

## QUARTERLY REPORT

October-December 1996

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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## EVOLUTION VS. “CREATIONISM”

Although the famous prosecution of high school science teacher John T. Scopes for teaching evolution occurred over seventy years ago in Dayton, Tennessee, the conflict between the teaching of the theory of evolution and the literal application of the account of instantaneous creation of man in Genesis (creationism) continues in both judicial and legislative arenas. Scopes was a 24-year-old science teacher with Darwinian views who agreed to be the nominal plaintiff in a test case to challenge the Butler Act, a public law passed by the Tennessee legislature in February 1925 making it unlawful for a teacher in any school supported by state funds “to teach any theory that denies the story of divine creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.” This became the so-called “Monkey Trial” and is remembered more for the clash between William Jennings Bryan and Clarence Darrow.<sup>1</sup> The “Monkey Trial” was high on drama but short on legal effect. The Butler Act, although never again enforced, remained “on the books” until repealed in 1967. In 1968 the U.S. Supreme Court, in Epperson v. Arkansas, struck down a similar anti-evolution law in Arkansas. At that time, only Arkansas and Mississippi had anti-evolution laws.

Epperson v. Arkansas, 393 U.S. 97 (1968) involved a 1928 law based on the Butler Act. The court noted, “The Arkansas statute was an adaptation of the famous ‘monkey law’ which that State adopted in 1925.” Epperson was a biology teacher in Little Rock who challenged the constitutionality of the law. The Supreme Court, with many direct references to the *Scopes* trial, noted that there was no record of any prosecution of a teacher under the Arkansas law. “It is possible that the statute is presently more of a curiosity than a vital fact of life...” (At 102.) Nevertheless, the court had to rule.

“[T]he law must be stricken because of its conflict with the constitutional prohibition of state laws respecting an establishment of religion or prohibiting the free exercise thereof. The overriding fact is that Arkansas’ law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.” (At 103.)

The Court added that it was not prohibiting the study of religions or the Bible “from a literary and historic viewpoint, presented objectively as part of a secular program of education...” (At 106.) However, Arkansas’ law “was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read [by fundamentalist

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<sup>1</sup>H.L. Menchen coined the term “Monkey Trial” to describe the July 1925 events in Dayton, Tennessee. The trial is also well known because of Inherit the Wind, a 1955 stage play and later a movie by Jerome Lawrence and Robert Lee.

sectarians].” (At 108-109.)<sup>2</sup>

Despite an attempt to carefully select its words, the court’s opinion could be read as either (1) balancing evolutionary theory with all other theories, including creationism; or (2) proscribing instruction on any theory regarding our origins. State legislatures, even in this post-Epperson era, continue to struggle with this conflict.

In 1996, Ohio House Bill 692 was introduced which provided:

Whenever a theory of the origin of humans or other living things that might commonly be referred to as *evolution* is included in the instructional program provided by any school district or educational service center, both scientific evidence and related arguments supporting or consistent with the theory and scientific evidence and related arguments problematic for, inconsistent with, or not supporting the theory shall be included.

The proposed legislation created quite a bit of controversy and did not pass. Its proponent, Rep. Ron Hood, wrote that he was “fighting for the rights of pupils to be taught the truth, the whole story, about evolution.” He added that there is “no empirical proof as to how the Earth and its inhabitants came to be, and pupils should be provided with this information. Let them decide what they believe for themselves.” (Letter, The Columbus (Ohio) Dispatch, June 15, 1996, p. 11A.) Rep. Hood quoted John T. Scopes in support for his bill. For two other cases involving this issue, see the following:

1. Edwards v. Aguillard, 482 U.S. 578, 107 S.Ct. 2573 (1987). The U.S. Supreme Court found unconstitutional, as in Epperson, Louisiana’s “Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act.” Known informally as “the Creationism Act,” the law forbade the teaching of the theory of evolution in public schools unless accompanied by instruction in “creation science.” No school was required to teach evolution or creationism. The court found that “creationism” is a religious belief,

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<sup>2</sup>The court was careful in crafting its language so as not to identify any particular religion in the body of the opinion while at the same time indicating there is no unanimity of opinion regarding instantaneous creation within any religion. Ironically, in the *Scopes* trial, William Jennings Bryan held himself out as an expert on the King James version of the Bible and actually testified as to his belief in the literal account of creation. Upon cross-examination, however, he admitted he did not think the earth was created in six 24-hour days, which undermined the literalism which was the cornerstone of Fundamentalist doctrine underlying the Butler Act. Many early Christian writers indicated that the “days” in the Genesis account weren’t solar days, especially since the sun wasn’t created until the fourth “day.” The use of poetic and figurative language, according to theologians, is a method of revealing truth in a variety of ways. See, e.g., St. Augustine’s fifth century work, *De Genesi ad Litteram*.

and the legislature's attempt "to discredit evolution by counter balancing its teaching at every turn with the teaching of creationism" fails the three-pronged Establishment Clause test established by Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971) because the law does not serve a solely secular purpose, it advances a religious belief, and it excessively entangles government with religion. The Court added at 482 U.S. 595, 107 S. Ct. 2583:

[T]eaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction. But because the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause.

The court also made reference to McLean v. Arkansas Board of Education, 529 F.Supp. 1255 (E.D. Ark. 1982), which at pp. 1258-1264 includes a historical review of contemporary antagonisms between the theory of evolution and religious movements.

2. Pelozo v. Capistrano Unified Sch. Dist. 37 F.3d. 517 (9th Cir. 1994). Pelozo was a biology teacher who filed suit against his school district claiming his civil rights were violated by the school's actions requiring him to teach evolution and prohibiting him from discussing religious matters with students on school grounds. He asserts that "evolutionism" is a "religious belief" and "not a valid scientific theory." He refused to include the theory of evolution in his instruction because it is not "fact" and because it "occurred in the non-observable and non-recreatable past and hence...not subject to scientific observation." The court found that adding "ism" to "evolution" doesn't "metamorphose 'evolution' into a religion" (at 521). Disagreeing with the teacher, the court did not find that he was required to teach the theory of evolution as fact nor did the court find that the theory of evolution denies the existence of a divine creator. "To say red is green or black is white does not make it so." Id. The teaching of the theory of evolution is not the promotion of a religion. The court also found that the teacher's rights of free speech were not impermissibly violated by the school district's reprimands and restrictions regarding his proselytizing of students on school grounds. The court acknowledged there was a restriction on his free speech rights, but such restrictions on public school teachers are justified where there is a compelling governmental interest in avoiding a constitutional violation. "The school district's interest in avoiding an Establishment Clause violation trumps Pelozo's right to free speech." (At 522.) The court supported this finding by noting that Pelozo, "whether...in the classroom or outside of it during contract time,...is not any ordinary citizen. He is a teacher." Because of his respected position, there is an increased likelihood that high school students will equate his views with those of the school. Discussing his religious beliefs with students during school time on school grounds "would flunk all three parts of the test articulated in Lemon v. Kurtzman..." Id.

## SCHOOL LIBRARY CENSORSHIP: FREEDOM OF SPEECH

(Article by Dana L. Long, Legal Counsel)

The First Amendment of the Constitution of the United States provides, in part, that “Congress shall make no law . . . abridging the freedom of speech . . .” The purpose of this part of the amendment is to abolish governmental censorship and protect the right to comment on issues of public concern. While the courts have long recognized the freedom of speech rights of adult speakers, a similar freedom of speech right has not always been applied to school children. It has generally been accepted that school officials stood in the stead of parents, i.e., *in loco parentis*, and had parent-like authority to control student conduct and expression. (*Prior Restraint and the Public High School Press: The Validity of Administrative Censorship of Student Newspapers Under the Federal and California Constitutions* (1987) 20 Loyola L.A.L. Rev. 1055, 1068, 1070-71.)

Judicial recognition of the free speech rights of students came with the landmark case of Tinker v. Des Moines School District (1969) 393 U.S. 503, 89 S.Ct. 733. In that case, the Court struck down a regulation prohibiting secondary students from wearing black arm bands as a form of silent protest against the Vietnam War on the ground that the regulation was an impermissible encroachment upon the students’ First Amendment right of free expression absent a showing that the regulated conduct would materially disrupt classwork or substantially intrude upon the privacy of others. Id. at 519, 89 S.Ct. at 740. The Court sustained the First Amendment right of secondary students to be free from governmental restrictions upon nondisruptive, nonintrusive, silent expression in public schools notwithstanding its awareness of the “comprehensive authority” traditionally accorded local officials in the governance of public schools. Id. at 507, 89 S.Ct. at 736. See id. at 515-26, 89 S.Ct. at 741-46 (Black, J., dissenting). The Court recognized that school officials generally had comprehensive authority to prescribe and control conduct in the schools, but found that this authority did not extend to administrative censorship of public school students’ nondisruptive expression, stating that students did not “shed their constitutional rights to freedom of expression at the school house gate.” Although students’ First Amendment rights had to be “applied in light of the special characteristics of the school environment,” students could not be “confined to the expression of those sentiments that are officially approved.” Id. at 506, 511, 89 S.Ct. at 736, 739.

Since the Tinker decision, a number of courts have addressed the First Amendment claims of students in a variety of contexts. The courts have uniformly afforded school authorities broad discretion and authority in curricular matters,<sup>3</sup> while affording students broader First Amendment

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<sup>3</sup>For court treatment of curricular concerns, see for example:

Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562 (1988), involving a student challenge to the principal’s deletion of two stories from the high school newspaper prior

rights in extra-curricular areas.

Beginning in the early 1980's, courts began addressing First Amendment claims of students in the area of the removal of books from school libraries and drawing distinctions between the authority of school officials and First Amendment rights of students in curricular areas versus non-curricular areas. One early challenge to the banning of a library book involved 365 Days, by Ronald J. Glasser. This book was a compilation of nonfictional Vietnam War accounts by American combat soldiers which had been acquired by the Woodland High School library in 1971. In 1981, the parents of a girl who had checked the book out of the library saw a copy of the book and were offended at the language used. These parents complained to the school committee chairman, the superintendent and the librarian. At an April 28, 1981, meeting the committee voted 5-0 to ban the book although at that time none of the committee members, the superintendent nor the parents had read the book. Another student, in protest, brought a copy of the book to school and was told that possession of the book on school property would result in the book's confiscation. On May 14, the student council formally requested that the book be

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to publication. The Court found that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expression so long as their actions are reasonably related to legitimate pedagogical concerns." Id. at 570-571. The Court established the principle that school officials could exercise substantial control over student speech that occurs within the context of the curriculum if they had legitimate educational objectives.

In Virgil v. School Board of Columbia County, 862 F.2d 1517 (11th Cir. 1989) the Eleventh Circuit upheld the school board's removal of a textbook from a humanities class upon a concern related to a legitimate educational objective. The textbook was removed by the school board due to two objectionable selections in the textbook: *Lysistrata*, by Aristophanes, and *The Miller's Tale*, by Chaucer. The board felt that due to their vulgarity and sexual explicitness they were not appropriate for reading by high school students.

Roberts v. Madigan, 921 F.2d 1047 (10<sup>th</sup> Cir. 1990), cert. denied 505 U.S 1218, 112 S.Ct. 3025 (1992) and Webster v. New Lenox School District No. 122, 917 F.2d 1004 (7th Cir. 1990) are two circuit court cases affirming the authority of school officials over teachers in matters related to the curriculum. In Roberts, the teacher had been forbidden to have two Christian religious books in his classroom library and to read from a copy of the Bible during the class silent reading time. The court indicated that the school has a legitimate educational concern that parents and students would perceive the teacher's action as school endorsement of religion in violation of the Establishment Clause. The court found that since the classroom library and free reading time were curricular, school officials could impose the restraints because they were related to a legitimate educational concern. In Webster, the court rejected a teacher's academic freedom claim in prohibiting the teacher from teaching creation science in his social studies class. See **Evolution vs. "Creationism,"** *supra*, and **Proselytizing by Teachers,** *infra*.

reinstated and be placed on a restricted shelf in the library. The motion failed to pass the committee at that time, but on June 17 the committee did vote to put the book on a restricted shelf until the school developed and adopted a challenged material policy. The policy was developed over the summer and adopted on August 17, at which time the committee refused to submit the book to the procedures set forth under the new policy, effectively reinstating the prior ban. Students then brought an action seeking an injunction prohibiting the school's action. In granting preliminary injunctive relief, the court stated "[t]he information and ideas in books placed in a school library by proper authority are protected speech and the first amendment right of students to receive that information and those ideas is entitled to constitutional protection. A book may not be banned from a public school library in disregard of the requirements of the fourteenth amendment." Scheck v. Baileyville School Committee, 530 F.Supp. 679, 689 (D.ME. 1982).

Later that same year, the United States Supreme Court for the first time addressed the removal of books from school libraries in Board of Education v. Pico. 457 U.S. 853, 102 S.Ct. 2799 (1982). While no clear majority emerged in this decision, limiting its use as precedent, a number of courts have found useful guidance in the plurality decision. This plurality decision offers the following guidance:

"The Court has long recognized that local school boards have broad discretion in the management of school affairs." (Citations omitted.) Id. at 2806. At the same time, the discretion of States and local school boards in matters of education must be exercised in a manner consistent with the requirements of the First Amendment. Id. at 2806-07.

The right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press and political freedom. Id. at 2808.

Reliance upon a school district's duty to inculcate community values in matters of curriculum is misplaced where the school attempts to extend its claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway. Id.

School officials possess significant discretion to determine the content of school libraries, but that discretion may not be exercised in a narrowly partisan or political manner. The Constitution does not permit the suppression of *ideas*. Therefore, whether a school district's removal of books from their libraries denied students their First Amendment rights depends upon the motivation behind the school district's actions. If the school district *intended* by the removal to deny students access to ideas with which school officials disagreed, and if this intent was the decisive factor in the decision, then the officials exercised their discretion in violation of the Constitution. Id. at 2810.

"In brief, we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their

removal to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.’” (Citation omitted.) Id.

In a 1995 decision, the Fifth Circuit Court of Appeals placed heavy reliance on the plurality opinion in Pico. Campbell v. St. Tammany Parish School Board, 64 F.3d. 184 (5<sup>th</sup> Cir. 1995) involved a challenge to the school district’s removal of Hoodoo & Voodoo, by Jim Haskins, from the school library. This book was described as facially serious and scholarly. The first half of the book traced the development of an African tribal religion and its transfer and evolution in America after slaves were brought from West Africa. The religion survived in the United States through the current practice of two variations of the original African religion, voodoo and hoodoo. The second half of the book was a presentation of “spells,” “tricks,” “hexes” and “recipes” that outlined, in how-to form, the way to bring about particular events in four categories: “To Do Ill,” “To Do Good,” “In Matters of Law” and “In Matters of Love.”

In 1992, a parent objected to the book’s content. The principal organized a school-level committee to review the book. This committee unanimously recommended that the book be retained. The parent then appealed the committee’s recommendation. A parish-wide committee, appointed by the superintendent, then reviewed the book. (In Louisiana, counties are referred to as parishes.) This appeals committee, with one dissent, agreed that the book should be retained, but with restricted access. The parent then appealed to the school board, which voted 12 - 2 to remove the book from the library. The school board gave no reason for its decision. A group of students and their parents then filed suit alleging a violation of the students’ First Amendment rights. The district court entered summary judgment in favor of the students, finding that the school board intended to deny student access to objectionable ideas contained in the book. The school board appealed.

Although reversing the district court’s grant of summary judgment, the 5<sup>th</sup> Circuit Court of Appeals relied heavily on the Pico plurality opinion. The court quoted at length from Pico, recognizing that while the plurality opinion does not constitute binding precedent, it may properly serve as guidance in determining whether the school board’s removal decision was based on unconstitutional motives. In reviewing the summary judgment evidence, the court determined that students in the St. Tammany Parish public schools are not required to read the books contained in the libraries, nor are the students’ selections of library materials supervised by faculty. Therefore, the removal of Hoodoo & Voodoo concerns a noncurricular matter. The school board’s decision to remove the book must withstand greater scrutiny within the context of the First Amendment than would a decision involving a curricular matter. Id. at 189. The court found that the key inquiry was the school official’s substantial motivation in arriving at the removal decision. The case was reversed and remanded for trial to determine the motivation for the decision to remove the book.

A district court in Kansas also relied heavily on the Pico plurality opinion in Case v. Unified School District No. 233, 908 F.Supp. 864 (D.Kan. 1995). In this case, students and their parents brought an action to compel the reinstatement of a novel, Annie on My Mind, which depicted a

fictional romantic relationship between two teenage girls. Although the book had been on the shelves of the library for nearly ten years, attention was brought to the novel when, in 1993, the Gay and Lesbian Alliance Against Defamation/Kansas City (GLAAD/KC) donated copies of the book to the school libraries. When the donation was made, the assistant superintendent requested the media specialists to review the book for suitability. The media specialists gave the book a favorable review and recommended keeping the book. The superintendent then prepared new “book donation guidelines” and decided to refuse the donated copies of the book and also to remove current copies from the shelves of the library (without following the board’s policy for the reconsideration of library materials). In granting an injunction restoring the book to the shelves of the libraries, the court looked at the motivation for the removal. While the board members voting for the removal stated they believed the book was “educationally unsuitable,” the court found no basis in the record to believe that the board members meant anything other than their own disagreement with the ideas expressed in the book. The school board intended to deny students in the school district access to those ideas.

## **NEGLIGENT HIRING AND PUBLIC SCHOOLS**

(Article by Valerie Hall, Legal Counsel)

This article reviews cases discussing liability involving the hiring of employees by school districts. These cases discuss the importance of thorough background checks on prospective employees, as well as the need for a supervisor to act upon reports or knowledge of a school employee’s misconduct. Failure in these areas can lead to a school district’s liability if such omissions can be causally linked to harm suffered by a student. School districts also have been found to be liable if they failed to give detrimental information or gave false information concerning a former employee’s misconduct to a hiring school employer, and a student was harmed by the employee.

Indiana has long recognized a cause of action for negligent hiring or retention of an employee. To prevail on this theory, a plaintiff must show that a defendant employer negligently hired or retained an employee who the employer knew was in the habit of misconducting himself or herself. Levinson v. Citizens Nat. Bank of Evansville, 644 N.E.2d 1264, 1269 (Ind. App. 1994).

### 1. Inadequate Hiring Policies and Failure to Supervise

In John Doe v. Hillsboro Independent School District, 81 F.3d 1395 (5th Cir. 1996), a thirteen (13)-year-old student was raped by a school custodian when the student stayed after school for additional academic work. The custodian had a criminal record prior to pleading guilty to raping the student. Doe filed a federal civil rights claim under 42 U.S.C. §1983 against the school board members, the school superintendent, and the manager of the Transportation and Maintenance Department. Doe alleged that the District’s hiring policies and procedures were inadequate, and that school officials were indifferent to Jane Doe’s constitutional right to bodily integrity.

An individual may file suit against any person who, “under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,” has deprived that individual of “any rights, privileges, or immunities secured by the Constitution and laws” of the United States. 42 U.S.C. §1983. The Fifth Circuit has held that sexual abuse of a school child by a school employee acting under color of state law violates the child’s Fourteenth Amendment liberty interest in being free from state-occasioned damage to bodily integrity.

At trial, it was disclosed that at least a third of the school’s maintenance staff had criminal records, including convictions for murder, armed robbery, unlawful weapons possession, multiple DWIs (Driving While Intoxicated), drug offenses, failure to identify a fugitive and cruelty to animals, despite a state law requiring school districts to investigate the criminal records of prospective employees. Prior to the rape, school officials had received reports that staff members had sexually abused some students, but these officials made no effort to verify these reports. These facts were sufficient to facially establish a hiring policy that violated the student’s constitutional right to bodily integrity, and demonstrated a deliberate indifference to the student’s welfare. The Court further held these facts established a real causal nexus between the hiring of these criminal custodians and the constitutional injuries suffered by the student.

In Hillsboro, the student also established a valid failure to supervise claim. She alleged that school officials learned of a pattern of inappropriate sexual behavior by staff and failed to take action to prevent the abuse. Such inaction was an abdication of a school official’s duty to protect a student from sexual abuse by “state actors,” and demonstrated deliberate indifference to the student’s constitutional rights. Also see Prete v. Akron City Sch. Dist. Bd. of Ed., 667 N.E.2d 73 (Ohio App. 1995), upholding a school custodian’s discharge on grounds that he was disqualified from employment by any board of education following his conviction for public indecency.

In Becerra v. Asher, 921 F.Supp. 1538 (S.D.Tex. 1996), a child was sexually molested at his mother’s home, by his former teacher, six months after the child withdrew from the school where the teacher taught. The mother sued the former teacher, school district, and school officials under Section 1983 alleging that the defendants violated the child’s substantive due process right to bodily integrity. The teacher was employed by the Houston Independent School District from 1975 until December 1992, and developed such a troubled history that the principal reprimanded the teacher and recommended he receive a medical evaluation, but no evaluation took place. In 1990, the defendant superintendent transferred the teacher to a school where the teacher cultivated a friendship with the plaintiff child victim.

The court found that there was no evidence that the teacher’s visits to plaintiff’s home were made pursuant to his duties as a teacher or at the direction of the school district. The evidence showed that the teacher visited plaintiff’s home on his own volition, with the permission of the child’s mother, and the result of a personal relationship the teacher had developed with the family. The Court held that the mere fact that the teacher was employed by the school district at the time of the sexual assaults was insufficient to show state action. The acts of state officers “in the ambit of their personal pursuits” were not acts under the color of state law.

In Armstrong v. Lamy, 938 F.Supp. 1018 (D. Mass. 1996), a former student and his wife brought an action against the city, public school officials, the teacher, and the teacher's family, alleging federal and state civil rights violations and common-law torts based on a teacher's alleged sexual abuse of the student. The defendant teacher allegedly had sexual contact with the student on school property, at the teacher's residence, in the teacher's vehicle, on camping trips, and on other outings with the teacher. The teacher also allegedly caused the student to drink beer, and attempted to sexually abuse the student when the student was intoxicated.

The Court ruled that the plaintiffs failed to offer sufficient evidence that the city and public school officials learned of any facts pointing toward the conclusion that the teacher was sexually abusing any students. Plaintiffs offered no evidence that the city and public school officials received and disregarded any complaints of sexual abuse by the teacher. The assertion that the atmosphere at the school was like a "zoo," and that teachers and students "fraternized" was insufficient to support an inference that the city and public school officials knew or should have known that any teacher was engaging in a pattern of sexually abusing students.

## 2. Duty to Report Employee Misconduct to Prospective Employers

School authorities, with knowledge of a former employee's sexual misconduct, who recommended the former employee for hiring at another school have been held liable for the physical harm to a student molested at the hiring school by the former employee. This liability was based upon the theories of negligent misrepresentation, fraud, and negligence per se.

In Randi v. Livingston Union School District, 49 Cal. Rptr.2d 471, 473 (Cal. App. 1995), a 13-year-old student brought an action against a vice-principal who allegedly sexually molested her, and the vice-principal's former employers who gave him positive recommendations. No misrepresentations were made directly to her or her family; however, she argued that she was entitled to protection as a "third party endangered by negligent or deliberate misrepresentations respondents made to the Fresno Pacific College placement office."

The Court found that her allegations that the vice-principal's former employer gave false information stated a valid claim against the former employer. This was based on the fact that the former employee's sexual misconduct with students was known by his former employers, but not disclosed in their employment recommendation letters. Thus, the letters constituted misleading half-truths.

In Randi, the court also ruled that the former employer's failure to comply with its statutory duty to report incidents of sexual misconduct to the authorities pursuant to the California Child Abuse and Neglect Reporting Act rendered the former employer liable as a matter of law. For additional cases on the duty of school officials to report suspected or known incidents of child abuse or neglect, see **QR** Oct-Dec: 95. For a related case, see Picton v. Anderson Union High Sch. Dist., 57 Cal. Rptr.2d 829 (Cal. App. 1996), finding that a school district's nondisclosure clause in a settlement agreement with a teacher accused of serious sexual misconduct was illegal as a matter of public policy and not enforceable.



### 3. Negligent Hiring and Reasonable Foreseeability

In Giraldi v. Community Consolidated School Dist. #62, 665 N.E.2d 332 (Ill. App. 1996), the court upheld a jury verdict finding that the school bus company and school district were not guilty of negligent hiring and negligent supervision of a bus driver who sexually assaulted a kindergarten student. Negligent hiring requires evidence that an employer knew or reasonably should have known that the person who was hired was unfit for the job and that his unfitness would create a foreseeable danger to others. The negligent hiring or negligent retention of the employee must be the proximate cause of the plaintiff's injuries. In this case, the bus driver's previous employment history reflected incidents of tardiness, absenteeism and irregular schedules, but these job-related deficiencies were not the cause of injury. There was nothing in the bus driver's history which would indicate his "particular unfitness." The resulting sexual abuse was not reasonably foreseeable by the bus company or the school district.

### **PROSELYTIZING BY TEACHERS**

In Helland v. South Bend Community School Corp., 93 F.3d 327 (7th Cir. 1996), the court affirmed summary judgment for the school district, which removed Helland from its list of substitute teachers because he failed to follow lesson plans, failed to control his students, and improperly interjected religion into his classrooms. Helland's religious beliefs require him to carry and read the Bible. He had received several negative performance evaluations. Several principals and teachers had asked that he not return to their classrooms and schools. He also had proselytized to his classes of middle and high school students by reading aloud to them from the Bible, distributing Biblical pamphlets, and professing his belief in the literal creation of man. (See **Evolution v. "Creationism,"** *supra*.) This latter conduct occurred during a fifth grade science class. Helland agreed not to give the students an assignment if they would not tell anyone about the discussion. Helland claimed that his removal from the substitute list violated his civil rights and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §2000bb.

The Court found that the school had sufficient nondiscriminatory reasons for removing him from the list: (1) he was a subpar teacher who did not follow lesson plans and did not control his classes; and (2) despite "numerous admonitions...that he stop interjecting religion into his classrooms," he continued to do so. Because public schools must make certain that "subsidized teachers do not inculcate religion" into their classrooms (citations omitted), the school had a legitimate, nondiscriminatory reason to remove Helland from the list and avoid a violation of the First Amendment's Establishment Clause. This was not a pretext for discriminating against Helland based upon his religious beliefs. 93 F.3d at 330.

Helland's RFRA claim is based upon his allegation that the school terminated him for refusing to cease carrying his Bible to school and to cease reading it in privacy during breaks in classroom assignments. However, the court noted that there was no evidence the school ever proscribed these activities. The school did admonish him for reading the Bible aloud to students and

discussing religion during class. A school can direct a teacher to “refrain from expressions of religious viewpoints in the classroom and like settings,” at 331, citing Bishop v. Aronov, 926 F.2d 1066, 1077 (11th Cir. 1991). The Court noted that Helland received ample notice and warning regarding his activities, and his religious practices were accommodated by not assigning him to schools where his past practices were objectionable. Had the school not terminated him, it “would have opened up another constitutional can of worms.” Id.

Removing Helland from the substitute teaching list was the “least restrictive means of furthering the compelling governmental interest in avoiding the unconstitutional interjection of religion into the South Bend public school classrooms,” and, hence, there was no violation of the RFRA.

Helland has appealed the 7th Circuit’s opinion to the U.S. Supreme Court (No. 96-773). Counsel for the school corporation has provided me a copy of its Brief in Opposition, which addresses the teacher proselytizing issue in more detail. (**Note:** The U.S. Supreme Court has rejected, without comment, the substitute teacher’s appeal.)

1. Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990), cert. den. 505 U.S. 1218, 112 S.Ct. 3025 (1992). The Helland court alluded to this case at 331, note 1. Roberts was a veteran teacher of 19 years who taught fifth grade students. As a part of teaching reading skills, each day was devoted to a “silent reading period” of fifteen minutes where students could read from materials from home, from the school library, or from Roberts’ classroom library of 239 books. Roberts also read silently during this period, frequently from the Bible, which he kept on his desk throughout the day. He never read aloud from the Bible and did not “overtly proselytize about his faith to his students.” (At 1049.) Two of the 239 books in Roberts’ classroom library were Christian books. There was also a poster which included a religious message. Following a parent complaint, the principal directed Roberts to remove the two books and to keep his Bible out of sight during classroom hours. Roberts complied with these directives. However, the principal found Roberts reading his Bible silently on two subsequent occasions. She directed him to keep his Bible in his desk during school hours. The professional relationship deteriorated. Roberts was given a directive which provided in part that the school must “avoid the appearance of teaching religion,” and should he not comply with the principal’s directions, he would be considered insubordinate. Roberts instituted this action claiming a violation of his First Amendment right to free speech, academic freedom, and access to information. He also claimed a violation of the Establishment Clause by the school “by treating Christianity in a non-neutral, disparaging manner.” The 10th Circuit Court of Appeals affirmed the district court’s finding that “the balance between Mr. Roberts’ rights to freedom of expression and academic freedom on the one hand, and the students’ rights to be free from religious indoctrination on the other, the students’ interest must prevail.” (At 1050.) Although the court also upheld the removal of the two books from Roberts’ classroom library because the proffered reason for doing so was related to a compelling governmental reason, it added that “[i]t is neither wise nor necessary to require school officials to sterilize their classrooms and libraries of any

materials with religious references in order to prevent teachers from inculcating specific religious values.” (At 1055.) The “Establishment Clause focuses on the manner of *use* to which materials are put; it does not focus on the content of the materials per se.” *Id.* See also **School Library Censorship**, *supra*.

2. Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1994), which is discussed in **Evolution vs. “Creationism”**, *supra*, is also pertinent here. Peloza, a biology teacher alleged his civil rights were violated because he was required to teach “evolutionism,” which he called a “religious belief” and one of “two world views on the subject of the origins of life the universe.” (The other “world view,” according to Peloza, is “creationism,” which he also acknowledges as a “religious belief system.”) The court upheld the school’s restrictions on Peloza from discussing religious beliefs with students during contract hours and on the school campus. Such speech has no secular purpose, has the primary effect of advancing Peloza’s religious beliefs, and excessively entangles the school with religion. The Helland court did not refer to Peloza. However, the South Bend Community School Corporation included the case in its “Brief in Opposition” to Helland’s appeal.

## TIME-OUT ROOMS

In Rasmus v. State of Arizona, 939 F.Supp. 709 (D. Ariz. 1996), an eighth-grade student with an emotional handicap alleged that his Fourth and Fourteenth Amendment rights were violated by a school’s use of a locked, windowless time-out room. The room was really more of a closet in the school’s alternative classroom. It was approximately 6' x 4' x 8' 10" with plywood walls and a carpeted floor. There was no furniture, but there was an overhead light, fire sprinkler, air vent and viewing peephole. The door was equipped with two exterior steel bolt locks. The student had become involved in an altercation with another student. A classroom aide separated the students, directing the plaintiff to remove his jacket and shoes and empty his pockets before entering the time-out room. The student spent approximately ten minutes in the locked room. The student exhibited no trauma when he exited the closet. In fact, he was not involved in any other incidents the remainder of the school year. The student’s parents were notified the same day he was confined to the time-out room. The parents asked the Fire Department to investigate. A deputy fire marshal found that the locks violated the fire code. The locks were removed.<sup>4</sup> The parents also initiated a complaint with the Arizona Department of Education (ADOE) under 34 CFR §§300.660-300.662 of the Individuals with Disabilities Education Act (IDEA). Although the ADOE has developed and disseminated guidelines for the use of non-aversive

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<sup>4</sup>This would be true in Indiana as well. Under §12.104(b) of the Uniform Fire Code, exit doors shall be capable of being opened from the inside without the use of a key or any special knowledge or effort. The Indiana State Fire Marshall has indicated that several Indiana schools have been required to remove locks from rooms used for time-out. The Fire Marshall will not approve of locked time-out rooms, even if an adult is present immediately outside the door.

behavior management practices, including time-out rooms, ADOE's complaint investigator found no IDEA violations. The court noted, however, that the school violated many of the principles in the ADOE guidelines for time-out rooms, including the following:

- \* The student's individualized education program (IEP) contained no provision for seclusionary time-out.
- \* The written permission of the parents was never obtained.
- \* Seclusion occurred without regard to any specific behavior management program.
- \* The school had not developed any policies or procedures for the use of the time-out room, deferring instead to the discretion of the adult present.
- \* The time-out room violated the fire code.
- \* The time-out room did not permit staff to see the student at all times nor the student to see anyone outside.

The school argued that the guidelines should not have legal effect because they were merely guidelines which had not been incorporated into law. The court noted that the ADOE referred to the guidelines and incorporated references to these principles when it conducted its IDEA complaint investigation. Although the court found the ten-minute, time-out seclusion period to be a *de minimus* violation of the student's Fourteenth Amendment rights such that the school was entitled to summary judgment on this issue, the court found there was sufficient merit to the Fourth Amendment issue that trial would be warranted. The court noted that time-out rooms do not necessarily offend the Fourth Amendment, but in this case the seemingly unfettered discretion permitted employees to place students in the time-out room for indeterminate periods without regard to a student's age or emotional disability may be excessively intrusive and thus may violate the relaxed Fourth Amendment standard for school officials.

For other cases involving time-out rooms, see the following:

1. Hayes v. Unified School Dist. No. 377, 877 F.2d 809 (10th Cir. 1989). The Rasmus court relied heavily upon Hayes, distinguishing its facts from the Rasmus dispute. The two students in Hayes had behavioral problems. The students' parent was advised of her IDEA procedural safeguards prior to giving written permission for the students' placement in a behavioral management program (Personal/Social Adjustment, or PSA, program). At times during the school year, the students were required to stay in a 3' x 5' time-out room. The parent never challenged this through IDEA due process nor sought a change of placement. Failure to exhaust IDEA remedies precluded the civil rights action

in court. Notwithstanding this, the 10th circuit court made the following observations or adopted them from the district court:

- \* Short-term removals for disciplinary reasons are not “changes of placement.”
- \* However, the use of time-out rooms can be challenged through IDEA procedures.
- \* The school’s use of time-out rooms was related to the provision of appropriate educational services to these students because:
  - (a) The use of the time-out room was rationally related to the school’s educational function to teach students rather than suspend them out of school;
  - (b) The students could be directly supervised at all times;
  - (c) The location of the time-out room allowed the students placed there to continue with their classroom instruction; and
  - (d) The school had a policy which strictly regulated the placement of students in the time-out room.

2. Dickens v. Johnson County Bd. of Ed., 661 F.Supp. 155 (E.D. Tenn. 1987). The court found no constitutional infirmity with the school’s use of a time-out room which consisted of a three-sided cardboard partition which was not attached to a wall and could easily be removed. The area contained a desk and enabled a student placed there to see and hear the teacher as well as observe the chalkboard.

## **SERVICE DOGS**

Although most people are familiar with guide dogs who assist blind or visually impaired individuals, there are increasing numbers of service dogs which perform a variety of everyday tasks which their masters cannot because of physical impairments. A number of states have passed laws regarding the accommodations of persons with disabilities and their guide or service dogs. Indiana has two such laws. I.C. 16-32-3-2 requires people who operate public accommodations to permit access to individuals with disabilities and their guide or service dogs, and further prohibits charging an additional fee to such individuals. This law also permits access to public accommodations by “a guide dog trainer while engaged in the training process of a guide dog. . .” “Public accommodation” is defined as “an establishment that caters or offers services, facilities, or goods to the general public.” See the Buchanan case, *infra*. In addition,

I.C. 22-9-6-5 prohibits discrimination against disabled individuals and their guide/service dogs by persons who rent or lease property. There have been few reported cases involving public school districts and students who require guide or service dogs.

1. Letter to Goodling, 17 EHLR 1027 (OCR 1991). The Office for Civil Rights, in answer to an inquiry from a member of Congress, stated that “if not allowing a student to bring a service dog into the classroom would effectively deny the student the opportunity, or an equal opportunity, to participate in or benefit from the education program [of a recipient of Federal financial assistance], then the recipient school would be in violation of Section 504 [of the Rehabilitation Act of 1973] and its implementing regulation.”
2. Gaudiello v. Delaware County Intermediate Unit, 796 F.Supp. 849 (E.D. Pa. 1992), involved a thirteen-year-old student with severe physical limitations due to spinal muscular atrophy. The student used a wheelchair and was slated to be mainstreamed into general education classes upon entering middle school. Although this case never addresses a significant issue because of the parents’ failure to exhaust administrative remedies under the Individuals with Disabilities Education Act, it does contain some background information on the training and function of service dogs for mobility-impaired individuals. In this situation, the service dog can turn lights on and off, open and close doors, carry the student’s books, pick up objects, bring the telephone to the student, and perform a number of other functions which actually enabled the student to participate in more school functions.
3. Clark County School District v. Buchanan, 924 P.2d 716 (Nev. 1996), addresses a different aspect of service dogs and public accommodations: the extent to which a teacher who trains service dogs may bring such training dogs to the school where she teaches. Buchanan is the music teacher for an elementary school. She is also a volunteer helping-dog trainer for Canine Companions for Independence. “Helping dogs,” as distinguished from guide dogs for the blind or visually impaired, are trained to perform hundreds of daily functions for their disabled masters, most of whom have impaired mobility. Buchanan needs to train such dogs to become acclimated to a host of environments and to refrain from contact with humans unless directed to do so. The school refused to permit Buchanan to bring the dog into her classroom, asserting that the presence of the dog would be a distraction to instruction, frighten children afraid of dogs, or present a health risk to children allergic to dogs. The school acknowledged that it would permit the dog if Buchanan required a helping dog, and further acknowledged that state law precluded the school from refusing admittance to a person training a helping dog. But the state law was meant for non-employees of the school, the school asserted. The court, in upholding the trial court’s injunction against the school, noted that the school district did not attempt to negotiate a reasonable compromise with Buchanan; there were many other animals in other classrooms; there were no known children allergic to or afraid of dogs; another Nevada school district permits teachers who are volunteer trainers to bring training dogs into their classrooms; and the injunction requires the teacher to adhere to reasonable

restrictions imposed by the school district to prevent health problems. The Nevada law makes it unlawful for a “place of public accommodation” to refuse admittance or service to a person who requires “a guide dog, hearing dog or other service animal. . .” A public school is defined as a “place of public accommodation.” Two separate dissenting opinions believe the majority have expanded the meaning of “admittance or service” and also believe the statute was not meant to apply to employees of the “public accommodation” who are volunteer trainers.<sup>5</sup>

### COURT JESTERS: OMISSIS JOCIS

The bane of the American Bar and Bench is the “lawyer joke,” a seemingly never-ending series of stories which portray lawyers as greedy, crafty, calculating, self-serving, predatory—but feared—members of society. Of course, no one tells a “lawyer joke” better than a lawyer, but no one can make a “lawyer joke” hurt as much a judge can. Such was the situation in Copeland v. Marshall, 641 F.2d. 880 (D.C. Cir. 1980), where two dissenting judges felt that the majority opinion in a gender discrimination case against the Department of Labor was over-generous in awarding attorney fees to plaintiffs’ counsel. Decrying the exorbitant attorney fees as damaging to the Bar and the Bench, the dissent, at 929-30, added the following in footnote 53:

This [case] reflects an unfortunate popular perception of how lawyer’s fees are arrived at, illustrated by this current example of humor: An immediately deceased lawyer arrived at the Pearly Gates to seek admittance from St. Peter. The Keeper of the Keys was surprisingly warm in his welcome: “We are so glad to see you, Mr. \_\_\_\_\_. We are particularly happy to have you here, not only because we get so few lawyers up here, but because you lived to the wonderful age of 165.” Mr. \_\_\_\_\_ was a bit doubtful and hesitant. “Now St. Peter, if there’s one place I don’t want to get into under false pretenses, it’s Heaven. I really died at age 78.” St. Peter looked perplexed, frowned and consulted the scroll in his hand. “Ah, I see where we made our mistake as to your age. We just added up your time sheets!”

Perhaps this is just an example of what the late U.S. Supreme Court Associate Justice William O. Douglas observed: “The right to dissent is the only thing that makes life tolerable for a judge of

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<sup>5</sup>The majority in the Buchanan case did not resist the temptation to employ a number of “dog” allusions in their written opinion. The opinion begins with “Every dog must have its day, and this is the day for every dog trained to help our handicapped citizens.” The court then refers to how the school district “howled its disapproval” at Buchanan’s training exercise, but the trial court, in “an attempt to teach an old dog new tricks,” enjoined the school. Nonetheless, the school maintain “dogged efforts” to appeal, but the appeal “barks up the wrong tree.” The court’s decision is intended to end a “judicial dog fight.” At 718.

the Appellate Court.” (*America Challenged*, 1960)<sup>6</sup>

### QUOTABLE...

Although Associate Justice Robert H. Jackson was quoted in **QR** July-Sep't:96, his remarks below in a concurring opinion are as relevant today as in 1948. Nowhere is there more uncertainty than the permissible role of religion in public schools. Judicial opinions are increasingly vitriolic and factious; legislators are waging wars with opposing bills. It is small wonder that school administrators are unsure as to what to do while taking cover from the continual and increasing barrage of constitutional mortar fire from all quarters.

I think it remains to be demonstrated whether it is possible, even if desirable...to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than in forthright sermon. Even such a “science” as biology raises the issue between evolution and creation as an explanation of our presence on this planet. Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religions have played in the tragic story of mankind.

Robert H. Jackson, Illinois ex rel. McCollum v. Board of education of Sch. Dist. No. 71, 333 U.S. 203, 235-36 (1948), concurring with the majority that the school district’s “release time” for students to attend religious classes in the public school violated the First Amendment’s Establishment Clause.

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<sup>6</sup>The dissent began their lengthy dissertation with “In our colleagues’ ‘lodestar’ opinion, the path of attorney’s fees in Title VII litigation is easy to discern. It is Up, Up, and Away! It is *Per Calculos Ad Astra*. (Not to be confused with the motto of the Royal Canadian Air Force, *Per Ardua Ad Astra*.)” 641 F.2d at 908, note 1. Incidentally, “omissis jocis” is from Pliny the Younger and means “joking aside.” Everything in law sounds so much more impressive when written in Latin. But it should always be remembered: Non est jocus esse malignum.



## UPDATES

### Textbook Fees

The 1997 Indiana General Assembly is again attempting to address the issue of textbook fees (see **QR** April-June: 96). There appears to be a general sentiment to provide parents and schools some relief through increased state support for these fees. It has been difficult to obtain reliable data regarding the practices of other states because of the varying and various definitions of “textbooks” and financing schemes. As noted in the previous article, other states are embroiled in court challenges and legislative actions.

1. State ex rel. Massie v. Bd. of Education of Gahanna-Jefferson Public Schools, 669 N.E.2d 839 (Ohio 1996) is the most recent published decision on this issue. Following defeat of an operating levy, the school district imposed a student “instructional fee” to offset a projected deficit. This “instructional fee” was as follows: Kindergarten (\$20/student), Grades 1-5 (\$35/student), Grades 6-8 (\$40/student), and Grades 9-12 (\$45/student). The fee is assessed up to a maximum of three children per family, and can be waived where there is serious financial need. This fee is in addition to other class-specific fees at the high school. The “instructional fees” are used to purchase materials used in courses of instruction (workbooks, notebooks, maps, pencils, etc.) and are not used to purchase textbooks. Ohio statute requires each school district to “provide for the free education of the youth of school age within the district under its jurisdiction...” However, another statute indicates that a school district is “not required to furnish, free of charge, to the pupils attending the public schools any materials used in a course of instruction with the exception of the necessary textbooks required to be furnished without charge...” Massie refused to pay the “instructional fees” for his three children attending school, although he did pay the \$65 class-specific charge for one child’s art class. The school withheld grades and credits for the three children until the fees were paid.<sup>7</sup> The Ohio Supreme Court noted that free public education is the general rule in Ohio and that there are exceptions permitted by statute, but these exceptions will be strictly construed. In this case, the court upheld the “instructional fees,” finding that the fees were used to purchase materials used in instruction and not to purchase administrative materials or textbooks. The court declined on procedural grounds to rule on the constitutionality of the school’s withholding of grades and credits for a parent’s failure to pay instructional fees.

### Metal Detectors and the Fourth Amendment

In **QR** July-Sep’t: 96, the emerging judicial status of the use of hand-held metal detectors and magnetometers indicated that such practices are generally satisfying Fourth Amendment scrutiny

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<sup>7</sup>Indiana does not permit a public school to withhold grades or credits for nonpayment of required fees. I.C. 20-8.1-9-10. See also Gohn v. Akron Sch. Dist., 562 N.E.2d 1291 (Ind. App. 1990).

for public schools where a district can demonstrate the existence of a genuine concern (guns and other weapons) and that the use of metal detectors is a reasonable response to this genuine concern. Two additional cases have since been reported, both upholding the school's use of metal detectors.

1. Thompson v. Carthage School Dist., 87 F.3d 979 (8th Cir. 1996). Following complaints from a school bus driver that there were fresh cuts on the seats, the principal began a search of all male students in grades 6-12 in the small Arkansas district. After the search began, students alerted the principal that there may also be a gun at school. Students were then checked for weapons with a metal detector. If the metal detector sounded, the student was patted down by the science teacher (the principal is female). Students' coats were also patted. During this process, Ramone Lea was found to be in possession of crack cocaine. This was turned over to a deputy sheriff and Lea was expelled. The 8th Circuit found that the student received adequate due process and refused to extend the "exclusionary rule" to school-based searches even, where here, there was no particularized, individual suspicion that Lea possessed drugs. The "exclusionary rule" is a judicial creation which precludes the admission of unlawfully seized evidence in criminal trials. The metal detector and pat-down search was justified at its inception, was reasonable in its scope, and was reasonably related to the circumstances justifying the search. In addition, to apply the exclusionary rule to a non-criminal proceeding (administrative due process) would frustrate the critical governmental function of educating and protecting children.
2. Florida v. J.A., 679 So.2d 316 (Fla. App. 1996). The Dade County School Board, in response to the "growing presence of firearms and other weapons in the public schools," instituted a policy with guidelines authorizing random searches of students in high school classrooms "with hand-held metal detector wands." An independent security firm was hired to conduct the searches, although search teams were always to be accompanied by a school administrator. Signs posted in the schools warned students that such random searches would occur. If a search revealed a school policy violation, the student could suffer disciplinary action. However, if contraband were discovered, the school notified police officers. (Police officers were never present during such searches.) The student could be arrested. J.A.'s jacket was found to have a gun inside, which was located during one of these searches. J.A. admitted he owned the jacket, but denied knowledge of the gun (he was not wearing the jacket at the time of the search). The State filed a delinquency petition, but J.A. successfully suppressed the evidence regarding the firearm, asserting the search was unlawful, not based upon probable cause, and unconstitutional. In reversing the trial court, the Florida Court of Appeal acknowledged that students have some expectation of privacy in school but this is less than the privacy interests in the population generally. The board's policy and guidelines were reasonable, related to a genuine concern, and resulted in minimal intrusion into the students' privacy rights. The searches were justified to ensure the safety of students and school personnel. As a consequence, the appellate court quashed the order excluding the evidence and remanded the matter to the trial court.

## Exit Examinations

In **QR** Jan.-Mar.: 96 there was a survey of case law from other jurisdictions involving issues surrounding graduation or exit examinations. Indiana will administer a graduation examination in the autumn of this year to 10th grade students. The State Board of Education is preparing a regulation to implement the appeal procedure required by I.C. 20-10.1-16-13. The graduation examination is a part of the Indiana Statewide Testing for Education Progress (ISTEP) program. All public schools are required to participate in the ISTEP program as a part of the accreditation process. Nonpublic schools seeking accreditation under Performance-Based Accreditation (PBA) likewise must participate in ISTEP. See I.C. 20-10.1-16-9. While the issue of nonpublic school participation in Indiana has not been a significant concern, it is in other states, for differing reasons.

1. Ohio Association of Independent Schools (OAIS) v. Goff, 92 F.3d. 419 (6th Cir. 1996). As reported in **QR** Jan.-Mar.: 96, Ohio utilizes its Ninth Grade Proficiency Test (NGPT) as a graduation examination which a student must pass by the end of the twelfth grade in order to receive a diploma. The NGPT covers five areas (reading, writing, mathematics, science, and citizenship) and is drawn from material already required to be taught by Ohio's minimum standards. The administration of the NGPT requires several hours a day over a five-day period. The State pays the schools fifty dollars (\$50.00) per students to administer the tests. During the five-year period (1987-1992) when the NGPT was developed, the Ohio State Board of Education solicited input from both public and private school educators. Many private school educators declined to participate in the development because they believed the testing would be optional for private schools. In 1993, the Ohio legislature passed laws requiring private schools to participate in the NGPT or lose their charters. The OAIS, an association of 28 private schools in Ohio, and others challenged the NGPT requirement as violative of a parent's Fourteenth Amendment right to direct, by choice of school, the education of his or her child. The court disagreed, finding that the NGPT places minimal limitations on the ability of private schools to operate independently and does not encroach upon their discretion to design their own curricula. The court found no merit to the OAIS contention that its membership's First Amendment rights to freedom of speech and association were violated. OAIS members did not have to alter their curricula, and they were not restricted from teaching any particular material or subjects or directed to teach any material in any particular manner. The NGPT assesses certain basic proficiencies and is designed to ensure that students from both public and private schools meet certain basic standards.

2. Rankins v. Louisiana State Board of Elementary and Secondary Education, 637 So.2d. 548 (La. App. 1994), writ. den., 635 So.2d. 250 (La. 1994), cert. den. 115 S. Ct. 195 (1995). This case was reported in **QR** Jan.-Mar.: 96. A part of this case involved an allegation by public school students they were being denied equal protection because the two-part exit examination is required only of public school students who wish to receive a diploma. Students in private, parochial or home schools--as well as those who earn a G.E.D.--do not have to take the examination. The court found that a State could establish reasonable conditions for the receipt of a diploma, and the decision not to require nonpublic school students does not deny equal

protection to public school students.

### **Title I And Parochial Schools**

In **QR** April-June: 95, I reported on two circuit court opinions analyzing and approving alternative service delivery models devised for providing Title I remedial services to economically and educationally disadvantaged students enrolled in parochial schools. The U.S. Supreme Court found that on-grounds programs involved excessive entanglement. Aguilar v. Felton, 473 U.S. 402, 105 S.Ct. 3232 (1985). As a consequence, in order to provide comparable services in an equitable manner to qualified students enrolled in parochial schools, federal and state laws and guidelines encouraged alternative methods for providing this assistance, including dual enrollment, educational radio and television, computer equipment and materials, and mobile educational services and equipment. New York City, in accordance with the revised federal and state guidelines and laws prohibiting in-school instruction by public school teachers but authorizing off-premises mobile instructional units and computer instruction, began to offer Title I Services through a variety of means. In Committee for Public Education and Religious Liberty v. Secretary , U.S. Department of Education, 942 F.Supp. 842 (E.D. N.Y. 1996), plaintiffs challenged these alternative methods as continuing to violate the Establishment Clause. The court disagreed, finding that school officials were not creating a “symbolic link” between church and state such that the excessive entanglement found in Aguilar continues, nor did the government’s ownership of the mobile instructional units and computers create the appearance of state support for religion. The court also noted at 851, note 6, that “[t]he life expectancy of *Aguilar* itself is, to put it mildly, subject to question.” Five present Supreme Court justices have publicly indicated that Aguilar may have been erroneous. (**Note:** The U.S. Supreme Court has agreed to reconsider its decision in Aguilar v. Felton.)

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Date

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Kevin C. McDowell, General Counsel  
Indiana Department of Education

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Textbook Fees	(A-J: 96, O-D: 96)
Time-Out Rooms	(O-D: 96)
Title I and Parochial Schools	(A-J: 95, O-D: 96)
Triennial Evaluations	(J-S: 96)
Valedictorian	(J-M: 96)