC but also related a series of alleged child abuse cases arising in Indiana because of FC elicited “testimony.” Although there are no published Indiana opinions, there have been several reported recently which provide insight into the difficulties in accepting such testimony.

1. In Storch v. Syracuse University, 629 N.Y.S.2d 958 (Sup. 1995), a father sued Douglas Biklen, a major proponent of facilitated communication (FC), and the university where he worked after the father had been charged with sexual assault of his autistic daughter. the allegations were based upon information derived through FC, which the court defines at 960 as “a technique whereby a ‘facilitator’ supports an individual’s hand, wrist or arm as he or she spells out messages by pointing to appropriate letters of the alphabet on a keyboard or some other communication device.” Proponents of FC believe that in certain non-verbal people, communication skills may be impaired but cognitive and other receptive abilities may be substantially intact. FC, under this theory taps into the otherwise intact abilities and assists the individual to communicate. The petition against the father was withdrawn by the local welfare agency when the trial court determined that FC was not generally accepted as reliable within the relevant scientific community, thus excluding all testimony elicited through FC. The claims against the university and Biklen were dismissed. The claims were based upon fraud and product liability theories in that FC is a “hoax” and Biklen knew that it was. Moreover, Biklen’s published articles and FC workshops/materials acknowledged that “facilitators” may inadvertently cue non-speaking individuals to letters, words or statements. He also acknowledged FC is controversial as that the validity of FC is seriously challenged. The court noted that Biklen’s enthusiasm for FC is as a means of communication by autistic individuals was “premature” given the recent studies which have not supported his original theories. But one’s opinion on a controversial theory is not fraudulent misrepresentation (at 963).

Further, Biklen offered no specific duty to the father or the child, and the mere placing of an idea in the stream of commerce does not invoke strict products liability applications (at 964).

2. In Callahan v. Lancaster-Lebanon Intermediate Unit 13, 880 F. Supp. 319 (E.D. Pa. 1994), parents sued school personnel and the local social service agency for civil rights violations following the parents' temporary loss of custody of their severely autistic, 16-year-old son due to allegations of sexual abuse by the father. The allegations were based upon information derived through FC. The court dismissed the claims, noting that FC was included in the student's individualized education program (IEP) and agreed to by the parents. Several facilitators believed students were reporting through FC alleged abuse. The local social service agency would accept reports of alleged abuse through FC if (1) the alleged abuse is detailed as to time, place or body parts involved, and (2) the student could convey the information consistently through more than one facilitator. The trial court observed school personnel engage in FC with the student and, following expert testimony challenging the validity of FC and medical examinations which did not reveal any injuries, the student was returned to his family. The court found that the school and social service agency acted in good faith under Pennsylvania's child protective services law such that they were immune from liability. Although parents had a protected due process liberty interest in familial privacy, this right is not absolute as has to be balanced against the state's interest in protecting children reasonably suspected of being abused (at 332).
  
3. In State of Kansas v. Warden, 22 IDELR 436 (Kan. 1995), the court admitted testimony elicited through FC of a 12-year-old severely autistic student, who has alleged he had been sexually abused by an employee at the residential school where he had been placed. The employee confessed the crime to police and to a co-worker, but later recanted. The student testified at trial, again through FC, and the jury found the employee guilty of indecent liberties with a child. Although the Storch court, *supra*, applied the test set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) regarding expert scientific opinions as evidence, the Warden court rejected the Frye test for FC, holding that the reliability or validity of FC, or its acceptance generally in the scientific community, is not the issue. The issue is whether the facilitator is only assisting the witness in communicating to the court his responses to questions and not whether there is any "scientific proof" regarding FC's validity. The judge found that the student had other means of communicating (some sign language, use of a picture book), and had developmental communication abilities in the range of a five-year-old child. There is a lengthy discussion of the history of FC and the status of current studies beginning on p. 438. The proponent for FC in the United States, Douglas Biklen (see Storch, *supra*) has a recommended protocol to be followed where abuse is alleged through FC (avoid short-answer or yes/no-type responses, substantiate claims through several facilitators, and facilitator looking away from the keyboard or wearing headphones while student is giving response). However, none of these precautions were taken during the testimony in

court. The facilitator heard all the questions and could observe the keyboard, and only one facilitator was used. The facilitator was not asked to divert her eyes. Nonetheless, the trial court's decision was sustained with two dissents. The Warden court relied upon four New York cases involving FC testimony:

- a. Matter of DDS v. Mark S., 593 N.Y.S. 2d 142 (Fam. Ct. 1992), applying the Frye test to FC testimony of 16-year-old severely autistic girl alleging abuse by her father. The court refused the testimony because FC "has not passed from the stage of experimentation and uncertainty to that of reasonable demonstrability."
- b. Matter of M. Z., 590 N.Y.S. 2d 390 (Fam. Ct. 1992), refusing to accept FC testimony of abuse by a 10-year-old child with Down's syndrome.
- c. People v. Webb, 597 N.Y.S. 2d 565 (Co. Ct. 1993), admitting FC testimony of a child victim to the grand jury where the facilitator did wear headphones and the grand jury could observe the question/response interaction.
- d. Matter of Luz P., 595 N.Y.S. 2d 541 (1993), declining to apply the Frye test thus admitting FC testimony of alleged abuse of an 11-year-old severely autistic girl by her parents. The court treated a facilitator as an interpreter of Spanish (which the parents required). The question for the court is empirical and not scientific:

Is the testimony transmitted FC in fact the testimony of the autistic child, uninfluenced by the facilitator, and does the witness-child understand the nature and obligation of the oath?

### **GANGS: DRESS CODES**

In **QR**: July-Sep't: 95, Dress Codes were addressed generally in light of recent legislation permitting school corporations to adopt dress codes. This **Quarterly Report** addresses dress codes designed specifically to curb gang activity in the schools.

In Bivens v. Albuquerque Public Schools, 899 F.Supp. 556 (D. N.M. 1995), a federal district court upheld the school district's long-term suspension of a student for wearing sagging pants. The student was a freshman in high school. Each school in the school district could establish a dress code. Plaintiff's school, in response to a perceived problem with gangs and gang-related activity, established a dress code which banned certain attire commonly associated with gangs or would be gang-members ("wannabes"). One such mode of attire banned was the "sagging pants." Plaintiff had been warned repeatedly regarding his "sagging pants" and had received several short-term suspensions for refusing to abide by the dress code. He eventually received a long-term suspension, which resulted in the lawsuit. Plaintiff claimed that the dress code was vague and therefore constitutionally defective and void. The court disagreed, refusing to reduce "sagging" to a measurement of "inches or millimeters," noting that it did not require quantified

exactness to define “short shorts” or “half shirts,” which were also prohibited. “The need to maintain appropriate discipline in schools must favor more administrative discretion than might be permitted in other parts of society” (at 563).

The plaintiff also asserted his “sagging pants” were constitutionally protected free speech. This claim that “sagging pants” result from “hip hop” styles whose roots are African-American. Plaintiff, who is black, asserts that his wearing of “sagging pants” is a statement of his identity as a black youth and “a way for him to express his link with black culture and the styles of black urban youth” (at 558). The court noted that public school students enjoy a degree of freedom of speech in their schools but this is balanced against the added concern of the need to foster an educational atmosphere free from undue disruptions to appropriate discipline (at 559). For non-verbal conduct to be “expressive conduct” for free speech protections, a student must show:

1. The intent to convey a particularized message; and
2. The great likelihood that the message would be understood by those who observe the conduct (at 560), the court found the student did not meet this two-prong test. Wearing “sagging pants” was a subjective message, but there was not a “great likelihood” that the subjective message (identifying with alleged black inner city youth) would be understood by those who observed it (at 561). The court noted at 560 that “The wearing of a particular type of style of clothing usually is not seen as expressive conduct.” The court added: “Not every defiant act by a high school student is constitutionally protected speech.”

The school’s institution of a dress code was “a reasonable response to the perceived problem of gangs within the school.” There was a belief that the climate and learning environment of the school had improved. “These are laudable educational goals that federal courts should be hesitant to impede” (at 561, footnote 9).

Also see:

1. Olsen v. Board of Education of School District No. 228, 676 F.Supp. 820 (N.D. Ill. 1987), where the court upheld the constitutionality of a school’s antigang rule which prohibited the wearing of earrings by male students. The school was experiencing significant gang-related problems (violence, intimidation and extortion). One particular gang had three symbols (a cross, a pitchfork and a six-pointed star). The student, who “misses more classes than he attends and fails more classes than he passes” was known to associate with the gang. He began to wear an earring with one of the gang’s symbols. The Board’s policy did not ban the wearing of earrings but did ban the wearing or displaying of any gang symbol, any act or speech showing gang affiliation, and any conduct in furtherance of gang activity (at pp. 821-22). Each local school building’s administration adapted the Board’s antigang policy. The student’s school noted that gang members were wearing earrings and, as a consequence, banned male students from wearing earrings. The court found that the Board’s antigang policy and its adaptation to

the student's particular school were rationally related to the educational function of instructing students in academic and behavioral areas. The court also rejected a claim of gender-based discrimination based on equal protection grounds because female students were not similarly banned from wearing earrings. The court noted that female gang members demonstrated their affiliation by other means, which were also banned. The Board's policy was substantially related to a legitimate government objective (at 823).

2. Jeglin v. San Jacinto Unified Sch. District, 827 F.Supp. 1459 (C.D. Cal. 1993). The school district instituted a dress policy forbidding all students from wearing clothing bearing writing, pictures or other insignia which identifies any professional sports team or college. The school policy was in response to the presence of gangs in the schools. The court noted that any policy which restricts a student's free speech rights under the First Amendment must be justified by school officials. "In the absence of such justification they may not discipline a student for exercising those rights" (at 1461). Here the court found the policy was not justified for elementary and middle school students because of the absence of gang activity. However, school officials provided adequate justification for imposition of the policy for high school students where a gang presence was demonstrated.

## COMMUNITY SERVICE

Legislative enactments encourage wider participation by students in their communities. See, for example, I.C. 20-10.1-4-4.5(b)(7) (Good Citizenship Instruction), which requires integrating into current curriculum instruction a stressing of the nature and importance of a student taking personal responsibility for obligations to family and community. Also see I.C. 20-10.1-7-16, which encourages the development of a community service ethic among high school students, including the opportunity to earn credit for such community or volunteer service. Some accredited nonpublic high schools in Indiana require community service of their students prior to graduation.

There have been several interesting cases reported recently involving attempts by public school districts to implement community service projects in their high schools. The Courts are supporting such programs rejecting claims that such programs constitute involuntary servitude or the establishment of religion.

1. In Steir v. Bethlehem (PA) Area School District, 987 F.2d 989 (3rd Cir.), *cert. den.*, 114 S. Ct. 85 (1993), the court upheld the constitutionality of the school districts program which required students to complete sixty (60) hours of community service before graduation. The Plaintiffs challenged the program as violative of the Thirteenth Amendment (involuntary servitude) as well as the First and Fourteenth Amendments for promoting the establishment of a religion (in this case, plaintiffs asserted that "altruism" is a religion).

The program's stated goal was to "help student acquire life skills and learn about the significance of rendering services to their communities...[and] gain a sense of worth and pride as they understand and appreciate the functions of community organizations." The goal was restated as four objectives and included in the curriculum course guide. Successful completion of community service requirements was required before receipt for a high school diploma. This is not unique program, as the court noted in Footnote 4 at 992. The court rejected plaintiffs' contention that the community service forced students to declare a belief in altruism, noting that "curriculum necessarily reflect the value judgements of those responsible for its development..." However, the court added at 994: "Even 'teaching values' must conform to constitutional standards. The constitutional line is crossed when, instead of merely teaching, the educators demand that students express agreement with the educators' values." The court also rejected the plaintiffs' contention that the community service program constituted involuntary servitude. The court found no forced labor through physical coercion and refused to equate the program with slavery.

The four objectives of the community service program were:

1. Students will understand their responsibilities as citizens in dealing with community issues.
2. Students will know that their concern about people and events in the community can have positive effects.
3. Students will develop pride in assisting others.
4. Students will provide services to the community without receiving pay.

The community service program maintained an extensive list of more than seventy (70) approved community service organizations, but the list was open-ended. Students and parents were encouraged to submit for screening and approval the names of other potential organizations. Students could also develop their own individual community service experience ("experiential situation"). [Similar provisions appear in Indiana statute at I.C. 20-10.1-7-16(b)(1)-(10, although the community service is related to elective curricular objectives.]

2. In Immediato v. Rye Neck (NY School District), 873 F.Supp. 846 (S.D. N.Y. 1995), the court rejected similar arguments that the mandatory community service program violated the thirteenth Amendment (involuntary servitude). In Rye Neck, high school students had to complete forty (40) hours of community service during their high school years in order to graduate. The program was similar to the Bethlehem program except that some of the voluntary service requirement could be satisfied by helping younger students. Rye Neck is a small school district with fewer than 300 students in grades 9-12. In a student's senior year, the student had to complete a questionnaire/form, as part of a course entitled "Managing Your Future," regarding the beneficial experiences from the community service the student performed. "A reasonable educator," the court observed at 851, "could conclude that the [community service] program teaches a variety of 'real world'

skills such as cooperation, organization and communication with others.” The court also found no Fourteenth Amendment infirmity. “We find no constitutionally protected parental right for students to opt out of an educational curriculum for purely secular reasons” (at 852). The court found the program to be a legitimate educational function.<sup>1</sup> The 2nd Circuit Court of Appeals has upheld the district court’s decision. Immediato v. Rye Neck Sch. Dist., 1996 WL 5547 (2nd Cir. 1996).

3. In Herndon v. Chapel Hill-Carrboro City Bd. of Education, 899 F.Supp. 1443 (M.D. N.C. 1995), yet another federal court rejected application of the Thirteenth Amendment to a mandatory community service program which required high school students to perform fifty (5) hours of community service as a requirement for graduation. The program is similar to Rye Neck and Bethlehem. The court noted at 1448 that “local school boards must be permitted to establish and apply their curriculum in such a way as to transmit community values.” The court also rejected the parents claims that the program violated their rights under the Ninth<sup>2</sup> and Fourteenth Amendments by interfering with their right to direct and control the upbringing and education of their children. Although recognizing that parents do have the right to direct the education and upbringing of their own children, “the right of individual parties to exert pre-emptive control over the curriculum of the public schools is not a ‘fundamental’ [right].” The right of parents--the regard may not be interposed as a barrier to reasonable state regulation of education particularly where objections are based on purely secular considerations (at pp. 14450-51).

The program, the court concluded is “rationally related to the legitimate state interest of educating students enrolled in its public schools and in preparing them for participation in society as citizens” (at 1453). The court also rejected various privacy right claims.

### **LATCH KEY PROGRAMS**

I.C. 20-5-2-1.5 authorizes Indiana school corporations to operate “latch key” (school-age child care) programs for grades K-6. A school corporation may contract with a not-for profit organization to run the latch key program in the school. A recurring question involves the standardization of fees: may a school corporation or its provider charge a higher fee to the parent or guardian of a student with significant needs. The answer has been generally that a higher fee cannot be charged.

The Office for Civil Rights (OCR) of the U.S. Department of Education has issued two Letters of

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<sup>1</sup>The court’s decision is replete with common sense musings, often tongue-in-cheek. There is a reference to “majoritarian government” and quite a few reference to “Home Rule,” which the court defined as “the right to be misgoverned by our friends and neighbors” (at 849).

<sup>2</sup>The Ninth Amendment reads as follows: “The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

Findings regarding after-school child care (“Latch Key”)programs and responsibility of such programs to accommodate students with disabilities.

In Conejo Valley (CA) Unified School District, 23 IDELR 448 (OCR 1995), OCR found that a parent-funded Latch Key program offered through the school district violated Sec. 504 and Title II, Americans with disabilities Act (ADA) when it refused to serve a severely disabled student. OCR noted that where a student meets the basic enrollment criteria for the child care programs the student is entitled to an equal opportunity to participate in the program except (1) where to do so would place an undue financial burden upon the program or (2) where to accommodate the student would constitute a fundamental alteration in the nature of the program. See 28 CFR§35.164 of the ADA and 34 CFR §104.38 of Sec. 504. In this situation, the fact the student required a part-time aide at \$8-\$10 an hour in a program which satisfied an outstanding loan of \$80,000 from the school district itself did not constitute an undue financial burden when all resources of the program were considered. Further, the student, with an aide, could participate in the benefits of the Latch Key program in having a safe place to go after school. This was not a fundamental alteration in the nature of the program.

In Board of Education of the City of New York, 16 EHLR 373 (OCR 1989), OCR cited the school district for violating Sec. 504 by refusing access to Latch Key programs for students with severe disabilities. Student with severe disabilities are to be afforded an equal opportunity for meaningful participation in the Latch Key program. The district developed and implemented a policy which provided information to parents of students with severe disabilities, offering them opportunities to apply for the Latch Key programs along with all other eligible students.

### **COURT JESTERS**

Judge Charles J. Hearn of Harris County, Texas, had a habit of adding a “happy face” to his signature. Unfortunately, he did this on an order setting a date for the execution of an inmate, which lead, in turn, to a minor brouhaha of short-lived national exposure.

It would seem that the sheer numbers of criminal proceedings will sometimes lead to less than serious responses from jurists. Such was the case in Nelson v. State of Indiana, 465 N.E.2d 1391 (Ind. 1984) where Indiana Supreme Court Justice Donald H. Hunter granted a criminal defendant his sought-for post-conviction relief because he had not been adequately informed of the possibility of an enhanced sentence for prior convictions should he plead guilty.

Justice Hunter waxed poetic. His opinion is reproduced in its entirety:

HUNTER, Justice.  
In petition for post-conviction relief,  
The petitioner herein expounds his grief.  
The record shows he does not lie;  
With the Code the court did not comply.

The problem is, as we herein perceive,  
Petitioner was not told he could receive  
A possible increased sentence by reason  
Of criminal convictions in another season.

In previous cases this Court has found  
We must remand upon this ground.  
It is the rationale of such decision  
That rights be given with much precision.

We give the trial court instructions at-  
tendant:  
To vacate the guilty plea of this defend-  
dant,  
Ant the not guilty plea to reinstate;  
It is so ordered from this date.

Justice Hunter did not give up his day job.

### QUOTABLE...

“It is possible to hold a faith with enough confidence to believe what should be rendered to God does not need to be decided and collected by Caesar.”

Supreme Court Justice Robert H. Jackson, dissenting in Zorach v. Clauson, 343 U.S. 306, 324-25, 72 S. Ct. 679 (1952). The majority of the court approved the use of release time by public schools during the school day for students to attend voluntarily religion classes or other devotions. Indiana has statutes addressing voluntary religious observances but with more procedural safeguards than before the court in Zorach. See I.C. 20-10.1-7-8, 9, and 10.

### UPDATES

1. Curtis v. Sioux City Comm. Sch. District, 895 F. Supp. 1197 (N.D. Iowa 1995) from **QR** July-Sep't: 95, p. 11 (Rejecting 30-day timeline for attorney fees under the Individual with Disabilities Education Act).
2. K.R. v. Anderson Community School Corporation, 887 F.Supp. 1217 (S.D. Ind. 1995), regarding the extent to which students in parochial schools are entitled to special education and related services and reported in **QR** July-Sep't: 95, was argued before the Indiana Supreme Court on February 6, 1996.

Date: \_\_\_\_\_

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Kevin C. McDowell, General Counsel