QUARTERLY REPORT

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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 or contact him by e-mail at <kcmdowel@doe.state.in.us>.

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DRUG TESTING FOR ALL EXTRACURRICULAR ACTIVITIES

QR Jan.-Mar.: 95 and **QR** April-June: 95 contained discussions of two important cases involving the use of random drug tests of public school students through urinalysis. In Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386 (1995), the U.S. Supreme Court upheld the constitutionality of such random testing requirements for students who wanted to participate in athletics. The school district was experiencing sharp increases in disciplinary problems due to drug use. The student body was said to be in a "state of rebellion" and was lead primarily by members of the athletic teams. In addition, several recent incidents of accidents and injuries in athletic competition were attributed to drug use. The Vernonia decision followed an earlier Indiana dispute decided by the 7th Circuit Court of Appeals. Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309 (7th Cir. 1988) did not involve a "state of rebellion" but concentrated more on the health and safety factors inherent in athletic participation and cheerleading. The 7th Circuit in Schaill was reluctant to extend such random drug testing through urinalysis beyond athletic participation, specifically indicating such searches may be improper "of band members or the chess team." Schaill, 864 F.2d at 1319. The 7th Circuit has now changed it position in this regard.

1. In Todd v. Rush County Schools, 983 F.Supp. 799 (S.D. Ind. 1997), the local school board approved a school-wide drug testing program that would prohibit a high school student from participating in any extracurricular activity or driving to school unless the student and the student's parent or guardian consented to a test for drugs, alcohol, or tobacco in random, unannounced urinalysis exams. Relevant procedures of the program included:

    * An initial positive detection will be retested immediately using a method with a higher degree of accuracy.

    * If the test remains positive, the student and parent are informed and provided an opportunity to explain to the principal why a result might be positive, such as a student's prescription medication. Parents are given the names of agencies that may be able to assist students.

    * Without an explanation, the student is barred from extracurricular activities until a retest is passed.

    * Positive test results are reported to persons in charge of extracurricular activities on a need-to-know basis.

    * A student can request an immediate retest, but the cost for such a retest would be borne by the student's family. A student is permitted only one retest at the school's expense. The student could wait until the next round of school-sponsored retests, but the student would be banned from participation during this time.

    * Positive results are not used in the school-based disciplinary process, although

these could be subpoenaed in criminal or juvenile proceedings. A student who tests positive twice is considered under "reasonable suspicion" and can be retested at any time. Tests based upon a "reasonable suspicion" do subject students to disciplinary proceedings.

The program demonstrated that since its inception, there has been a measurable decease in the numbers of students testing positive, although tobacco use remains the primary finding from the tests.

Unlike past programs that withstood judicial scrutiny, the "empirical data available in [this] case is somewhat slight." Id., at 803. There was no widespread drug, alcohol, or tobacco use. "There is no consistent increase or decrease in numbers [of students being disciplined for alcohol, drug, or tobacco use] over the years with numbers in all categories fluctuating from year to year." A 1994 survey indicated that tobacco use was higher than the state average, which in turn was higher than the national average. Alcohol use increased as students moved through high school, but marijuana use was lower than the state rate.

"Extracurricular activity" was not confined to athletic teams or cheerleading, as in Vernonia and Schaill. It also included the Student Council, Fellowship of Christian Athletes, Future Farmers of America, and the Library Club. "Extracurricular programs are a privilege at the High School. However, they are considered valuable to the school experience, and participation may assist a student in getting into college." Id., at 803.

Of the 950 students at the High School, 728 signed with the program. Plaintiffs were among the ones who did not sign. One plaintiff videotaped football programs, while another was a member of the Library Club. Plaintiffs challenged the program as an unreasonable search under the Fourth Amendment (and analogous Indiana law). The court rejected their arguments, finding that:

a. Although it is true students do not "shed their constitutional rights...at the school-house gate," Tinker v. Des Moines Ind. Comm. Sch. Dist., 393 U.S. 503, 506; 89 S.Ct. 733, 736 (1969), it is likewise true that students do not enjoy the same level of constitutional protection where a school official conducts a search based upon a "reasonable suspicion." New Jersey v. T.L.O., 469 U.S. 325, 346; 105 S.Ct. 733, 745 (1985).

b. A urinalysis drug-testing program qualifies as a "search" for the purpose of applying the Fourth Amendment.

c. Although individualized suspicion is generally necessary as a predicate for a search by a school official, there are "particularized exceptions to the main rule" where a school district can demonstrate and justify the need to institute a random drug-testing program to address an actual problem.

d. Although the school district in this case relied upon data which is "not particularly indicative of drug, alcohol or tobacco use by a majority (or even a large minority) of the students," Todd, at 805, "the evidentiary hurdle for a public school is lower than in other contexts." Id.

e. The program had no significant opposition from the community during the planning stages. Id., at 806. Because there is "no minimum triggering point of substance abuse...that must be met to justify" the institution of such a program, there must be at least some use of prohibited substances in order to "give rise to legitimate concern about the potential for a rapid increase in abuse, if unchecked." Id. There was sufficient data to support this.

f. Precedent involved athletics and cheerleading where drug use created a special hazard of injury. However, "all public school students have a diminished expectation of privacy" although athletes have even lower expectations. The threat of injury while driving to school may be greater than the threat during athletic competition. "While chess or debate matches may seem to pose little risk of physical harm, traveling to and from them can include risks exacerbated by drug and alcohol use." Id., at 806.

g. Although not all extracurricular activities are related to athletics, "[p]articipation...is voluntary and a privilege; any student joining these activities is subject to regulation beyond that of a non-participant." Id. In addition, any student who is involved in an extracurricular activity assumes to some degree a "leadership role" in the school community and is expected to "serve as an example to others." Id. "[T]he school has an interest in the conduct of those who may serve as an example to others." Id.

The district court's decision was affirmed on appeal. See Todd v. Rush County Schools 133 F.3d 984 (7th Cir. 1998). In a footnote to its decision, the 7th Circuit pointed out that its decision does not address the constitutionality of the drug-testing program as applied to a student's right to drive to and from school because the issue was not presented for judicial scrutiny. Todd., Note 1, 133 F.3d at 986.

2. There are critics of the Todd decision, who note that the U.S. Supreme Court decision in Vernonia was a 6-3 one, with the majority assuring that its holding was intended to be restricted to athletic programs in schools that were experiencing immediate and severe drug problems. "To extend suspicionless searches from school athletes to all participants in extracurricular activities is not a small step," wrote Lawrence F. Rossow and Jerry R. Parkinson in *School Law Reporter*, Vol. 40, No. 3 (March 1998). "If the step can be taken from athletics to all extracurricular activities by relying on Vernonia, it seems easy to take the next logical step—require drug testing of the entire student body."

In Todd, the plaintiffs were represented by the Indiana Civil Liberties Union (ICLU).

The ICLU has not confined its concern over the expansion of random drug-testing programs to this legal dispute. It indicated there were other public school district plans for the conduct of random drug-testing through urinalysis that the ICLU believed to be more effective and less constitutionally suspect. The ICLU specifically mentioned in several newspaper articles and published commentaries the drug-testing policy and procedures implemented on January 20, 1998, by the Metropolitan School District (MSD) of Washington Township, an Indianapolis school district. Because the design and implementation of drug-testing programs are receiving considerable attention, the policy and procedures for the MSD of Washington Township are reproduced below, with minimal abridgment.

> *Student Drug and Alcohol Testing*: *MSD of Washington Township (Indianapolis)*
>
> The Board believes that maintaining an environment that is safe, free from substance use/abuse, and conducive to learning is an important goal for the district and the community. The Board of Education recognizes its responsibility to address drug and alcohol problems in the schools. The Board believes that the parent(s)/guardian(s) and the school must work together to educate, encourage and support students in an attempt to prevent their illegal use of drugs and alcohol. The Board believes that parents/guardians want to know when their children are using drugs or alcohol.
>
> *Definitions*
>
> As used in this policy, the terms “substance use/abuse,” “drug or alcohol use or abuse,” “drug or alcohol problems” or similar phrases include, without limitation, the following:
>
> - Use or under the influence of any drug, intoxicant, controlled substance or other substance made unlawful by law or regulation;
> - Use or under the influence of any alcoholic beverage or similar intoxicant;
> - Use of any prescription medication or legend drug not strictly in accordance with the direction of a licensed physician;
> - Use of any non-prescription or over-the-counter medication or of any other substance, legal or illegal, in a way that noticeably impairs or alters mood, behaviors, motor skills or mental functions (except use of a substance strictly in accordance with the direction of a licensed physician).

The term “use” means consuming, ingesting, drinking, injecting, demonstrating, inhaling or smoking drugs or alcohol.

The term “under the influence” means any positive test that was administered under this policy. Any confirmed evidential breath test with a value of .020 or greater is the definition of under the influence of alcohol.

The term “alcohol” means ethyl alcohol and includes all beverages, mixtures, medications, inhalants or preparations which contain ethyl alcohol.

The term “drug” means any substance that has known mind or function-altering effects upon the human body or that impairs one’s ability to safely perform his or her work, and specifically includes, but is not limited to, all prescription and over-the-counter medications, all psychoactive substances, all controlled substances, all substances illegal under Federal or Indiana law, all synthetic, counterfeit or designer drugs, all “look alike” drugs, all drug paraphernalia and nicotine.

Purposes

The Student Drug and Alcohol Testing policy and program in the Metropolitan School District of Washington Township for students in grades 6-12 is established for the following purposes:

- To ensure the safety and security of our schools;
- To discourage and reduce use of drugs and alcohol at school, at school-related events and activities, to and from school and during non-school times;
- To provide students and parents with information on ways to prevent drug and/or alcohol use/abuse;
- To identify students who might have drug and/or alcohol problems;
- To assist students and parents in seeking assessment, and treatment (if necessary) when a student has a drug and/or alcohol problem;
- To allow for effective transition of students back into school after treatment.

Behavior Indicators

Students who use or abuse drugs and/or alcohol often exhibit negative behaviors and other indicators of their problem. These indicators can include, but are not limited to the following:

Mood swings
Aggressive (including fighting) or lethargic behavior
Smoking
Risk-taking behavior
Paranoia
Falling grades
Bragging or talking to other students about drug and/or alcohol use
Psychosis
Loss of interest in school and in favorite activities
Significant deterioration in grades or attendance
Significant deterioration in grooming
Truancy, excessive tardiness and/or excessive absence
Isolation from friends and family members
Depression and/or entire withdrawal

Definition of "Reasonable Suspicion"

As used in this policy, "reasonable suspicion" includes observation of the negative behaviors and actions set out above as indicators of a problem; specific observations concerning the appearance, behavior, body odors or speech of a student; information received by the principal or his designee from teachers, parents, students, employees or detection devices; the past record of a student in connection with any of the above-listed factors; an accident involving a motor vehicle (cars, motorcycles, motor bikes, etc.) before, during or after school hours at school or in any other "school district location" defined as any school building and on any school premises; on any school-owned vehicle or in any other school-approved vehicle used to transport students to and from school or school activities; on or off school property at any school-sponsored or school-approved activity, event or function, such as a field trip or athletic event, where students are under the jurisdiction of the school district; or during any period of time students are under the supervision of employees who are working on behalf of the district or otherwise engaged in district business.

Circumstances Triggering Tests

The District has the right to request an appropriate specimen such as urine,

breath, saliva, sweat, or any other specimen deemed reasonable in conducting drug and alcohol tests. Students will be required to submit to a drug and alcohol test in accordance with rules and regulations to be developed by the Superintendent in the following circumstances:

1. The student violates the district policy and/or the school rules pertaining to use and possession of tobacco.
2. The student violates the district policy and/or the school rules pertaining to use, possession, and/or being under the influence of drugs and/or alcohol.
3. The student violates any district policy and/or school rule that results in the student being suspended from school for:
   a. three (3) or more days, or
   b. multiple suspensions in any school year that aggregate to five (5) or more days.
4. If an administrator, teacher or other staff member has reasonable suspicion that a student might be using drugs and/or alcohol.

Procedures

The results of the drug and alcohol test will be provided to the Drug Education Coordinator, who will share the results with the parent/guardian. If the results are positive, the Drug Education Coordinator will proceed as follows:

1. First Positive Test- The results of the test will be provided to both the parent/guardian and the principal or principal's designee. If the parent/guardian wants a retest administered on the same sample, the full cost of the retest shall be borne by the parent/guardian. The Drug Education Coordinator will work with the parent/guardian to provide guidance in seeking assessment and/or treatment, as an alternative to expulsion. Students testing positive will be placed on probation. Failure to participate in any recommended program for assistance and treatment will result in a recommendation of expulsion.

2. Second Positive Test- When any student tests positive a second time (not including a prior retest that was paid by the parent/guardian), the student will be suspended, and the school will initiate a request for the student's expulsion. The cost for the second positive test shall be the responsibility of the parent/guardian. The results of the

second positive test will be provided to both the parent/guardian and the principal or principal's designee. If the parent/guardian wants a retest administered on the sample, the full cost of the retest shall be borne by the parent/guardian.

Refusal to Submit

A student's refusal to submit to a drug and alcohol test or to provide a valid specimen will be considered an admission of a violation of district policy or school rules pertaining to the use and possession of drugs or alcohol. If the laboratory reports the presence of an adulterant in the specimen provided, the district shall deem it a refusal to provide a valid specimen. This violation of district policy and/or school rules will be dealt with according to the district's policy and rule on the student suspension and expulsion.

Volunteer Testing Program

The Board believes that students need encouragement and motivation to keep from illegally using drugs and alcohol. In an effort to supply students with positive reinforcement, the Board will institute a voluntary drug and alcohol testing program for students. Students who volunteer will be tested on an unannounced random basis throughout the school year. Students testing positive under the voluntary testing program will receive student assistance and shall be subject to the same discipline procedures as students testing positive under the "reasonable suspicion" program.

Student Assistance Program

Any student who has a drug and/or alcohol-related problem may request assistance through the principal or the Drug Education Coordinator. A student who makes a self-referral or requests assistance prior to a first positive drug test will be assigned to the Student Assistance Program. This provision does not apply to students who make such requests after they have been notified of the requirement to submit to a drug and alcohol test or to provide a specimen under this policy. Self-referrals after a positive drug test may be assigned to the Student Assistance Program and shall be subject to the same discipline procedures as students testing positive under the "reasonable suspicion" program.

The Board directs the Superintendent to develop administrative guidelines, including the staff development of personnel and the use of

educational materials for students and parent(s)/guardian(s) to fully implement all aspects of this policy.

3. Bridgman v. New Trier (IL) High School Dist. No. 203, 128 F.3d 1146 (7th Cir. 1997) addresses a spontaneous search of a student suspected of drug use. Bridgman was enrolled in an after-school smoking cessation program after being caught smoking cigarettes on at least two occasions on school property. The Student Assistance Program (SAP) Coordinator observed Bridgman and other students giggling and "acting in an unruly fashion." The other students calmed down quickly, but Bridgman remained distracted and acted inappropriately during the smoking cessation program. The SAP Coordinator also observed that Bridgman's eyes were bloodshot and his pupils were dilated. His manner was somewhat surly and sarcastic. The SAP Coordinator suspected marijuana use, which she confronted him with. He was allowed to call his mother, which he did. The school nurse then conducted a "medical assessment" of Bridgman. This "medical assessment" consisted of taking his blood pressure and pulse, both of which were elevated. A limited search of Bridgman's clothing did not reveal any drugs. (He was not required to disrobe, and the search did not require anyone to touch him.) The mother indicated she would take Bridgman to a physician for a drug screen. The drug screen indicated Bridgman had not been using drugs. Nevertheless, the 7th Circuit affirmed the district court's dismissal of the student's civil rights action against the school. The 7th Circuit reiterated that school officials need to possess only a "reasonable suspicion" that a school rule or law is being broken, and the subsequent search must be reasonable in scope and not excessively intrusive in light of the age and sex of the student and the nature of the alleged infraction. At 1149, citing to New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985). In this case, the symptoms observed by the SAP Coordinator were sufficient grounds, and the "medical assessment was reasonably calculated to uncover further evidence of the suspected drug use." Bridgman 128 F.3d at 1149.

JUVENILE COURTS AND PUBLIC SCHOOLS: RECONCILING PROTECTIVE ORDERS AND EXPULSION PROCEEDINGS

As reported in Recent Decisions 1-12:95 "Pupil Discipline Statute vs. Juvenile Justice Statute" and Recent Decisions 1-12:96 "Expulsion Proceedings Under I.C. 20-8.1-5.1," there has been marked disagreement among members of the Indiana Court of Appeals over how or to what extent the injunctive authority of a juvenile court "[t]o control the conduct of any person in relation to [a] child" should be or could be harmonized with a public school's authority to expel a student for certain egregious behavior.[1] Rather than reconcile or harmonize these sometimes competing interests, the Court of Appeals attempted to divine the most recent legislative intent. By doing so, it alternatively granted preeminence first to juvenile courts, Matter of P.J., 575 N.E.2d 22 (Ind. App. 1991), and then to public school districts, Matter of H.L.K., 666 N.E.2d 80 (Ind. App. 1996). The Indiana Supreme Court granted transfer for the H.L.K. dispute on November 14, 1996, but took over thirteen (13) months to decide the case, and even then by a 3-2 count.

In West Clark Community Schools v. H.L.K., 690 N.E.2d 238 (Ind. 1997), the Indiana Supreme Court declined to follow the Court of Appeals' application of the doctrine of most recent legislative intent in favor of a "principle of statutory construction that where two statutes cannot be harmonized and the legislature dealt with a subject in a detailed manner in one statute and in a general manner in another, the detailed statute will supersede the general one." H.L.K., at 241.

H.L.K. involves a 14-year-old student whose father had abandoned her and whose mother had died of ovarian cancer over a five-year period during which she attended to her mother. She had not been a disciplinary problem. She was, however, subjected to sexual harassment by a fellow eighth grade student who repeatedly touched her breasts and buttocks despite her protestations. She did not report this harassment to any school officials although some of her classmates were aware of these occurrences. At the instigation of some of these classmates, H.L.K. put between 10 and 16 pellets of rat poison in a soft drink and offered it to the boy. Fortunately, the boy had been alerted to the contaminated drink and refused to drink it.

H.L.K. was charged with criminal recklessness, which would have been a felony had she been an adult. She admitted the charge and was adjudicated a delinquent. The juvenile court, in its dispositional order, committed H.L.K. to the Department of Correction, suspended the commitment, and awarded custody to H.L.K.'s aunt.[2] One of the terms of her probation was to attend school regularly with no unexcused absences or tardiness. At 239. However, during this period the Indiana General Assembly repealed the former pupil discipline laws and replaced

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[1]The juvenile court's authority to control the conduct of a "person" is now found at I.C. 31-32-13-1(1). A school corporation is a "person." See I.C. 31-9-2-89 and West Clark Comm. Schs. v. H.L.K., 690 N.E.2d 238, 239, Note 6 (Ind. 1997).

[2]Ironically, had the court not suspended H.L.K.'s commitment to the Department of Correction (DOC), the DOC would have been obliged to provide her educational services. See, for example, I.C. 20-8.1-3-36 and Faver v. Bayh, 689 N.E.2d 727 (Ind. App. 1997).

them with new procedures, now found at I.C. 20-8.1-5.1. Under the new statutory provisions, now found at I.C. 20-8.1-5.1, the school expelled H.L.K. for a semester. H.L.K.'s aunt petitioned the juvenile court for a modification of its dispositional order to require the school district to admit H.L.K. In addition, the chief probation officer filed motions for injunctive relief to prevent the school from expelling H.L.K. At 240. Although the juvenile court wanted to avoid a conflict between the courts and the schools, the school "wholly failed to provide the Court with a reasonable and less restrictive alternative that balances the interest of the juvenile and the school's interest to maintain disciplinary standards." Id. Accordingly, the juvenile court enjoined the school, requiring it to admit H.L.K. The Court of Appeals, 2-1, reversed. In vacating the decision of the Court of Appeals, the Supreme Court attempted to disentangle juvenile court proceedings from school-based disciplinary proceedings. The following are relevant determinations:

a. A student and the student's parent or guardian cannot avoid the judicial review process to challenge an expulsion by invoking the injunctive authority of a juvenile court. A student must exhaust administrative remedies, and a juvenile court is not the proper forum for judicial review of an expulsion order under I.C. 20-8.1-5.1. At 241.

b. Although "when the pupil discipline statute is validly invoked, the pupil discipline statute pre-empts the authority of the juvenile court '[t]o control the conduct of any person in relation to [a] child,'" this will not apply to others who are not the student or the student's parent, guardian, or guardian ad litem. The pupil discipline statute does not pre-empt the authority of these other "persons" (such as the chief probation officer) to seek such injunctive relief from the juvenile court. "As the judicial review provisions of the pupil discipline statute [I.C. 20-8.1-5.1-15] do not govern probation officers, those provisions do not limit the authority of the juvenile court to act upon a probation officer's motion." At 242.

c. Although the Supreme Court concluded the juvenile court was without authority to grant H.L.K.'s petition to modify the court's prior dispositional order but did have the authority to grant the chief probation officer's motions for injunctive relief to prevent the school's expelling of H.L.K., the Supreme Court urged "the need for judicial restraint"; consideration of the interests of the student, other students, and the school; and exploration of all available "reasonable alternatives." Id.

Chief Justice Randall T. Shepard, in dissent, criticized the majority's opinion as extending the authority of a juvenile court to such an extent as to place school districts at an extreme

disadvantage in attempting to implement disciplinary measures for students who have engaged in

disruptive behavior significant enough to involve the juvenile courts.[3]

The dissent also lamented the majority's opinion as an invitation for judicial intrusion into school-based disciplinary matters, a recurring criticism of the courts by the legislature. "The Court has read the music, but it fails to catch the tune." H.L.K., at 243 (dissent).

"QUALIFIED INTERPRETERS" FOR STUDENTS WITH HEARING IMPAIRMENTS

Although American Sign Language (ASL) is the best known method for communication with persons who are deaf or hearing impaired, it is not necessarily the preferred or only mode of communication in determining whether one is a "qualified interpreter" under federal law.[4] The Americans with Disabilities Act does not define a "qualified interpreter" in terms of licensure or certification. Rather, "[a] qualified interpreter means an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary. This definition focuses on the actual ability of the interpreter in a particular interpreting context to facilitate effective communication between the public entity

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[3]As the dissent noted, probation officers are employees of the very judge who will rule on their motions. "Lawyers and clients who find themselves responding [to probation officers' challenges] under such circumstances will probably not think this is a level playing field." H.L.K., at 243 (dissent).

[4]Indiana does not have any particular requirements for one to be "qualified interpreter." However, certification in ASL is required where a school corporation offers ASL as a foreign language credit. I.C. 20-10.1-7-17 dictates the requirements:

> **20-10.1-7-17 American Sign Language; foreign language credit; teacher certification; curriculum**
> (a) A school corporation may offer classes in American Sign Language as a first or second language for hearing, deaf, and hard of hearing students.
> (b)If:
> (1) classes in American Sign Language are offered at the secondary level by a school corporation; and
> (2) a student satisfactorily completes a class in American Sign Language as a second language;
> the student is entitled to receive foreign language credit for the class.
> (c) A class in American Sign Language offered under this section must be taught by a teacher licensed in Indiana and:
> (1) certified by the American Sign Language Teachers Association; or
> (2) holding a degree in American Sign Language.
> (d) The board shall establish a curriculum in American Sign Language as a first or second language.

and the individual with disabilities." 28 CFR §35.104, 28 CFR Part 35, Appendix A, §35.104, "Qualified Interpreter."

In the absence of the presumptive qualifications inherent in specific certification or licensure, public school districts—and, by extension, State and Federal agencies who are obliged to investigate complaints—will need to follow the general guidance under the ADA in assessing whether or not the interpreter is, indeed, "qualified." The following are recent investigations involving the qualifications of interpreters.

1. Complaint No. 1222-98 involved a situation where the case conference committee for a 15-year-old student with a hearing impairment determined he "would need an interpreter who is fluent in ASL [American Sign Language]" to assist him in his educational program. The interpreter who had previously worked with the student agreed to work with the student during the 1997-1998 school year. However, the interpreter failed to report to work and did not notify the school of her intention not to return to work. The school hired several temporary interpreters, but was not able to hire a full-time interpreter until early September. Temporary interpreters were used when the full-time interpreter was not available. The full-time interpreter is a licensed teacher of the hearing impaired and earned an undergraduate degree in special education from Ball State university, where he completed at least one course in Deaf Culture and two courses in ASL. He had five years' experience in teaching and tutoring hearing impaired students, including assisting students with Signed English, ASL, and Cued Speech. At one point, he was observed by a representative of United Health Services (UHS), who reported to the school some deficiencies in the interpreter's performance but offered suggestions for improvement. UHS did not indicate he was unqualified to provide interpreter services for the student. The Indiana Department of Education, Division of Special Education, found that although the case conference committee determined the student required "an interpreter who is fluent in ASL," the interpreter had sufficient training and experience to be considered fluent. In addition, the State of Indiana does not require licensure or certification to provide interpreter services for students who are deaf or hearing impaired. Accordingly, the school district did not fail to implement the student's Individualized Education Program (IEP) as it was written.

2. In Collier County (FL) Sch. Dist., 27 IDELR 849 (OCR 1997), the Office for Civil Rights (OCR) investigated a complaint that alleged the school district discriminated against a deaf student when it failed to provide the student with a substitute teacher who could instruct her using American Sign Language. OCR found the school in compliance with Sec. 504 of the Rehabilitation Act of 1973 as well as Title II of the Americans with Disabilities Act (ADA). Although the substitute teacher could not use ASL, she could use functional communication skills, including finger spell signs and certain basic signing words such as sit, stand, work, look, etc. The substitute also used a microphone that amplified her voice for one of the students who was not profoundly deaf. This student assisted the substitute teacher in communicating instructional objectives when necessary. All the objectives of the primary teacher's lesson plans were achieved. The

comprehension of the students, as measured by the classroom assignments, did not reveal any problems. Notwithstanding, the school district planned training programs for substitute teachers to develop skills for effectively communicating instructional goals to children with hearing impairments. This voluntary action will increase the availability of substitutes who would be considered "qualified."

3. Charlotte County (FL) School District, 27 IDELR 1067 (OCR 1997) involved a hearing-impaired student in a gifted program. The complainant alleged the student's declining academic progress was due to the interpreter's use of ASL rather than "signed Exact English" (SEE). OCR defined ASL as "a manual-visual language recognized as a separate distinct language from English, with its own grammar, inflections, and idioms." SEE is "a manual communication system in which signs and finger spellings are used in English word order with English grammatical structure." The Florida Department of Education does not require any particular certification for interpreters or that interpreters use any particular signing language to be considered effective. Florida does provide the following guidelines:

> For the interpreter/translator working with hearing impaired students, knowledge of various sign systems may be necessary. Manual Coded English (MCE) with inaudible speech is generally used in the school setting. Systems may include: Signing Exact English (SEE II), Signed English, Pidgin Signed English (PSE), American Signed Language (ASL), finger spelling, and special educational technical signs. The interpreter must be proficient in the system the school uses.

OCR defined PSE as "a communication mode utilizing the signs and principles of ASL in English syntax and combines two or several different modes." The student's IEP required the interpreter to use SEE and PSE in several academic contexts. Although the complainant alleged the interpreter was utilizing ASL and this was the reason for the student's academic decline, OCR determined the student's deficiencies were attributable to other reasons, such as the parent's removal of the student from school due to dissatisfaction with a different interpreter, the student's disinclination to wear his hearing aids, the student's inattentiveness to the interpreter, and the student's rushing through assignments in order to be the first one finished. The deficiencies were not attributable to the translation services of the interpreters. OCR found the school district in compliance with Sec. 504 and the ADA.

(This article does not address other school-based disputes involving methodologies employed to teach students who are deaf or hearing impaired. This will be a future article.)

QUOTABLE...

"The people of the United States did not adopt the Bill of Rights in order to strip the public square of every last shred of public piety."

Circuit Judge David A. Nelson in Chaudhuri v. State of Tennessee, 130 F.3d 232, 236 (6th Cir. 1997), rejecting as impermissible hostility attempts to sanitize civic occasions by eliminating all vestiges of religious acknowledgments (reported elsewhere in this **Quarterly Report**).

COURT JESTERS: POE FOLKS

Edgar Allan Poe was a noted poet, short story writer, mystery writer, literary critic, and editor, even though he died when he was only 40 years of age. His mystery stories ("The Gold Bug," "The Murders in the Rue Morgue," "The Mystery of Marie Rogêt"), especially the fictional detectives Legrande and Dupin, influenced Arthur Conan Doyle, who would later create Sherlock Holmes. The haunting, lyrical quality of his poems was a major influence on the 19th century French Symbolist movement in poetry. Poe influenced numerous other writers as well, including Alfred Lord Tennyson and Fyodor Dostoevsky.

He even influenced a bankruptcy judge.

Although Poe's literary output is significant, his best-known poem is "The Raven" (1845), which involves a bereaved poet haunted by a raven that sonorously warns, "Nevermore." This poem, coupled with the fact that Poe's life was marked by abject poverty and despondency, appears to have influenced Federal Bankruptcy Court Judge A. Jay Cristol in reconsidering his original inclination to dismiss a debtor's petition. The judge, *sua sponte* (that is, on the judge's own initiative and not at the instigation of any party), "received...inspiration...from a little old ebony bird" in determining the outcome in In re Robin E. Love, Debtor, 61 Bankruptcy Reporter 558 (Bkrtcy. S.D. Fla. 1986).

Once upon a midnight dreary, while I
pondered weak and weary
Over many quaint and curious files of
chapter seven lore[5]

While I nodded nearly napping, suddenly
there came a tapping
As of some gently rapping, rapping at
my chamber door,

"Tis some debtor" I muttered, "tapping at
my chamber door—
Only this and nothing more."

Ah distinctly I recall, it was in the early
fall
And the file still was small
The Code provided I could use it
If someone tried to substantially abuse it

No party asked that it be heard.
"Sue sponte" whispered a small black bird.
The bird himself, my only maven, strongly
looked to be a raven.

Upon the words the bird had uttered
I gazed at all the files cluttered
"Sua sponte," I recall, had no meaning;
none at all.

And the cluttered files sprawl, drove a
thought into my brain.
Eagerly I wished the morrow—vainly I had
sought to borrow

From BAFJA, surcease of sorrow—
and an order quick and plain
That this case would not remain
as a source of further pain.
The procedure, it seemed plain.

As the case grew older, I perceived I must
be bolder.
And must sua sponte act, to determine
every fact,

If primarily consumer debts, are faced,
Perhaps this case is wrongly placed.
This is a thought that I must face, perhaps
I should dismiss the case.

I moved sua sponte to dismiss it
for I know I would not miss it

The Code said I could, I knew it.
But not exactly how to do it, or perhaps
some day I'd rue it.

I leaped up and struck my gavel.
For the mystery to unravel
Could I ? Should I? Sua sponte, grant my
motion to dismiss?
While it seemed the thing to do, suddenly I
thought of this.

Looking, looking towards the future and to
what there was to see
If my motion, it was granted and an appeal
came to be,
Who would be the appellee?
Surely, it would not be me.
Who would file, but pray tell me,
a learned brief for the appellee
The District Judge would not do so
At least this much I do know.
Tell me raven, how to go.

As I with the ruling wrestled
In the statute I saw nestled
A presumption with a flavor clearly in the
debtor's favor.
No evidence had I taken
Sua sponte appeared forsaken.
Now my motion caused me terror
A dismissal would be error.

Upon consideration of §707(b), in anguish,
loud I cried
The court's sua sponte motion to dismiss
under §707(b) is denied.

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[5]In the parlance of bankruptcy proceedings, "Chapter Seven" is a "straight bankruptcy" where all eligible debts are sought to be discharged. "Chapter 11" and "Chapter 13" proceedings permit debtor individuals and corporations the opportunity to restructure or repay debts pursuant to a court-approved plan.

Before one concludes Judge Cristol is stark Raven mad for writing a published opinion in this fashion, the reader should consider this: Judge Cristol is now *Chief* Judge Cristol.

UPDATES

Prayer and Public Meetings: College Graduation Ceremonies

QR Jan.-Mar.: 97 contained a discussion of the differing legal standards applied to religious invocations and benedictions at college graduation ceremonies as opposed to elementary and secondary school ceremonies. (See **QR** April-June: 97, "School Prayer: Graduation Ceremonies" for elementary and secondary school ceremonies.) Essentially, courts do not perceive a need for intense First Amendment scrutiny of post-secondary ceremonies because the age and maturity of those in attendance renders them less susceptible to religious indoctrination. The U.S. Supreme Court declined to review the 7th Circuit Court of Appeals decision in favor of Indiana University. See Tanford v. Brand, 104 F.3d 982 (7th Cir. 1997), *cert. den.* 118 S.Ct. 60 (1997).

The 6th Circuit Court of Appeals has recently decided a similar case in Chaudhuri v. State of Tennessee, 130 F.3d 232 (6th Cir. 1997). Relying upon Tanford, the 6th Circuit rebuffed the First Amendment challenges made by a tenured professor to nonsectarian prayers and "moments of silence" conducted at university functions at Tennessee State University, including graduation ceremonies. The court noted the age and maturity of the audience and added that attendance by faculty was not required nor was it monitored. The court also noted that such practices may afford dignity and formality to events while also serving to solemnize the occasion through reflection. It was not the school's responsibility to halt a spontaneous recitation of the "Lord's Prayer" during a declared "moment of silence," as occurred. As the court observed, "The Establishment Clause does not require [the university] to silence an audience of private citizens." At 237. "A moment of silence is not inherently religious.... [A] participant may use the time to pray, to stare absently ahead, or to think thoughts of a purely secular nature." At 238. The court found no coercion on the part of the university. "We may safely assume that doctors of philosophy are less susceptible to religious indoctrination than children are." At 239. A dissenting judge, while allowing that the university ceased the "generic" prayer in favor of a "moment of silence," warned that there is nothing to prevent the university from reinstituting the practice. The dissent noted that although the supposedly "generic" prayer was to be non-sectarian by avoiding references to Jesus Christ, the references to "Heavenly Father" and "Father" are distinctive Christian references that are repugnant to and serve to humiliate one such as the plaintiff, an adherent of the Hindu religion, which is neither monotheistic nor exclusively referred to in male terminology. At 240-41.

Prayer and Public Meetings: Local Government

Although this category was not addressed in **QR** Jan.-Mar.: 97, an important case should be added to the discussion of prayer within the context of meetings open to the public.

Society of Separationists, Inc. v. Whitehead, 870 P.2d 916 (Utah 1993) involved a fairly

common practice of public bodies to set a time at regularly scheduled meetings for "opening remarks." The "opening remarks" were actually "nonsectarian, nondenominational prayers," according to the city council, although not all "opening remarks" were prayers. The Utah Supreme Court, in analyzing the case under Utah's constitution (which is more precise in preventing church-state collusion than the federal constitution), found the prayer to be a "religious exercise" that provided indirect benefit to religion but not financial support. Although the City Council's agenda consisted of "generic opening thoughts, some of which may include prayers," there was no showing that the "City Council favored particular religions or religion in a general..." At 939. Participants represented diverse groups and no one was denied an equal opportunity. Utah's constitutional ban against Church-State union does not refer to "church" in a general sense but to "a particular religious denomination and the state so that the two function in tandem on an ongoing basis." Id. There was no showing that the City Council's "opening remarks" were designed to provide a preferential forum for one particular denomination. Its practice and its policy was nondenominational and nondiscriminatory. At 940. (This decision is interesting in several respects, not the least of which is the impressive recitation of the history of Utah and its uniqueness as the only state to be associated with one religion—the Church of Jesus Christ of Latter-Day Saints, more commonly known as the Mormon Church. The historical recitation details the origins of the "State of Deseret," the attempts at achieving statehood, the 1895 constitutional convention, and the intense, often acrimonious invective directed at these efforts.)

Choral Music and the Establishment Clause

QR April-June: 96 contained a number of cases challenging the selection of religiously based choral pieces for public school choirs as violative of the Establishment Clause of the First Amendment. Courts, for the most part, have recognized that most serious choral pieces have religious origins or themes but are primarily employed as part of a secular music program.

Bachman v. West High School, 132 F.3d 542 (10th Cir. 1997), is the latest published decision in a continuing dispute over the selection and performance of religious-based choral pieces by a Utah school district. The student had been a member of the school's *a capella* choir class, but objected to certain choral selections and further objected to the church sites where some performances would be given. The 10th Circuit, in rejecting the student's claims, reiterated that the historical, social and cultural significance of religion cannot be ignored, and "there is a legitimate time, manner and place for discussion of religion in the public classroom." At 554, citing Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 83 S.Ct. 1560 (1963). The court found "a number of plausible secular purposes" for the selection of certain choral pieces: (1) a significant percentage of serious choral music is based on religious themes or texts; (2) sacred choral music, like secular choral music, is selected for unique pedagogical qualities, such as sight reading, intonation, harmonization, and expression; and (3) occasional performances in churches and other religious institutions could be expected because such venues are acoustically superior to high school gymnasiums yet still provide adequate seating. Finding no real constitutional threat, the court dismissed Bachman's federal claims.

Contracting for Educational Services

In **QR** April-June: 97, it was reported that Marion County Superior Court No. 7 in Indianapolis dismissed a claim by a bargaining unit challenging the approval of remediation and preventive remediation grants for an Indiana public school corporation which, in turn, intended to contract with a for-profit organization to provide the remediation services to students who scored below the proficiency standards or who are at risk of falling below the State achievement standards. The trial court found the bargaining unit lacked standing to challenge the State's actions. In Fort Wayne Education Association (FWEA) et al. v. Indiana Department of Education et al., _____ N.E.2d _____ (Ind. App. 1998), the Indiana Court of Appeals affirmed the trial court's decision, finding the FWEA lacked any personal stake sufficient to have personal standing because the FWEA was in no "immediate danger of sustaining some direct injury as a result of the conduct at issue." Slip Op. at 4. It is insufficient to allege that the program would divert funds from other, unspecified programs. Such arguments, the court noted, calls upon a court to engage in "abstract speculation," an activity an appellate court is to avoid. Id. The court also rejected the FWEA's contention it had "public standing" because there is an issue of enforcement of a public right as distinguished from a private right. It is insufficient, the court noted, to allege a general interest common to all members of the public (i.e., public education) without demonstrating some direct injury. Slip Op. at 5, relying upon Pence v. State, 652 N.E.2d 486 (Ind. 1995). Without any direct injury, the FWEA lacked both private and public standing to challenge the awarding of the grants or the contract for educational services.

_____ _____

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