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 <kmcdowel@doe.state.in.us>.

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LEGAL SETTLEMENT AND INTERSTATE TRANSFERS OF STUDENTS

The 1999 Indiana General Assembly passed an important law that will address one of the growing problems brought about by the increased numbers of school-aged children being placed residentially outside their home states for correctional, medical, or educational reasons. Many of these students have significant disabilities and require considerable resources to provide educational services. Although there are a number of interstate compacts regarding or affecting the interstate placements of children for correctional and medical reasons,[1] none of these compacts speaks directly to the financial responsibility for educational costs. This has resulted in charges that some states are "dumping" their hard-to-place children in private facilities in states where there is no law specifically requiring financial responsibility for educational costs.

Through P.L. 118-1999, Sec. 3, the legislature amended I.C. 20-8.1-6.1-13 to address this anomaly. The amended law now specifically details that any facility or individual who accepts a school-aged child from another state, and for whom educational services are sought from an Indiana public school corporation, is the "guarantor for the student's transfer tuition...unless there is another guarantor." The Indiana State Board of Education has the authority to hear all appeals under this subsection, which could include disputes as to legal settlement, right to attend school, and the amount of transfer tuition owed, if any.[2]

The genesis for this latest legislative action actually began in 1989. The Family & Children's Center, Inc. ("FCC") and the School City of Mishawaka had been involved in a mutually beneficial arrangement for a number of years. FCC, a private, state-licensed child care facility that provides residential services and operates group homes, had been providing educational services for its residents through its own resources. FCC later asked the School City of Mishawaka (SCM) to assume this responsibility under I.C. 20-8.1-6.1-5.[3] SCM was willing to provide educational services to FCC

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[1]See, for example, I.C. 12-17-8-1 *et seq.* (Placement of Children), I.C. 12-28-2-1 *et seq.* (Mental Health), I.C. 20-11-1-1 *et seq.* (Education), I.C. 31-19-29-1 *et seq.* (Adoption Assistance), and I.C. 31-37-23-1 *et seq.* (Juveniles).

[2]The term "transfer tuition" is employed because it is defined and there is a means for determining costs. There is no corresponding definition for "tuition." A student with legal settlement in a state other than Indiana will not generate any state tuition support for an Indiana public school corporation obliged to provide educational services to such a student.

[3]I.C. 20-8.1-6.1-5(a) entitles a student who is placed in a state-licensed private or public health care facility, chid care facility, or foster family home through either welfare authorities, a court order, or any child-placing agency licensed by the state to receive educational services from the public school corporation where the home or facility is located. This is not dependent upon the student having legal settlement anywhere in Indiana.

residents, but only to those who actually reside within the school boundaries of SCM. (FCC maintained group homes within the boundaries of a neighboring public school district. These students were being served by the neighboring school district.) FCC initially sought on September 17, 1991, a hearing before the Indiana State Board of Education to determine whether SCM had to serve all of its eligible residents, but, due to the involvement of issues arising under the Individuals with Disabilities Education Act (IDEA), the State Board referred the matter to the Indiana Department of Education, Division of Special Education, to conduct a complaint investigation under the provisions of IDEA. See 34 CFR §§300.660-300.662 and 511 IAC 7-15-4. A detailed Complaint Investigation Report was issued on December 9, 1991. In Complaint No. 611.91, the Division of Special Education essentially upheld SCM's practice of ensuring educational services to FCC residents who are actually residing within SCM's boundaries. The U.S. Secretary of Education declined FCC's invitation to review the complaint.[4] A tangential issue was litigated in federal court, culminating in Family & Children's Center, Inc. v. School City of Mishawaka, 13 F.3d 1052 (7th Cir. 1994). More important issues were raised in a related state court action.

Family & Children's Center, Inc. v. School City of Mishawaka, Cause No. 71C01-9302-CP-10094 (St. Joseph County Circuit Court) began as an issue regarding whether SCM should pay rent to FCC for the facilities FCC provided to SCM while SCM was providing educational services to FCC's residents. FCC believed that SCM had agreed at one time to contribute financially to the construction of such facilities.[5] SCM brought the Indiana Department of Education into the matter through a third-party complaint. Eventually, the parties entered into a Consent Decree. As a part of the Consent Decree, the FCC agreed:

> To include within the per diem charged to out-of-state placing agencies, a cost component designed to reimburse the SCM for its average educational expenses (excluding facilities' expenses for those Children educated on the FCC's Campus) for FCC Children educated by the SCM. The FCC also agrees to undertake reasonable efforts to collect these sums and specifically agrees that the SCM will be reimbursed as these funds are collected on a pro-rata basis using the same ratio as exists between the educational expenses and overall per diem charge to the out-of-state placing agency. The FCC agrees either to pay these sums as received or provide the SCM with written documentation in FCC's possession with information why these sums were not collected....

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[4]Effective May 11, 1999, the U.S. Secretary of Education no longer provides federal review of the results of state complaint investigation reports conducted under IDEA.

[5]This issue was later resolved by the General Assembly through P.L. 36-1994, Secs. 28, 31, by indicating a facility such as FCC could charge a pro-rated capital cost per student for its facilities but only to the county of the student's legal settlement and not to an Indiana public school corporation.

While this resolved the issue between FCC and SCM, the problem involving out-of-state children continued to grow elsewhere, especially as publicly funded facilities were closed in Indiana and surrounding states to be replaced by privately operated facilities. Problems arose when Indiana public schools balked at providing educational services to school-aged children who did not have legal settlement. The costs for doing so were, for the most part, absorbed by the local school district because there existed no formal means for requiring the private facilities or individuals to pay for such costs yet state law required that services be provided. The estimated financial loss to local public school districts and the State of Indiana during the 1997-1998 school year was at $1.5 million. Other states already had passed laws prohibiting facilities or individuals from accepting out-of-state children without first securing financial responsibility for the educational costs.[6] P.L. 118-1999, Sec. 3, became effective July 1, 1999.

As noted above, this problem has not been confined solely to Indiana. Other states have been faced with similar problems.

1. Wise v. Ohio Department of Education, 863 F.Supp. 570 (N.D. Ohio 1994) involved a law similar to the one just passed in Indiana. The case involved two different children whose parents lived in other states, Maryland and Michigan. The parents placed their minor children in an Ohio-licensed residential facility providing long-term care to children with developmental disabilities. Educational services were provided through the local public school district. The facility was billed approximately $90,000 for the tuition for the children for three school years. The parents sued, asserting that the facility would likely pass the tuition costs to them, thus violating the IDEA, which indicates that children with disabilities are entitled to a "free appropriate public education" that is "at no cost" to the parents or guardians of the children. The district court agreed with the parents and prohibited Ohio from attempting to collect the tuition costs for the out-of-state children. However, the 6th Circuit Court of Appeals reversed. In Wise v. Ohio Department of Education, 80 F.3d 177 (6th Cir. 1996), the court noted that IDEA requires states to provide educational services at no cost to eligible students who reside within the state and not to non-resident students. The students are entitled to a free appropriate public education at no cost in the states and in the public school districts where their parents reside. The parents rendered their children ineligible for a free education at public expense when they unilaterally placed them at the Ohio facility. The district court decision was reversed, with directions to enter summary judgment in favor of the Ohio Department of Education and the school defendants.

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[6]In contrast to other placements, Indiana students placed out of state for educational reasons have not posed financial problems for the receiving states. Indiana places such students through a contract format that details relative financial responsibility of the State of Indiana, the local public school district, and the parent or guardian. See I.C. 20-1-6-19 and 511 IAC 7-12-5.

2. Catlin v. Sobol, 93 F.3d 1112 (2nd Cir. 1996) was the culmination of extended federal and state court proceedings dating back to 1986. The parents, who initially lived in New York but later moved to Massachusetts, placed their child in a "family home" in New York that specialized in care of children with Down Syndrome. Although the "family home" tended to the child's day-to-day needs, the parents retained their responsibility for him, including financial responsibility for his placement in the "family home," clothing, medical and dental care, and other incidental costs. When the local school district informed the parents that they would be financially responsible for the child's educational costs because they were not residents of New York, the parents challenged the decision that the child was not a resident of New York. The state Commissioner of Education determined that the child was considered a legal resident of Massachusetts and not New York, based upon the parents continuing responsibility for the child, including the exercising of control and financial responsibility for the child. Because the child's legal residency was with his parents in Massachusetts, the New York school district was not obliged to offer the child a free appropriate public education (FAPE) under IDEA or state law. The 2nd Circuit Court of Appeals rejected the parents' argument that IDEA and Sec. 504 of the Rehabilitation Act of 1973 require states to provide a free education to any child within the state, regardless of the child's residence or domicile. IDEA and Sec. 504, the court noted, "contain a presumption that children reside with their parents and it is the parents' resident district which is required to fund the child's education, wherever the child lives." At 1121. This presumption of residency is defeated only where the parents have abandoned the child or the child has become a "ward of the state." Once the parents established residency in Massachusetts, the child "would be presumed to be a resident of Massachusetts, and Massachusetts would become responsible for seeing that [the child] received a FAPE." At 1123.[7]

3. Letter to McAllister, 21 Individuals with Disabilities Education Law Reporter (IDELR) 81 (OSEP 1994). This Letter from the Office of Special Education Programs (OSEP), U.S. Department of Education (see 20 U.S.C. §1402) was cited by the Catlin court, *supra*. OSEP was responding to a series of questions involving interstate placements of children with disabilities and how IDEA might affect such placements. The location of the child does not affect responsibility under IDEA, OSEP wrote. Rather, "[i]t is residence that creates the duty under the statute and regulations [of IDEA].... As interpreted by this Office, a child is a resident of the State which: (1) their [sic] parent or guardian is a resident of; or (2) the child is a ward of." At 82. "The movement of a child from one placement in one jurisdiction to another

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[7]In a subsequent proceeding, the federal district court found the parents liable for the educational costs. The court also noted that neither Massachusetts nor the local school district in Massachusetts could be liable because the parents never attempted to enroll or seek services, electing instead to maintain a unilateral placement in New York. See Catlin v. Sobol, 988 F.Supp. 85 (N.D. N.Y. 1997).

placement in another jurisdiction does not, in most instances, change a child's district of residence or shift the responsibility for providing FAPE from one public agency to another." Id.

4. Letter to Moody, 23 IDELR 833 (OSEP 1995) was also cited by the Catlin court, *supra*, not only because the letter addressed a situation similar to the one the court was wrestling with, but because the inquiry came from the Massachusetts Department of Education. The question posed to OSEP was:

> Which State has the responsibility to serve a student with a disability under the following circumstances: a student with a disability is placed in a residential facility located instate A by a local educational agency in that state and subsequently, the child's parents move out of state A and assume residency in another state, state B?

In response, OSEP reiterated its position that, under IDEA, "it is residency that creates the duty to ensure that a free appropriate public education (FAPE) is made available to eligible children with disabilities. A student is presumed to be a resident of the State in which his or her parents reside or that he or she is a ward." At 834. Once the parents established residency in another state (State B), State A was no longer responsible for ensuring the provision of FAPE to the student. Id.

DRUG TESTING AND SCHOOL PRIVILEGES: REFINEMENTS IN POLICIES AND PROCEDURES

As noted previously,[8] courts, including the U.S. Supreme Court, have approved the use by schools of random, suspicionless drug-testing procedures through urinalysis testing where there is a compelling governmental interest as demonstrated through actual occurrences or incidents (or through reliable surveys). Schools have also been required to show that "individualized suspicion" searches would be unworkable in addressing the concerns, which are usually related to school safety; and the scope of the search is reasonably related to the objective and not excessively intrusive, especially in light of the age and sex of the student. The courts have also been less stringent in addressing school drug-testing policies if: (1) the policies relate to voluntary participation in extracurricular activities or other school-sponsored events; (2) results are used for non-punitive reasons (i.e., confined to addressing the objective rather than to detect infractions or crimes, or otherwise subject students to disciplinary sanctions); and (3) the testing results are communicated only to a limited, defined class of school personnel. See Vernonia Sch. District 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386 (1995).

Because Vernonia and other Supreme Court decisions have created gradations of privacy expectations,

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[8]See "Drug Testing Beyond *Vernonia*," **QR** Jan.-Mar.:98.

including gradations within a public school environment, trying to balance public and private interests continues to result in a number of constitutional challenges to school-initiated, suspicionless drug-testing procedures. Courts are seemingly less concerned with individual privacy rights where the school activity is "extracurricular" and voluntary, although there is increased judicial scrutiny of the survey methods utilized as a basis for demonstrating the need for such suspicionless searches in the first place (but see Miller v. Wilkes, *infra*).

Driving Privileges and Extracurricular Activities

Indiana case law continues to refine the extent to which public schools may extend voluntary, suspicionless drug-testing programs. In Schaill v. Tippecanoe Co. School Corp., 864 F.2d 1309 (7th Cir. 1988), a pre-Vernonia case, the courts approved the use of a random, suspicionless drug-testing program for athletes and cheerleaders based upon safety and health considerations. However, the 7th Circuit was reluctant to extend this program beyond the narrowly defined group, indicating such searches may be improper "of band members or the chess team." Id., at 1319. But in Todd v. Rush County Schools, 133 F.3d 984 (7th Cir. 1998), *cert. den.*, 119 S.Ct. 68 (1998), the 7th Circuit, in upholding the district court decision, did permit an Indiana public school district to extend its suspicionless, random, drug-testing program through urinalysis to any extracurricular activity or to driving privileges. This program not only addressed athletic participation, including cheerleading, but also included the Student Council, the Fellowship of Christian Athletes, Future Farmers of America, and the Library Club, as well as a host of other activities. The district court addressed the non-athletic programs and driving privileges together. The threat of injury while driving to school, the district court noted, 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." Todd v. Rush Co. Schools, 983 F.Supp. 799, 806 (S.D. Ind. 1997). However, on appeal to the 7th Circuit, driving privileges were not raised. The 7th Circuit noted that it was not addressing the constitutionality of the drug-testing program as it relates to driving privileges because the issue was not presented for their scrutiny. See Todd, 133 F.3d at 986, footnote 1.

The 7th Circuit now has its opportunity to address this issue. On May 12, 1999, federal District Court Judge Allen Sharp ruled in favor of a school corporation that had extended its random drug-testing program to driving privileges.[9] In Joy *et al.* v. Penn-Harris-Madison School Corp., _____ F.Supp.2d _____ (N.D. Ind. 1999), the court found that driving privileges are encompassed within the ambit of "extracurricular activities."

> It needs to be understood that except for a limited category of students who are close enough to walk and a limited category of students otherwise, public transportation is provided to the great majority of students attending Penn High School. So, there is no

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[9]Judge Sharp was also the federal district court judge that first ruled on the constitutional appropriateness of the drug-testing program in Schaill, *supra*, which was cited favorably by the majority opinion in Vernonia, *supra*.

> compulsion to drive to school in a private automobile. Certainly, as a maintenance of premises, the school has a considerable leeway and the privacy interest in being able to drive an automobile to a public high school by a high school student is certainly not as substantial as other privacy interests involved here.

Slip Opinion, at 9. The court determined the school's drug, alcohol, and tobacco policy passed constitutional muster, finding that the requirement that students consent to such random testing "in exchange for the privilege of parking on school premises in designated parking lots..." is rationally related to the "values of safety with regard to the issue of students driving to high school[.]" Id.

> It is an unfortunate reality of our times that those responsible for the premises of public high schools must out of duty of safety to all maintain tight control over those physical facilities. This certainly includes school parking lots.

Slip Opinion, at 12. The plaintiffs have appealed to the 7th Circuit.[10]

Confidentiality of the Results

Where a public school has initiated a random, suspicionless drug-testing program through urinalysis, a key area of concern expressed by the courts was that such results not be communicated generally but to a well defined group of school personnel who would, in turn, use these results to address the objective of the policy and procedure (drug, alcohol, or tobacco use) rather than to initiate school-based disciplinary actions.

Hedges v. Musco, 33 F.Supp.2d 369 (D. N.J. 1999) actually involved a situation where the student was subjected to a "reasonable suspicion" drug test through both urinalysis and blood testing because she appeared to be under the influence of either drugs or alcohol, and was acting in a manner inconsistent with her usual behavior. A search of her purse revealed unidentified pills, which she described as vitamins and diet pills. The school followed its policy and procedure in notifying the student's parent, advising the student and the parent of the school's suspicion, and advising the student and the parent that the student would have to undergo a drug screen before being readmitted. The parent was directed to a medical care facility that had a contract with the school. The parent provided written permission for drug screens, which turned out negative. The following morning, school officials met with the parent, the student, and the family's attorney. The school nurse called the medical care facility to obtain the results. Another student overheard the nurse's conversation with the medical care facility. Although the student was readmitted to school by the second period, by the end of the day, a

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[10]The progress of cases before the 7th Circuit Court of Appeals can be followed through the court's web site at <www.ca7.uscourts.gov>. The 7th Circuit's docket number for Joy v. Penn-Harris-Madison is Docket No. 99-2261.

number of students were aware that she had been subjected to a drug screen. The resulting lawsuit alleged, among other causes of action, that the school invaded her privacy by revealing confidential information, and that this breach of her privacy has caused her to be "stigmatized by her fellow students as a drug user."[11] The court found in favor of the school. Although the school's policy provides that the results of a student's medical examination for drug or alcohol use shall only "be shared with the nurse, the substance abuse counselor and the Superintendent," Id., at 380, the disclosure of the student's examination results occurred because a student overheard the nurse's conversation with the medical care facility. The "right to privacy" protects two types of privacy interests: (1) the individual interest in avoiding disclosure of personal matters; and (2) the individual interest in having the independence to make certain kinds of important decisions. Id., at 381. This case involved the first element: the right not to have one's personal affairs made public. Id.

In finding for the school, the court noted that the only information disclosed was "that she tested negative for drugs or alcohol." In addition, there was no intention on the school's part for other students to learn that the student had been so tested. "There is no evidence that Nurse Kiely expected that students would overhear her telephone conversation with [the medical care facility] or that she acted negligently which then lead to the disclosure." Id.[12]

Empirical Data

The various state and federal courts have scrutinized the empirical data employed by public schools in support of instituting random, suspicionless drug-testing programs. The court in Todd found the data "somewhat slight," but nevertheless found it adequate, noting that "the evidentiary hurdle for a public school is lower than in other contexts." 983 F.Supp. at 803, 805. In Joy, the district court lauded the school's "presentation of statistical and social data..." Slip Opinion, at 3. But the 7th Circuit was critical of the school's data in Willis v. Anderson Comm. Sch. Corp., 158 F.3d 415, 419 (7th Cir. 1998), *cert. den.* 119 S.Ct. 1254 (1999), finding that the school's data was insufficient to establish conclusively a "reasonable suspicion" of substance abuse when a student is suspended for fighting. The Colorado Supreme Court, in Trinidad School Dist. No. 1 v. Lopez, 963 P.2d 1095, 1099 (Colo. 1998) was critical of the school's survey of drug and alcohol use because the results had not been

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[11]The student does not implicate the Family Educational Rights and Privacy Act (FERPA) in this dispute. See "Educational Records: Dissemination of Personally Identifiable Information Under Federal and State Laws," *infra*. Rather, in an unusual move, the student claimed a violation of the Ninth Amendment to the U.S. Constitution, as applied to the states through the Fourteenth Amendment. The Ninth Amendment reads as follows: "The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

[12]For an expansive treatment of the tort of invasion of privacy, including its historical antecedents, see Doe v. Methodist Hospital, 690 N.E.2d 681 (Ind. 1997), a plurality decision of the Indiana Supreme Court addressing the disclosure of a postal worker's HIV status by a co-worker.

quantified, especially with respect to involvement in the school's marching band, a curricular event with no known or reported history of any problems.

However, in Miller v. Wilkes, 172 F.3d 574 (8th Cir. 1999), the 8th Circuit Court of Appeals downplayed the importance of such data in upholding the drug-testing policy and procedures of an Arkansas school district. The school's policy was somewhat similar to the policy in Todd, *supra*, in that it required students to sign consent forms for the random testing before being permitted to participate in any school activity outside the regular curriculum. There are provisions for re-testing of positive results. As in Todd, the policy addressed all extracurricular activities (including, for example, the radio club, the quiz bowl, and the prom committee), and was not confined to participation in athletics or cheerleading. Where Miller differs from the other cases is that the public school district is not actually experiencing any significant drug or alcohol problems that would serve as a necessary predicate for invoking a random, suspicionless drug-testing program in furthering the "compelling governmental interest" in addressing such problems where lesser intrusive means have failed or would be futile.

> We must acknowledge, however, that there is not the same "immediacy" here as there was in *Vernonia*, and this is where the facts before us differ most significantly from those the Supreme Court faced when declaring Vernonia's drug testing policy to be constitutional. There is no "immediate crisis" in Cave City public schools [citation omitted]; indeed, there is no record evidence of any drug or alcohol problem in the schools. We do not believe, however, that this difference must necessarily push the Cave City policy into unconstitutional territory, as it does not mean that the need for deterrence is not imperative. "A demonstrated problem of drug abuse [is] not in all cases necessary to the validity of a testing regime...." *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295, 1303, 137 L.Ed.2d 513 (1997) (citing [*National Treasury Employees v.] Von Raab*, 489 U.S. [656] at 673-75, 109 S.Ct. 1384).
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> Drug and alcohol abuse in public schools is a serious social problem today in every part of the country. (Indeed, to the extent any party thinks it necessary to do so, we take judicial notice of that fact. *See* Fed. Rules of Evidence 201 (generally known fact).) Perhaps no public school is safe from the scourge of drug and alcohol abuse among its students, and it is in the public interest to endeavor to avert the potential for damage, both to students who abuse and to those students, teachers, family members, and others who are collaterally affected by the abuse, before the problem gains a foothold."

Miller v. Wilkes, 172 F.3d at 580-81. The court also disagreed with the Colorado court, finding that it is unnecessary for a public school district to quantify results when the possible harm to the school is substantial.

> We see no reason that a school district should be compelled to wait until there is a demonstrable problem with substance abuse among its own students before the district

> is constitutionally permitted to take measures that will help protect its schools against the sort of "rebellion" proven in *Vernonia*, one "fueled by alcohol and drug abuse as well as the student's [sic] misperceptions about the drug culture." *Acton v. Vernonia Sch. Dist. 47J*, 796 F.Supp. 1354, 1357 (D. Or. 1992),...quoted in *Vernonia*, 515 U.S. at 663, 115 S.Ct. 2386.

Id., at 581. The 8th Circuit also noted that it believes its decision in Miller comports with the decisions by the 7th Circuit in Todd and Willis. See Miller, 172 F.3d at 582, footnote 6.

Drug Prevention and Intervention

Armstrong v. Alicante School, 44 F. Supp.2d 1087 (E.D. Cal. 1999) involves an unusual question: Are drug prevention and intervention programs mandated as a part of a "free appropriate public education" (FAPE) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq*.? A FAPE is provided where the educational program: (1) addresses the student's unique needs; (2) provides adequate support services so the student can take advantage of educational opportunities; and (3) is in accord with the student's Individualized Education Program (IEP). Bd of Ed. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 188-89, 102 S.Ct. 3034 (1982). Also see 20 U.S.C. §1401(8) and 34 CFR §300.13.

Armstrong was a student with a disability entitled to a FAPE. While at school, he ingested PCP in the boys' restroom, allegedly resulting in his need for residential care. He claimed the school tolerated the use of illegal drugs on its campus, and that this institutional attitude resulted in his being provided and ingesting PCP. As a consequence, he argued, he was unable to take advantage of educational opportunities and, hence, he was denied a FAPE as required by IDEA.

The student acknowledged that his IEP addressed his educational needs and that the school implemented his IEP. He contends that the lack of drug prevention or intervention programs did not provide him "adequate support services" so as to allow him to take advantage of the educational opportunities.

The court rejected the student's claims.

> It is obvious that drug use may impede any student's ability to take advantage of the educational opportunities. Such a determination, however, does not end the court's inquiry. The question remains whether drug prevention is the type of "supportive service" contemplated under the IDEA. The court finds it is not. There are a myriad of conditions caused by action or inaction within the school environment which [sic] may impede an individual's ability to take advantage of the educational opportunities, from poor ventilation to poor diet to poor sanitation. Indeed, such conduct may be actionable. However, the court finds that, in enacting the IDEA, Congress did not

> intend to create a federal claim for every activity or type of conduct which [sic] may impede an individual's ability to take advantage of the educational opportunities.

At 1089. Although the court acknowledged that IDEA addresses student discipline, and that discipline is an "ongoing and integral part of every educational process," the court concluded: "Unlike discipline, the prevention of drug use is not inextricably intertwined with the provision of an appropriate public education as required under the IDEA." Id.

EDUCATIONAL RECORDS: DISSEMINATION OF PERSONALLY IDENTIFIABLE INFORMATION UNDER FEDERAL AND STATE LAWS

The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, as implemented by 34 CFR Part 99, is the principal federal law affecting the collection, maintenance, dissemination, and destruction of the educational records of students who attend public or publicly funded schools. Because the federal law is so detailed as to access requirements, parental and student rights, hearing procedures, and local policy development and dissemination, state laws tend not to enlarge upon the FERPA requirements so much as to refine some of its provisions. Recently, there has been a small but important increase in the number of lawsuits involving perceived breaches of confidentiality and, in some cases, invasions of privacy.[13]

Meury v. Eagle-Union Community School Corporation, 714 N.E.2d 233, (Ind. App. 1999) is the first Indiana case addressing exclusively FERPA provisions. Meury asked the school to forward his transcripts to a university where he wished to attend through an athletic grant-in-aid for swimming. The public school district forwarded the records. However, attached to the records was a letter from three years earlier written by Meury's parents, challenging information contained in his educational records and asking that he be removed from one of his teacher's classes due to "philosophical differences." The handwritten note also sought to reach some resolution regarding Meury's "immature judgement" with respect to an incident at school. This note was apparently attached to other copies of Meury's transcripts that were sent at his request to other college-related institutions. When Meury did not receive the grant-in-aid or any other scholarship, he and his parents sued the school district claiming their rights were

[13]For related issues, see "Access to Public Records and Statewide Assessment," **QR** April-June: 98 and July.-Sep't..: 98; and "Grades," **QR** Jan.-Mar.: 96.

violated under FERPA and requesting damages, punitive damages, and a permanent injunction to prevent the school from acting in this matter in the future.[14]

The trial court dismissed the action, and the Indiana Court of Appeals affirmed. The following are pertinent findings:

- FERPA does not provide a private cause of action. "FERPA explicitly provides for a funding remedy with enforcement vested exclusively in the [U.S.] Secretary of Education." At 238. "The enforcement provisions within FERPA explicitly provide that the Secretary of Education is solely responsible for enforcement, thereby preempting a private cause of action. The Secretary of Education may withhold funds to schools with a 'policy or practice' violative of the provisions of the statute."

Id., at 239. See 34 CFR §§99.60-99.67 for the specific enforcement procedures. Also see Norris v. Greenwood Community School Corporation, 797 F.Supp. 1452 (S.D. Ind. 1992), finding that violations of FERPA are insufficient to support a claim of violation of one's civil rights.

- Notwithstanding, the inclusion of a single letter when forwarding Meury's transcript does not indicate a "policy or practice" of the school district, citing to Maynard v. Greater Hoyt School District, 876 F.Supp. 1104 (D. S.D. 1995). Id .

- The letter itself was authored by Meury's parents, and "the thrust of the letter appears to partially satisfy FERPA's requirement that parents be provided 'an opportunity for the correction or deletion of any...inaccurate, misleading or otherwise inappropriate data contained therein, and to insert into such records a written explanation of the parents respecting the content of such records.' 20 U.S.C.A. §1232(g)(a)(2). The letter comports with FERPA's requirement that the parents be allowed to include explanatory material in a student's education record." Id., at 240. See also 34 CFR §§99.7(a)(2), 99.20-99.22.

- "[T]he letter itself, whether distributed malevolently, benevolently, or negligently, does not contain substantive private information and cannot form the basis for an action alleging a federal right to privacy violation." Id., at 241

- The plaintiffs "have [also] failed to present a cognizable state invasion of privacy claim for two reasons. The letter alone is not actionable, and the nature of the disclosure does not satisfy the publicity component for disclosure of private information.... The Meurys base their claim on a truthful disclosure which was made only to parties to whom they requested that private educational information be disclosed." Id., at 242.

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[14]There was a strained relationship between the high school principal and the parents. The court acknowledged the inclusion of the parents' letter with the transcript may not have been inadvertent.

The court noted as an aside that the parents' claims could have been denied on the basis Meury was at least 18 years of age. Under FERPA, the rights transfer to the student when the student attains the age of 18 years or is attending a post-secondary educational institution. See 20 U.S.C. §1232g(d) and 34 CFR §99.5. The court could have found the parents did not have standing to present any claims. Id., at 240, footnote 5.

The parties and the court in Meury relied heavily upon emerging case law that indicates, in some cases, the dissemination of personally identifiable information or confidential information may support either an action for invasion of privacy or a civil rights violation under 42 U.S.C. §1983.
The first three cases below figured heavily in the Meury controversy.

1. When a student with disabilities may require alternative or residential services in order to receive an appropriate education, the local school district typically applies to the Indiana Department of Education for extraordinary funding under I.C. 20-1-6-19 as implemented by 511 IAC 7-12-5. (This process is sometimes referred to as "S-5" or "Rule S-5" after its former designation.) It is necessary to share information from the affected student's educational record, first with the State, and then with prospective providers, including residential facilities both in Indiana and outside Indiana. The application form does contain a place where the parent or guardian can provide written permission for the sharing of records. Sometimes, the parent or guardian attempts to limit what information can be disclosed or objects altogether with the sharing of any information. In one case, the local school district, following State law in effect at the time, shared information with the "Local Coordinating Committee" (LCC), which was composed of other governmental entities that are involved in residential placements (such as Child Protective Services). In Norris v. Board of Education of Greenwood Community School Corporation, 797 F.Supp. 1452 (S.D. Ind. 1992), the court balanced the student's legitimate privacy interest in confidential educational records with the school corporation's use of that information when it shared information with the non-school personnel on the LCC, finding that such sharing of information from the student's educational record was "within the State educational system as provided by State law." At 1465. The court added at 1465-66:

> A student does not have a legitimate expectation that information potentially related to his educational needs will not be available within the educational system. Regardless whether the Defendants had a proper motive in bringing the S-5 proceeding, their communication of the information from [the student's] records was not so broad as to violate his right to privacy.

2. This becomes more problematical where the disclosure of information is made while the public school is attempting to comply with other state laws requiring deliberations be open to the public. In Maynard v. Greater Hoyt Sch. Dist., 876 F.Supp. 1104 (D. S.D. 1995), a student with autism required an out-of-state residential placement. The school district had no cities of

any size and no industrial tax base. The cost of the placement eventually required a property tax increase. Under South Dakota law, the school board was required to document expenditures in published notices in the local newspaper. When the property tax increase became necessary, taxpayers began to inquire. As the matter became something of a brouhaha, newspaper coverage increased. One newspaper report linked the tax increase to the student, and published a picture of the student with his name. The parents received harassing telephone calls. Public statements by taxpayers were derogatory toward the student and his parents. Although a violation of FERPA did occur in that sufficient information was disclosed that made the student's identity easily traceable (a category of what constitutes "personally identifiable information" under FERPA), the court nonetheless found the school board members entitled to qualified immunity against the civil rights claim of the student because the disclosure of information regarding expenditures was made pursuant to State law, and the school board, following consultation with its attorney, did not list the student's name in the published minutes, but they did list the parents' names, as required, because reimbursement had been made to them for travel expenses. In addition, the school was required to release information to the public regarding the reasons for the tax increase. "An objectively reasonable school board member would not know that the release of information regarding the cause of the increase in property taxes was a violation of the plaintiffs' clearly established right to confidentiality." At 1108.

3. Doe v. Knox County Board of Education, 918 F.Supp.181 (E.D. Ky. 1996) is similar to Maynard in many respects. The parent and the school had disagreements over the appropriate program for the parent's daughter, a 13-year-old child who was also a hermaphrodite. The parent requested a due process hearing under IDEA, and exercised the right to keep the proceedings confidential, as permitted by IDEA at the parent's election. In providing a program for the student, the governing body was required to make emergency purchases. Under Kentucky law, discussion of such purchases are matters of public record. A newspaper reporter inquired as to the reasons for the emergency purchases. In an article that appeared in the local newspaper, the following was published:

> "As an alternative to the residential placement, the emotional behavior disorder (EBD) unit was established at Lay Elementary at the beginning of the 1994-95 school year for the fifth through eighth grade. A written explanation in the board of education agenda from a recent meeting stated that the EBD unit was created because of a 12-year-old female with severe emotional and behavioral problems, resulting primarily from a medical condition, hermaphroditism.
>
> "Hermaphroditism is a person born having both male and female reproductive organs."

The parent alleged the information disclosed made her daughter's identity easily traceable and violated her privacy rights under FERPA. The court, without deciding whether or not the school board's disclosure actually violated FERPA, did note that the exceptions to disclosing personally identifiable information without parental consent (see §99.31, *supra*), does not include newspapers or newspaper reporters. At 184. As the court noted in Maynard, *supra*, school officials performing discretionary functions generally are immune from personal liability for civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. At 185. In this case, the student had a clearly established right of freedom from the board of education disclosing personally identifiable information contained in her educational records. The school board does not dispute the information was disclosed by them, but disputes the information constituted "personally identifiable information." Whether or not the information was "personally identifiable" would be a matter for the jury. However, the law in this area was sufficiently established that the school's Motion to Dismiss had to be denied. Id. "However," the court added cryptically, "if the information was identifiable, disclosing it to the press was not reasonable." Id.

4. Greater Hoyt (IA) School Board, 20 IDELR 105 (FPCO 1993). The Family Policy Compliance Office (FPCO), which is the agency within the U.S. Department of Education responsible for enforcement of FERPA (see §§99.60-99.67), found that, Iowa law notwithstanding, FERPA prohibits the disclosure of personally identifiable information from a student's educational record, including his Individualized Education Program (IEP), to the media without first obtaining the written consent of the parent or eligible student. This administrative decision by the FPCO is related to the Maynard case, *supra*.

FERPA Relationship To IDEA

Although the Meury case did not involve disability issues, the three cases cited most often in the Meury decision did involve students with disabilities. The Individuals with Disabilities Education Act (IDEA) incorporates FERPA by reference. See 20 U.S.C. §1417(c), as implemented by 34 CFR §§300.560-300.577. However, in some cases, IDEA is more specific than FERPA. This raises a number of different issues, including dissemination of information to law enforcement, parental access rights, and costs for duplicating records.

Law Enforcement and Injunctive Relief

1. Although the IDEA has been revised to provide more flexibility, in removing to an interim alternative educational placement, students with disabilities who are believed to pose a danger to themselves or others, there are time limitations within which a change of placement, if needed, must occur. Should the parties fail to resolve differences within the 45-day period such an alternative placement can be unilaterally implemented or within the period of time ordered by an Independent Hearing Officer under specific conditions, the school may have to seek injunctive relief from a court in order to maintain the placement pending exhaustion of the

procedural safeguards established under this federal law. See 20 USC §1415(k) and 34 CFR §§300.519-300.529. These types of injunctions are referred to as "Honig" injunctions, after Honig v. Doe, 484 U.S. 305, 108 S.Ct. 592 (1988), which first addressed the use of such measures to enjoin a student's attendance at school pending exhaustion of IDEA administrative remedies. In one situation in Indiana that occurred prior to the 1997 amendments to IDEA, the school district and the parent, unable to determine an interim placement while the parties resolved differences through IDEA due process (see 511 IAC 7-15-5), sought to enjoin the student's attendance at school because of violent behavior. The school, in support of its "Honig" motion for injunctive relief, supplied the court with documents from the student's educational records and affidavits from his teachers. Unfortunately, the court was in a largely rural county and exercised a number of judicial functions beyond juvenile matters. The school did not advise the court such information should be confidential, nor did court personnel exercise confidentiality requirements under juvenile court procedures. A reporter for a local newspaper, while checking court filings as a part of the reporter's regular assignments, saw and read the school's "Honig" motion with its supporting affidavits. A story was published on the front page of the local newspaper, identifying the student, his disability, his address, and his parents.

The parents' attorney agreed not to pursue action against the school if the Indiana Department of Education (IDOE) would seek clarification from the Family Policy Compliance Office (FPCO), see *supra*, regarding responsibilities in this area. Although IDOE wrote the FPCO on April 23, 1991, FPCO did not respond until November 26, 1991. FPCO's response indicated that disclosure of personally identifiable information from educational records to a court are not prohibited, but "further disclosure without prior written consent might constitute a violation of FERPA." FPCO added:

> Accordingly, educational agencies or institutions that disclose information from students' education records to a court under circumstances that are likely to result in public disclosure of such information may want to seek a protective order or initiate appropriate action that will ensure confidentiality of the information is maintained. Further, [it is suggested] that before disclosing education records to any third party, educational agencies and institutions indicate on the records that they are subject to FERPA.

2. In a somewhat analogous situation, the 8th Circuit Court of Appeals had to address the confidentiality requirements of both IDEA and FERPA when a newspaper sought to intervene and seek court records involving a dispute between a parent and school regarding a student with a disability alleged to have brought a gun to school. In Webster Groves School Dist. v. Pulitzer Publishing Co., 898 F.2d 1371 (8th Cir. 1990), the Circuit Court affirmed the district court's protecting the privacy rights of the student by closing the proceedings and the court

record to the public. As the court noted at 1375: "In order to safeguard the confidentiality of such information in judicial proceedings, it therefore is appropriate to restrict access to the courtroom and the court file."

3. IDEA, when reauthorized in 1997, now permits public schools to report crimes committed by students with disabilities to appropriate authorities without first obtaining the written consent of the parent or eligible student. See 20 U.S.C. §1415(k)(9). In Complaint No. 1332.98,[15] a public school reported a 14-year-old student with a disability to the local police after he allegedly set on fire another student's sweatshirt by using matches. The police entered the school and questioned the student. The school informed the police of the student's educational status and that he was receiving special education and related services. The student was taken into custody and removed to the county juvenile detention center. The school was found not to have violated federal and state law. Under 20 U.S.C. §1415(k)(9), the school was found to have "acted responsibly and within its legal boundaries to notify Police of the incident and by disclosing personally identifiable information about the student. Further, 20 USC §1415(k)(9)(B) ...requires the public agency reporting a crime committed by a student with a disability [to] 'ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.'" See 34 CFR §300.529.

Parental Access Rights

Parents are presumed to have full access rights under FERPA and IDEA unless the public school "has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights." See 34 CFR §99.4. This is similar to Indiana's Parental Access to Education Records Act at I.C. 20-10.1-22.4 *et seq.*, except that Indiana recognizes that the legal document referenced in FERPA does not have to "revoke" such access rights but may simply "limit" the rights. The school has to receive a copy of such a court order or have actual knowledge of the order's existence. The school is not required to act upon one parent's assertion (usually the custodial parent) that such an order exist, nor is the school required to obtain the court order on its own. The party alleging limitations on another party has the responsibility for producing the document.

Except for certain limitations found at §99.12, a parent or an eligible student has the right to inspect and

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[15]Complaint investigations regarding alleged violations of special education laws are required by IDEA's implementing regulations. See 34 CFR §§300.660-300.662. Because IDEA incorporates FERPA requirements, the Indiana Department of Education, through its Division of Special Education, investigates complaints regarding the educational records of students with disabilities. The procedures are detailed at 511 IAC 7-15-4.

review the student's educational records, including any educational records maintained on the student by a State agency. The parent and student are entitled to explanations and interpretations of the records (except where the request is not reasonable). The access must be provided within forty-five (45) days after receiving the request for access, unless State law or local policy provides for a shorter period of time. There is no *right* to copies of the educational record except where circumstances indicate the parent or eligible student would not be able to exercise the access rights within the 45-day time frame. (Under other constructions, the parent or eligible student is entitled to a copy of the educational record if the records are needed for due process proceedings.) However, as noted above, there are some areas where IDEA requirements are more specific than FERPA provisions.

In Complaint No. 1387.99, an Indiana public school corporation required a parent of a student with disabilities to sign a release form prior to gaining access to the educational records of the parent's child. The school explained that its local policy was based upon a "best practices" recommendation from a nationally recognized publication, which had recommended such practice in order to develop a defense to parental allegations that access to records had been denied. Although FERPA does not address such a circumstance directly—and the national publication was addressing only FERPA—IDEA does address this. Public schools are required to keep a record of parties obtaining access to educational records collected, maintained, or used under IDEA "...except access by parents and authorized employees of the participating agency..." 34 CFR §300.563. By conditioning parental access upon the parent signing the release form, the school district was out of compliance with IDEA. See also Lehigh (Pa.) School District, EHLR 352:99 (OCR 1986), an investigation by the Office for Civil Rights (OCR) of the U.S. Department of Education, applying nondiscrimination laws. In Lehigh, OCR determined that a public agency cannot require a parent to submit a written rationale and justification with any request to inspect the educational records of the parent's child.

Cost of Duplication

Both FERPA (§99.11) and IDEA (§300.566) permit public schools to charge parents a fee for copies of educational records so long as "the fee does not effectively prevent the parents from exercising their right to inspect and review those records." No fee can be charged for searching or retrieving such records. The Indiana State Board of Education is more detailed regarding such fees. At 511 IAC 7-8-1(f), the fee cannot "exceed actual cost of duplication..."[16]

In Complaint No. 1269.98, the complainant alleged the school district overcharged her for copies of

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[16]The Indiana General Assembly, in response to numerous complaints that public agencies other than State agencies were charging excessive fees for copies of public documents and discouraging the public from gaining access to records, recently amended I.C. 5-14-3-8(d) to define what is meant by an "actual cost" that public agencies, other than State agencies (see the explanation, *supra*), can uniformly charge. As provided by P.L. 151-1999, Sec. 1, "actual cost" means "the cost of paper and the per-page cost for use of copying or facsimile equipment, and does not include labor costs or overhead costs."

her child's educational record. The school charged her ten (10) cents a page. The complainant alleged local print shops charged only six (6) cents a page. Under 511 IAC 7-8-1(f), a public agency may charge a fee under usual circumstances, but the fee for copies cannot "exceed actual cost of duplication." The school arrived at its ten (10) cents a page by surveying local print shops, where fees ranged from six (6) cents a page to fifteen (15) cents a page. The average cost was nine (9) cents a page; the mean cost was ten (10) cents a page. The ten-cent fee, the school maintained, was consistent with the local market. The school was found in compliance. As one of the Findings of Fact, the complaint investigator noted that the per-page charges for State agencies, such as the Indiana Department of Education, are established by the Access to Public Records Act, I.C. 5-14-3-8(c), which requires the Department of Administration to set the rate. The current fee per page, if the complainant had sought the same records from the IDOE, would have been fifteen (15) cents a page.

Hearing Rights

FERPA (§99.22) requires hearings to challenge the contents of educational records to be conducted within a "reasonable time" after receiving such a request, and that the hearing be conducted by someone other than a school official who has "a direct interest in the outcome of the hearing." A written decision must be issued "within a reasonable time after the hearing" and "must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reason for the decision." IDEA references these procedures at §300.570. However, Indiana's special education regulations contain more specific time frames for the conduct of such hearings, including how soon a hearing must be convened after receiving a request (15 business days). Also, the hearing officer has ten (10) business days from the date of the hearing to issue the written decision. See 511 IAC 7-8-1(p). In Complaint No. 1437.99, the public school district received a request for a hearing from a parent to amend information contained in the student's educational record. The school appointed as hearing officer the assistant superintendent from a neighboring school district. However, following the hearing, the hearing officer sent the written decision to the superintendent of the school district, requesting that he review the hearing officer's decision and "render a decision, and send to the parents a letter stating your decision, and a justification for your decision, [along with] a copy of my report...." The parents received an unsigned letter that was not on school stationery 16 days after the hearing, apparently from the superintendent, informing the parents that he concurred with the decision of the hearing officer. The school district was found to be in violation of Indiana's special education regulations for failure to render a written decision within ten (10) business days from the hearing, and by having the decision rendered by someone other than the hearing officer.

GANGS AND GANG-RELATED ACTIVITIES: BALANCING SCHOOL VIOLENCE CONCERNS WITH CONSTITUTIONAL REQUIREMENTS

(This article is part of the continuing series addressing various aspects of emergency preparedness and crisis intervention plans that are part of the accreditation requirements under 511 IAC 6.1-2-2.5. For a related article addressing "Gangs," see **QR** Oct.-Dec.: 95.)

Dr. Suellen Reed, the Indiana State Superintendent of Public Instruction, once related an incident that occurred while she was a principal of an elementary school in a local school district. A parent called the principal of the high school to complain of gang activity in the high school. This school district is somewhat of a rural district and, in Dr. Reed's estimation, removed sufficiently from the "big city" influences at the time that gang activity seemed highly unlikely. The principal asked the parent for more particulars. The parent obliged: It seems the "gang" congregated in the same area everyday, making her children feel nervous when passing them. They all wore the same "colors." These colors, it turned out, were on jackets of dark blue corduroy with yellow lettering. The yellow letters were "FFA." The "gang," it turns out, were members of the school's chapter of the Future Farmers of America.

This story illustrates some of the problems courts are facing when asked to review policies and procedures enacted by local governing bodies in an attempt to address perceived gang activity within the schools. The gang activity often takes the form of threats, intimidation, extortion, and, not infrequently, weapons possession. The courts are generally recognizing the need for public school districts to address demonstrable gang problems with their associated violence and disruption to the educational process. "Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 686; 106 S.Ct. 3159, 3166 (1986). Nevertheless, a school's rules cannot be so vague as to not provide a fair notice or warning as to what activities are actually proscribed. A vague law generally has a resulting legal flaw through the impermissible delegation of basic policy matters to non-policy makers on an *ad hoc*, subjective basis. This results in arbitrary enforcement.[17]

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[17]The Indianapolis Public Schools, the largest public school district in Indiana, is developing a dress code policy that will, in part, address gang apparel. According to a story in the July 1, 1999, issue of *The Indianapolis Star*, the dress code will attempt to address clothing that is disruptive to the school environment, such as spaghetti-strap tank tops and sagging pants (see *infra*). IPS will also attempt to proscribe the wearing of clothing that has rips and tears, T-shirts that promote alcohol or violence (see **QR** July-Sep't.: 95, **QR** Oct.-Dec.: 95; and **QR** July-Sep't.: 96), and gang symbols. At a recent meeting of the IPS governing body, the IPS Police Chief, Jack Martin, demonstrated to the school board recently confiscated items, which included a leather collar with one-inch metal spikes, a bracelet with a bullet as a charm and a Star of David that was used as a gang symbol (see *infra*).

In addition, some school policies may inhibit otherwise protected speech under the First Amendment, including "symbolic speech" that conveys a particularized message that does not disrupt the school process and is understood generally by those who perceive the symbolic speech.[18] Where First Amendment rights are implicated, notably in free speech and free exercise areas, a greater degree of judicial scrutiny will be applied.

The following recent school-related cases are illustrative of these principles.

1. In Bivens v. Albuquerque Public Schools, 899 F.Supp. 556 (D. N.M. 1995), a federal district court upheld the school district's long-term suspension of a student for wearing sagging pants. The student was a freshman in high school. Each school in the school district could establish a dress code. Plaintiff's school, in response to a perceived problem with gangs and gang-related activity, established a dress code that banned certain attire commonly associated with gangs or would be gang-members ("wannabes"). One such mode of attire banned was the "sagging pants." Plaintiff had been warned repeatedly regarding his "sagging pants" and had received several short-term suspensions for refusing to abide by the dress code. He eventually received a long-term suspension, which resulted in the lawsuit. Plaintiff claimed that the dress code was vague and therefore constitutionally defective and void. The court disagreed, refusing to reduce "sagging" to a measurement of "inches or millimeters," noting that it did not require quantified exactness to define "short shorts" or "half shirts," which were also prohibited. "The need to maintain appropriate discipline in schools must favor more administrative discretion than might be permitted in other parts of society" (at 563).

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

   a. The intent to convey a particularized message; and
   b. The great likelihood that the message would be understood by those who observe the conduct (at 560).

   The court found the student did not meet this two-prong test. Wearing "sagging pants" was a subjective message, but there was not a "great likelihood" that the subjective message

[18]See, for example, "Confederate Symbols and School Policies," **QR** Jan.-Mar.: 99.

(identifying with alleged black inner city youth) would be understood by those who observed it (at 561). The court noted at 560 that "The wearing of a particular type or style of clothing usually is not seen as expressive conduct." The court added: "Not every defiant act by a high school student is constitutionally protected speech."

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

2. In Olsen v. Board of Education of School District No. 228, 676 F.Supp. 820 (N.D. Ill. 1987), the court upheld the constitutionality of a school's antigang rule which prohibited the wearing of earrings by male students. The school was experiencing significant gang-related problems (violence, intimidation and extortion). One particular gang had three symbols (a cross, a pitchfork and a six-pointed star). The student, who "misses more classes than he attends and fails more classes than he passes" was known to associate with the gang. He began to wear an earring with one of the gang's symbols. The Board's policy did not ban the wearing of earrings but did ban the wearing or displaying of any gang symbol, any act or speech showing gang affiliation, and any conduct in furtherance of gang activity (at pp. 821-22). Each local school building's administration adapted the Board's antigang policy. The student's school noted that gang members were wearing earrings and, as a consequence, banned male students from wearing earrings. The court found that the Board's antigang policy and its adaptation to the student's particular school were rationally related to the educational function of instructing students in academic and behavioral areas. The court also rejected a claim of gender-based discrimination based on equal protection grounds because female students were not similarly banned from wearing earrings. The court noted that female gang members demonstrated their affiliation by other means, which were also banned. The Board's policy was substantially related to a legitimate government objective (at 823).

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

4. In Chalifoux v. New Caney Ind. Sch. Dist., 976 F.Supp. 659 (S.D. Tex. 1997), portions of the school's dress code that purported to ban the wearing of gang-related apparel, including rosaries, was found to violate two students' rights to freedom of speech and free exercise of religion. The students wore rosaries outside their shirts for several months and were never identified as belonging to any gangs. The student handbook listed several items that were considered "gang-related apparel" (baseball caps, hair nets, sweatbands, bandanas, baggy pants), but did not include "rosaries." The handbook also indicated a more detailed list was in the principal's office, but no such list existed. Decisions regarding what constituted "gang-related apparel" were made almost exclusively by the gang liaison police officer and the principal. For the plaintiffs, the wearing of the rosaries had religious significance. The policy failed for four reasons: (1) It abridged the students' freedom of speech; (2) It abridged the student's free exercise of religion; (3) the policy provisions were void for vagueness; and (4) policy-making authority was vested within the discretion of too few, non-policy making officials, thus encouraging arbitrary enforcement.

Important findings of the court include:

a. "Symbolic speech is protectible under the First Amendment if the person displaying the symbol intends to convey a particularized message and there is a great likelihood that the message will be understood by those observing it....Plaintiffs wore their rosaries with the intent to communicate their Catholic faith to others."
At 665.

b. Absent a showing that the plaintiffs' religiously motivated speech caused an actual disruption at the school, or that there was a substantial reason to anticipate a disruption, the school was not justified in its infringement of the plaintiffs' right to wear the rosaries. At 667.

c. "Violence upon and intimidation of students in public schools is unacceptable to parents and the public in general. Reasonable measures may be employed by school districts, administrators and teachers to ensure the safety of children and to permit them to pursue their learning experience.... Because of the need for flexibility, school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions. However, where, as here, the District's regulation reaches First Amendment free speech and free exercise rights, the doctrine demands a greater degree of specificity than in other contexts." [Internal punctuation and citation omitted.] At 668.

d. "The Student Handbook defines 'gang-related apparel" as '[a]ny attire which identifies students as a group (gang-related).' This definition reveals little about what conduct is prohibited by [the District]. It is a well recognized principle of language construction that it is inappropriate to define a word by using that same word in the definition.

> Accordingly, because [the District] defines 'gang-related apparel' as attire which is 'gang-related,' the District's definition is ambiguous."
> Id.

5. Stephenson v. Davenport Community School District, 110 F.3d 1303 (8th Cir. 1997). The Chalifoux court, *supra*, was influenced significantly by this decision, especially as it relates to gang-related policies that were void for vagueness. In this case, the plaintiff, when she was an eighth grade student, tattooed a small cross between her thumb and index finger. She maintained this tattoo without incident for the next 30 months. She did not consider the tattoo as religious expression but, rather, as a means of "self expression." She did not belong to any gang and was not suspected of any such affiliations. She had no disciplinary record and was, in fact, an honor roll student despite the presence of a learning disability. While attending her Iowa high school, gang activity increased. Students brought weapons to school and violence increased, including threats to other students who displayed rival gang symbols or signs and intimidation of students who did not have any allegiance. The school district, in cooperation with the local police, developed what it termed a "Proactive Disciplinary Position K-12," which read in relevant part:

> Gang related activities such as display of "colors," symbols, signals, signs, etc., will not be tolerated on school grounds. Students in violation will be suspended from school and/or recommended to the Board of expulsion.

No definitions are provided for "gang-related activities" or "'colors,' symbols, signals, signs, etc." A school counselor noticed plaintiff's tattoo when she met with him to discuss her class schedule. He reported this to the assistant principal who, in turn, reported this to the police liaison officer. The officer stated it was his opinion that the tattoo was a gang symbol. Plaintiff was suspended for a day, and was threatened with ten days' suspension if she did not remove the tattoo. She did not want to alter the tattoo because it would create a larger tattoo which, she feared, could also be considered a "gang symbol." A tattoo specialist indicated a laser treatment was the only effective way to remove the tattoo. The liaison officer spoke to another officer who, without viewing the tattoo, indicated it was his opinion the tattoo was a gang symbol. The plaintiff underwent the laser treatment, which cost about $500 and left a scar on her hand. Her resulting civil rights claims against the school resulted in summary judgment to the school at the district court level. The 8th Circuit Court of Appeals affirmed the decision below in some respects, but essentially reversed the district court regarding the more substantive issues. Although the court found the tattoo was not a form of "symbolic speech" protected by the First Amendment because it was not intended to convey a

particularized message beyond her mere "self expression," the court did find the school's policy to be void for vagueness. The following are pertinent findings:

a. "The void for vagueness doctrine is embodied in the due process clauses of the fifth and fourteenth amendments. A vague regulation is constitutionally infirm in two significant respects. First, the doctrine of vagueness incorporates notions of fair notice or warning, and a regulation violates the first essential of due process of law by failing to provide adequate notice of prohibited conduct. In short, a regulation is void-for-vagueness if it forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application. Second, the void-for-vagueness doctrine prevents arbitrary and discriminatory enforcement. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis...." [Internal punctuation and citations omitted.] At 1308.

b. Under the school's policy, "common religious symbols may be considered gang symbols." Although plaintiff's cross is not intended to convey a religiously oriented form of symbolic speech, nevertheless, "The District regulation...sweeps within its parameters constitutionally protected speech." Id. Schools must have flexibility in addressing disruptions of the educational process. Accordingly, schools can impose disciplinary sanctions for a wide range of unanticipated conduct, and its rules need not be as detailed as a criminal code that imposes criminal sanctions. However, where a school rule affects First Amendment rights, a greater degree of specificity will be required than in other contexts. "[W]hile a lesser standard of scrutiny is appropriate because of the public school setting, a proportionately greater level of scrutiny is required because the regulation reaches the exercise of free speech." At 1308-09.

c. The term "gang" is "notoriously imprecise.... We find no federal case upholding a regulation, challenged as vague or overbroad, that proscribes 'gang' activity without defining that term." Where there is a failure to "define the pivotal term of a regulation," one does not have prior warning that his conduct might be proscribed. "Accordingly, the District regulation fails to provide adequate notice of prohibited conduct because the term 'gang,' without more, is fatally vague." At 1309-10.

d. There is an additional defect in the school's policy "because it allows school administrators and local police unfettered discretion to decide what represents a gang symbol." In this case, other students did not perceive plaintiff's tattoo to be a gang symbol, nor did anyone complain about it for the thirty months she had it prior to the school counselor expressing his concerns. "She underwent a medical treatment, incurred expense, and suffered physical injury solely on the basis of the subjective opinion of school administrators and local police who had no other evidence

> Stephenson was involved in gang activity.... The District regulation, therefore, violates a central purpose of the vagueness doctrine that if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." [Internal punctuation and citations omitted.] At 1310-11.

It is noteworthy (in fact, it was "worthy of a note" by the court at 1311, note 6) the school district did amend its gang regulation in order to define more precisely what it meant by a "gang" and what activities were considered "gang related." The amended policy reads as follows:

> A "gang" as defined in this policy and under Iowa Code 723A means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more criminal acts, which has an identifiable name, or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity. The "pattern of gang activity" means the commission, attempt to commit, conspiring to commit, or solicitation of two or more criminal acts provided the criminal acts were committed on separate dates or by two or more persons who are members of, or belong to, the same criminal street gang.[19]

For additional cases of interest that can be instructive to school officials in implementing policies to address gang activity, please see the following.

Invalidity of Ordinance for Being Vague and Overbroad

City of Harvard v. Gault, 660 N.E.2d 259 (Ill. App. 1996). Gault's conviction for violating a city ordinance forbidding the wearing of "gang insignia" was reversed, the court finding the ordinance to be "facially overly broad" and in violation of "constitutional guarantees of free speech." At 260. The ordinance read as follows:

> It shall be unlawful for any person within the City to wear known gang colors, emblems, or other insignia, or appear to be engaged in communicating gang-related messages through the use of hand signals or other means of communication.

Gault was thirteen years old at the time of his arrest. He was wearing a six-pointed star (Star of David) in public. When he saw police officers, he tried to hide the star but to no avail. He admitted he was not Jewish and further admitted he belonged to a street gang known as the "Action Packed Gangster

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[19]It is a Class A Misdemeanor in Indiana to tattoo a minor unless the minor's parent is present at the time the tattoo is provided and provides written permission for the minor to receive the tattoo. I.C. 35-42-2-7, as added by P.L. 181-1997. In the 1999 session of the General Assembly, the legislature amended this statute to make "body piercing" of a minor without parental permission a Class A Misdemeanor. See P.L. 166-1999, Sec. 2.

Disciples." The city argued that Gault knew the Star of David was a gang symbol because he had been present when a police officer "trained and certified in street-gang identification and anti-gang education" visited his high school and provided a lecture on this topic. The city also argued there were no "free speech" issues because the wearing of such gang symbols is tantamount to "fighting words," which are not protected by the First Amendment. At 260-61. The appellate court rejected these arguments. Although the reason for the ordinance was laudable, its enforcement placed substantial limitations on constitutionally protected free speech. Police officers testified that they would arrest anyone wearing a Star of David, even if Jewish, should the police have evidence the person was a gang member. Anyone walking with a shoelace untied would be warned that this is a "gang symbol." Anyone wearing "black and gold" gang colors would be similarly confronted, although black and gold are also the official colors of the Harvard High School. In addition, people wearing Oakland Raiders caps, Chicago Bulls jackets and caps (note: this is an Illinois case), Converse shoes, one untied shoelace, and caps tilted to the left or right would be warned or arrested for violating the ordinance. Pertinent findings of the court are as follows:

- "A law regulating conduct is facially broad if it: (1) criminalizes a substantial amount of protected behavior, when judged in relation to the law's 'plainly legitimate sweep' [citation omitted]; and (2) is not susceptible to a limiting construction that avoids constitutional problems [citation omitted]." At 262.

- Although the ordinance prohibits gang members from wearing gang colors, emblems, and insignia, "...it also prohibits nongang embers from engaging in symbolic speech, which is protected by the first amendment. [Citations omitted.] 'Speech,' as protected in the United States Constitution, includes not only written or spoken words but also a considerable amount of expressive conduct, often called 'symbolic speech.' [Citations omitted.] Nonverbal conduct implicates the first amendment if the actor intends to convey a particularized message and it is likely the message will be understood by those who view it." [Citations omitted.] Id.

- "It is well established that wearing certain clothing can be a form of protected symbolic speech." Id.

- The ordinance prohibits constitutionally protected free symbolic speech. "For example, black and gold are the official colors of Harvard High School, and a Bulls jacket is primarily a fashion item for sports fans. One who wears such clothing may well be attempting to convey an easily understood message. But the message is no more likely to be 'join a gang' than 'Go, Harvard High,' or 'Be Like Mike.'" At 263.

- "The ordinance does not define, list, or explain what constitutes a 'gang symbol' or 'gang colors'; it does not even define 'gang.'" Because "the list is endless" as to what currently constitutes or may constitute a gang symbol, according to police testimony, then "[w]hat is innocent today may become a gang symbol tomorrow *according to the*

whim of the gangs themselves. [Emphasis original.] Were a gang (however defined) to adopt red, white, and blue as its colors or the crucifix as a symbol, every school and church would be 'flashing' gang signals." Id.

- The ordinance is invalid "because it criminalizes the *appearance* of engaging in any gang-related 'communication.'" At 264. (Emphasis original.)

- "[T]he City of Harvard is not helpless to control gang activity. It may punish criminal *conduct* more harshly where the conduct is gang motivated; prohibit active, intentional, and knowing promotion of criminal gang activity; and prosecute gang 'communication' that constitutes disorderly conduct because it rises to the level of fighting words which provide a breach of the peace." (Internal citations omitted.)

Intimidation and Self Defense

In Dozier v. State of Indiana, 709 N.E.2d 27 (Ind. App. 1999), a high school student unsuccessfully appealed his convictions for carrying a handgun on school property without a license and dangerous possession of a firearm. The student had been a member of an Indianapolis-based gang since he was ten years old. The gang is notorious for such criminal activity as drug trafficking, gun dealing, intimidation, and extortion. The student became a discipline problem at home and at school. When he turned sixteen years of age, he decided to leave the gang. He quit associating with gang members and refused to wear gang colors. The student was aware that he faced potential violence from other gang members. He sought advice from several adults on how best to protect himself. His math tutor recommended he form a support group; a mental health counselor advised that he talk to his parents; and his football coach said that the student would have to quit the gang on his own. The student received a telephone call at home from a gang member who, through "street slang and gang terminology," told him he was going to be killed. The student obtained a .9 millimeter handgun and took it with him to high school. School authorities, acting on a tip, confiscated the gun. The student was arrested, tried as an adult, and convicted.

On appeal, the student claimed he brought the handgun to school out of "manifest necessity," which is analogous to a claim of self defense. He asserted the advice he received from adults was unrealistic given the circumstances, leaving him "no adequate alternative to protect himself other than carrying a handgun." At 29.[20] The court rejected the student's "manifest necessity" argument because (1) he did not talk to his parents; (2) the gang threat was itself a criminal offense that he should have reported to police; and (3) he could have stayed home from school the day after receiving the threat. At 30. The

[20]The student never did talk to his parents, who were apparently unaware of his gang involvement. The student eventually talked to a 27-year-old adult gang member who assured him he would be safe so long as he "kept his mouth shut." Id.

court added at 31:

> Indeed, we can envision no set of facts supporting the proposition that a student carrying a handgun into a public school is ever an adequate alternative for self protection.

The court also rejected the student's argument that under Indiana's constitution he had a right to possess a handgun.[21] "The right to bear arms is not absolute," the court noted at 31.

Indiana Laws that Affect Gangs and Gang Activity

- I.C. 20-10.1-27 *et seq.*(Anti-gang Counseling Pilot Program and Fund). This program has never been funded.

- I. C. 34-31-4-2 (Child Participant in Gang Activity), which makes a parent of a child who is a member of a criminal gang liable for damages to person or property intentionally caused by the child while participating in a criminal gang activity, but only where the parent has custody, the child is living with the parent, the parent actively encouraged or knowingly benefitted from the child's gang activity, and the parent failed to use reasonable efforts to prevent the child's involvement in the criminal gang.

- I.C. 35-45-9-1, defining a "criminal gang" as a group with at least five (5) members who promote, sponsor, assist, or participate in the commission of what would constitute a felony or battery, or require as a condition of membership that such acts occur. This statute is not unconstitutionally vague. See Helton v. Indiana, 624 N.E.2d 499 (Ind. App. 1993), *cert. den.*, 117 S.Ct. 1252 (1997). The Statute is not overly broad because it does not prohibit activities protected by the First Amendment. Jackson v. Indiana, 634 N.E.2d 532 (Ind. App. 1994).

- I.C. 35-45-9-2, defining what it means to "threaten" a person.

- I.C. 35-45-9-3, making participation in a "criminal gang activity" a Class D felony.

- I.C. 35-45-9-4, making a Class C felony the use of "criminal gang intimidation."

COURT JESTERS: BULL-DOZING

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[21]Art. I, §32 of the Indiana Constitution provides "Right to bear arms.—The people shall have a right to bear arms, for defense of themselves and the State."

In the Rotunda of the Indiana State House, there are the obligatory statuary representations, in the classical mode, of certain important aspects of Indiana life, such as Agriculture, Liberty, History, Art, Oratory, and Commerce.[22] There are two other statues, one representing Law; the other, Justice, but positioned diametrically opposite one another.[23] Although Justice is typically personified as "blind," the Indiana version is not so encumbered. She has her eyes wide open, which may be more than can be said for the poor trial judge in *Musselman v. Musselman*.[24]

Musselman (the plaintiff, not the defendant) was a frequent litigant in the Indiana courts during the latter part of the 19th century. Much of his disenchantment with his relatives, his neighbors, elected officials, judges, and especially lawyers stems from his one-time involuntary commitment for insanity, from which he may not have fully recovered. In *Musselman v. Musselman*, 44 Ind. 106 (Ind. 1873), Musselman appealed an adverse decision in his divorce action emanating from Cass County, alleging twenty-one errors committed by the trial court judge.[25]

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[22]The statue representing Commerce, oddly enough, is holding the Caduceus, the symbol for the medical profession. An editorial remark will be resisted.

[23]Another editorial remark will be resisted.

[24]Before leaving the subject of the statuary of the Indiana State House, budding Indiana author Kyle Hannon, who has held several sinecures within this Edifice Rex, would often point out to visitors that Indiana's classical personages that reside in the Rotunda include just about every noble endeavor of mankind, but Wisdom is notably absent. Like Diogenes with his lantern, Kyle searched the State House for Wisdom but apparently never found it until he left the building.

[25]One of the alleged errors was the court's permitting the lawyers to smoke in court, which the judge apparently also did. The Indiana Supreme Court dismissed this by noting the plaintiff did not object to everyone smoking during the trial, nor did he show how smoking "had any injurious effect upon him. We cannot see how smoking in court prevented him from having a fair trial." 44 Ind. at 118.

One of the more interesting allegations was that, during Musselman's extended presentation of his "evidence," which consisted mostly of vagrant opinions regarding conspiracies and defamatory practices of perceived enemies, "[t]he court erred in sleeping, or sitting with his eyes closed, in open court..."

Although trial courts are charged with determining truth and appellate courts with finding error, the Indiana Supreme Court, through Justice Samuel H. Buskirk, declined to find error but did issue a profound, even Supreme, truth.

While admonishing Mussleman, who was personally present, for not knowing whether the judge was asleep or only had his eyes closed but asking the Supreme Court, which wasn't there, to determine this for him, the court opined that if Musselman "had reason to suppose the judge was indulging in a gentle doze after dinner, he should have suspended his reading, or awakened the judge." The court certainly seemed to believe that anyone could have fallen asleep during Musselman's lengthy reading of "wholly immaterial and irrelevant" evidence, nevertheless, no trial court judge would have done so:

> We might reasonably conclude that the judge but imitated the example of many of the profoundest thinkers and most distinguished judges, and closed his eyes that he might hear the [evidence] more accurately and more fully comprehend what he heard.

Id., 44 Ind. at 118.[26]

The *Musselman* case predates the statue of Justice in the Indiana State House, and may very well be the reason that she is depicted as so alert and attentive. The Supreme Court's decision illustrates this concept of Justice. The fact the court cited to no Law to support this determination may also serve to explain why Law and Justice are separate, diametrically opposite denizens of the Rotunda.

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[26]Although many a student has argued this very point with many a teacher, this is the only known circumstance where such an argument has prevailed.

QUOTABLE...

> To say that the rules of evidence may be relaxed in Juvenile Court is like saying that during a surgical operation on a child the surgeon may relax the rules of precise hygiene. Hygienic precautions in the operating room are taken to keep out microbes and germs of infection in the same way that rules of evidence in Court erect barriers to bar the microbes of lies, the germs of prejudice and the infection of rumor.

Justice Michael A. Musmanno, Pennsylvania Supreme Court, dissenting in In Re Holmes, 109 A.2d 523, 530-31 (Pa. 1954), criticizing the majority for permitting a child's conviction for armed robbery to stand absent any credible evidence against him. Justice Musmanno characterized the court proceedings as reminiscent of Charles Dickens' *Oliver Twist*. Although he acknowledged that the country then, as now, is plagued with "considerable juvenile delinquency," he added that the "least effective way to solve that problem is to indiscriminately punish the guilty and the innocent. To charge a juvenile with armed robbery and then send him to a reformatory without legal proof that he has committed that heinous crime is to embitter not only him but all his companions who will feel that they no longer owe any loyalty to an unjust society." Id., at 537.

UPDATES

Peer Sexual Harassment Revisited

As noted in two previous articles in **QR** October-December 1997 and July-September 1998, there have been many conflicts in the federal district and circuit courts in the treatment of complaints concerning peer sexual harassment brought pursuant to Title IX of the Education Amendments of 1972 (Title IX).[27] On September 29, 1998, the United State Supreme Court granted certiorari in Davis v. Monroe County Board of Education, Docket No. 97-843[28] to resolve the differences among the various circuit court decisions. The Supreme Court's much- awaited decision was rendered on May 24, 1999. Davis v. Monroe Co. Bd. of Ed., 119 S.Ct. 1661 (1999).

The complaint alleged that a fifth grade student, LaShonda Davis, was repeatedly subjected to sexual

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[27]20 USC §1681.

[28]Davis v. Monroe County Board of Education, 120 F.3d 1390 (11th Cir. 1997)(*en banc*). This case is also discussed in **QR** Oct.-Dec.: 97.

harassment by a male classmate from December, 1992 until May, 1993. LaShonda reported each incident of harassment to her teachers and her mother. Her mother also contacted the teachers. Other girls were also harassed and a group of girls, including LaShonda, tried to talk to the principal but a teacher denied their request. LaShonda's grades dropped, she was unable to concentrate on her studies, and she wrote a suicide note. The harassment finally stopped in mid-May when the male student was charged with, and pleaded guilty to, sexual battery. The complaint also alleged the school took no disciplinary action against the male student.

LaShonda and her parents filed their complaint in federal district court in May, 1994. The district court dismissed the complaint, concluding that Title IX provided no basis for liability absent an allegation the school board or an employee had any role in the harassment. On appeal, the district court's decision was reversed by a panel of the Eleventh Circuit Court of Appeals,[29] but that decision was vacated *en banc* and the full Eleventh Circuit reached a contrary result. The Supreme Court, in a 5-4 decision, reversed the Eleventh Circuit Court of Appeals.[30]

The Supreme Court noted that Gebser v. Lago Vista Independent School District, 118 S.Ct. 1989, 524 U.S. 274 (1998) established that a recipient of federal funds intentionally violates Title IX, and is therefore subject to a private damages action, where it is deliberately indifferent to known acts of teacher-student discrimination. The question before the court in Davis was whether the misconduct identified in Gebser (deliberate indifference to known acts of harassment) amounts to an intentional violation of Title IX when the harasser is a student rather than a teacher. The majority concluded that, in limited circumstances, it does.

The majority decision determined that recipients of federal funds are liable in damages only where they are deliberately indifferent to peer sexual harassment of which they have actual knowledge; and where the harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school. The Court noted that it is not mandating any particular response or disciplinary action, as courts should refrain from second guessing the disciplinary decisions made by school administrators. The school must respond to known peer harassment in a manner that is not clearly unreasonable.

In a strongly worded dissent, Justice Kennedy, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, found fault with most aspects of the majority opinion. The dissent argues that schools cannot be held liable for peer sexual harassment because Title IX does not give them clear and unambiguous notice that they are liable in damages for failure to remedy discrimination by their students. In finding that schools were on notice, the majority refers to the fact that during the 1992-1993 school year, the year of the events in question in this case, the National School Boards Association issued a

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[29]Davis v. Monroe County Board of Education, 74 F.3d 1186 (11th Cir. 1996).

[30]120 F.3d 1390.

publication for use by school attorneys and administrators, observing that schools could be liable under Title IX for their failure to respond to peer sexual harassment. Additionally, the 1997 regulations promulgated by Department of Education put schools on notice of such potential liability. However, neither of these "notices" come from the language of the statute itself or are any indication of congressional intent. Further, these events occurred 20 - 25 years after the enactment of the statute, and in the latter case, five years after the facts of this case.

The dissent also noted the difficulties presented to schools in dealing with issues pertaining to discipline and controlling student behavior, particularly as students are maturing and learning to cope with sexual issues. Besides learning academic subjects in school, students also must learn to get along with other people socially and in the school setting as they mature sexually. Name-calling, teasing and flirting are everyday occurrences in the school setting and are not the sexual harassment the majority contemplates. But the majority provided no definition of actionable peer harassment. Because of this, the dissent anticipates even greater litigation in this area.

It is also interesting to note that the majority decision appeared to cite with approval the Seventh Circuit Court of Appeals' decision in Doe v. University of Illinois, 138 F.3d 653, 661 (7th Cir. 1998).[31] However, on June 1, 1999, the Supreme Court granted certiorari in this case, vacated the Court of Appeals' decision, and remanded the case for reconsideration in light of the Davis decision. (**Update** article prepared by Dana L. Long, Legal Counsel.)

Charter Schools: Practical and Legal Concerns

QR Oct.-Dec.:98 reported on the growing legal problems states are experiencing in attempting to institute charter school programs. Most of the problems involve either issues of alleged discrimination or concerns regarding equitable funding. Recent federal legislation recognizes this growing trend and has attempted to ensure that federally funded education initiatives are not circumvented through such programs. See, for example, 20 U.S.C. §1413(a)(5) and 20 U.S.C. §1413(e)(1)(B) of the IDEA (1997).

1. In Re Charter School Application, 727 A.2d 15 (N.J. Super. A.D. 1999) is the latest in a series of challenges by local public school districts to the New Jersey "Charter School Program Act of 1995." Although this case addressed three (3) such challenges, there are apparently at least seven additional cases waiting in the judicial wings. This case is notable because it details the procedures employed by the New Jersey Department of Education in evaluating each charter school application leading to the final disposition by the New Jersey Board of

[31]For the earlier discussion of the 7th Circuit's decision, see **QR** July-Sep't.: 98.

Education. The court upheld the state in each of these cases.[32] This may not stem the source of discontent. Although charter schools in New Jersey can be established by combinations of parents, teaching staff, institutions of higher education, or private entities, the funding scheme essentially involves contribution from the local public school districts whose "frequently expressed objection [has been that] charter schools would divert tax dollars from existing districts without any corresponding decrease in their costs. Also articulated was the fear that charter schools would drain away 'the best and the brightest' and ultimately lead to elitism and segregation." At 22. Nearly 90 percent of the funding for charter schools is derived from forced contributions from the local school districts. At 24. Nevertheless, "[t]he current position of the State Board apparently is that the effect of a proposed charter school on the existing district is not relevant to the decision whether to approve an application.... Nothing in the legislation commands the Commissioner to consider as a criterion for approval the fiscal impact that the charter school will have on the existing district." At 30. This may implicate constitutional issues. Id. The argument that seemed to interest the court the most is New Jersey's constitutional requirement that publicly funded education provide a "thorough and efficient" education. This provision has been at the core of long-standing disputes over inequities in school funding in that state. The public schools argued that the charter schools will not meet the "thorough and efficient" requirements. Further, the funding scheme will prevent existing public schools from meeting this requirement as well. The court found that "Charter schools are part of the public school system" that must meet the "thorough and efficient" requirements as any other public school must. At 49. Although the coercive funding scheme will mean that there are fewer funds available to existing schools, the charter schools will not have more than the existing districts. "Indeed, one optimistic goal underlying the charter school movement is to reduce per-pupil spending while increasing learning and performance." Id.

2. Much of the national attention has been focused on the Milwaukee Parental Choice Program that permits the use of vouchers to attend certain sectarian private schools. See Jackson v. Benson, 578 N.W.2d 602 (Wisc. 1998), *cert. den.*, 119 S.Ct. 466 (1998), as analyzed in **QR** Oct.-Dec.:98. Wisconsin's Department of Public Instruction has had several well publicized disagreements with some of the participating private schools over the extent to which the participating schools must comply with state and federal education laws and non-discrimination provisions. This same controversy has been reported in other states as well.[33] However, Wisconsin does not appear to be experiencing the same problems with its charter school

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[32]Although states differ somewhat in their definitions of "charter school," such an entity is usually created through a type of contractual agreement with the state in which the charter school is free from most state regulations in return for its commitment to heightened standards of accountability.

[33]Although Indiana was unable to pass a charter school law this past session, all four introduced bills recognized that charter schools, as publicly funded entities, could not discriminate in enrollment procedures or educational opportunities.

program as it is with the providers in the Milwaukee Parental Choice Program. Robert J. Paul, Chief Legal Counsel for the Wisconsin Department of Public Instruction, provided a copy of a list of state and federal laws that a Wisconsin university requires compliance by prospective charter school operators. The list is as follows:

> Compliance with Applicable Law. The Charter School shall comply with the following, without limitation, as well as other Applicable Law:
> (1) Sec. 118.13, *Wisconsin Statutes*, Pupil Nondiscrimination.
> (2) Title IV of the Civil Rights Act of 1964, 42 U.S.C. §2000c-2000c-9.
> (3) Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d-2000d-7.
> (4) Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq*.
> (5) Age Discrimination Act of 1985, 42 U.S.C. §6101 *et seq*.
> (6) Age Discrimination in Employment Act, 29 U.S.C. §621-634.
> (7) Sec. 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 and the Americans with Disabilities Act, 42 U.S.C. §12101-12213.
> (8) Individuals with Disabilities Education Act, 20 U.S.C. §1400-1485 *et seq*.
> (9) General Education Provisions Act, 20 U.S.C. §1221-1234j, including the Family Educational Rights and Privacy Act, and Sec. 118.125, *Wisconsin Statutes*.
> (10) Drug-Free School and Communities Act of 1986, 20 U.S.C. §3171 *et seq*.
> (11) Fair Labor Standards Act, 29 U.S.C. §201-219.
> (12) Family and Medical Leave Act, 29 U.S.C. §2601 *et seq*.
> (13) Occupational Safety and Health Act, 29 U.S.C. §651 *et seq*.
> (14) Drug-Free Workplace Act, 41 U.S.C. §701 *et seq*.
> (15) Asbestos School Hazard Detection and Control Act, 20 U.S.C. §3601-3611.
> (16) Asbestos Hazard Emergency Response Act, 15 U.S.C. §2641-2655.
> (17) Child Nutrition Act, 42 U.S.C. §1771 *et seq*.
> (18) Schoolyard Statute, 21 U.S.C. §860 *et seq*.
> (19) Alcohol and Drug Abuse Education Act, 21 U.S.C. §1001 *et seq*.
> (20) National School Lunch Act, 42 U.S.C. §1751 *et seq*.
> (21) Carl D. Perkins Vocational and Applied Technology Education Act, 20 U.S.C. § 2301-2471.
> (22) Elementary and Secondary Education Act, 20 U.S.C. §6301-8962.
> (23) Adult Education Act, 20 U.S.C. §1201-1209.
> (24) Teaching of Agricultural, Trade, Home Economics and Industrial

Subjects, 20 U.S.C. §11-28.
(25) Consolidated Omnibus Budget Reconciliation Act, 29 U.S.C. §1161-1168.
(26) Toxic Substances Control Act, 15 U.S.C. §2601-2629.

There had been a 27th item, the Religious Freedom Restoration Act of 1993, 42 U.S.C. §2000bb-2000bb-4, but this law was declared unconstitutional by the U.S. Supreme Court in City of Boerne v. Flores, 117 S.Ct. 2157 (1997).

Prayer and Public Meetings: School Board Meetings

In **QR** Jan.-Mar.:97, there was a lengthy discussion of the use of prayer in public meetings, especially meetings where children would be present. The confusion is occurring because the U.S. Supreme Court has found no fault with such prayers when sponsored by state legislatures, Marsh v. Chambers, 463 U.S. 783, 103 S.Ct.3330 (1983), but he expressed concern where the audience is primarily students attending public schools pursuant to compulsory attendance laws. See Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649 (1992) and **QR** April-June: 97. School board meetings, however, are neither legislatures nor school-sponsored activities where students are compelled to attend or perceive they are compelled to attend. In Coles v. Cleveland Board of Education, 950 F.Supp. 1337 (N.D. Ohio 1996), as reported in **QR** Jan.-Mar.:97, the federal district court upheld the school board's use of prayer to begin its meetings. Even though students were often present, sometimes to be recognized by the school board for achievements, sometimes to address the board on matters of concern, the district court found Marsh more applicable than Lee. The 6th Circuit Court of Appeals has reversed the district court. In Coles v. Cleveland Board of Education, 171 F.3d 369 (6th Cir. 1999), the court recognized that the school board situation "puts the court squarely between the proverbial rock and a hard place," with Lee being the rock and Marsh being the hard place. At 371. Although the court observed that "[r]easonable minds can differ on this issue," they found "that this case is closer to the rock than to the hard place," thus reversing the district court's decision. Id. Although there are circumstances where students are present voluntarily, there are also times when the students are compelled to be there to address grievances to the school board in its adjudicative function (i.e., to contest a proposed suspension or expulsion). In addition, a student representative sits on the school board and is responsible for delivering a report to those in attendance regarding the representative's perspective on school activities. At 372. Other students attend at the invitation of the school board in order to be recognized for certain academic, athletic, or community-service achievements. Id. The school board initiated its practice of offering prayers relatively recently (1992), and have moved increasingly from non-sectarian prayer to exclusively Christian in tenor. At 373. Although school board meetings might be of a "different variety" from other school-related activities, "the fact remains that they are part of the same 'class' as those other activities in that they take place on school property and are inextricably intertwined with the public school system." At 377, 381, 383. The school board's practice does not have a secular purpose, has the primary effect of advancing the Christian religion, and

excessively entangles government with religion, all contrary to the three-prong test of Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971). At 383-385. This decision leaves Bacus v. Palo Verde Unified Sch. Dist., 11 F.Supp.2d 1192 (C.D. Cal. 1998) as the only published decision supporting a school board's practice of beginning its meetings with prayer. See **QR** Oct.-Dec.:98.

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