

QUARTERLY REPORT

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The **Quarterly Report** provides information to the Indiana State Board of Education on recent judicial, legislative, 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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FREEDOM OF SPEECH: TEACHERS

(Article by Dana L. Long, Legal Counsel)

“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” (Emphasis added)¹

The above quotation is familiar to many and frequently cited by the courts in cases concerned with First Amendment issues in the school setting. And, as fundamental as First Amendment rights may seem in our society, this has not always been the opinion that was typically applied to public employees, including teachers. As the Supreme Court noted in Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684 (1983),

[F]or most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment--including those which restricted the exercise of constitutional rights. The classic formulation of this position was that of Justice Holmes, who, when sitting on the Supreme Judicial Court of Massachusetts, observed: “[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).

Id. at 1688. Justice Holmes’ opinion expressed the Supreme Court’s law for a number of years. In the 1950’s and 1960’s the Court’s position began to change with a series of cases addressing loyalty oaths and restrictions on employee affiliations.²

In addressing the First Amendment rights of teachers, the courts rely heavily upon two Supreme Court decisions. In the first of these, a teacher was dismissed for writing a letter to the editors of a local newspaper in connection with a recently proposed tax increase. The teacher’s letter, written and published after the taxpayers voted against the increase, was critical of the way in which the school board and superintendent had handled past proposals to raise money. The school board determined that the letter was “detrimental to the efficient operation and

¹Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 736 (1969).

²See, for example: Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215 (1952) (the Court held a state could not require its employees to establish their loyalty by extracting an oath denying past affiliation with Communists); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247 (1960) (the Court invalidated New York statutes barring employment on the basis of membership in subversive organizations); and Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675 (1967) (the Court struck down an Arkansas statute that required a teacher, as a condition of employment, to file annually an affidavit listing, without limitation, every organization to which he had belonged or regularly contributed during the past five years). Also see “Loyalty Oaths,” **Quarterly Report** Jan.-Mar.: 96.

administration of the schools of the district.” Pickering v. Board of Education of Township High School District 205, Will County, Illinois, 391 U.S. 563, 88 S. Ct. 1731, 1733 (1968). The Illinois Circuit and Supreme Courts both upheld the dismissal of the teacher, determining that the interests of the school overruled the teacher’s First Amendment rights. In reversing, the U.S. Supreme Court recognized that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulating the speech of the general public. The problem as found by the Court is in balancing the interests of the teacher, as a citizen, in commenting upon matters of public concern versus the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Id. at 1734-1735. The Court rejected the school board’s position that “comments on matters of public concern, that are substantially correct, may furnish grounds for dismissal if they are sufficiently critical in tone.” Id. at 1736. Further, the interests of the school in limiting a teacher’s opportunity to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the public. The Court held that “absent proof of false statements knowingly or recklessly made by him, a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.” Id. at 1738.

A decade later, the Supreme Court had an opportunity to expand and clarify the holding of Pickering. In Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977), a nontenured teacher brought an action for reinstatement, claiming that the district’s refusal to rehire him violated his constitutional rights. The teacher had released to a local radio station the contents of a memorandum relating to teacher dress and appearance which had apparently been prompted by the view that there was a relationship between teacher appearance and the public’s support for bond issues. The school district contended that its decision was based on a series of incidents, including: Doyle’s argument with another teacher, who slapped Doyle; Doyle’s refusal to accept the other teacher’s apology and insisting that teacher be punished (both were given a one-day suspension, which was lifted when a number of teachers walked out in protest); Doyle’s argument with cafeteria employees concerning the amount of spaghetti served to him; Doyle’s referring to students as “sons of bitches” in connection with a disciplinary complaint; and Doyle’s making obscene gestures to two girls in the cafeteria when they refused to obey his commands. The district court, applying the balancing test set forth in Pickering, concluded that the communication with the radio station was a valid exercise of Doyle’s First Amendment rights. Because it played a substantial role in the decision not to renew his contract, the decision could not stand even in the face of permissible grounds.

The Supreme Court disagreed, stating:

A rule of causation which focuses solely on whether protected conduct played a part, “substantial” or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. . . . The constitutional principle is vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.

A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected speech. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

Id. at 575. The initial burden of proof was on Doyle to show that his conduct was constitutionally protected and was a “substantial factor” or “motivating factor” in the decision not to rehire him. The Supreme Court found that Doyle met this initial burden. However, the court below erred in not going on to determine whether the school had shown, by a preponderance of the evidence, that it would have reached the same decision in the absence of the protected conduct. Id. at 576.

Criticism

In Wytrwal v. Mowles, 886 F.Supp. 128 (D.Me. 1995), aff’d 70 F.3d 165 (1st Cir. 1995) a special education teacher claimed her contract was not renewed because, at an executive session of the school board, she criticized the special education department and suggested that the school was violating special education laws. Following the Mt. Healthy analysis, the district court determined that while the protected speech was a factor in the decision not to renew her contract, there were significant reasons wholly apart from the school board presentation which led the school administrators to conclude her contract should not be renewed.

The Seventh Circuit Court of Appeals, in Dishnow v. School District of Rib Lake, 77 F.3d 194 (7th Cir. 1996), addressed the First Amendment violation claims of a high school guidance counselor who claimed he had been fired for writing articles which the school board considered scandalous or disreputable, for writing a letter to the editors of the newspaper, and because he had tipped off the local media to a violation by the school board of the state’s open meeting laws. The school claimed he was not fired because of any of these but because he had committed fourteen acts of insubordination or unprofessional conduct. The jury considered the fourteen-count indictment pretextual.³ On appeal, the school district argued that the counselor’s activities were not even prima facie protected by the First Amendment. The Court chided the school for its lack of understanding of this fundamental point about American civil liberties. Citing to Connick, supra, and Mt. Healthy, supra, the court set forth the three-step analysis of a public employee’s First Amendment claim: (1) Decide whether the speech, were it uttered by someone who was not a public employee, would be protected. If not, the case is at as an end. (2) If yes, decide whether the speech falls within the category of personal grievances that are not worthy of

³The court noted the jury had every right to consider the school’s proffered reasons a pretext. One count of insubordination, the use of the copying machine between 8:05 a.m. and 8:40 a.m., the court found to be particularly transparent, as no one else had ever been disciplined, let alone fired, for this “peculiarly venial sin.” Id. at 196.

judicial intervention. If so, the case is at as an end. (3) If not, decide whether the public employer had a convincing reason to forbid the speech. If so, the protection is withdrawn. Dishnow, at 197. In this case, because the school failed to understand the right, it never asked the district judge to proceed to the third step to balance the interests, thereby waiving their defense.

In Westbrook v. Teton County School District, 918 F.Supp. 1475 (D.Wyo. 1996), the district court used the Pickering analysis to determine that a school district's policy prohibiting criticism from staff members—other than to the person being criticized, the principal, the superintendent or at a school board meeting—to be unconstitutional because it was overly broad and too vague. As written, the policy would prohibit speech which numerous courts had already determined was protected. Further, because “criticism” was not narrowly defined for purposes of the policy, and Webster's dictionary definition includes activity the school admittedly does not seek to prohibit, the policy fails to provide employees with fair warning as to what can and cannot be said. The court found that “the First Amendment does not tolerate this in terrorem effect; therefore, the policy must fall.” Id. at 1491.

Political Activity

In Castle v. Colonial School District, 933 F.Supp. 458 (E.D.Pa. 1996), teachers sought a declaration that a school district policy which prohibited school employees from engaging in political activities on district property at any time violated their First Amendment rights when invoked to prevent off-duty employees from soliciting votes at official polling places which happen to be on school property. The school district argued that the speech at issue does not involve a matter of public concern⁴ because it is motivated by self-interest and that governmental interests in diminishing disruption in the educational process, protecting voters from undue influence, and avoiding the appearance of an official endorsement of particular candidates justified the policy. The court noted that government must do more than articulate an interest; it must show the impact on the actual operation of the school. No evidence supported the school's assertions.

⁴The court cited to a number of cases to show that political speech is central to the First Amendment protections. See, for example Burson v. Freeman, 504 U.S. 191, 112 S.Ct. 1846 (1992) (advocacy of candidates at polling places is quintessential speech protected by First Amendment); Buckley v. Valeo, 424 U.S. 1, 13, 96 S.Ct. 612, 632 (1976) (the First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office”); and Williams v. Rhodes, 393 U.S. 23, 30, 89 S.Ct. 5, 10 (1968) (“no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”)

Finally, the court addressed the school's attempts to silence the voices of opposition,⁵ finding uncontroverted testimony that board members were annoyed about teachers supporting rival candidates. One board member found it "objectionable" that employees could affect a change in their employer through the political process. "A desire to silence voices of opposition is not consistent with the reasons proffered for the Policy and is not a governmental interest which justifies regulation of First Amendment activity. The very essence of free political speech is the right to criticize an existing regime and voice support for alternatives." *Id.* at 464.

Another case addressing the political activities of teachers involved a challenge to a school policy which prohibited employees from wearing political buttons at work sites during work hours. Finding that school children were impressionable, attendance was involuntary, and that administrators and teachers act with the imprimatur of the state which compels student attendance, the California Court of Appeals determined that wearing a political button is the type of advocacy a school may restrict in instructional settings. California Teachers Association v. Governing Board of San Diego Unified School District, 53 Cal.Rptr.2d 474 (Cal.App. 4 Dist. 1996).

Classroom Activity

In Boring v. The Buncombe County Board of Education, 98 F.3d 1474 (4th Cir. 1996) a high school drama teacher brought an action against the board of education alleging she was transferred to another school in violation of her First Amendment rights. She chose "Independence" as a play for four student actresses in her advanced acting class, a play which as described by the teacher "powerfully depicts the dynamics within a dysfunctional, single-parent family--a divorced mother and three daughters; one a lesbian, another pregnant with an illegitimate child." After selecting the play, she notified the principal, as she did every year, of her choice. The principal did not comment or react to the choice of the play. The teacher also sent the script home with the students to discuss with their parents. None of the parents complained. In regional competition, the students' performance of "Independence" received 17 out of 21 possible awards. Before performing at the state level, a scene from the play was performed for another English class at the school. A parent of one of the English students complained, and the principal informed the drama teacher the play could not be performed in the state competition. After the parents of the drama students pleaded for reconsideration, the school allowed the play to be entered in the state competition with certain scenes deleted. "Independence" was awarded second place. After that, the drama teacher was informed she would be transferred to a middle school where she would teach introductory drama. All of her performance evaluations rated her as "superior" and "well above average."

⁵The court also noted that the challenged policy did not restrict school board members from communicating with voters at polling locations on school property, nor did it prohibit school employees from communicating with voters at polling locations not on school property (23 out of 27 polling places).

First, the Circuit Court of Appeals determined that the district court erred in determining that the play selection was not protectable “expression” and dismissing her complaint on this ground. In the alternative, the district court had concluded that even if the selection of the play were protected activity, it did not merit protection because the school could restrict the speech if the restriction were “reasonably related to legitimate pedagogical concerns.” Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 273, 108 S.Ct 562, 571 (1988). Since the district court had dismissed the case, however, there was no evidence to establish the school’s “legitimate pedagogical concerns” and no way for the court to apply the Pickering balance. While recognizing the right of school administrators and school boards to establish curricula, the Circuit Court also noted:

But there remains a limited area in which a teacher’s in-class speech, even in secondary schools, retains protection. In fulfilling her function of expressing ideas to students (all day, every day), a high school teacher almost inevitably will mention some topics, and choose some teaching materials that will be perceived as controversial; as noted earlier, even the classics present some controversial themes. Cognizant of the difficulty a teacher faces in selecting course material and subjects devoid of potentially controversial material, several courts have emphasized the importance of prior notice to the teacher before her speech may subject her to discipline. *See* Ward v. [Hickey], 996 F.2d at 453 [(1st Cir. 1993)] (“Even if a school may prohibit a teacher’s statements before she makes them, . . . it is not entitled to retaliate against speech that it never prohibited”).

Boring, at 1483.

Another case addressing speech in the classroom involved a nontenured speech and language pathologist who was not rehired because of a brief discussion of vulgar words in a class session. Hosford v. School Committee of Sandwich, 659 N.E.2d 1178 (Mass. 1996). In one session involving three thirteen-year-old boys with whom she had worked for one and one-half years, the subject under discussion was words with multiple meanings. One disruptive boy was often muttering “the ‘f’ word” and did so again on this occasion by mentioning “the ‘f’ word and the words we do not use in class” as examples of words with multiple meanings. Rather than ignoring him as usual, the teacher confronted the issue and had a brief discussion (no more than ten minutes) on the meaning of these words. She admonished them not to use these words at school or at home, and that if they had questions, to ask an adult or use the unabridged dictionary. The Supreme Judicial Court of Massachusetts found that the teacher’s actions were not improper and the school’s actions in not renewing her contract violated her free speech rights. The Court noted that the school had no policy which banned any articulation of such words and the teacher did not tolerate the use of vulgarities. The Court was also swayed by the special needs discipline guidelines which called upon resource teachers to be flexible and creative in addressing the individual needs of students.

DISTRIBUTION OF RELIGIOUS MATERIALS IN ELEMENTARY SCHOOLS

While it is legally axiomatic that secondary school students do not shed their right to free speech at the schoolhouse door, Tinker v. Des Moines Independent Community Sch. Dist., 393 U.S. 503, 89 S.Ct. 733 (1969), such students do not enjoy the same rights as adults in other settings. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 106 S.Ct. 3159 (1986). The special characteristics of the classroom can result in limitations of the First Amendment in order to maintain discipline, but content-based prior restriction on student speech must show that the restricted speech would materially and substantially interfere with school operations or with the rights of other students. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562 (1988). However, even though secondary school students may not enjoy the same free speech rights as adults, elementary school students do not enjoy the same rights as secondary students. See Baxter v. Vigo County Sch. Corp., 26 F.3d 728 (7th Cir. 1994) and “Dress Codes” in **Quarterly Report** June-Sept.: 95, Oct.-Dec.: 95, and June-Sept.: 96.

The balancing of free speech rights of elementary school students to distribute religious tracts with the school’s need to maintain order and discipline has become a major legal issue in the Seventh Circuit Court of Appeals, which includes Indiana, Illinois, and Wisconsin.

1. Harless v. Darr, 937 F.Supp. 1339 (S.D. Ind. 1996), 937 F.Supp. 1351 (S.D. Ind. 1996) involved a first-grade student who attempted to distribute certain religious tracts to his classmates in an Indiana public elementary school. His teacher advised him not to do so. He put the tracts back in his school bag; but two weeks later, he again attempted to distribute religious literature to his classmates. The principal advised the student that there were better ways to evangelize than passing out tracts at school. The lawsuit followed. The student attempted to pass out more tracts on the school bus. The principal again advised him not to do so. At no time was the student disciplined or otherwise sanctioned for this activity. Thereafter the school district adopted a policy regarding the distribution of literature in school. Any student wishing to distribute more than ten (10) copies of written materials on school grounds must, at least forty-eight (48) hours prior to any distribution, notify the principal and provide a copy of the material to the superintendent for review. The student claimed the policy violated his constitutional rights of free speech and free exercise of religion as well as the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* The court disagreed, finding for the school. The following are pertinent findings:
 - * A school may ban outright certain categories of speech, including obscene, indecent, commercial, and libelous speech. At 1345.
 - * The school’s policy has not prohibited the student from distributing his tracts, nor has the policy significantly curtailed the student’s belief in evangelism. At 1347.

- * A student does not have an unfettered right to distribute literature on school grounds. Id.
- * Although the policy permits the superintendent to review the literature, it does not authorize suppression of all speech in advance of expression or empower the superintendent to forbid a particular distribution for content-related reasons. At 1353.

The court noted that the policy does not require the permission of the superintendent before distribution. The restrictions as to time, place, and manner of distribution are reasonably related to the school's function. The student has been able to distribute his literature at school after complying with the policy. At 1354.

2. Hedges v. Wauconda Community Unit Sch. Dist. No. 118, 9 F.3d 1295 (7th Cir. 1993) is the seminal case in this circuit. The Harless court relied heavily upon Hedges, even though the students involved were junior high school students in Illinois. The policy in question in Hedges required students who wished to distribute literature, including religious literature, to do so from a table near the main entrance of the school within certain specified times. This policy applied to the distribution of more than ten (10) copies, and the principal had to be notified twenty-four (24) hours in advance. Notwithstanding the restrictions, the 7th Circuit found that “[p]ermitting individual students to pass out literature with religious themes, at times and places they could pass out literature with political or artistic themes, does not entail a similar preference. It is instead neutrality toward religion.” At 1299. The following are pertinent findings:

- * “School districts seeking an easy way out try to suppress private speech. Then they need not cope with the misconception that whatever speech the school permits, it espouses. Dealing with misunderstanding—here, educating the students in the meaning of the Constitution and the distinction between private speech and public endorsement—is, however, what schools are for.” At 1299.
- * “A central location for distribution may help the school dissociate itself from the students’ expression, because the table will be used to disseminate opposing points of view and may bear a sign reminding recipients that the school does not endorse what the students hand out.” At 1300.
- * “Limiting distribution to a designated place is not an inappropriate rule, given the nature of the school and the principal’s lawful control over the pupils’ behavior within.” At 1301.

* A public school is a nonpublic forum and may forbid or regulate many kinds of speech, so long as such decisions are not arbitrary or whimsical. At 1302.

3. Muller v. Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir. 1996) involved a fourth grade student in Wisconsin who wanted to hand out invitations to classmates to attend a religious meeting at the student's church. The 7th Circuit revisited Hedges and applied it to an elementary school, although this case is somewhat confused by the curious, inexplicable, evasive behavior of the school's principal. Notwithstanding the principal's unusual behavior, the school did have a policy, which bore some similarities to Hedges and Harless by establishing reasonable conditions on the time, place, and manner of distribution of materials and by advising that certain materials could not be distributed (materials which (1) are libelous or obscene; (2) may incite others to illegal acts; (3) are insulting to any group or individuals; or (4) if distributed, would greatly disrupt or materially interfere with the school's function). However, the policy also required that each publication contain the following disclaimer: "The opinions expressed are not necessarily those of the school district or its personnel." At 1534, n. 2. There is a formal complaint process to challenge any principal's decision with respect to implementing this policy. The school district also had a policy which required students to obtain the written permission of the school principal or superintendent before distributing materials from outside the school or displaying materials on designated bulletin boards. Id., at n. 3. In finding that the school had not violated the student's First Amendment free speech and free exercise of religion rights, the court found:

* Elementary school students do not have the free expression rights of high school students. At 1538, citing Baxter v. Vigo County Sch. Corp., 26 F.3d 728 (7th Cir. 1994), which involved dress code violations in an elementary school. "Age is a critical factor in student speech cases...Grammar schools are more about learning, including learning to sit still and be polite, than about robust debate." Id.

* A public elementary school is not a public forum. While racist and other hurtful views can be expressed in a public forum, "...an elementary school under its custodial responsibilities may restrict such speech that could crush a child's sense of self-worth." At 1540.

* "Prior restraint of student speech in a nonpublic forum is constitutional if reasonable.... Prior restraint in the public school context, and especially where elementary schools are concerned, can be an important tool in preserving a proper educational environment." Id.

* Although a public elementary school is a nonpublic forum and, as such, only unreasonable restrictions are forbidden, school authorities are

accorded wide discretion in establishing reasonable prescreening measures. Courts should not impose rigid deadlines or intricate procedures or other artificial time limits as these may result in the distribution of obscene or otherwise harmful materials. “The reasonableness of a delay in prescreening a proposed handout must be determined in a highly specific factual inquiry, not in the abstract.” At 1541.

- * “Schools...are free to screen student handouts for material that is insulting or lewd or otherwise inconsistent with legitimate pedagogical concerns.” At 1542.

Although the court found that the posting of a sign clarifying the school’s policy, as in Hedges, would be a reasonable alternative to the disclaimer requirement (at 1544), the court nevertheless found no constitutional infirmity by requiring the disclaimer.

4. Johnston-Loehner v. O’Brien, 837 F.Supp. 388 (M.D. Fla. 1993), 859 F.Supp. 575 (M.D. Fla. 1994) involved a fifth grade student who wished to pass out two religious tracts: “Strange Facts About You, God, and Your Mother” and an invitation to a “Harvest Party” at her church as an alternative to Halloween (see “Halloween,” **Quarterly Report** July-Sept.: 1996). The hand-outs are reprinted at 837 F.Supp. at 393-95. The school’s policy on the distribution of literature imposed reasonable restrictions on the time, place, and manner of distributing religious and secular materials. However, the school’s policy left the decision to distribute any material within the discretion of the superintendent. However, testimony revealed that school officials used the school policy to screen out and prohibit materials with a religious content, thus engaging in impermissible content-based prior restraint on student speech. 859 F.Supp. at 579. The school’s attempt to avoid Establishment Clause problems actually created one. “[T]he Establishment Clause forbids government to inhibit as well as to advance religion. A ban on all student religious speech clearly inhibits religion.” 859 F.Supp. at 580. The court also expressed concern that there were no guidelines or procedural safeguards which would limit an official’s authority to grant or withhold approval. Id.

HABITUAL TRUANCY AND ACTIONS TO COMBAT IT (Article by Valerie Hall, Legal Counsel)

This article reviews Indiana statutory and case law, cases from other jurisdictions, and federal initiatives regarding habitual truancy and actions to combat it. “Habitual truancy” has been defined as the willful, unexcused refusal of a pupil to attend school in defiance of parental authority and in violation of a compulsory school attendance law. Simmons v. State, 371 N.E.2d 1316, 1322 (Ind. App. 1978). Simmons is Indiana’s defining case in this area, although the court

was addressing habitual truancy as part of an adjudication of delinquency under former law.

1. Indiana Statutory Law

Indiana's Compulsory School Attendance Act now addresses habitual truants. I.C. 20-8.1-3-17.2 reads in relevant part as follows:

(a) Each governing body shall establish and include as part of the written copy of its discipline rules described in I.C.20-8.1-5.1-7:

- (1) a definition of a student who is designated as a habitual truant;
- (2) the procedures under which subsection (b) will be administered [regarding issuance of a driver's license or learner's permit]; and
- (3) all other pertinent matters related to this action.

* * *

(g) The department of education shall develop guidelines concerning criteria used in defining a habitual truant that may be considered by a governing body in complying with subsection (a).

According to I.C. 20-8.1-3-17.2(a), each Indiana school corporation must establish a local definition of habitual truancy. Thus, the definition of "habitual truancy" can vary from one school corporation to another school corporation. The Indiana Department of Education (IDOE) is also required by I.C. 20-8.1-3-17.2(g) to establish guidelines concerning criteria used in defining "habitual truant." The IDOE established these guidelines through a memorandum of August 9, 1996, to public school superintendents. According to these guidelines, "habitual truancy" may be evidenced by the following:

1. Refusal to attend school in defiance of parental authority.
2. Accumulation of a number of absences from school without justification over a period of time, such as a grading period. "Habitual truancy" is not evidenced by a single, isolated incident of unexcused absence.
3. Three (3) or more judicial findings of truancy.

Guideline No. 1. relies on the Simmons case, whereas guideline No. 3. is a higher standard than Simmons. The IDOE guidelines provide a degree of flexibility in defining "habitual truancy," particularly because such a determination can result in the restriction of one's driving privileges. The definitions established by the local school corporations are not required to follow the IDOE guidelines, so there is no unanimity in defining a "habitual truant." This poses legal problems

because the term remains vague and ambiguous, but sanctions can be imposed based upon such a determination.

According to I.C. 20-8.1-3-17.2(b), a habitual truant may not be issued an operator's license or a learner's permit to drive a motor vehicle or motorcycle until the person is at least eighteen (18) years of age. I.C. 20-8.1-3-17.2(b) reads as follows:

(b) Notwithstanding I.C. 9-24 concerning the minimum requirements for qualifying for the issuance of an operator's license or learner's permit, and subject to subsections (c) through (e), a person who is:

(1) at least thirteen (13) years of age but less than fifteen (15) years of age;

(2) a habitual truant under the definition of habitual truant established under subsection (a); and

(3) identified in a list submitted to the bureau of motor vehicles under subsection (f);

may not be issued an operator's license or a learner's permit to drive a motor vehicle or motorcycle under I.C. 9-24 until the person is at least eighteen (18) years of age.

* * *

(f) Before February 1 and before October 1 of each year, the governing body of the school corporation shall submit to the bureau of motor vehicles the pertinent information concerning a person's ineligibility under subsection (b) to be issued the license or permit.

The Indiana Bureau of Motor Vehicles (BMV) receives information from a school regarding a student on an invalidation form required by the BMV. When the BMV receives this information, a record is created if the student does not already have a record on file with the BMV. If a student already has a record on file, the BMV adds the school invalidation to that record, then the BMV does whatever the school instructs them to do, such as invalidate the person's license or permit for one hundred twenty (120) days or the end of a semester or until the student becomes eighteen (18) years of age. The license invalidation procedures are codified at I.C. 9-24-2-4, which reads in part as follows:

(a) If a person is less than eighteen (18) years of age and is a habitual truant, is under a suspension or an expulsion or has

withdrawn from school as described in section 1 [I.C. 9-24-2-1] of this chapter, the bureau shall, upon notification by the person's principal, invalidate the person's license or permit until the earliest of the following:

- (1) The person becomes eighteen (18) years of age.
- (2) One hundred twenty (120) days after the person is suspended, or the end of a semester during which the person returns to school, whichever is longer.
- (3) The suspension, expulsion, or exclusion is reversed after the person has had a hearing under I.C. 20-8.1-5.1.

According to information received from the BMV, from January 1, 1997 to April 1, 1997, there were two thousand one hundred twenty-three (2,123) school-imposed invalidations for varying discipline reasons, including habitual truancy. The total school invalidations for 1996 were ten thousand three hundred sixty-eight (10,368). It is unclear as to what kind of impact this has on the habitual truant; nevertheless, it is a disincentive to being a habitual truant considering that obtaining a driver's license is erroneously considered to be a "rite of passage" for a teenager into the world of the adult.

In Indiana every school attendance officer, sheriff, marshal, and police officer has the power to take truants into custody. I.C. 20-8.1-3-29 reads, as follows:

(a) Every school attendance officer, sheriff, marshal, and police officer in Indiana is empowered to take into custody any child who is required to attend school under this chapter and who is found during school hours, unless accompanied by a parent or guardian or unless accompanied, with the consent of a parent, foster parent, or guardian, by a relative by blood or marriage who is at least eighteen (18) years of age, in a public place, in any public or private conveyance, or in any place of business open to the public.

(b) When an officer takes a child into custody under this section, he shall immediately deliver the child to the principal of the public, private, or parochial school in which the child is enrolled. If a child is not enrolled in any school, then the officer shall deliver him into the custody of the principal of the public school in the attendance area in which the child resides. If a child is taken to the appropriate school and the principal is unavailable, the acting chief administrative officer of the school shall take custody of the child. The powers conferred under this section may be exercised without warrant and without subsequent legal proceedings.

The State Attendance Officer is appointed by the State Superintendent of Public Instruction. I. C. 20-8.1-3-16. The State Attendance Officer works with local school districts in providing information, education, and training for school attendance officers and school officials as part of the effort to combat truancy.

2. Indiana Case Law

In Simmons, a fourteen (14)-year-old student was found to be a “habitual truant” when she missed, during the period from November 3, 1975 to February 25, 1976, twenty-eight (28) of sixty-two (62) school days for which absences no excuse was offered. At trial, there was testimony that the student willfully disobeyed her parents by refusing to attend school and by running away from home on more than one occasion. The court held that there was sufficient evidence to find that she was a “habitual truant,” and thus, a delinquent child.

The court also held that the school’s attendance records, which were compiled by the custodian of the attendance records from forms prepared by each teacher noting the names of students absent at the beginning of the first period of the school day, were properly admitted into evidence under the “business records” exception to the hearsay rule.⁶

Evidence of ungovernability, including repeated desertion of the home, was also sufficient to prove incorrigibility. The Indiana Court of Appeals found that the consistent pattern of disregarding the orders of her parents justified the trial court’s finding, that she was incorrigible and, hence, a delinquent.

3. Cases from Other Jurisdictions

In State v. Michael, 670 N.E.2d 560 (Ohio App. 1996), the trial court convicted a grandmother of contributing to the unruliness of two high school students. One definition of an unruly child is one who is a habitual truant from school. From the beginning of the school year until February, both students each missed approximately eighty (80) days of school. Of these absences, only one or two were excused because of illness. At trial, the school attendance officer testified that the grandmother expressed concern and surprise that the students were not in school because, the grandmother asserted, she would get them up and tell them they needed to go to school. The grandmother testified that she had done everything in her power to see that the students attended school. She encouraged them to attend school, and told them if they wanted a decent life, they

⁶Hearsay can be defined as testimony in court or written evidence of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. Patterson v. State (1975), Ind., 324 N.E.2d 482, 484, quoting McCormick, Evidence §225. However, other jurisdictions have held that a noncertified, unauthenticated copy of a form purporting to be a student’s attendance record does not qualify as a “business record.” See Matter of Sara G., 597 N.Y.S.2d 524, 525 (A.D. 3 Dep’t. 1993).

had to finish school. She also drove one of the students to school, but he would leave the school after she dropped him off. If she threatened him with consequences, he threatened to run away as he had done previously. The grandmother also testified that at times she was physically afraid of him. With regards to the other student, the grandmother had threatened to call the police if she did not start attending school. In response, the student moved in with her boyfriend. The Ohio Court of Appeals found that in order to convict the grandmother of the crime of contributing to the unruliness of a child due to truancy, the state need not prove culpability but still must establish that a child is absent from school without permission due to some act of the defendant. The court further held that the evidence showed that the grandmother consistently attempted, though unsuccessfully, to ensure that the students attend school on a regular basis. As a consequence, the judgment of the trial court was reversed.

There is a nationwide trend to prosecute parents and guardians for failing to ensure their school-aged children attend school. However, school-aged children can be adjudicated “habitual truants” even when their parents prevent them from attending school. See In Re Interest of K.S., 346 N.W.2d 417 (Neb. 1984), where a seven-year-old child was prevented from attending school after completing first grade because his parents believed boys were not emotionally ready to attend school until they are ten years old. Other jurisdictions disagree with punishing a child for the sins of the parent. See, for example, In the Interest of C.S., 382 N.W.2d 381 (N.D. 1986), specifically rejecting at 384-85 to apply the K.S. decision to North Dakota.

In the Matter of Jamie L., 488 N.Y.S.2d 111 (A.D.3d 1985), a fifteen (15)-year-old student appealed an order of the Family Court that found him in need of supervision and placed him in the custody of the County Commissioner of Social Services for a period of eighteen (18) months. The record disclosed that at the time the Family Court placed him in the Commissioner’s custody, he was a “chronic truant” who had failed to improve his attendance record, despite a directive to attend school by the court at his initial court appearance and disciplinary measures taken by the school and the probation department. There was also evidence that his parents were unable to provide adequate supervision and discipline, and that two of his older siblings had criminal records. At the time he appeared before the Family Court, a charge of juvenile delinquency had been filed against him arising out of his alleged possession of a stolen motorbike. The New York Supreme Court, Appellate Division, held that given the student’s conduct and background, the Family Court did not abuse its discretion.

In Chicago Board of Education v. Kouba, 354 N.E.2d 630 (Ill. App. 1976), a fifteen (15)-year-old student appealed an order of the Circuit Court of Cook County, Juvenile Division, that found her guilty of habitual truancy and committed her to the Northeastern Illinois Residential School. At trial, the school attendance officer’s testimony established, at most, nine (9) days of truancy in more than two academic years. The Appellate Court of Illinois held that, as a matter of law, nine (9) days of truancy during a period of more than two (2) years did not constitute proof of “habitual truancy” but were merely occasional acts of truancy.

4. Federal Initiatives

In July 1996, President Clinton announced a two-pronged initiative to support schools and communities in preventing truancy. First, a Manual to Combat Truancy was prepared by the U.S. Department of Education in cooperation with the U.S. Department of Justice which was to be sent to every school district in the nation. Second, the U.S. Department of Education invited applications under a new \$10 million discretionary grant program on truancy. According to this manual, research indicated that students who become truants and eventually drop out of school put themselves at a disadvantage in becoming productive citizens. High school dropouts were two and one-half times more likely to be on welfare than high school graduates, and in 1995, were almost twice as likely to be unemployed than high school graduates. Furthermore, high school dropouts who were employed earned lower salaries.

The Manual to Combat Truancy also indicated that truancy was a gateway to crime because high rates of truancy have been linked to daytime burglary rates and vandalism in cities across the nation.⁷ Although no national data on the incidence of truancy exists, there are regional results which are instructive. In Pittsburgh, each day approximately 3,500 students or 12 percent of the student population are absent and about 70 percent of these absences are unexcused. In Milwaukee, on each school day, there are approximately 4,000 unexcused absences, and in Philadelphia, approximately 2,500 students each school day are absent without an excuse.

A. Local School and Community Efforts to Combat Truancy

The Manual to Combat Truancy indicated that communities that have been successful in deterring truancy have focused on improving procedures to track student attendance, as well as provide meaningful incentives and realistic sanctions for truants and their parents. Included in the manual is a guide to deterring truancy, which provides the following information on community and educational strategies to combat truancy: 1) involve parents in all truancy prevention activities; 2) ensure that students face firm sanctions for truancy; 3) create meaningful incentives for parental responsibility; 4) establish continuing truancy prevention programs in school; and 5) involve local law enforcement in truancy reduction efforts.

B. Parental Involvement in Truancy Prevention

Parents play a key role in getting their school-aged children to go to school each day, and in recognizing how education can affect their future. Truancy programs include monitoring of and counseling for truants and their families.

C. Student Sanctions for Truancy

⁷During a recent sample period in Miami more than 71 percent of 13 to 16 year olds prosecuted for criminal violations had been truant. In Minneapolis, daytime crime dropped 68 percent after police began citing truant students. In San Diego, 44 percent of violent juvenile crime occurred between 8:30 a.m. and 1:30 p.m.

Linking truancy to a student's grades or driver's license can help to deter truancy. Students with a certain number of unexcused absences can receive a failing grade in their courses in New York. Delaware and Connecticut have daytime curfews during school hours that allow law enforcement officers to question youth to determine if their absence is legitimate.

D. Incentives for Parental Responsibility

In some states, parents of truants were asked to participate in parenting education programs. Parents who fail to prevent truancy can lose eligibility for certain public assistance in Oklahoma and Maryland. These programs were based on the idea that it is critical that parents of truants assume responsibility for such truant behavior.

E. School Truancy Prevention Programs

Truancy can relate to student drug use, violence, peer pressure from truant friends, lack of family support for regular school attendance, emotional or mental health problems, or inability to keep up with academic work. The manual recommends that schools provide tutoring, added security measures, drug prevention initiatives, campaigns to involve parents in their children's school attendance, mentors through community groups, and community service projects.

F. Law Enforcement Involvement

The manual recommended that to enforce school attendance policies, school officials should work with police, probation officers, and juvenile courts. Police Departments have reported that community-run temporary detention centers where truants can be dropped off may be preferable to processing truants at local police stations. Law enforcement efforts also included police sweeps of neighborhoods where truant youth are prevalent.

“FAIR SHARE” AND COLLECTIVE BARGAINING AGREEMENTS

The General Assembly amended I.C. 20-7.5-1-6(a) in 1995 (P.L. 199-1995, Sec. 1) to state that a school employee may not be required to support financially a school employee organization through the payment of “fair share” fees. Prior to the amendment, Indiana did not have a statute which specifically authorized a “fair share” fee provision in a master contract between a school board and a teacher bargaining unit, but Indiana law generally permitted such provisions under a presumption that non-members of the bargaining unit benefited from the negotiated contract and thus should pay a “fair share” for this benefit. See Fort Wayne Education Association, Inc. v. Goetz, 443 N.E.2d 364 (Ind. App. 1982).

The U.S. Supreme Court has rejected a claim that it is unconstitutional for a public employer to designate a union as the exclusive collective bargaining representative of its employees and to require nonunion employees as a condition of employment to pay a “fair share” of the union's costs of negotiating and administering a collective bargaining agreement. Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 302; 106 S.Ct. 1066, 1073 (1986). However, the

Supreme Court also held that nonunion employees have a constitutional right to “prevent the Union’s spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative.” *Id.*, 475 U.S. at 303, 106 S.Ct. at 1073. In order to prevent “compulsory subsidization of ideological activity” by nonunion employees while still requiring contributions to offset the costs related to collective bargaining activities, procedural safeguards are necessary to ensure the nonunion member’s First Amendment rights, including freedom of association, are not infringed.⁸ In order for collective-bargaining activities to be chargeable under “fair share” provisions, the activities must:

1. Be germane to the collective bargaining activity;
2. Be justified by the government’s vital policy interest in labor peace (some minimal infringement may occur); and
3. Not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop. *Lehnert v. Ferris Faculty Assoc.*, 500 U.S. 507, 520; 111 S.Ct. 1950, 1959 (1991).

Although the current Indiana statute does not permit “fair share” fees in master contracts between school boards and teacher bargaining units, the law does not affect contracts entered into prior to July 1, 1995, the effective date of the statute. There have been legislative attempts in 1996 and 1997 to restore “fair share,” but these efforts have not been successful. Nonetheless, there are many contracts still in effect with “fair share” provisions, providing grist for the judicial mill.

1. In *Ford et al. v. Madison-Grant Teachers Assoc.*, 675 N.E.2d 734 (Ind. App. 1997), the appellate court overturned the trial court’s granting of summary judgment for the teacher association against nonunion teachers who refused to pay their “fair share” fees. The appellate court remanded to the trial court with directions to enter summary judgment for the nonunion teachers. The contract in issue was for the 1992-93 school year. The agreement contained a “fair share” provision, but required nonunion teachers to pay the same amount as member teachers pay in dues, which, under the agreement, also go to support a state and national teacher organization. While the agreement recognized no member should be forced to support financially political or ideological activities unrelated to bargaining activities, there were inadequate procedural safeguards to ensure that no one—union or nonunion—would have an adequate remedy to address concerns.

The court, citing *Hudson* and *Lehnert*, observed: “A requirement that nonunion employees support a collective-bargaining representative has an impact upon their First Amendment interests and may well interfere in some way with an employee’s freedom of association to advance ideas, or to refrain from doing so, if the employee sees fit.” *Id.*, at

⁸I.C. 20-6.1-6-13 guarantees an Indiana teacher “freedom of association.” A teacher may not be dismissed or suspended because of the teacher’s affiliation with or activity in an organization “unless the organization advocates (1) the overthrow of the United States Government by force or the use of violence or (2) the violation of law to achieve its objective.”

The “fair share” fee was the same as membership dues, even through “membership dues include expenses not properly chargeable for collective bargaining activities.” Id., at 738. This constituted “a forced exaction of a service fee” which “is not carefully tailored to minimize the infringement of First Amendment rights.” Even though the contract contained a rebate provision, the mechanism for doing so was strictly within the teacher association’s control. This procedure was inadequate, the court noted, because it required nonunion members to finance, on a temporary basis, ideological activities unrelated to bargaining. “The affirmative obligation [in the contract] to pay the improper fees does not permit the non-member teacher to refrain from participation in the advancement of ideas which they oppose. Therefore, the fair share provisions are fundamentally flawed.” Id. See also Otto et al. v. Pennsylvania State Education Assoc. – NEA, et al., 950 F.Supp. 649 (M.D. Pa. 1977), which involved nonunion members challenging the calculation of “fair share” fees which, they alleged, were being used in part for political activities unrelated to the union’s role as the exclusive bargaining representative. The court, in finding the nonunion teachers had standing to challenge the fee calculation, noted that while Hudson requires unions to create a non-judicial means for the resolution of objections to fees, a dissatisfied member can forego the union’s challenge procedure and resort to the federal courts. There is no requirement that a nonunion member exhaust the union’s challenge procedure before initiating legal action. Id., 950 F. Supp. at 652.

2. In Florenz et al. v. John Glenn Education Association et al., 656 N.E.2d 864 (Ind. App. 1995), the Court of Appeals upheld the trial court’s grant of summary judgment to three teacher associations who initiated action to recover “fair share” fees from nonunion members during the 1992-1993 contract year. The master contracts involved had standard “fair share” provisions which require non-union members to pay a “fair share” fee for the negotiation and administration of the contract. The unions presented an accounting to nonunion members and then entered into nonbinding arbitration before the American Arbitration Association (AAA) to determine the “fair share” fee.⁹

The court found that the unions established a ratio of chargeable expenses to total expenses, satisfying the three-prong standard under Lehnert; and that the use of AAA is an independent, non-judicial means adequate for addressing objections, as required by Hudson.

⁹This method of determining “fair share” so as not to coerce non-members into supporting political or ideological views with which they do not agree has passed judicial muster and found to be consistent with Hudson. See Ping v. National Education Assoc. et al., 870 F.2d 1369 (7th Cir. 1989).

BASKETBALL IN INDIANA: SAVIN' THE REPUBLIC AND SLAM DUNKIN' THE OPPOSITION

Indiana has long been known for its one-class basketball tourney where the Davids and Goliaths could clash on an annual basis. This became the stuff of legends, as captured by the movie *Hoosiers*. There was not a little consternation when the Indiana High School Athletic Association (IHSAA) voted to end the 87-year tradition by dividing the tourney into four classes beginning with the 1997-1998 school year. This matter hardly escaped the notice of the General Assembly. Rep. Lawrence Buell (R-Indianapolis), with bipartisan support, sponsored HB 1318 which would have prohibited Indiana school corporations from participating in any association which would conduct, organize, sanction or sponsor a multi-class, post-season basketball tournament. The following question would have been placed on the November 3, 1998, ballot: "Should the Indiana high school basketball tournament be played under a multi-class system?" Although HB 1318 died on second reading in the House, legislative interest was very much alive. The General Assembly is aware that the status of the IHSAA has been altered through a number of judicial decisions, rejecting the IHSAA's claim to be a voluntary organization and finding instead that it is a "state actor" whose decisions are subject to judicial review. See IHSAA v. Schafer, 598 N.E.2d 540, 550 (Ind. App. 1992), finding that the IHSAA, "as a monolithic entity," engages in activity so intertwined with the State that in making and enforcing its rules it is engaged in "state action." See also Jordan v. IHSAA, 813 F.Supp. 1372, 1376-77 (N.D. Ind. 1993) finding the IHSAA is a "state actor."

While the General Assembly was considering its options, the IHSAA relented, creating a "tournament of champions" where the four class champions in basketball would vie for an overall champion. In return, the legislature would cease entertaining bills on the issue. In a session described as "raucous" by The Indianapolis Star on the front page of its April 10, 1997, edition, the House passed House Resolution No. 17, supporting the compromise which would retain the possibility of a single basketball champion. The Speaker of the House, John Gregg (D-Sandborn), after the voice vote approval, declared (with his tongue firmly placed in his cheek): "The resolution has passed. The republic has been saved."

Although the **Quarterly Report** usually does not have attachments, House Resolution No. 17 is included with this report.

The next **Quarterly Report** will address a number of athletic-related issues involving public schools. The article will be framed around a poem ("Hoosier Hoopball") about Indiana basketball written by Dr. Ralph Ankenman, a psychiatrist in Ohio. One may very well wonder why an Ohio psychiatrist would be interested in Indiana basketball. If you are wondering, please read this article again.

PRAYER AND PUBLIC MEETINGS

In the March 31, 1997, edition of *Indiana Education Insight*, it was reported that the Knox

Community School Corporation had adopted a resolution calling for prayer at the start of each school board meeting. The Indiana Civil Liberties Union objected, claiming a school board is not a legislature. The school board, citing community sentiment and a recent Ohio decision, is unpersuaded. Although the U.S. Supreme Court generally applies its three-prong Lemon test in analyzing government-sponsored actions involving religion, there appears to be different standards applied where the audience is primarily adult.¹⁰ This issue of the **Quarterly Report** addresses judicial treatment of prayer where the audience is adult. The next issue will address prayer with students of compulsory school attendance age.

Legislatures

In Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330 (1983), the U.S. Supreme Court upheld the Nebraska legislature's practice of opening each legislative day with a prayer by a chaplain paid by the state, finding this practice did not violate the Establishment Clause of First Amendment. The court's decision is heavily rooted in the history and tradition of the Continental Congress and the First Congress. The Continental Congress opened its sessions with a prayer offered by a paid chaplain. 463 U.S. at 787. The First Congress authorized the appointment of paid chaplains on September 22, 1789. Three days later, on September 25, 1789, final agreement was reached on the language of the Bill of Rights, which includes the First Amendment. That same day the House resolved to request the president to set aside a Thanksgiving Day to acknowledge "The many signal favors of Almighty God." As the court added, "Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption even since the early session of Congress." 463 U.S. at 788. Adults are presumably not susceptible to religious indoctrination or peer pressure. "[T]he practice of opening legislative sessions with prayer has become part of the fabric of society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment, it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." 463 U.S. at 792. The prayers cannot be used to exploit, to proselytize, or to advance any one religion or disparage any other faith or religion. 463 U.S. at 794. Although much was made out of the history of

¹⁰Under Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971), the analysis includes whether the action has a secular purpose, whether the action advances a religion, and whether the action fosters excessive entanglement with religion.

legislative prayer, including the long history in Nebraska, “[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees...” 463 U.S. at 790.¹¹

School Boards

Coles v. Cleveland Board of Education, 950 F.Supp. 1337 (N.D. Ohio 1996) is a case of first impression, applying certain Marsh principles in upholding the decision of a school board to begin its meetings with prayer. Unlike Marsh, there is no historical context, and the school board’s decision to begin its meetings with prayer is a relatively recent one (1992). For a time prayers were offered by various clergy until 1996 when a minister was elected president of the board. From that time to the present, the board president has either offered a prayer or requested a moment of silence. Although students may be present at a school board meeting from time to time, their attendance is not compulsory, the meeting is adult-oriented, and a school board is a deliberative body with duties more closely associated with legislative functions. At 1345. It does not matter that the subject matter of the board meeting is school related or that the location of the meeting is on school property. There is no potential coercion of impressionable students. A school board meeting is not a classroom or a graduation ceremony. The occasional presence of students does not alter the fundamentally adult atmosphere. Students are present as pages and on field trips when legislative prayers are offered. At 1346. As long as prayer is not used to convert audience members or to promote any particular belief or disparage any particular belief, the Marsh decision would seem to apply. At 1347.

College Graduation Ceremonies

1. Tanford v. Brand, 104 F.3d 982 (7th Cir. 1997) is a continuing unsuccessful challenge to Indiana University’s long-standing practice of including a nonsectarian invocation and benediction at its commencement exercises in Bloomington. The practice began in 1840. Various clergy are invited “to give an uplifting and unifying” invocation and benediction. The activities are not intended to endorse any religion but rather to emphasize “the solemnity and dignity of the ceremony.” At 983. In affirming the lower court, the 7th Circuit found that there are no Establishment Clause infirmities: (1) students are not required to attend the graduation ceremony, and many did not; (2) the plaintiffs are all adults and do not require “special solicitude”; (3) the invocation and benediction are included in the morning graduation ceremony and not the afternoon one such that a protesting student could elect to attend the afternoon one; (4) a person who objects could leave the stadium while the invocation or benediction was being offered; (5) the

¹¹The Indiana rules for the Government of the House, 110th General Assembly (Rev. 1997) includes the following:

10. Order of Business – Usual. The order of business shall be as follows:
 - 10.1 Calling the House to order.
 - 10.2 Prayer.

...

invocation and benediction continue a long university history and serve to solemnize a public ceremony; (6) the invocation and benediction do not dominate the ceremony; and (7) the attendees were adults and mature, were voluntarily present, and were free to ignore the remarks of the clergy.¹²

2. Chaudhuri v. Tennessee, 886 F.Supp. 1374 (M.D. Tenn. 1995). Plaintiff, a tenured professor of Asian heritage and a follower of the Hindu religion, asserted constitutional violations by the practice of Tennessee State University offering Christian prayers at University functions he was required or encouraged to attend, including commencement exercises. The school did advise its personnel to refrain from invocations and benedictions which contain religious messages from a particular denomination. However, the dispute continued over what constitutes “nonsectarian” or “nondenominational” prayer and whether a “moment of silence” is also “prayer.”¹³ The court, relying upon Marsh and the dissent in Lee, found that “permitting a prayer to be offered at a public university’s graduation ceremony and other occasional university-wide functions presents no real threat of establishing religion.” At 1386. In addition, the court rejected plaintiff’s assertion that he was “coerced into participation” in prayer by the expectation he attend graduation ceremonies. The court noted that a tenured faculty member is not readily susceptible to religious indoctrination or peer pressure. At 1387-88. Plaintiff is neither required to recite a prayer nor sing a song. “Merely standing or sitting while the song is sung does not constitute forced participation.” Id.

¹²The case is distinguishable from Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649 (1992). The court found the practice of inviting clergy to offer invocations and benedictions at graduation ceremonies in public elementary and secondary schools to be violative of the Establishment Clause because of the age of the students and the obligation to attend. Lee applies a “coercion” test separate from the Lemon test.

¹³At several commencement exercises where a “moment of silence” was observed, members of the audience spontaneously began recitation of the “Lord’s Prayer,” a distinctively Christian prayer. The plaintiff also objected to the singing of choral selections with Christian messages. See **QR** April-June 1996.

COURT JESTERS: re: JOYCE

As insipid poetry goes, few lines have been more the subject of parody than Joyce Kilmer's opening to his poem "Trees":

I think that I shall never see
A poem lovely as a tree.¹⁴

Since nearly every wag and greeting card writer has had an opportunity to wax poetic with Kilmer's lines, why shouldn't judges? And so they have.

In Fisher v. Lowe, 333 N.W.2d 67 (Mich. App. 1983), the Michigan Court of Appeals reviewed the decision of the trial court, which granted summary judgment to the driver, owner, and insurer of a car which struck an oak tree.

The synopsis for the case, the key notes, and the published opinion are all written in poetry. The synopsis provides, in part:

A wayward Chevy struck a tree
Whose owner sued defendants three
He sued car's owner, driver too,
And insurer for what was due
For his oak tree that now may bear
A lasting need for tender care.

The actual opinion of the court is reproduced below:

We thought that we would never see
A suit to compensate a tree.
A suit whose claim in tort is prest
Upon a mangled tree's behest;
A tree whose battered trunk was prest
Against a Chevy's crumpled crest;
A tree that faces each new day
With bark and limb in disarray;
A tree that may forever bear
A lasting need for tender care.

¹⁴Although there have been a number of parodies, my personal favorite remains the one by Ogden Nash in "Happy Days," Songs of the Open Road (1933):

I think that I shall never see
A billboard lovely as a tree.
Indeed, unless the billboards fall
I'll never see a tree at all.

Flora loves though we three
We must uphold the court's decree.

As the court noted in its synopsis: "And thus the judgment, as it's termed,
Is due to be, and is,
Affirmed."

QUOTABLE...

A sign that says "men only" looks very different on a bathroom door than a courthouse door.

Justice Thurgood Marshall

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 468-69
(concurring in part and dissenting in part in the majority opinion, which
invalidated the city's zoning ordinance which was selectively applied to prevent
the establishment of a group home for individuals with significant disabilities.)

UPDATES

Exit Examinations

1. Austin (TX) Independent School District, 25 IDELR 253 (OCR 1996). This is a continuation of previous civil rights concerns raised regarding the administration of the Texas Assessment of Academic Skills (TAAS). See **QR** Jan.-Mar.: 96. In this case the student alleged violations of Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act when the school district would not permit him to use a calculator while participating in the TAAS. The student was eligible for special education services. His individualized education program (IEP) did not exempt him from participating in the TAAS but did describe certain modifications necessary for the student. However, the use of a calculator was not one of the modifications, even though it had been identified and provided the previous year. Because the student's IEP did not include the use of a calculator as a necessary modification, the school district did not discriminate against the student on the basis of disability when it would not permit the student to use a calculator while participating in the TAAS.
2. Nevada State Department of Education, 25 IDELR 752 (OCR 1996). The State developed with CTB/McGraw-Hill a minimum proficiency test, which is administered in the 4th, 8th, and 11th grades. The 11th grade test must be passed to obtain a standard high school diploma. Students have several opportunities to pass the test; but if they do not, they receive a "Certificate of Completion." Students receiving special education can be exempt from participation and receive, instead, an "adjusted diploma." The test is designed to test basic competencies, and the pass score is set at a relatively low level (16th

percentile). State guidelines permit a wide variety of accommodations for students with disabilities. However, for the mathematics section—which has 45 multiple choice questions with 45 minutes to complete—accommodation can include additional time (up to twice the normal time) but the use of calculators for this section is prohibited. In addition, an appeal to the state can be made. Two such appeals were made, but both were denied. No student denied the use of a calculator has failed the math section. The State’s rationale for prohibiting the use of calculators is that to permit their use would change the nature, content, and integrity of the math section. Further, the ability to calculate is the skill being assessed although the math section is not designed to focus solely on the ability to perform calculations. OCR did not find this practice in violation of Sec. 504 or Title II, A.D.A., because (1) the State makes accommodations available, (2) there is a method for granting exceptions to its policy prohibiting the use of calculators on the math section of its exit examination, (3) the pass score is set at a relatively low level, (4) students have multiple opportunities to take the test, and (5) no students have failed the test due to the State’s refusal to permit the use of a calculator as an accommodation.

3. Gabrilson v. Flynn, 554 N.W.2d 267 (Iowa 1996) involves a school board member’s allegations that her school district’s graduation examination, administered during the eleventh grade, was “politically based” and espoused “out-come based educational philosophy.” The Davenport Community School District developed a graduation test to “measure students’ problem-solving abilities and their competence.” The test was piloted, and samples of the assessment were made available to the public for inspection. Although Gabrilson publicly denounced the test, the majority of the school board did not agree with her. The district copyrighted the test and demanded of Gabrilson that she return materials in her possession. She refused to do so. She also requested the district provide her with any unreleased scoring rubrics and other materials related to the assessment. The school refused based upon Iowa law which exempts from public disclosure materials which are “confidential trade secrets and statutory protected examinations.” [Indiana’s Access to Public Records Act contains similar exemptions to public disclosure. See I.C. 5-14-3-4.] Gabrilson then distributed the field-tested material she possessed to a radio talk show host and to other media outlets. She also filed this suit to force public disclosure of the assessment. The Iowa Supreme Court made the following determinations: (1) Academic examinations are, by their very nature, confidential even though the examination has been used before and portions were made public. It is reasonable for the district to assert that public disclosure would destroy the objectives of the test.” At 271-73. [For Indiana law regarding confidentiality of test questions, scoring keys, and other examination data, see I.C. 5-14-3-4(b)(3).] (2) Confidentiality of an academic examination is not abrogated upon completion of its administration. It would be “unreasonable and untenable” to compel disclosure after administration because this would force the district to develop a new assessment each year. At 273. (3) A school board member has a fiduciary duty imposed by law and, as such, cannot be denied access to the school district’s graduation examination in her role as a school board member. However, Gabrilson can be—and is—enjoined from copying, disseminating, or publishing the contents of the confidential records. At 276. (4) The school board cannot establish a policy or rule which has the effect of withholding

information from minority members of the school board who hold unpopular opinions. At 275-76.

4. Texas Education Agency v. Maxwell, 937 S.W.2d 621 (Tex. App. 1997). This dispute involves the TAAS (see above) and the right of parents under Texas law to view a “true and correct copy of the test after it has been administered and graded.” The TAAS is a statewide test to assess competencies in reading, writing, mathematics, social studies, and science. There is an exit examination version of TAAS, which is part of the requirements for a high school diploma. State law declared the TAAS confidential, but the law was repealed after the trial court had found the state law interfered with the parents’ rights to direct the upbringing and education of their children and had enjoined the administration of TAAS. The trial court stayed the injunction pending this appeal. The Texas legislature has since enacted legislation which requires the release of questions and answer keys to each test administered for the last time during a school year. However, to ensure a valid bank of questions for future use, field-test questions that are not used to compute a student’s scores are not required to be released. Because the legislature repealed the law at issue in the trial, the Texas Court of Appeals determined the issue moot, vacated the injunction, and remanded to the trial court for a determination of reasonable attorney fees for the parents who prevailed at the trial phase.
5. Letter to Anonymous, 25 IDELR 632 (OSEP 1996). The establishment of proficiency standards for a high school diploma is a State function. “However, while it is appropriate for States to set standards for the receipt of a high school diploma, including the use of proficiency examinations,... a student who meets the standards established by the State for a high school diploma cannot be denied a diploma on the basis of his or her disability.” To ensure that students with disabilities do not experience discrimination, federal law requires “the provision of appropriate test accommodations, such as extended time or alternative formats, for students who require these accommodations because of their disabilities.” At 633.

Metal Detectors

The courts have been upholding the constitutionality of the use of metal detectors in public schools where the need for doing so has been demonstrated. See **QR** July-Sept.: 96 and **QR** Oct.-Dec.: 96. However, even though school officials are held to a lesser standard for the purpose of Fourth Amendment analysis, police officials are still subject to strict scrutiny, even if the search occurs in a public school.

In People v. Parker, 672 N.E.2d 813 (Ill. App. 1996), the Illinois Court of Appeals affirmed the Trial Court’s decision to quash the arrest and suppress the evidence of gun possession in the prosecution of a high school student stopped by a police officer after the student entered the school building but turned to leave upon seeing a metal detector. As noted in previous **QR**’s, a unit of Chicago police officers conducts random metal detector operations inside Chicago area high schools where there has been a history of violence and possession of weapons. Signs were posted at the schools indicating any person on the premises was subject to a search. The

defendant, a 16-year-old student, entered the school, saw students lined up to go through a metal detector, turned and started to leave the school. A Chicago police officer stopped him, identified himself as a police officer, and directed the student to go through the metal detector. At this point the student inexplicably raised his shirt and said, "Someone put this gun on me." The police officer then saw the handle of a blue steel semiautomatic pistol and arrested the student. The court found that the police officer had detained the student when he accosted the student and restrained his freedom to walk away, and further directed him to submit to a metal detector search. The student was not free to walk away or otherwise disregard the police officer. He would have been physically restrained had he attempted to do so. The police officer did not have a reasonable suspicion the student was breaking any law or was about to do so. As such, the detention was illegal, and statements provided during an illegal detention are inadmissible at trial even if the statements are given voluntarily. The court did distinguish the criminal prosecution aspect of this case from school discipline concerns, noting that suspicionless administrative searches conducted as a part of a general regulatory scheme within a school to ensure safety is different from a criminal investigation to secure evidence of a crime, citing to New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985) and Vernonia Sch. Dist. 47J v. Acton, 115 S.Ct. 2386 (1995).

Negligent Hiring

In **QR** Oct.-Dec. 1996, the decision by the California Court of Appeals in Randi W. was reported. The plaintiff, a 13-year-old student who was allegedly sexually molested by a vice principal, successfully sued the vice principal's former employers who provided misleading letters of recommendation to a college placement office, failing to disclose past sexual misconduct by the vice principal. The California Supreme court has upheld the finding of tort liability against the administrator's former employers for fraud and negligent misrepresentation through their letters of recommendation, which contained unconditional and unreserved praise for the former employee despite knowledge of complaints against him of sexual misconduct with students. In Randi W. v. Muroc Joint Unified School, 929 P.2d 582 (Cal. 1997), the court found the former school employers liable because the injury to the student by the vice principal was a foreseeable result from the misleading letters of recommendations "[A] writer of a letter of recommendation owes to prospective employers and third persons a duty not to misrepresent the

facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the prospective employer or third persons.” At 591.

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