

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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CHARTERING A NEW COURSE IN INDIANA: EMERGENCE OF CHARTER SCHOOLS IN INDIANA

The Indiana General Assembly, in its most recent completed session, agreed upon legislation creating charter schools in Indiana, making Indiana the 37th state to have such legislation.¹ The governor signed the legislation into law as P.L. 100-2001. Although the definition and concept of a “charter school” are variable from state to state, there are some commonalities: a “charter school” is a publicly funded school, either a new one or a transformed existing public school; it will be smaller and more flexible than its typical public school counterpart, permitting it to test various methodologies and educational approaches; it will be exempt from some rules and regulations that are perceived as too restrictive, except those that prohibit discrimination; it will commit, usually through a contract, to attaining specific, ambitious educational results, especially for educationally disadvantaged students (“at risk” students); and provide public school constituents with more school choices.²

Charter schools are not without controversy. Proponents of charter schools believe the schools will increase innovation in publicly funded education, while promoting more parental involvement and accountability. Such increased activism, both internally and externally, will promote creativity in management and curricula. Opponents counter that such schools will create a “brain drain” or tend to segregate students by race or income.

A substantial amount of litigation has been generated since Minnesota instituted the first charter school law in 1991. As noted above, the definition and concept of a charter school will vary from state to state; nevertheless, the following are recurring litigation issues:

- Precise Legal Nature of a Charter School
- Equal Protection, including Discrimination
- Due Process and Standards of Review
- Establishment Clause concerns
- Improper Legislative Delegation of Power
- Public Funds to Private Entities
- Conflict of Interest
- Financial Matters and Accounting Procedures
- Facilities

There are also various state constitutional issues that are subsumed within the litigation issues listed *supra*.

¹Washington, D.C., also has a charter school law, which predates Indiana’s version.

²This commonality is driven in part by the federal Public Charter Schools’ Grant language under the Elementary and Secondary Education Act. See 20 U.S.C. §8061 *et seq*.

INDIANA'S CHARTER SCHOOL LEGISLATION

P.L. 100-2001, effective upon its passage, adds I.C. 20-5.5 to the Indiana Code. A charter school may be created or may consist of a transformed public school (“conversion charter school”). A charter school, to be established, must provide “innovative and autonomous programs” that (1) serve the different learning styles and needs of public school students; (2) offer public school students appropriate and innovative choices; (3) afford varied professional development opportunities for educators; and (4) enjoy certain “freedom and flexibility” in exchange for “exceptional levels of accountability.” I.C. 20-5.5-2-1.³

Sponsoring entities are the governing bodies of local public school districts, publicly funded universities, and the mayor of Indianapolis. An “organizer” can be a group or an entity but it must be a not-for-profit corporation or has applied for such status with the Internal Revenue Service. In addition, an “organizer” and a “sponsor” cannot serve such roles simultaneously with respect to a given charter school. I.C. 20-5.5-3-15. An organizer must enter into a contract with the sponsor to operate a charter school. Although I.C. 20-5.5-3-2 reiterates that a sponsor may not grant a charter to a “for-profit organizer,” the law does not proscribe a not-for-profit organizer from employing a “for-profit” entity to assist in operating the charter school.

Similar to other states, Indiana’s law requires a potential organizer to submit a proposal to the sponsor. This proposal must not only identify the organizer and describe its organizational structure and governance plan, but must also provide details as to its purposes, management structure, educational mission goals, curricular and instructional methodologies, methods for pupil assessment, admission policy and criteria, school calendar, age or grade range of pupils to be enrolled, description of staff responsibilities, description and address of the physical plant, budget and financial plans, personnel matters (including selection, retention, compensation, and other benefits), transportation plan, discipline procedures, initiation date for operation of the school and for attendance of pupils, plan for compliance with any applicable desegregation plan, and manner for conduct of an annual audit by the sponsor. I.C. 20-5.5-3-3(b).⁴

A charter school is defined as “a public elementary school or secondary school.” It cannot be a

³This analysis does not include all of the charter school requirements, including certain reporting requirements and provisions specific to university sponsors and the Indianapolis mayor. It is concerned with the relationship between governing body sponsors and potential organizers in light of emerging case law from other jurisdictions.

⁴The Public Law, as did the legislative enactment (Senate Enrolled Act No. 165), contains two Section 3’s under Chapter 3 of I.C. 20-5.5. This reference is to the second “3.” It should have been a “4.” There are also editing anomalies at I.C. 20-5.5-3-11(g),(h),(i), referring incorrectly to subsections (e)(1), (e)(2), and (e)(3). The correct subsections should be (f)(1), (f)(2), and (f)(3).

religious or sectarian school and must operate under a charter contract. I.C. 20-5.5-1-4. It cannot discriminate on the basis of disability, race, color, gender, national origin, religion, and ancestry, and is subject to all federal and state laws and constitutional provisions that prohibit such discrimination. I.C. 20-5.5-2-2. The right to bargain collectively, including the right to organize, is not restricted. I.C. 20-5.5-3-3(c).

A sponsor has sixty (60) days from submission of a proposal to notify an organizer whether the proposal is accepted or rejected⁵. An organizer has several elections should a sponsor reject a proposal: (1) amend the proposal and resubmit it to the same sponsor or another sponsor; or (2) appeal the rejection to the Charter School Review Panel (CSRP). This five-member panel will be chaired by the State Superintendent of Public Instruction. The remaining four members will consist of the Governor or his designee; a member of the State Board of Education, as appointed by the State Superintendent; a person with financial management experience appointed by the Governor; and “a community leader with knowledge of charter school issues” to be appointed jointly by the Governor and the State Superintendent. I.C. 20-5.5-3-11(c).

Although there is no specific time frame within which an organizer must appeal a rejection, the CSRP must meet and issue its finding not later than 45 days from the request for review from an organizer. Statute limits the CSRP to a choice of three findings: (1) uphold the sponsor’s rejection of the proposal, which would be a final determination; (2) recommend the organizer amend the proposal with specific guidance as to which portions of the proposal would benefit from such amendment, with the proviso that the amended proposal can be resubmitted to the CSRP rather than to the original sponsor; or (3) approve the proposal. The latter approval would be a “conditional approval.” It would be final only upon acceptance of the proposal by a sponsor.⁶

⁵Pennsylvania has a 75-day period for a school district to act upon a charter school application. A court has determined that this period of time is mandatory and not directory. When the organizer appealed to the State Charter School Appeal Board after the 75-day period had run without any action by the school district, any subsequent act by the school district was a nullity. Sch. Dist. of Philadelphia v. Independence Charter School, 2001 WL 460109 (Pa. Cmwlth. 2001).

⁶This section is somewhat problematical. All decisions are to be determined “by a majority vote of the panel’s members,” but there are questions as to whether this means a majority of the five-member panel or a majority of the five-member panel that convenes to review a proposal. Also, the statute provides no review criteria for the CSRP. This poses administrative difficulties for aggrieved organizers as well as CSRP members. In addition, it would seem that the CSRP’s decision to support the sponsor’s rejection would be subject to judicial review. In the absence of ascertainable standards that were stated with sufficient precision to give fair warning as to what the CSRP considers when reaching its determinations, a reviewing court may find any such CSRP determinations arbitrary and capricious. County Dep’t of Public Welfare v. Deaconess Hospital, 588 N.E.2d 1322 (Ind. App. 1992); Evansville State Hospital v. Perry, 549 N.E.2d 44 (Ind. App. 1990).

The charter itself must be in writing and executed by an organizer and a sponsor. It must confer certain rights, franchises, privileges, and obligations on the charter school, as well as confirm the charter school's status as "a public school."⁷ The charter cannot be for less than three years but must be for a fixed period. The charter must also detail monitoring and assessment of the charter school's achievement of its academic goals on at least a five-year cycle, as well as its compliance with applicable laws. Renewal and revocation criteria must be specified, as well as procedures for amending the charter. Start-up dates must be indicated. Also, the charter must indicate that records related to the charter school's operation are subject to Indiana's Access to Public Records Act, I.C. 5-14-3 and that the charter school itself is subject to the Open Door Act, I.C. 5-14-1.5.⁸

A charter school that is not a "conversion charter school" must be open to any student residing in Indiana. A parent can determine that transfer to a charter school not located in the student's area of legal settlement⁹ would enhance the student's academic opportunities. The school corporation of legal settlement does have the right to appeal to the State Board of Education for a determination whether such a transfer would "improve the student's academic opportunities."¹⁰ The burden of proof remains with the school district of legal settlement. A "conversion charter school" must be open to all students within the local school corporation but can be extended outside these boundaries through a joint agreement of the sponsor and organizer. A charter school may not establish admission policies or procedures that would limit student admissions to the same extent a public school may not do so.

If a charter school receives a greater number of "timely applications" than there are spaces for students, each "timely applicant" must be given an equal chance of admission, except preferences are permitted for students already in attendance and siblings of students already in attendance.

Charter school employees are employees of the charter school "or of an entity with which the

⁷It is noteworthy that a charter school is a "public school" and not a "public school corporation" or "public school district." As noted *infra*, this may place some limitations on the charter school in initiating legal action against its sponsor.

⁸Applications of the Access to Public Records Act and the Open Door Act are important criteria in determining the status of a charter school under the Indiana Tort Claims Act, as noted *infra*, but not dispositive of this issue.

⁹"Legal settlement" refers to the area where the student resides and has the right to attend school without charge. It also is used to determine which school district may be responsible for payment of transfer tuition where the student attends school in another district. See I.C. 20-8.1-1-7.1 and I.C. 20-8.1-6.1-1.

¹⁰At present, the State Board of Education conducts hearings under I.C. 20-8.1-6.1-10 where a student seeks a transfer to another school district based upon academic or vocational aspirations (secondary level), medical reasons, overcrowding, or the probationary accreditation status of the student's school. See 511 IAC 1-6-3.

charter school has contracted to provide services.”¹¹ I.C. 20-5.5-6-1. As noted previously, charter school employees have the right to organize and bargain collectively. Teachers in “conversion charter schools” remain part of the bargaining unit of the sponsor, although a waiver of specific provisions of the collective bargaining agreement may be made by mutual agreement among the governing body, the equivalent body of the “conversion charter school,” and the exclusive representative. A collective bargaining unit cannot restrain a public school sponsor from granting a charter.

Not all teachers in the charter schools need be presently licensed to teach. Under the “Transition to Teaching Program” established at Sec. 22 of P.L. 100-2001, a charter school teacher not presently licensed must be in the process of obtaining licensing within the three years after beginning to teach at the charter school.

The organizer is the “fiscal agent” for the charter school and enjoys exclusive control of funds received by the charter school and any financial matter concerning the charter school. The organizer must maintain a separate accounting of all funds received and disbursed by the charter school. Charter school students are counted in the same fashion as other public school students with respect to computing state funding for any purpose and local funding for any purpose, except capital projects.¹² It is the organizer’s responsibility to submit to the Indiana Department of Education the requisite information necessary for disbursement of state and federal funds to the charter school. The organizer is likewise responsible for supplying the necessary information to the local governing body in order to receive distribution of local funding. A school corporation can provide services to charter schools, including transportation, but cannot assess more than one-hundred three percent (103%) of the actual cost of the services. Distributions to a charter school from a school district’s capital fund are dependent upon the approval of a majority of the members of the school’s governing body.

Should a charter school use public funds for the construction or renovation of a public building, “bidding and wage determination laws and all other statutes and rules shall apply.”¹³ A sponsor has the right to financial reports of the charter school.

¹¹This is the somewhat cryptic provision that would seem to indicate that, although an organizer must be a not-for-profit, the actual service provider need not be.

¹²A charter school is subject to audits by the State Board of Accounts. See I.C. 20-5.5-8-5(1).

¹³While the concept “public funds” is clear, the rest of this provision at I.C. 20-5.5-7-7 is not. The statute does not require that all such funds be “public funds” nor does it say otherwise. It is unlikely that this provision would not apply just because not all of the funds employed are “public funds.” However, the construction and renovation would seem to be of a “public building” for the bidding and wage determination laws to apply. Presumably, this would mean a building that was a “public building” prior to the construction or renovation began. It would seem that should the building have been a “private building” but “public funds” were being employed, then the bidding and wage determination laws would not apply.

There are certain enumerated powers a charter school enjoys. It can “sue and be sued in its own name.”¹⁴ It can acquire real and personal property, so long as this is for “educational purposes,” which is not otherwise defined or limited. It can convey property and enter into contracts in its own name, including contracts for services. However, a charter school cannot operate at a site or for grades beyond its charter and it cannot charge tuition to students who reside within the boundaries of the school corporation where it is located.¹⁵ It can charge tuition for a preschool program (except where federal law would prohibit such a charge) and for a “latch key” program,” if the charter school provides such programs. A charter school cannot charge tuition for a foreign exchange student attending school in Indiana under I.C. 20-8.1-6.1-6(b), although this is not explicitly stated. A charter school can enroll foreign exchange students but cannot otherwise enroll a pupil who is not a resident of Indiana. A charter school cannot be located in a private residence nor can it provide “home based instruction.” I.C. 20-5.5-8 *et seq.* In addition, a charter school may not duplicate a Bureau of Apprenticeship and Training (BAT) approved Building Trades apprenticeship program. I.C. 20-5.5-8-6(a).

The charter school and the organizer are accountable to the sponsor for ensuring compliance with applicable state and federal laws, the charter, and Indiana’s constitution. I.C. 20-5.5-8-3.¹⁶

P.L. 100-2001, at I.C. 20-5.5-8-4(1), indicates that, unless otherwise specifically listed in this law, “[a]ny Indiana statute applicable to a governing body or school corporation” will not apply to a charter school. The Act does not specifically provide that the Indiana Tort Claims Act, I.C. 34-13-3 *et seq.*, applies to a charter school, nor does the criminal conflict of interest statute, I.C. 35-44-1-3, seem to apply. Although this will be discussed *infra*, a strict reading of the Act would seem to indicate that charter schools and their employees will not enjoy the immunity provided by the Tort Claims Act, but they would not be otherwise limited by the statutes that prevent and “public servants” from engaging in potential conflicts of interest through profiting from contracts and purchases associated with the operation of the charter school.¹⁷

The organizer is required to submit an annual report to the Department of Education “for informational and research purposes.” The report is to include the results of standardized testing, a description of

¹⁴However, as noted *infra*, its right to sue may be limited in that it may not be able to sue its sponsor.

¹⁵This is not limited to situations where the sponsor is the governing body of the school corporation.

¹⁶This does not otherwise relieve the sponsor of its responsibility and accountability to other entities, notably the Indiana Department of Education. See I.C. 20-5.5-9-3, requiring the sponsor to oversee a charter school’s compliance with the charter and “all applicable laws.”

¹⁷A school counselor would continue to enjoy the immunity provided by I.C. 20-6.1-6-15. See I.C. 20-5.5-8-5(9).

methodologies employed, daily attendance records,¹⁸ certain graduation statistics (where applicable), and enrollment data, including students who were expelled or withdrew. I.C. 20-5.5-9 *et seq.* A student who withdraws from a charter school and transfers to a public school cannot be discriminated against because of his previous charter school enrollment, including the inappropriate educational placement of the student. I.C. 20-5.5-10 *et seq.* A charter school is required to report to the sponsor its attendance records, student performance data, financial information, any other information necessary to comply with state and federal requirements, and any other information required by the charter itself. I.C. 20-5.5-9-6. A charter school is required to participate in Indiana’s new school accountability law for improvement in performance, I.C. 20-10.2, but P.L. 100-2001, Sec. 26, amended I.C. 20-10.2-6-1 to prevent state takeover of charter schools that would be categorized as lowest performing.¹⁹

A sponsor may revoke a charter any time before the expiration of the charter if the sponsor determines the organizer failed to comply with the terms of the charter; the charter school failed to meet the educational goals established in the charter; the organizer failed to comply with “all applicable laws”; the organizer failed to meet “generally accepted government accounting principles”; or any other grounds for revocation contained in the charter. I.C. 20-5.5-9-4.

An existing public school can convert to a charter school, but at least 60 percent of the teachers and 51 percent of the parents of students at the school sign a petition requesting such a conversion.²⁰ If these conditions are met, a committee is appointed to act as the organizer. Under these circumstances, only the governing body of a public school corporation can act as the sponsor.

Although there are additional elements to Indiana’s new Charter School law, the above represent the major provisions. As with any new legislation, there will be unanticipated “gaps” that can be remedied through future legislative action. However, there will always be issues that will generate litigation. The following discussion analyzes administrative and judicial decisions from around the country that are instructive in anticipating and addressing potential problems.

¹⁸Although a charter school must abide by the compulsory attendance law, see I.C. 20-5.5-8-5(11), there is no requirement to provide 180 days of instruction as required of other accredited schools under I.C. 20-10.1-2-1(c).

¹⁹The state would seem to be limited to removing the accreditation status of a charter school. The legislation does not prevent a public school facing imminent takeover from becoming a “conversion charter schools” to avoid the consequences of I.C. 20-10.2-6.

²⁰The percentage of teachers can be calculated with some precision. However, the percentage of the parents is not so easy to determine. The legislature may have meant 51 percent of the families attending the school rather than 51 percent of the parents. It is possible to have 51 percent of the parents in favor of conversion but still have fewer than 50 percent of the families involved in the school in favor of such a move.

PRECISE LEGAL NATURE OF A CHARTER SCHOOL

Although P.L. 100-2001 provides several defining criteria for what will constitute a “charter school,” the law does not provide the degree of preciseness that may be necessary under certain circumstances. It is unquestioned that a charter school in Indiana is a legal entity with the power to sue and be sued as well as to enter into contracts. But can a charter school sue its sponsor?

Standing To Enforce the Charter School Contract

This is the situation that arose in Academy of Charter Schools v. Adams Co. School Dist. No. 12, 994 P.2d 441 (Colo. App. 2000). The charter school, asserting the sponsoring school district was not complying with the terms of the charter contract and was also intervening in the charter school’s internal personnel and physical plant decisions, filed suit to enforce the charter contract. The trial court determined that Colorado’s charter school law did not grant a charter school the authority to sue. However, even if the law did permit a charter school to sue, a charter school is a “subordinate political body” and may not sue a sponsor school district, which is a “superior political body.” Accordingly, the trial court dismissed the suit. On appeal, the Colorado Court of Appeals concluded that although there is implicit authority to sue arising out of the power to negotiate and contract, this “does not include the power or authority to sue the District because it is the superior governmental body.” At 444. The legislature would have to provide explicit language in order for a charter school to sue its sponsoring school district. Colorado’s legislature, as did Indiana’s, provides that a charter school is a part of the school district that grants its charter. Colorado’s law “provides that a charter school is a *public*, nonsectarian, nonreligious, non-homebased school which operates within a school district.” At 445, emphasis original. Indiana’s law contains the same criteria and proscriptions, except that there are additional sponsoring entities (public universities and the mayor of Indianapolis). Although a charter school does enjoy a considerable degree of autonomy, “it is to be administered and governed in a manner agreed upon between the charter school applicant and the board of education.” Id. As in Indiana, the local school district “remains accountable to its electorate and to the supervising and accrediting agencies for the operation and performance of all schools within its district, including the charter schools.” Id.

It is noteworthy that Indiana’s law does not grant charter schools the authority to organize as non-profit corporations. Colorado law does permit this, but the appellate court found that this did not affect its determination because, no matter how incorporated, a charter school is still a “public school” and still a subordinate entity to the sponsoring school district. Id.

The charter school also argued in the alternative. If it does not have direct authority to sue to enforce the contract entered into between the organizer and the sponsor, then it should have the authority to sue under the theory that it is a third-party beneficiary. The court disagreed, noting that the purpose of Colorado’s charter school law was to provide diverse and innovative approaches to education that are intended to benefit school children. The beneficiaries, then, are Colorado school-aged children and not charter schools. At 446.

The Indiana Tort Claims Act

Although the Indiana legislature may not have intended to exclude a charter school from inclusion under the protections of the Indiana Tort Claims Act (ITCA), a strict reading of the charter school legislation would seem to indicate this.²¹ Recent Indiana court decisions bolster the position that an Indiana charter school, absent expressed legislative intent, may not be included under the ITCA.

In Lane v. Frankfort Comm. Schs. Building Trades Corp., 747 N.E.2d 1172 (Ind. App. 2001), decided May 17, 2001, the Indiana Court of Appeals reversed the trial court's grant of partial summary judgment for the defendant Building Trades Corporation (BTC). BTC has three public school districts that participate in the vocational programs offered through BTC, including a house-building project. Lane, a student at the building site, fell from a ladder and suffered personal injuries. BTC moved for summary judgment, alleging that it was a cooperative venture of the participating school corporations and that the teacher at the site was an employee of one of the participating school districts. The trial court granted partial summary judgment to BTC, finding that it was "an agency or instrumentality of the state" through its status as a cooperative venture of the participating public school districts. As a "governmental entity," it was covered by the ITCA. An interlocutory appeal was made to the Court of Appeals.

The appellate court noted that BTC was not formed as a typical cooperative venture. It is an incorporated entity. In responses to interrogatories, BTC asserted that its records are not subject to Indiana's Access to Public Records Act, nor were its meetings subject to the requirements of the Open Door Act. It also claimed that its budget is not subject to review by the participating school districts and that it is not subject to audit from the State Board of Accounts or the State Board of Tax Commissioners. It claims tax exemption status as a Sec. 501(c)(3) entity under the Internal Revenue Code rather than Sec. 115, which exempts governmental entities from federal taxation.

The central question, the Court of Appeals noted, is whether the activities of BTC are "uniquely governmental." A "uniquely governmental" function is one that is performed exclusively by government and not by private entities, the court noted, citing to Ayres v. Indian Heights Volunteer Fire Dep't, Inc., 493 N.E. 2d 1229 (Ind. 1986), where a volunteer fire department, pursuant to a written contract with a township, was determined to be "an instrumentality of local government" and, thus, entitled to the protections of the ITCA because fire fighting is a "uniquely governmental" function. BTC claimed that its status was similar to the volunteer fire department in that it was not "for hire" by either public or private individuals but existed solely to provide vocational education and training to public high school

²¹Indiana does have a statute intended to provide guidance in interpreting enactments. I.C. 1-1-4-1 requires, inter alia, that words and phrases be taken in their plain, ordinary, and usual sense. Generally, the construction of any statute should avoid any interpretation or application that would be "plainly repugnant to the intent of the legislature or of the context of the statute[.]"

students in the cooperating public school districts. This was not persuasive, however. The Indiana Supreme Court, in Greater Hammond Community Services, Inc. v. Mutka, 735 N.E.2d 780 (Ind. 2000), determined that a not-for-profit regional community services organization was not a governmental entity entitled to the ITCA's protections because it did not provide a "uniquely governmental" service. The type of work performed by Greater Hammond (providing certain services to disadvantaged people) is also performed by numerous charities in the state. Following the reasoning in Mutka, the Court of Appeals found that providing vocational instruction is not a "uniquely governmental" function because it does not fall under the typical "police power" function of government and other non-governmental entities provide similar instruction.

The appellate court rejected the argument that BTC was a cooperative venture of the public school districts. As noted in Yerkes v. Heartland Career Center, 661 N.E.2d 558 (Ind. App. 1995), *trans. den.* (1996), a cooperative vocational school would have to have "no independent identity or authority" with a budget subject to approval by each participating school corporation. It would have to be subject to audit by the State Board of Accounts. Under these circumstances, the vocational school would "share the same status under the [ITCA] as each participant would when engaged in the same activity." The Heartland Career Center was organized under Indiana law creating such a specific vocational school. BTC was not organized under such a law. BTC is an independent, not-for-profit vocational program organized under an alternative statute. As noted in the Mutka case, *supra*, 735 N.E.2d at 784, an entity does not become a "public agency" by contractually agreeing to submit to some measure of control by a governmental entity. It would become a governmental entity for ITCA purposes "only if compelled to submit by statute, rule or regulation" to such control. "A group that is neither specifically named a political subdivision by statute nor engaged in the provision of uniquely governmental services may not receive the protection of the Indiana Tort Claims Act by contracting to be managed by an established governmental entity." *Id.*

Although the appellate court noted that the definition and application of "public agency" will differ between the ITCA (and the Indiana Comparative Fault Act) and other laws, such as the Open Door Act and the Access to Public Records Act, whether or not an entity is subject to such laws is, nevertheless, germane to the determination of the status of an entity. Being subject to the scrutiny of the State Board of Accounts is also germane. "Such public access and financial oversight are important facets of any 'governmental entity,'" the court wrote. Providing educational services is not a "uniquely or exclusively governmental" function or service. Because BTC was not engaged in a "uniquely governmental" service or function and there is no statutory mandate that BTC submit to governmental oversight, the court concluded that BTC fell "outside the ambit of the protections afforded 'governmental entities' by the Indiana Tort Claims Act and the Comparative Fault Act." 747 N.E. 2d at 1178.

P.L. 100-2001 does require charter schools to be subject to the Open Door Act and the Access to Public Records Act. It also requires a charter school to be subject to the State Board of Accounts. These, as the court noted in Lane supra, are germane but not dispositive. Education is not "uniquely

governmental.” The unresolved question is whether statute mandates sufficient governmental oversight to bring a charter school within the “governmental entity” concept employed for ITCA purposes. Without clarification by the legislature, the current language at I.C. 20-5.5-8-4 expressly excluding from application to a charter school “[a]ny Indiana statute applicable to a governing body or school corporation” without reserving the ITCA, could be interpreted as excluding charter schools from such protections.

EQUAL PROTECTION AND DISCRIMINATION

Discrimination on the Basis of Disability

Indiana’s charter school law forbids charter schools to discriminate in any manner. This tracks current state law that requires all Indiana public schools to provide “equal, non-segregated, non-discriminatory educational opportunities and facilities for all...” See I.C. 20-8.1-2 *et seq.*, the Equal Educational Opportunity for All Act.

The two primary federal laws prohibiting discrimination in the programs and services of entities receiving federal education funds are Sec. 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, as implemented through 34 CFR Part 104, and Title II of the Americans with Disabilities Act, 42 U.S.C. §12134 as implemented through 28 CFR Part 35. Sec. 504 and the A.D.A. are not detailed education-related laws as such. There is no list of specific disabilities nor are there detailed, minimum procedures. Also, because of the general yet inclusive nature of the laws, a number of students with disabilities who do not require special education under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, are also covered. Because a “charter school” is by federal definition a “public school,” such schools would likely come under the scrutiny of the Office for Civil Rights (OCR) of the U.S. Department of Education where there are allegations of discrimination against any identified class. The following is a report involving such allegations.

The Horace Mann Foundation and the Edison Project, through an approved charter with the Commonwealth of Massachusetts, opened a K-6 school known as the “Boston Renaissance Charter School” with a mission to provide “urban youth with the fully rounded education they will need to take their place in the economic and political life of their city and their country.” Admission is by lottery. The charter school is open 12 hours a day, seven to eight hours devoted to academics with the remainder of the time devoted to a variety of before-school and after-school activities. The school year is 206 instructional days, 26 days longer than the state minimum. In Boston (MA) Renaissance Charter School, 3 ECLPR ¶95 (OCR 1997), the Office for Civil Rights found the charter school in violation of Sec. 504 and Title II, A.D.A. for its failure to notify parents of Sec. 504 procedural safeguards, for failure to have the required notice of nondiscrimination, and for failure to have a designated Sec. 504 coordinator. OCR also found the charter school discriminated against a student on the basis of his disability. The student, who had previously been in a Head Start program, began as a kindergarten student in the charter school. The student experienced behavioral problems almost immediately. He

was physically restrained by his teacher, the classroom aide, or other employees of the charter school. Often, the parents were called at their places of employment and requested to remove the student from school for the remainder of the school day and, occasionally, for the following day or days. The school proposed the student be evaluated for special education, but the parents declined. The parents were not informed of Sec. 504 nor were the parents consulted regarding several behavioral modifications that were employed with the student. The situation was exacerbated by numerous turnovers in teaching personnel, many of whom were inexperienced in addressing behavioral problems. In December, the charter school informed the parents the student's instructional day would end at noontime and the parents were responsible for removing him at that time. The student's behavior did not improve. He was often dismissed prior to noon, and often suspended for the following day or days. The parents did consult a therapist during this time, and did consult a physician regarding possible Attention Deficit Hyperactivity Disorder (ADHD). The physician prescribed medication. Eventually, the parents consented to a psycho-educational evaluation. The IEP team, however, did not find the student eligible for special education. The psycho-educational evaluation recommended an academic setting with a low teacher/student ratio. The charter school continued his placement in a class of 28 children with a teacher and aide. The school, based on the student's ADHD and medication, did develop a "504 Accommodation Plan" that continued to dismiss him at noon, or earlier if his behavior was aggressive. The student's educational placement was changed often at the end of his kindergarten year, but with little or no coordination or planning. Shortly after the beginning of first grade, the student's parents were notified he would be facing long-term suspension or expulsion. The parents were not notified of Sec. 504 procedures. To avoid expulsion, the parents withdrew the student from the charter school and enrolled him in the local public school, where he completed the first grade with no early dismissals or suspensions. The charter school, in resolving the complaint, agreed to do the following: (1) re-admit the student for second grade, if his parents so request; (2) submit to OCR for approval procedures and policies regarding the use of physical restraints, Sec. 504 plans, pre-referral procedures, and newly enrolled students with disabilities; (3) submit to OCR for approval policies and procedures for mandatory training for school employees on racial and ethnic sensitivity, classroom transfers, and nondiscrimination; and (4) reimburse the parents for the costs associated with therapy, tutoring and childcare they provided the student as a result of the numerous removals from school.

Special Education

The IDEA, as implemented generally through 34 CFR Part 300 and in Indiana through 511 IAC 7-17 *et seq.* ("Article 7"), is not a non-discrimination law, although 20 U.S.C. §1405 does contain a provision requiring that a recipient of IDEA funds "makes positive efforts to employ and advance in employment qualified individuals with disabilities."

When Congress reauthorized the IDEA in 1997, it included a specific reference to charter schools that local school districts must meet as a condition for receipt of federal funds:

TREATMENT OF CHARTER SCHOOLS AND THEIR STUDENTS.—

In carrying out this part with respect to charter schools that are public schools of the local educational agency, the local educational agency—

(A) serves children with disabilities attending those schools in the same manner as it serves children with disabilities in its other schools; and

(B) provides funds under this part to those schools in the same manner as it provides those funds to its other schools.

20 U.S.C. §1413(a)(5). Also see 20 U.S.C. §1413(e)(1)(B) regarding the joint establishment of eligibility for funding by charter schools. In the wake of the Wisconsin Supreme Court's decision in Jackson v. Benson, 578 N.W.2d 602 (Wisc. 1998), *cert. den.*, 119 S.Ct. 466 (1998),²² three charter schools participating in the Milwaukee Parental Choice Program (MPCP) but chartered by the City of Milwaukee's Common Council became embroiled in a dispute with the Wisconsin Department of Public Instruction (WDPI) over the application of IDEA to their operations. The schools acknowledged their responsibility to accept students with disabilities, but did not believe they had to offer the students all the services required by the federal law. They maintained they are neither a private school nor a public school but a "new breed" of school created by the legislature. They maintained they did not have any responsibility for evaluating a student to determine eligibility for IDEA services, developing an individualized education program (IEP) for an eligible student, including a student with disabilities in the general education population where appropriate, or providing such a student with properly licensed teachers. WDPI noted the charter schools were financed with public money and, as such, were required to abide by IDEA's requirements to provide eligible students with a free appropriate public education (FAPE) in the least restrictive environment (LRE) pursuant to an IEP. Parents would be entitled to the full procedural safeguards afforded under IDEA.

The United States Department of Education (USDOE) was asked by all parties to render an opinion. By letter dated October 8, 1998, Acting Deputy Secretary Marshall S. Smith noted that, for IDEA purposes, a school is either public or private and not in between. The schools chartered by the City of Milwaukee through its Common Council are public schools. In reaching this determination, USDOE noted the charter schools "do not charge tuition to any of their students, receive their basic support through public funds, are exempt from many or all State laws and regulations applicable to traditional public schools, are established under a State charter school law, are chartered by a public authority, are required to meet public standards of educational and fiscal accountability, and are subject to termination by a public authority for failing to meet those standards."²³ Wisconsin, as other states with charter schools, had also assured the USDOE as a

²²See "Charter Schools: Practical and Legal Concerns," **Quarterly Report** October-December: 1998.

²³The USDOE was applying pertinent elements of the "charter school" definition found at 20 U.S.C. §8066(a)(1)(A)-(K) of the Elementary and Secondary Education Act (ESEA).

condition for receipt of federal funds under the ESEA that its charter schools are “public schools” that will, among other things, comply with IDEA.²⁴

The USDOE also rejected the Common Council’s interpretation of a “local educational agency” or LEA. The Common Council claimed the Milwaukee Public Schools is the LEA responsible for compliance with IDEA. “Neither the City nor the State may use the LEA concept to avoid obligations under federal law. For purposes of the IDEA, those obligations—and specifically the obligation to provide FAPE to children with disabilities—turn on whether the charter schools are public or private schools, as discussed above. 20 U.S.C. §1412(a)(10). If those schools are public, and we believe that they are, then there is considerable flexibility in the State to designate an LEA under the alternative definitions of LEA in the IDEA. 20 U.S.C. §1402(15). However, that LEA must have the authority to ensure full compliance with the IDEA for children with disabilities attending charter schools for which the LEA is responsible.” USDOE noted that the Milwaukee Public Schools is “unable to exercise sufficient control over the charter schools to ensure compliance,” and, hence, cannot be the LEA for students with disabilities attending the city-chartered schools. Because the concept of “LEA” is a somewhat flexible concept that can be accomplished in a number of ways, including the use of interagency agreements, educational service agencies, and “other strategies that pool resources,” the USDOE leaves to the States the determinations as to whether or not an entity will be an “LEA.” However, “[i]f the State does not designate a responsible LEA, the [USDOE] would look to the State for ensuring that FAPE is made available [to eligible students with disabilities].”

USDOE also noted that failure of a State to comply with IDEA can result in the full or complete withholding of federal funds.²⁵ In addition, “[n]oncompliance with Section 504 [of the Rehabilitation Act of 1973] could place at risk all federal financial assistance from the [USDOE].”

The Office of Special Education Programs (OSEP), as created by 20 U.S.C. §1402, recently addressed the consequences of non-compliance with IDEA procedures by a charter school. In Letter to Stager, 33 IDELR ¶248 (OSEP 2000), the Boston Renaissance Charter School (the same one involved in the OCR investigation *supra*) was ordered by the Massachusetts Department of Education to return federal IDEA funds because of non-compliance with federal “child count” procedures. The charter school sought clarification from OSEP. OSEP reminded the charter school that the Massachusetts DOE, as the State Educational Agency (SEA), is responsible under the IDEA to ensure that IDEA requirements are adhered to by Local Educational Agencies (LEAs). One of the ways of ensuring compliance is through monitoring of programs. When the SEA monitored the charter school, it could not produce documentation to substantiate the claims it made in 1997 and 1998 regarding eligible

²⁴USDOE distinguished publicly funded charter schools from the “choice” program under the MPCP, which specifically allowed parents to chose “private schools.”

²⁵This sum can be considerable. Indiana is scheduled to receive, for special education funding alone (not including preschool), in excess of \$145 million in the next grant cycle.

students served. As a consequence, the SEA is required by IDEA to recapture such funds. See 34 CFR §300.145.

In Letter to Gloeckler, 33 IDELR ¶222 (OSEP 2000), OSEP addressed IDEA funding issues as these related to charter schools. OSEP noted that 34 CFR §300.312 identifies three types of public charter schools: (1) a public charter school that is an LEA; (2) a charter school that is a school of an LEA; and (3) a public charter school that is neither an LEA nor a school that is part of an LEA (an “independent” charter school). Under 34 CFR §300.711, an SEA can distribute IDEA flow-through funds to LEAs that have established eligibility under IDEA. As a consequence, “the only public charter schools that are eligible to receive subgrants from the SEA are charter schools that have been established as LEAs under State law, and meet the Part B definition of LEA at 34 CFR §300.18...”²⁶ An LEA receiving IDEA flow-through funds is not obligated to distributed such funds to its schools “unless the LEA distributes such funds to its other schools. The LEA is not required to distribute its [IDEA] flow-through funds to charter schools that are not established as public schools of the LEA.”

Discrimination on Basis of Ethnic Origin and Equal Protection

Villanueva v. Carere, 85 F.3d 481 (10th Cir. 1996) involved the Colorado Charter Schools Act. The University of Southern Colorado was granted a charter by a local school district to open an arts and sciences school using non-traditional teaching methods, especially in addressing the needs of “at risk” and minority students. Colorado is also a “school of choice” state, permitting parents to send their children to any school in a public school district. The charter school sought to ensure geographic and ethnic diversity. Students were admitted on a first-come, first-served basis. There was a mandatory community service requirement as well as a mandatory pre-admission parental interview, although, in practice, the interviews occurred after admission. Parents were required to provide transportation. There was a concerted effort to publicize the charter school. In the first year of operation, 52 percent of the students were Hispanic while total enrollment was 62 percent minority. Although the local school district had discussed school closings for several years, it did not vote to close any schools until three months after granting the aforementioned charter. Thereafter, it closed two neighborhood elementary schools that had a population that was 75 percent Hispanic. Parents of Hispanic students filed suit, claiming the opening of the charter school with the closure of neighborhood schools serving primarily an Hispanic population violated equal protection and due process rights. They sought a permanent injunction. The federal district court denied the motion for injunctive relief and dismissed the case. The 10th Circuit Court of Appeals affirmed the dismissal, finding no discriminatory impact on Hispanic students or intentional discrimination based on ethnic origin. The court also rejected the argument that “at risk” students created a suspect classification. This argument was based upon the State law that

²⁶The Article 7 definition of “LEA” is found at 511 IAC 7-17-49. An LEA means “a public board of education or other public authority legally constituted for either administrative control or direction of, or to perform a service function for, publicly funded schools as such schools are established under the laws of Indiana. The term includes school corporations and state-operated schools.”

reserves thirteen charters for schools that address educational needs of “at risk” students. “At risk” pupils are defined as those “who, because of physical, emotional, socioeconomic, or cultural factors, [are] less likely to succeed in a conventional educational environment.” At 488. Plaintiffs argued that the word “cultural” is a “code-word for ethnic minority,” thereby separating and classifying students according to race and ethnicity. The court allowed that the use of “culture” is somewhat suspect, but when the law is read in its totality— including the open enrollment and nondiscrimination requirements, as well as parental choice not to send their children to such schools—there is no evidence that any suspect classification has been created. *Id.*

Desegregation Order and Charter School Application Standards

Beaufort Co. Bd. of Education v. Lighthouse Charter School Committee, 516 S.E.2d 655 (S.C. 1999) involves interesting questions of the standard of review to be employed where the sponsoring entity is a local governing body and the local governing body is operating under a desegregation order. South Carolina passed a charter school law in 1996. Lighthouse applied to Beaufort County for approval of a charter school that would operate year-round and eight hours a day. It proposed to serve 400 students in grades K-8. Beaufort tendered 84 questions to Lighthouse, which were answered. Nevertheless, the school district rejected the application because it did not meet health, safety, and civil rights requirements. Lighthouse appealed to the State Board of Education, which reversed the local district’s decision. The school then sought judicial review. The trial court reversed the State Board. The South Carolina Supreme Court affirmed the decision of the trial court.

South Carolina’s charter school law provides for privately organized schools to be sponsored and funded by local school districts. Such a charter school is exempt from certain laws and regulations; however, a charter school is not exempt from adhering to the same health, safety, civil rights, and disability rights all public schools must meet. It must also meet or exceed student attendance requirements, adhere to the same financial audits and procedures, hire non-licensed teachers only in specified ratios, show no preference in admissions except to siblings and children of employees, and be subject to the Freedom of Information Act. A charter school’s racial composition cannot deviate by more than ten percent from the racial composition of the district as a whole.²⁷

Beaufort County entered into a desegregation agreement in 1970 with OCR that, in part, requires approval by OCR of any new school facilities in the school district. OCR informed the school district that a charter school would have to comply with the reporting requirements of the school district’s voluntary desegregation plan. However, Lighthouse asserted that it was not required to obtain OCR’s approval. The court found that Beaufort County’s rejection of the application based in part on Lighthouse’s refusal to comply with the desegregation plan was “not clearly erroneous in light of

²⁷It is noteworthy that South Carolina’s legislature ensured that a charter school in its state would be considered a school district for tort liability application, specifying, however, that tort immunity would not include acts of intentional discrimination.

substantial evidence that Lighthouse must comply with the desegregation agreement and has not done so.” At 659.

A charter school must comply with the health and safety requirements applicable to all public schools. Beaufort County noted that Lighthouse’s schematic drawing of its proposed building and the accompanying description of the facility were not sufficient to determine an adequate facility would be in existence by the charter school’s projected start-up date. When Beaufort requested additional information, Lighthouse presented only the following summary assurance of compliance: “Facilities for the Lighthouse Charter School will be comparable to those of other Beaufort County Schools and will meet all state health and safety specifications.” At 658. No specifications were provided regarding the proposed building such that compliance with state standards could be determined. Beaufort County’s finding of noncompliance “is not clearly erroneous in light of substantial evidence that its request for assurances of compliance were unmet.” At 659.

The court also upheld the local school district’s determination that the charter school’s economic plan was not economically sound. The school noted that the charter school relied too heavily upon fund-raising (12 percent of projected total revenue in the first year of operation, in addition to projected fund-raising for start-up costs and construction of a permanent facility).

South Carolina’s charter school law also permits a school sponsor to deny a charter school application where an application would “adversely affect other students in the district.” At 660. Lighthouse failed to provide Beaufort County with the identity of any prospective students. This prevented Beaufort County from determining the budget impact on the public schools and faculty of the district. Beaufort County also determined Lighthouse would be a “racially identifiable” school in contravention of the desegregation agreement with OCR.²⁸

For a discussion on the review of a charter school proposal to assess the racial impact that may result from the granting of a charter, see In the Matter of the Grant of a Charter School Application, 753 A.2d 687 (N.J. 2000) discussed *infra*.

DUE PROCESS AND STANDARDS OF REVIEW

P.L. 100-2001 creates a Charter School Review Panel (CSRP) that has the authority to entertain appeals from unsuccessful charter school applicants. However, there is not legislative guidance as to what standards should be applied when reviewing a charter school application. In Beaufort County, *supra*, the local school district, in reviewing the Lighthouse application, based its decisions upon direct legislative requirements, including the responsibility to comply with its desegregation agreement with

²⁸Indiana’s charter school law details twenty areas that must be addressed by an organizer in its submission of a proposal to a sponsor. One of these areas is the organizer’s “[p]lan for compliance with any applicable desegregation order.” See I.C. 20-5.5-3-3(b)(3)(Q).

OCR. The court did not reverse the school district's determinations (but did reverse the State Board's findings) because they were not "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." This is one of the standards of judicial review of final administrative actions in South Carolina. Other grounds for reversal include administrative findings that are made (1) in violation of constitutional or statutory provisions; (2) in excess of statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; or (5) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. 516 S.E.2d at 657. Indiana law provides for similar standards of judicial review of final administrative actions. Under I.C. 4-21.5-5-14(d), an agency action will be reversed only upon a showing that such action was (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; and (5) unsupported by substantial evidence.

Shelby School v. Arizona State Board of Education, 962 P.2d 230 (Ariz. App. 1998) involved the adequacy of State Board procedures for receiving and acting upon charter school applications. In this case, the Arizona State Board of Education (ASBOE) denied a charter to the Shelby School, in part because of concerns about the creditworthiness of the applicants and, possibly, an association with a religious group. In Arizona, a "charter school" is a public school that operates under a charter contract between a "sponsor" (school district, the ASBOE, or the State Board for Charter Schools) and a public body, private person, or private organization. The two state-level boards may approve up to twenty-five (25) charter schools each fiscal year. At 234. The applicant school had once been associated with the Church of Immortal Consciousness, but described itself in its application as a non-profit, tax-exempt corporation and non-sectarian school. The ASBOE required applicants to provide criminal history information and to permit reference and credit checks. The applicant complied. The State Board initially approved the application, but made it contingent upon, among other things, a favorable background investigation. Residents of the area where the charter school would operate objected to the school, in part because of perceived increases in taxes, but also because of the purported lifestyle and religious beliefs of the people associated with the school. Further, a background investigation raised questions of the creditworthiness of key members of the school. The charter was then denied, based on the credit report. The two members of the applicant school whose credit reports had jeopardized the charter withdrew and were replaced by two other board members, but the ASBOE would not permit the charter school applicant to amend its application. The State Board reaffirmed its denial. In reversing the State Board's actions, the court found its adjudicative processes lacking in fundamental fairness, including the failure to make findings and conclusions and the deliberating behind closed doors without meaningful input from the affected party. The decision to issue a charter in Arizona is not with the court. As a consequence, the court remanded to the ASBOE for further consideration, with the applicant permitted to supplement the record and reargue its position. "The Board may then make its decision, which it must support with adequate findings and conclusions." At 238. However, the court did find the ASBOE was within its discretion to conduct investigations into the creditworthiness of an applicant, as well as the lifestyles and religious affiliations of applicants,

because there may be a nexus between these inquiries and the legality and viability of a charter, should it be approved.

Denver Board of Education of School Dist. No. 1 v. Booth, 984 P.2d 639 (Colo. 1999) involved a direct challenge to the constitutionality of the Colorado legislature authorizing the State Board of Education to order a local school board to approve a charter school application that the local board has rejected but the State Board has determined that approval would be in the best interests of the pupils, school district, or the community.²⁹ Colorado's charter school law was passed in 1993. Individuals or groups may apply to local school boards to establish charter schools, with interested parties having the right to appeal adverse decisions to the State Board of Education. An application must provide specifics as to the proposed school's structure as well as its missions, goals, program, curriculum, governance, economic plan, transportation plan, enrollment policy, and legal obligations. An approved application "shall serve as the basis for a contract between the charter school and the local board of education." At 643. Colorado's appeal procedure is somewhat circular. If a local board denies an application, it must specify the reasons for doing so. An appeal to the State Board is limited to these specific grounds. On the first appeal, the State Board either affirms the decision of the local board or remands it for reconsideration. If after remand, the local board again rejects the application, the applicant can appeal again to the State Board. For each appeal, the State Board must consider whether the local board's decision was "contrary to the best interests of the pupils, school district, or community." *Id.* The second appeal step permits the State Board, after a "contrary to the best interests" review, to remand the decision to the local board "with instructions to approve the charter application." *Id.* In this case, the applicant submitted a proposal on December 21, 1993, to create the Thurgood Marshall Charter Middle School.³⁰

The charter applicants proposed implementing a core DPS [Denver Public School] curriculum in a nontraditional manner. The application describes a school that operates on a "limited resource model." Four or five teachers are assigned to "teams" of approximately seventy-two students. Students learn in integrated "blocks" according to their learning needs. In addition, small class sizes would permit students with a range of backgrounds and abilities to learn together. This structure anticipates addressing both special education and gifted and talented learning needs within the regular classroom rather than through separate programs.

²⁹As noted *supra*, Indiana's five-member Charter School Review Panel has limited review authority. It has no authority to order a sponsor to accept an application from an organizer.

³⁰This is another possible area of concern for sponsors. Indiana law does not establish certain "windows of opportunity" during which an organizer may submit an application to an eligible sponsor. This would mean that an organizer may submit an application virtually any time during the year. A sponsor may not be able to restrict applications to certain time periods without running afoul of judicial review standards, especially those concerned with limitations of statutory authority.

Id. The Denver board rejected the application, citing concerns regarding the lack of an appropriate site for the school, inadequacies in the budget, excessive per-pupil funding requests, and inconsistencies in the proposed teacher grievance procedures. The applicants appealed to the State Board, which reversed the decision and remanded with instructions that the parties reevaluate and negotiate several issues, including the proposed school site and a financial relationship. The school board suggested an elementary school presently used for offices could be used for a school. The applicants amended their proposal, naming the elementary school as its proposed site. Nevertheless, the Denver board rejected the application. The second appeal process was initiated. The State Board reversed the local board, finding the rejection by the local board was “contrary to the best interests of the pupils, school district, or local community.” It ordered the school district to approve the charter middle school and directed the parties to submit a “status report” before a given date, outlining the progress in resolving issues such as budget, site, enrollment, and employment. At 644.

Upon judicial review, the Denver board argued the State Board exceeded its statutory authority and that the statute itself was unconstitutional. The Colorado Supreme Court found the State Board acted within its statutory authority in the review, remand, and order to approve the charter middle school application. However, the State Board exceeded its authority by requiring the submission of status reports. The court agreed that the second-appeal procedure requires the State Board to substitute its judgment for that of the local board. But the State Board is actually reviewing whether the local board has made a proper “best interests” analysis of an application. The second-appeal process is concerned with whether the local board made the correct decision. The legislature, when it wishes to constrain discretion, does so by providing specific criteria that must guide a particular decision. Here, no such criteria has been established. Accordingly, the State Board is authorized to substitute its judgment for that of a local board. The court also found that the “best interests” language is not so ambiguous as to be susceptible to different meanings. At 651.

The parties also disagreed over the legal effect of the application. The school district asserted that an application, if approved by a local board, becomes a contract. The applicants asserted that an approved application “serves as a blueprint for the school rather than as a binding contract.” The Colorado Supreme Court found the legislature’s language ambiguous on this point and susceptible to differing interpretations. It attempted to construe the statutory language in order to meet the intent of the law. At 652. The court determined that the legislature intended “[a]n approved charter application shall serve *as the basis for* a contract between the charter school and the local board of education.” At 653, emphasis added by the court. If one reads the language as creating a contractual relationship upon approval of an application, then State Board approval of a rejected application would impose a contract on the local board, which would violate Colorado law. The legislature did not intend approval of a charter application to establish a final contract between an applicant and a local school board, the court concluded, although a local board and an applicant may agree to treat an approved application as such. Id.

The Illinois Court of Appeals applied the “clearly erroneous” and “statutory authority” criteria in

upholding a decision of the Illinois State Board of Education in Board of Education of Community Consolidated School Dist. No. 59 v. Illinois State Board of Education, 740 N.E.2d 428 (Ill. App. 2000). The charter school law in Illinois, similar to the laws of other states, states that the purposes and goals of its law are to encourage innovative and alternative means of providing educational services to Illinois students, to increase learning opportunities for all students, to provide expanded choices to parents and students within the public school system, and to encourage parental and community involvement with public schools. The Thomas Jefferson Charter School Foundation applied to Community Consolidated School District No. 59 to establish a charter school. It had submitted two earlier proposals, each of which were rejected by school district. These rejections were upheld by the Illinois State Board of Education. The school district again rejected the proposed charter, representing that the proposal lacked adequate information regarding its financial and facility plans. The foundation appealed again to the State Board of Education, which reversed the school district.³¹ The school district sought judicial review. Illinois law has fifteen (15) specific areas that must be addressed in a charter school application. The State Board found that the budget information, although it addressed only four of the five years proposed for the charter school, and the proposed facility locations were in substantial compliance with the Illinois charter school law. In reversing the school district, the State Board did order the foundation to submit a viable facility plan and an updated budget 30 days prior to the opening of the school.

A charter school proposal must identify at least two sites that are potentially available as a charter school facility by the time the charter school is to open. In addition, there must be a proposed budget that would indicate the charter school would be economically sound. After conducting a public hearing, the local school board votes to accept or reject the charter.

The Illinois Court of Appeals noted that administrative agencies, such as the State Board, exercise purely statutory powers. Any authority it has to act must arise either from the express language of a legislative enactment or as a necessary power to discharge its statutory authority. Express legislative grants of powers or duties to administrative agencies include the power to do all that is reasonably necessary to execute those powers or duties. In this case, although the Illinois charter school law does not expressly state the State Board may reverse a local school district's decision, the legislature indicated that its charter school is "to be interpreted liberally to support its findings and goals," which are stated *supra*. The State Board, the appellate court found, is authorized to reverse the denial of a charter upon a finding that the proposal substantially complies with the charter school law, and that the approval would be in the best interests of the students if certain conditions were met within a specified period of time. Unlike the Denver Board of Education case *supra*, the condition that the Foundation submit a viable facility plan and an updated budget supported the authority of the State Board rather than undermined its decision. The court also upheld the decision of the State Board, finding that its

³¹The Illinois State Board of Education utilizes a Staff Appeal Panel to conduct a review and establish a record. The Staff Appeal Panel then makes a formal recommendation to the State Board, which has the authority to issue a final administrative decision.

reversal was not “clearly erroneous.” The Foundation’s proposal, it was undisputed, satisfied 13 of the 15 requirements under Illinois law. The State Board found that the remaining two factors (facility location and budget information) were sufficiently addressed so as to substantially comply with Illinois law, especially in light of the “best interests” determination.

ESTABLISHMENT CLAUSE CONCERNS

Reported cases to date have involved disputes over the Establishment Clause of the First Amendment. Although Indiana—like other states—places limitations on who may be an organizer and what a charter school might be, there are no expressed limitations on the educational service provider an organizer may contract with, other than the typical limitations that are placed on public schools generally through state and federal constitutional provisions.

In Daughtery v. Vanguard Charter School Academy, 116 F.Supp.2d 897 (W.D. Mich. 2000), a charter school was established to provide educational services to students in grades K-8. The organizer then entered into a contract with the National Heritage Academies (NHA) to manage or otherwise operate the Vanguard Academy. The plaintiffs in this case assert that Vanguard became a pervasively Christian school in violation of the Establishment Clause. Vanguard had established a number of policies regarding the use of its facilities during and after instructional hours. It also had policies regarding the instruction of religion and expressions of faith by teachers. The federal district court noted that Supreme Court precedent does not prohibit all religious activity in a public school, but did acknowledge that, due to the ages of the students, a higher degree of scrutiny is required for Establishment Clause analysis. The court applied the oft-criticized (but not supplanted) three-part test derived from Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971): For a government-sponsored activity to be constitutional under the Establishment Clause, the activity must (1) have a secular purpose; (2) as a principal or primary effect, neither advance nor inhibit religion; and (3) not create an excessive entanglement of government with religion.

Vanguard has a “parent room” that it permits parents to use during the school day. This is in furtherance of the charter school’s policy of encouraging increased cooperation and involvement of parents in their children’s education. One of the parent groups that uses the parent room is the “Moms’ Prayer Group,” which met one day a week for 90 minutes. The parent room is off-limits to students and is not officially endorsed by the charter school. The court found the charter school’s policy was secular in that it promoted the school’s educational mission to increase parental involvement in the school’s educational mission. The parent room was open for parent use by other parent groups. “In fact,” the court wrote at 908, “refusing to permit religious groups to use school facilities open to others would demonstrate hostility toward religion and create even greater risk of impermissible entanglement with religion.” The court also found that Vanguard’s facility-use policy and practice evinced neutrality, neither endorsing nor disapproving of religion, satisfying the second prong of the Lemon test. The plaintiffs questioned Vanguard’s neutrality because it denied access to the parent room by the “Free Thought Association of West Michigan,” an agnostic group. The charter school explained that the parent room is available only for parent use during the school day. There was only one parent involved in the “Free Thought” group. The charter school indicated that the Free Thought Association could apply to use the parent room after hours. The court found that Vanguard’s policies and practices in this regard did not indicate an endorsement of religion. There is also no excessive entanglement with religion, the court concluded at 909, because the parent-room policy is neutral on its face, the group

meets in a room where students are not allowed to enter, and the charter school does not seek to direct, limit or censor the prayer group.

Vanguard policies expressly permit teachers to discuss religious topics as long as such discussions do not occur during instructional time and do not occur in the presence of students. Although the plaintiffs complained that teachers were openly discussing religion in the classroom and leading students in prayer before school around the flagpole, there was no evidence of this, other than isolated instances where a guest speaker referred to God and a science teacher, in preparing students to take Michigan's statewide assessment, expressed some criticism of the theory of evolution.

The charter school also had a policy regarding the distribution of literature by outside groups. The policy, the court found at 911, is content-neutral. Outside groups, including religious groups, have distributed materials in the charter school, which are placed in "Friday folders" and taken home by the students. Vanguard will not permit the distribution of materials that conflict with its educational program or promotes illegal conduct, hatred or violence.

Probably one of the more interesting—and contentious—areas dealt with Vanguard's charter "to create a learning environment that enables students to realize their full academic potential, develop high moral character and become contributing members of society." This is a part of the Declaration of Moral Purpose for Vanguard Charter Academy. In furtherance of this goal, Vanguard created a "Morals Focus Curriculum" that was based "on the four Greek cardinal virtues: prudence, temperance, fortitude and justice. These four virtues are deemed to embody 'certain moral principals, common to all, that transcend time.'" At 913. The school has defined nine elements subsumed within these four virtues: respect and wisdom from "Prudence"; gratitude, self-control and encouragement from "Temperance"; courage and perseverance from "Fortitude"; and compassion and integrity from "Justice." One of these nine elements is provided special emphasis by Vanguard teachers each month of the school year. Although the plaintiffs do not object to the "Morals Focus Curriculum" *per se*, they assert that this is basically a mechanism not to promote common virtues derived from Greek philosophy but to promote Christianity. Plaintiffs identified certain "key words" that they assert demonstrates that teachers are exploiting the opportunity to teach virtues by teaching religion instead. (Some of the "key words" were "merciful," "compassion," "kindness," "forgiveness," "grace," "conscience," "moral strength," "faith," and "self-sacrifice.") The court noted that Vanguard's policy with respect to its "Morals Focus Curriculum" requires instruction based on "commonly held, historical values of our community, regardless of religious conviction." At 914. Charter school policies require a posture of neutrality toward religion, although it does recognize the legitimacy of teaching "*about* religions and the role and influence of religion in history, literature, art, music, science or any other area in which religion has played a role," with the caveats that such instruction should foster knowledge about religion and not indoctrinate, be academic and not devotional or testimonial, promote awareness of religion without sponsoring its practice, inform students about the diversity of religious views without imposing one particular view, and promote understanding and respect rather than divisiveness. *Id.*, with emphasis added by court. There were some isolated instances where school personnel did not adhere to the

charter school's policy, but these instances were addressed and corrected. The court found that the curriculum satisfied all three prongs of the Lemon test, although such a curriculum does "demand vigilance and diligence of [the charter school] to ensure that Vanguard's policy on Teaching About Religion is carefully adhered to.... [T]he mere possibility that a policy *may* be unconstitutionally applied does not alone render it invalid." At 915, emphasis added by court.

Porta v. Klagholz, 19 F.Supp. 2d 290 (D. N.J. 1998) involved a challenge to the facility used by a charter school. In 1995, New Jersey's legislature passed the Charter School Program Act. A "charter school" in New Jersey is defined as "a public school operated under a charter granted by the Commissioner [of Education], which is operated independently of a local board of education and is managed by a board of trustees." At 302. Charter schools may not construct facilities with public funds, but are excused from compliance with school building requirements, except health and safety requirements. Charter schools may not discriminate on the "basis of intellectual or athletic ability," but may limit admission to a particular grade level or to areas of concentration, such as mathematics, science, or the arts. Id. Plaintiff sought to enjoin two charter schools from operating in facilities leased from churches and to enjoin the state from providing funds to such charter schools. The court found for the defendants, noting that the charter schools entered into standard commercial leases with the churches at the fair market rental value. (At trial, only one charter school remained as a defendant.) The classrooms had no visible church signs or religious symbols, artwork, or literature. "The building has a secular appearance," the court found at 299. Further, "the court finds that the school has taken all reasonable and necessary steps to cover or remove vestiges of religion." Id. The court determined the curriculum was non-sectarian and students were not selected based upon church attendance or affiliation. Because there were more potential students than the charter school could accommodate, students were selected by random lottery. At 300. "There is one minor lease restriction pertaining to Halloween decorations by the school, in which the school has agreed not to keep Halloween-type items on display because the church does not want depictions of witches, devils, ghosts, and the like."³² At 300. As a consequence, "The court rejects plaintiff's assertion that the mere leasing of public school space in a church building, without more, violates the First Amendment's Establishment Clause." At 301. The court also found New Jersey's Charter School Program Act did not, on its face, advance religion.

IMPROPER LEGISLATIVE DELEGATION OF POWER

Most states, by constitutional provisions, establish the primary responsibility for the establishment and maintenance of public schools with the respective legislatures. Indiana is no different in this respect. Under Article 8, §1, "[I]t shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and

³²See "Er the Gobble-Uns'll Git You," **Quarterly Report** July-September: 1996.

uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.’³³ It necessarily follows, then, that charter schools created by legislation must be “public schools” no matter who the sponsor might be. There have been legal challenges that state legislatures, by not exercising a degree of control or through adequate funding schemes, are not meeting constitutional mandates when creating charter school legislation.

In 1993, Michigan’s legislature passed a charter school law (using the term “academy”), allowing such schools to organize as nonprofit corporations run by a board of directors. An application had to include a list of proposed members of the board of directors, a description of qualifications and method for selecting board members, and proposed articles of incorporation. Four different entities could authorize an “academy”: a local governing body of a school district, an intermediate school district’s board, the board of a community college, or the board of a public university. The authorizing body is the fiscal agent for the charter school and is responsible for compliance with applicable laws and the contract creating it. State law does consider such academies to be “public schools.” Churches and other religious organizations were not able to operate charter schools under this law. The first charter school to be approved was the Noah Webster Academy, which planned to use telephones and computers to connect up to 2,000 home-schooled students statewide in grades K-12 to 14 teachers located in a schoolhouse. The Noah Webster Academy became the focal point of protracted litigation.³⁴ In Council of Organizations and Others for Education About Parochial v. Governor of Michigan, 566 N.W.2d 208 (Mich. 1997), the Michigan Supreme Court reversed the appellate court on the issue of the constitutionality of the Michigan statute, finding the charter school academies did not have to be under the *direct* immediate and exclusive control of the state, given that the state constitutional requirement was that the legislature maintain and support a system of free public elementary and secondary schools. At 216. These charter schools, the court found, are under the “ultimate and immediate control of the state and its agents.” This finding is based upon the fact the charter can be revoked at any time by the “authorizing body” where there are reasonable grounds to do so (such as not complying with applicable law); authorizing bodies are public institutions over which the state exercises control; and the state controls the money. At 216-17. The majority opinion also found the charter school academies were obliged to abide by school code requirements not otherwise specifically exempted by law, although the dissent disagrees.

³³The term “Common Schools” is synonymous with “public schools” and includes high schools. Chandler v. South Bend Community School Corporation, 312 N.E.2d 915 (Ind. 1974).

³⁴Indiana’s charter school law prohibits charter schools from being located in private residences or providing “home based instruction,” but the law does not define what is meant by “home based instruction.” I.C. 20-5.5-8-2(4),(5). The law does not forbid a “virtual school,” which the Noah Webster Academy is. Two of the goals of the charter school law is to “[s]erve the different learning styles and needs of public school students” and “[o]ffer public school students appropriate and innovative choices.” I.C. 20-5.5-2-1(1),(2). It would seem a “virtual school” connecting students receiving “home based instruction” in “private residences” could meet the requirements of the charter school law so long as the students were enrolled as “public school students.”

It is the state's direct control of the four authorizing bodies that essentially dictated the finding by the majority that the Michigan law was constitutional.

There have been a number of legal challenges to New Jersey's "Charter School Program Act of 1995." In Re Charter School Application, 727 A.2d 15 (N.J. Super. A.D. 1999) involved three (3) such challenges, although there were 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 of the New Jersey Board of Education. The court upheld the state in each of these cases. This did not stem the source of discontent, as noted *infra*. 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 alleged 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 will be less funding 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.*

The school districts appealed to the New Jersey Supreme Court, which affirmed the appellate court. In the Matter of the Grant of the Charter School Application, 753 A.2d 687 (N.J. 2000). In New Jersey, a charter school is a public school operated pursuant to a charter approved by the Commissioner of Education. A charter school is independent of a local board of education and is managed by a board of trustees. Such schools have more autonomy than other public schools, especially in staffing, curriculum, and spending choices. Generally, if the goals set forth in the school's charter are not fulfilled, the charter is not renewed. "The providing of public education in New Jersey," the court wrote at 689, "is a state function. Our constitution mandates that the Legislature must 'provide for the maintenance and support of a thorough and efficient system of free public schools' for New Jersey's children." The court added at 691: "The choice to include charter schools among the

array of public entities providing educational services to our pupils is a choice appropriately made by the Legislature so long as the constitutional mandate to provide a thorough and efficient system of education in New Jersey is satisfied.”

Two of the school districts complained the Commissioner was not assessing the effect on racial balance that a charter school may have on a public school district from which it draws its pupils. New Jersey law requires a charter school’s admission policy to ensure, “to the maximum extent practicable,” that its school population reflect a cross section of the community’s school-age population, including racial and academic factors. The Commissioner requires the local school districts to monitor racial balance in the public schools and provides guidelines to assist school districts in this endeavor. At 692. When a public school district raises a legitimate racial-imbalance concern before the State Board, the Commissioner is ordered to assess the racial impact caused by the approval of a charter school. The State Board is also revising its regulations to require more information from proposed charter schools regarding pupil recruitment and to require submission of such information by a certain fixed date that would permit the Commissioner to investigate more thoroughly the racial impact the charter school may have in a given public school district. At 693-94. The court held that “the Commissioner must assess the racial impact that a charter school applicant will have on the district of residence in which the charter school will operate.” At 694.

The public school districts resurrected the objections made in earlier cases that the funding mechanism established by the legislature is unconstitutional because it prevents both the charter school and the public school district from providing “a thorough and efficient” education to public school students. The Supreme Court was somewhat more receptive of this argument than the appellate court.

[I]f a district of residence demonstrates with some specificity that the constitutional requirements of a thorough and efficient education would be jeopardized by loss of the presumptive amount, or proposed different amount of per-pupil funds to a charter school, then the Commissioner is obligated to evaluate carefully the impact that loss of funds would have on the ability of the district of residence to deliver a thorough and efficient education.

At 698. “The legislative will to allow charter schools and to advance their goals suggests our approach which favors the charter school unless reliable information is put forward to demonstrate that a constitutional violation may occur.” *Id.*

PUBLIC FUNDS TO PRIVATE ENTITIES

Although charter schools are “public schools,” the organizer that enters into an agreement with a sponsor and the entity that actually manages or operates the charter school may not be “public schools” or even public entities. As noted above in the cases from Michigan and New Jersey, state constitutional mandates to provide and maintain a system of public schools can be satisfied

in a number of ways, not exclusively through direct control of governmental or public entities. The accountability for the expenditure of public funds is a key indicator. As the concurring opinion noted in In the Matter of the Grant of a Charter School Application, 753 A.2d 687, 700 (N.J. 2000), a state constitution may authorize a legislature to determine the means by which publicly funded education is provided, but it is not the court's position to express or imply "any view about the wisdom of that legislative choice."

CONFLICT OF INTEREST

Indiana has a "conflict of interest" law that applies to "public servants." Generally, a "public servant" who "knowingly or intentionally...has a pecuniary interest in...or derives a profit from...a contract or purchase with an action by the governmental entity served by the public servant commits conflict of interest, a Class D felony." I.C. 35-44-1-3. There are some exceptions to this general statement of law, but under such circumstances, there is usually a requirement to disclose the potential or actual interest. The Indiana Attorney General, in Official Opinion No. 88-14, p. 210 (1988), concluded that "public servant" under this law includes all school officers and employees because the definition of "public servant" at I.C. 35-41-1-24 means any person who "[i]s authorized to perform an official function on behalf of, and is paid by, a governmental entity..." [or] "[i]s elected or appointed to office to discharge a public duty for a governmental entity[.]" The term "governmental entity" is fairly broadly defined at I.C. 35-41-1-12:

35-41-1-12. Governmental Entity. – "Governmental Entity" means:

- (1) The United States or any state, county, township, city, town, separate municipal corporation, special taxing district or public school corporation.
- (2) Any authority, board, bureau, commission, committee, department, division, hospital, military body, or other instrumentality of any of those entities; or
- (3) A state-assisted college or state-assisted university.

Will an Indiana charter school employee come within the requirements of the Conflict of Interest law? P.L. 100-2001 does not define a charter school as a "governmental entity," but the three potential sponsors—public school corporations, public universities, and the mayor of Indianapolis—are included within this definition and are subject to the Conflict of Interest law. A careful analysis is necessary because the General Assembly excepted charter schools from "[a]ny Indiana statute applicable to a governing body or school corporation" except those specifically listed. I.C. 20-5.5-8-4. The Conflict of Interest statute is applicable to a governing body and a school corporation, but it is not listed with the statutes a charter school must comply with. See I.C. 20-5.5-8-5. A charter school will have an organizational structure and a governance plan. I.C. 20-5.5-3-3(b)(2).³⁵ Individuals who work at the charter school can be employees of the charter school. I.C. 20-5.5-6-1. A charter school may also

³⁵Please note that Chapter 3, as indicated above, has two Section 3's. The reference is to the second "Sec. 3," which should have been a "4."

“[e]nter into contracts in its own name, including contracts for services.” However, current law for public school corporations does not permit individuals employed as teachers or as noncertificated employees, as those terms are defined in statute and applied to both charter schools and typical public schools, from serving as a member of the governing body of the school corporation. I.C. 20-5-3-11. The primary reason for this is that contracts are entered into on behalf of a school corporation by the governing body. I.C. 20-5-3-8. An organizer of a charter school could include teachers or other persons who might be members of the governing body for the charter school. If the teachers or noncertificated employees are to be considered employees of the charter school but such teachers or noncertificated employees are also part of the governance structure with the authority to contract, it would appear such an arrangement would constitute a conflict of interest, if a charter school is viewed as an “instrumentality” of its sponsoring governmental entity. Clarification by the legislature or by the Attorney General may be necessary to resolve this issue.

This issue was raised in Academy of Charter Schools v. Adams Co. School Dist., discussed *supra*. The school district prohibited two members of the charter school’s governing body from being employed as teachers in the charter school. The trial court found that the school district’s policy of preventing charter school board members from being teachers at the school prevented potential conflicts of interest. 994 P.2d at 447. The school district maintained it was rational to prevent “members of the board [from] hiring themselves as educators.” The school drew a distinction between teachers filling slots on a governing body reserved for teachers (which it permitted) and teachers on a governing body hiring themselves. However, the Colorado Court of Appeals did not have a sufficient record before it.

While there may be a valid distinction between hiring members of the board of a charter school as teachers or administrators and reserving seats on the board for persons so employed by the charter school, we are unable to make that distinction on this record.... It is unclear from this record whether the complaint alleged that the District was imposing a uniform policy inconsistently or was just imposing a limitation applicable only to the [charter school] or the two individual plaintiffs.

Id. The court of appeals reversed the trial court’s dismissal of the equal protection claims and remanded the dispute to the trial court for further proceedings on the teachers’ claims.³⁶

FINANCIAL MATTERS AND ACCOUNTING PROCEDURES

³⁶I.C. 20-5.5-6-3 permits employees of charter schools to organize and bargain collectively under I.C. 20-7.5. This has raised an interesting, albeit unsettling situation: What would happen should charter school teachers go out on strike? Indiana law at I.C. 20-7.5-1-14 makes public school teacher strikes unlawful (although instructional days lost due to such unlawful activity do not have to be made up). This law is not applied specifically to charter school teachers. It is possible that a prolonged strike could serve as a basis for revocation of the charter by the sponsor under I.C. 2-5.5-4-1(7)(A).

Indiana's charter school law is more definitive in its accounting procedures than similar laws from other states. I.C. 20-5.5-7 *et seq.* details fiscal matters affecting charter schools, providing a degree of autonomy but requiring oversight from the sponsor and the state. Under I.C. 20-5.5-8-5(2), a charter school is required to utilize the unified accounting system prescribed by the State Board of Accounts and the State Board of Education as provided by I.C. 20-1-1.5. Also see I.C. 20-5.5-3-3(b)(4), requiring the charter school proposal as submitted to the sponsor to describe the manner in which an annual audit of the program operations of the charter school will be conducted by the sponsor. The Indiana legislature did not establish a system such as New Jersey's that results in a great deal of uncertainty as to the budget development process. It is New Jersey's method of funding charter schools that seems to be the primary impetus behind the series of legal challenges to charter schools and the laws that create them.

FACILITIES

A number of cases discussed *supra* included facility issues, including the requirement that the charter school facility be identified and that it meet certain health and safety standards. Of the twenty (20) areas that need to be addressed by an organizer in its charter school proposal, I.C. 20-5.5-8-3(b)(3)(L) requires only that there be a description and the address of the physical plant. A charter school in Indiana will be subject to the same regulation by other state agencies as public school corporations are, notably the State Department of Health and the State Fire Marshall. See I.C. 20-5.5-8-5(5) applying I.C. 20-5-2-3 (subject to laws requiring regulation by state agencies). The State Department of Health's rules at 410 IAC 6-5.1 *et seq.* are rather extensive. A charter school created by P.L. 100-2001 would be included within the State Department of Health's definition of "school" at 410 IAC 6-5.1-1 for applying its school site and school building or facility requirements.

THE GROWING CONTROVERSY OVER THE USE OF NATIVE AMERICAN SYMBOLS AS MASCOTS, LOGOS, AND NICKNAMES

When the U.S. Commission on Civil Rights issued its statement on April 16, 2001, calling for the end to the use of Native American images and team names by schools and professional athletic teams that are not otherwise associated with Native American culture, it focused national attention on an issue that has been brewing for some time in individual states.

In recent years, there have been disputes over the use of certain mascots, including challenges to the use of mascots that some believe promote satanism and devil worship³⁷ and challenges to the use of

³⁷See "Er the Gobble-Uns'll Git You," **Quarterly Report** July-September: 1996, analyzing cases challenging the use of "Red Devils" and "Blue Devils" as school mascots.

Confederate images and symbols.³⁸ The Civil Rights Commission stated that the use of caricatures, mascots, performances, logos, or names tend to stereotype Native Americans and are insensitive “in light of the long history of forced assimilation that American Indian people have endured in this country.” The Civil Rights Commission added that the civil rights movement of the 1960s resulted in the removal of “overtly derogatory symbols and images offensive to African-Americans” but the same sensitivity is not being displayed toward Native Americans. This is particularly disturbing, the Commission wrote, because the use of stereotypical Native American images and performances are promoted by educational institutions. This, the Commission warned, may create “a racially hostile educational environment that may be intimidating to Indian students. American Indians have the lowest high school graduation rates in the nation and even lower college attendance and graduation rates. The perpetuation of harmful stereotypes may exacerbate these problems.”

Although the Commission acknowledged that some schools believe the use of Native American imagery and references stimulates interest in Indian culture and honors Native Americans, the Commission believes such arguments are misguided.

The stereotyping of any racial, ethnic, religious or other groups when promoted by our public educational institutions, teach all students that stereotyping of minority groups is acceptable, a dangerous lesson in a diverse society. Schools have a responsibility to educate their students; they should not use their influence to perpetuate misrepresentations of any culture or people.

Many of the depictions of Native Americans are either inaccurate or “romantic stereotypes that give a distorted view of the past” that trivializes the present obstacles faced by Native Americans, such as poverty, education, housing, and health care. False portrayals either prevent non-Native Americans from understanding “the true historical and cultural experiences of American Indians” or encourage and enforce “biases and prejudices that have a negative effect on contemporary Indian culture. Mascots and logos promote a “mythical ‘Indian’” that blocks “genuine understanding of contemporary Native people as fellow Americans.”³⁹

The American Indian Cultural Support (AICS) group in conjunction with the National Coalition on Racism in Sports and the Media (NCRSM) has created a state-by-state listing of schools that it

³⁸See “Confederate Symbols and School Policies: Mascots and Collective Free Speech,” **Quarterly Report** January-March: 1999, discussing the use by schools of the Confederate Battle Flag, “Johnny Reb,” and similar images and symbols from the Civil War.

³⁹The Commission’s statement can be found at www.usccr.gov.

believes are inappropriately employing Native American symbols and images as mascots.⁴⁰ They have identified 178 Indiana schools with mascots they deem offensive. Although some of the mascot names are obvious (e.g., Braves, Chiefs, Indians, Warriors, Redskins, Tomahawks, Blackhawks, Apaches, and Mohawks), the list also includes Marauders and Raiders, which may not be related to Native Americans but may refer to Indiana skirmishes during the Civil War.⁴¹ Indiana, despite its name, has no tribal presence. The issue is more pronounced in states where the use of such logos and mascots affect more directly Native Americans.

Illinois and “Chief Illiniwek”

Crue et al. v. Aiken, 137 F.Supp.2d 1076 (C.D. Ill. 2001) is the latest salvo in a continuing battle between students and faculty on the one hand and the University of Illinois on the other regarding the use of “Chief Illiniwek” as the school’s mascot. Crue, which was issued April 6, 2001, involved an attempt by the students and faculty who oppose the mascot, the plaintiffs in this case, to contact prospective student-athletes to inform them of the university’s position, which they assert contributes to the development of cultural biases and stereotypes. They have in the past expressed their opposition to Chief Illiniwek through public speeches, letter-writing campaigns, meetings, protests, and newspaper articles. The University asserted that such contact would violate National Collegiate Athletics Association (NCAA) rules, and directed that any such contact would have to be reviewed in advance by the athletic director or his designee (“Preclearance Directive”). The plaintiffs sought and obtained a temporary restraining order (TRO) from the court. The court found the Preclearance Directive to be an unlawful prior restraint on speech that was not justified by the university’s fear of violating NCAA rules. In addition, the directive was unconstitutionally overbroad and vests to an impermissible degree “largely unconstrained discretion” in the athletic director “to decide who can and cannot speak to prospective student athletes.” At 1082. “It is undisputed,” the court wrote at 1086, “that the Chief Illiniwek controversy presents a matter of public concern” and that “citizens...have an interest in being able to communicate on the topic.” The university’s interests—complying with NCAA regulations and protecting the educational and privacy interests of prospective student-athletes—are outweighed by the matter of public concern (racial stereotyping or insensitivity), which “is only tangentially related to

⁴⁰“Mascot” is derived from Medieval Latin’s *masca* (“witch”). It eventually became part of the French language as *mascotte* (“sorcerer”) and was popularized by Edmond Audran’s 1880 operetta, “*La Mascotte*.” “*La mascotte*” in his play was a beautiful maiden whose influence results in victories for the army of the prince of Pisa. Shortly after this play, *mascot* became a part of the English language, meaning a person or thing that is held to bring good luck. More recognizable but not particularly offensive mascots are Notre Dame’s leprechaun, Ohio State’s buckeye, Georgia’s bulldog, and the Texas “long horn.” Some mascots are influenced by local interests. Jeffrey Weldon, Chief Legal Counsel for the Montana Office of Public Instruction, reports that Belfry High School in his state has, as its mascot, a Bat.

⁴¹The state-by-state list can be accessed through “American Indian Mascots in Our Schools” at <www.aics.org/NCRSM/index.htm> or <www.aics.org/mascot/schools.html>.

athletics.” At 1087. The court noted that the plaintiffs have “multiple alternative channels of communication” available to them—and they have used them—but this does not negate the legal conclusion that the Preclearance Directive is a “content-based prior restraint” that “chills potential speech before it happens.” At 1086.

The “multiple alternative channels of communication” include newspaper articles and letters to the editor. One such letter/article appeared in the *Chicago Tribune* under its “Voice of the People” column on its editorial pages. Bearing a headline “Mascots degrade schools, people,” the author, Ed Gelin, cautioned non-Native Americans in the use of Indian images, symbols, and rituals. “[T]he objects and images commonly used in mascot depictions, such as Chief Illiniwek’s feathered headdress, are sacred religious objects in traditional Indian spiritual practice” analogous to communion wafers used in Christian services.

No one would suggest that it would be appropriate for a Protestant school to name its sports team the “Fighting Popes” and feature a halftime mascot engaged in goofy caricatures of sacred Catholic practice. Nor would you find much support for a Catholic school that wanted to field the “Fighting Israelites” with similarly offensive halftime shenanigans. And of course the civil-rights struggles of African-Americans are recent enough that your chances of encountering a white student in black face doing a pseudo-African halftime dance are zero. Why do so many, including supposed academic leaders, think that it’s acceptable to do this with Native Americans?

There are a number of discussions occurring in Illinois public school districts at this writing regarding this issue. The *Chicago Tribune* reported on April 26, 2001, that the recently formed Illinois Native American Bar Association is threatening a lawsuit against the Huntley School District 158 after the school board voted to keep its Redskins mascot. However, as the *Tribune* reported, Niles West High School and Marist High School in Chicago both dropped Indian-related names.

New York’s Commissioner Weighs In

New York’s Commissioner of Education, Richard P. Mills, issued on April 5, 2001, an advisory to all public school board presidents and local superintendents, urging public schools in that state to cease the use of Native American mascots as soon as possible. His advisory followed a study of the issue by the New York Department of Education as well as solicitation of the views of local administrators, citizens at large, and Native American representatives. The study found that, nationwide, over 600 schools within the last 30 years have changed or eliminated the use of Native American symbols, images, or rituals as names or mascots, notably Miami (Ohio) University, St. John’s University (New York), and Stanford University (California). The U.S. Department of Justice investigated a North Carolina school district that used an Indian mascot and nickname to determine whether such use violated federal civil rights laws by creating a racially hostile environment. The investigation was closed after the district agreed to eliminate the use of Native American symbols. The New York Attorney General, in August

of 2000, opined that the use of historical and religious symbols, such as a feather headdress, face paint, or totem poles, could violate the Federal Civil Rights Act of 1964. The Commissioner observed at pp. 2-3 of his advisory:

Schools must provide a safe and supportive environment that promotes achievement of the standards for all children. The use of Native American mascots by some schools can make that school environment seem less safe and supportive to some children, and may send an inappropriate message to children about what is or is not respectful behavior towards others.... If children and parents in the school community are offended or made to feel diminished by the school mascot, what school leader or board would not want to know that and correct the situation? School mascots are intended to make a statement about what the school values. School leaders may not be aware that the statement heard can be contrary to the one intended.

The Commissioner also noted that there are no easy solutions. “Most people would recognize and deplore mocking, distorted representations of minority group members. However, fair-minded people might view these mascots as respectful without realizing that the representation included religious symbols that Native American observers would find distressing when used in that manner.” At 3.

Progress has been made, the advisory stated. Newer professional teams and colleges are avoiding the use of Native American mascots. However, maintaining the status quo or mandating a statewide halt are equally implausible.

People in many communities haven’t had an opportunity to talk about this and listen to one another. There are cherished traditions surrounding many of the mascots.... [L]ocal remedies should be exhausted first. Many communities have engaged the issue and made changes. Many other communities will not do so.⁴²

The Commissioner disagreed that this issue is strictly a local matter. “There is a state interest in providing a safe and supportive learning environment for every child. The use of Native American mascots involves a state responsibility as well.” *Id.* He urged local school districts to engage their constituencies in positive discussions on this issue. There are four questions that should be posed:

⁴²The use of the “bully pulpit” is not without precedent. In 1988, the Minnesota State Board of Education issued a similar statement. “It made an impact,” Yvonne C. Novack, manger of the Minnesota Department of Education’s Indian education office, reported to *Education Week*. “We’ve gone from 50 school districts using Indian names down to nine. It was a learning activity for many of the schools and students.” *Education Week*, “Rights Commission Calls For End to Indian Team Names,” (April 25, 2001), p. 6.

- Do Native Americans and non-Native Americans perceive the mascot differently?
- Is there a significant difference between how the mascot may have been intended and how it is interpreted?
- How should an organization respond if its well intentioned actions unintentionally offend a member of the group's religious or ethnic beliefs?
- Are there other symbols that represent the school's values that could be used in place of the existing mascot?

“It is important that our students learn about the diversity of our communities,” the Commissioner concluded at 4, “so that they will understand and respect our differences and draw strength from them in becoming good citizens and productive adults.... As educators, we have an obligation to inform communities so that they might come to understand the pain, however unintentionally inflicted, these symbols cause.”

Judicial and Legislative Action in Wisconsin

The New York Commissioner's advisory letter made reference to progress in Wisconsin on this issue, where twenty schools have ceased the use of Indian names and mascots. However, this has not been without local controversy, judicial scrutiny, and legislative attention.

According to an article in *Education Week*, the school board of the Menominee Area Schools in Wisconsin voted to change the name from the “Indians” to the “Mustangs.” Three school board members were ousted because the issue “wasn't taken to the community,” long-time board member Marshall Quilling reported. “That's where the problem came.”⁴³

The Wisconsin Court of Appeals, in Munson and Students A., B., C. v. State Superintendent of Public Instruction and the School District of Mosinee, 577 N.W.2d 387 (Table) (Wisc. App. 1998),⁴⁴ turned back a legal challenge by Native American students who asserted the use of an Indian wearing a feathered headdress violated Wisconsin's nondiscrimination laws. The Wisconsin State Superintendent of Public Instruction—like the Minnesota State Board of Education before him and the New York Commissioner after him—issued in 1992 an advisory to public school districts, requesting that they review the use of Indian mascots and logos. The State Superintendent followed this advisory with an

⁴³“Rights Commission Calls for End to Indian Team Names,” *Education Week* (April 25, 2001), p. 6.

⁴⁴This is an unpublished decision. Robert J. Paul, Chief Legal Counsel for the Wisconsin Department of Public Instruction, graciously provided a copy for the Indiana Department of Education.

April 1994 letter to 65 school districts, including Mosinee, cautioning that the use of such mascots, although legal, is inappropriate and should be eliminated. The plaintiffs in this case requested the Mosinee school board to cease this practice, but it declined to do so. The plaintiffs formally complained in May of 1994 to the school board that the practice constituted discrimination on the basis of race, national origin, and ancestry. The school board denied their complaint, resulting in an appeal in June of 1994 to the State Superintendent. The Wisconsin Department of Public Instruction (WDPI) investigated the complaint. Student B. reported she has experienced name-calling and other ethnic slurs, including “squaw.” Students at pep rallies and athletic contests would mimic Indian dancing and make stereotypical “war cries.” The school district did not provide any courses regarding Indian culture.

The students’ mother expressed concern regarding the self-esteem and cultural identity of her family. The use of ethnic stereotypes was insensitive, she represented, and demeaned the religious practices of Indian people. The mascot utilized by the school perpetuates the notion that Indians are “a savage and war-like people,” one student reported.

The investigators concluded the district failed to adopt, implement or use the required state pupil nondiscrimination policies and complaint procedures but found ultimately that the school district did not discriminate against the plaintiffs on the basis of race, national origin, or ancestry through the use of Indian logos, nicknames, and mascots. Notwithstanding, the investigation report provided interesting details. The logo employed by the school district is an Indian wearing a full feather headdress or “war bonnet” in the “Plains Indian” style, an inaccurate “depiction of an American Indian from any particular tribe from Wisconsin.” Further, although the cheerleaders had been directed not to use cheers with the word “Indian” in them, the band played some songs with “Indian” themes, such as the Florida State Seminole song. Some fans perform the “tomahawk chop” and a few students wear face paint or feathers to athletic contests. Opinion, at 4-5.

Although Mosinee has used the Indian logo since the 1920's, it had been reducing its use the past few years and discouraging such practices as the “tomahawk chop.” “The team mascot, a young woman dressed in a white-fringed costume with moccasins, is no longer used by the teams...” At 5. The community has been divided on the issue. The Indian tribes in Wisconsin are in agreement that such logos should be removed from the schools, the court noted. “The Oneida tribe, Great Lakes International Council, United Indian Nations of Oklahoma, National Congress of American Indians, and the Wisconsin Indian Educational Association Board of Directors have all passed resolutions condemning the use of the Indian logo.”⁴⁵ At 5-6.

The WDPI, however, could not reach the legal conclusion the plaintiffs urged: all Indian logos are *per*

⁴⁵The New York Commissioner’s advisory indicated that the National Association for the Advancement of Colored People (NAACP) and the National Education Association (NEA) also have passed similar resolutions.

se discriminatory. Instead, the WDPI indicated it would employ a case-by-case, independent analysis of the use of Indian logos to determine whether any such logos or mascots depicted a negative stereotype that would be considered discriminatory under Wisconsin law.

The plaintiffs sought judicial review of WDPI's conclusions, but the trial court affirmed the WDPI's determination. The Court of Appeals affirmed the trial court's ruling.

The appellate court agreed with WDPI that a school district would violate Wisconsin's anti-discrimination law if its use of an Indian logo discriminated against a protected class of persons, including American Indians. Stereotyping and harassment are forms of discrimination. At 7.

The plaintiffs argued that WDPI did not consider fully their subjective impressions of the Indian logo when assessing whether the logo was "detrimental to a protected class." The court determined that WDPI's investigative approach under the "reasonable person similarly situated" standard was legally sufficient. WDPI attempted to interview all students in the school with Indian heritage. It did interview a representative cross-section of the school community. WDPI noted that the logo, although not an accurate depiction of Wisconsin tribes, was not a cartoon figure or a caricature. It concluded that a "reasonable person, similarly situated" would not view the Indian logo as "detrimental to a protected class" and, accordingly, was not discriminatory. At 10.

The court also indicated approval of WDPI's use of the investigative guidelines developed by the Office for Civil Rights (OCR). OCR employs a "hostile environment analysis" that considers several factors, including frequency of discriminatory conduct, its severity, whether it is physically threatening or humiliating or merely offensive, and whether it unreasonably interferes with performance. These factors are balanced against consideration of the age and race of the purported victim, the nature of the incidents, the size and location of the relationships of the individuals, and other incidents at the school. At 11.

OCR will find a violation where it is established that (1) a racially hostile environment exists; (2) of which a school district had actual or constructive notice; and (3) where the school district has not taken action reasonably calculated to redress the hostile environment. *Id.* OCR defines a "racially hostile environment" as one where racially harassing physical, verbal, graphic or written conduct is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the school's activities.⁴⁶ At 12.

In this case, the plaintiffs indicated they had been subjected to racial slurs but did not report these to the

⁴⁶WDPI referred to two OCR investigations regarding the use of Indian logos. One of the investigations involved the University of Illinois' use of Chief Illiniwek as its mascot. OCR found the use of Chief Illiniwek and the university's use of the nickname "Fighting Illini" did not present circumstances of a racially hostile environment that was sufficiently severe, pervasive, or persistent." At 12.

school. The concerns they did share with the school were addressed by administration (advising teachers and staff of such concerns and reducing the use of the logo, mascot, and certain cheers).

Because the department reviewed the nature and frequency of the conduct, its severity and its persistence from both an objective and subjective viewpoint, its analysis, including consideration of the two civil rights cases, is not erroneous.

At 13. The court concluded the WDPI's factual findings—which the plaintiffs do not dispute—indicate the school's administrators and teachers took “action reasonably calculated to address the [plaintiffs'] concerns” and the complained-of incidents “do not show severe, persistent, racial harassment.” At 14.

There have been subsequent attempts in the Wisconsin legislature to ban outright the use of Native American mascots, logos, or nicknames by schools and athletic teams. However, these legislative initiatives have failed to date. Recently, a “2001 Assembly Joint Resolution” was introduced, urging school boards to “cease and desist” in the use of such “stereotypical depictions of Native Americans.” Such depictions, the proposed Joint Resolution states, subject the children of Wisconsin Indians to a “mockery of their cultures on a daily basis in school environments throughout the state” and that “many of the icons, portrayals, and rituals associated with the use of Native Americans as mascots or logos are hurtful and degrading to American Indians because they demean and mock religious and spiritual practices, traditions, and beliefs.”

The proposed Joint Resolution identifies by name 42 Wisconsin schools the sponsoring legislators assert have offensive nicknames or logos (Mosinee High School is on the list). They demand the schools “immediately begin the process of eliminating Indian mascots, logos, and nicknames” and to complete the process by the beginning of the 2004-2005 school year.

COURT JESTER: THE EDUCATION OF HĪ EĪ RĪ SĪ KĪ OĪ WĪ ĪĪ TĪ Z

American humorist, author, and teacher Leo Rosten, writing as Leonard Q. Ross, published in 1937 his now-famous work, *The Education of HĪ YĪ MĪ AĪ N KĪ AĪ PĪ LĪ AĪ N*, a collection of stories involving the bespeckled Mr. Parkhill and his class of recent immigrants in the Beginners' Grade of the American Night Preparatory School for Adults, a preliminary step in the naturalization process. One member of the class was the intrepid Hyman Kaplan, a Polish-born immigrant (as was Rosten) whose primary language was Yiddish.⁴⁷ Kaplan's escapades with language and logic would have any teacher seeking a padded room at the State Home for the Bewildered. Mostly Mr. Parkhill sighed heavily and carried on. Kaplan did not lack a strong sense of self-worth. He always signed his name in

⁴⁷Yiddish is derived from medieval High German but written in the Hebrew alphabet. It draws significantly from Hebrew, Russian, Polish, and English. It is usually spoken by East European Jews and their descendants in other countries.

three colors, with all letters capitalized and stars in between each letter. Rosten's *Ki Ai Pi Li Ai N* stories, as well as his later works, *The Joys of Yiddish* (1968) and *Hooray for Yiddish: A Book About English* (1982), helped popularize Yiddish, with many Yiddish terms finding their way into American English and everyday usage.⁴⁸

Not unexpectedly, Rosten's promotion of the Yiddish language has affected American law.⁴⁹ Several courts have cited to Rosten, especially his *Joys of Yiddish*. There have even been scholarly works.⁵⁰ So it should not be surprising that one enterprising judge should employ Yiddish in order to address—and, the judge hoped, end—a 17-year-old feud between two sisters.

In re Judith Herskowitz, 166 Bankruptcy Reporter 764 (S.D. Fla. 1994) involved the latest in a lamentable series of legal struggles between Judith Herskowitz and her sister, Susan Charney. Judge A. Jay Cristol, Chief Judge of the Bankruptcy Court for the Southern District of Florida, received a motion for sanctions from Charney against Herskowitz. The evening before the motion was to be heard, Herskowitz filed a motion for continuance, indicating that she would simply not be available the next day and, besides, she had a cold. Chief Judge Cristol wrote that “[a]n exhaustive search of the case law, statutory law and rules, does not disclose that grounds for continuance may be based upon the fact that one of the litigants had a cold.” He also noted that this litigation between sisters and their respective families “has been bitterly contested for 17 years” and Herskowitz has “played games with the court” in the past when attempts were made to “link her by telephone for the conduct of telephone hearings scheduled in that format for her convenience” only to have her be “unavailable.” “[S]he almost never wishes to go forward with any scheduled matter,” the court lamented at 765.

From the court's perspective, this case is a tragedy of greater proportions than the issues briefly presented at this hearing. The litigation presents a family that has been engaged in internecine warfare for approximately 17 years. Not only are two sisters, Susan and Judy involved, sadly the sons of Ms. Herskowitz have been dragged into this battle of the galaxy. Instead of proceeding with their lives, these nice young men, in support of their mother, are locked in never-ending vendetta with their blood relatives. The court is unaware of precisely how many other family members are in one camp or

⁴⁸For instance, it is not uncommon to read or hear “chutzpah,” variations on “kibitz,” “klutz,” “kosher,” “schmaltz,” “schmo,” “schnook,” “schlep,” “schlock,” “schtick,” “schlemiel,” “schmooze,” or “schmuck.”

⁴⁹See, for example, People v. Arno, 153 Cal. Reporter 624, 628 n. 2 (Cal. App. 1979), where the majority of the court, taking umbrage with a dissenting opinion they thought too personal, used an acrostic to refer to the dissenting judge as a “schmuck.” See “Court Jesters: The Caustic Acrostic,” **Quarterly Report** July-September: 1996.

⁵⁰See “Lawsuit, Shmawsuit” by Alex Kozinski and Eugene Volokh, *The Yale Law Journal*, Vol. 103, p. 463. (Nov. 1993).

the other. It is clear to the court that Ms. Herskowitz not only does not act in good faith but is not capable of acting appropriately in her own best interest. She has been urged on numerous occasions to obtain counsel but persists in her quest to master the legal process and overwhelm her sister. She goes on and on with the waste and destruction of family relationships and family treasure.

At 765-66. However, the court noted that “it usually takes ‘two to tango,’” determining that Susan probably bears some responsibility for the continuing warfare. Nevertheless, the court determined that “Ms. Herskowitz has probably done something wrong which would qualify her for sanctions under the motion of her sister.” Accordingly, he entered the following order at 766:

ORDER OF SHANDA⁵¹

• • •

The motion of Susan Charney for sanctions against Ms. Herskowitz is granted. The sanction ordered by this court is that Ms. Herskowitz shall obtain and mail to Ms. Charney, at least five days before Susan's next birthday, a birthday card which contains the words "Happy Birthday, Sister" and the signature of Ms. Herskowitz. The card shall not contain any negative, inflammatory or unkind remarks but may contain an overture to family reconciliation and settlement.

Wotta a buncha schmucks.

QUOTABLE...

Few of us can look too far back in our personal histories—and the Country certainly cannot ignore the circumstance of its own birth—without acknowledging that our ancestors were people who suffered significantly because of their religious beliefs and who were ostracized by their national communities or made to suffer poverty or even worse because of their religious beliefs. As one visitor to our shores, himself a refugee from Nazi tyranny, put it, Americans can all say, "We are bruised souls." We each carry "the wounds and sorrows of ancestors, and that memory of the sufferings caused by persecution and prejudice which they left to their progeny" is our "spiritual patrimony."

Circuit Judge Kenneth F. Ripple, quoting Jacques Maritain, *Reflections on America*, 83-84 (1958) in Books v. City of Elkhart, 235 F.3d 292, 308 (7th Cir. 2000), reversing the district court's decision in favor of the City of Elkhart (Ind.) in a continuing dispute over the display of a monument bearing the Ten Commandments.

UPDATES

Decalogue: Epilogue

"The Decalogue: Thou Shalt and Thou Shalt Not," **Quarterly Report** April-June: 2000 and "Decalogue: Epilogue," **Quarterly Report** October-December: 2000, reported on the judicial

⁵¹"Shanda," the court explained in a footnote, is Yiddish for "shame," which the court believes "is entirely descriptive of this tragic case." Chief Judge Cristol is noted for occasional idiosyncratic decisions. See "Court Jesters: Poe Folks," **Quarterly Report** January-March: 1998, where one of his decisions, written entirely in the style of Edgar Allan Poe's "The Raven," was discussed.

progress of two important federal decisions involving the constitutionality of posting the Ten Commandments on public property.

1. In Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000), the 7th Circuit Court of Appeals, by 2-1, reversed the federal district court, finding instead that the placement of a monument on municipal grounds, where it stood for over 40 years, was unconstitutional. The monument included symbols representative of several faith traditions, and the text attempted to be as inclusive of such faith traditions as possible. It was presented to the city by a fraternal service organization as part of a nationwide campaign to provide more guidance to increasingly wayward youth. The dedication ceremony was as inclusive as the monument and its text. The federal district court found the monument, given its protracted history, placement within a larger context of monuments, and inclusive approach, did not violate the First Amendment's Establishment Clause. When the 7th Circuit reversed, the city appealed to the U.S. Supreme Court. On May 29, 2001, the Supreme Court, by 6-3, denied certiorari. At least four (4) affirmative votes are necessary to invoke the review of the Supreme Court. Although it is not common for a written opinion to issue when certiorari is denied, Chief Justice William Rehnquist authored a dissenting opinion, which was joined by Justice Antonin Scalia and Justice Clarence Thomas. In City of Elkhart v. Books et al., 532 U.S. ____, 121 S.Ct. 2209 g(2001), Chief Justice Rehnquist asserted the court should have granted certiorari in order to distinguish cases such as Elkhart from the coercive effect present in Stone v. Graham, 449 U.S. 39, 101 S.Ct. 192 (1980), where the court struck down a state statute that required the posting of the Ten Commandments in public school classrooms. In Stone, the court could divine no secular purpose for such a law. The dissent observed that the court has not held that the Ten Commandments can never have a secular application. "Undeniably," the Chief Justice wrote, "...the Commandments have secular significance as well, because they have made a substantial contribution to our secular legal codes." The stated purpose for accepting the monument was "sincere and not a sham." The 7th Circuit should have noted the lack of evidence of insincerity on the city's part and provided more credit to the city's stated purpose for displaying the monument. There is some doubt that the monument, when viewed in its context, has the primary or principal effect of advancing religion. The monument sits outside the Municipal Building, which houses the local courts and prosecutor's office. "This location emphasizes the foundational role of the Ten Commandments in secular, legal matters. Indeed, a carving of Moses holding the Ten Commandments, surrounded by representations of other historical legal figures, adorns the frieze on the south wall of our courtroom, and we have said the carving 'signals respect not for great proselytizers but for great lawgivers,'" citing Allegheny Co. v. Greater Pittsburgh ACLU, 492 U.S. 573, 652-53, 109 S.Ct. 3086 (1980) (Justice John P. Stevens concurring in part and dissenting in part). The dissent represents that the Elkhart monument "is part of the city's celebration of its cultural and historical roots, not a promotion of religious faith." The monument shares the lawn outside the Municipal Building with a Revolutionary War Monument and a "Freedom Monument." "Considered in that setting, the monument does not express the city's preference for particular religions or religious belief in

general.” The monument has as much civic significance as it has religious. Given that it has stood without controversy for over 40 years, the dissent believes the court should have visited the issue.

2. That visitation may come sooner rather than later. The Indiana General Assembly, through P.L. 22-2000, permits—but does not mandate—Indiana public schools and other state and local political subdivisions to post “[a]n object containing the words of the Ten Commandments” so long as this object is placed “along with documents of historical significance that have formed and influenced the United States legal or governmental system,” and the object containing the Ten Commandments is not fashioned in such a way as to draw special attention to the Ten Commandments apart from other displayed documents and objects. I.C. 4-20.5-21 and I.C. 36-1-16. A legislator had a monument prepared that contained a version of the Ten Commandments with the intention of placing the monument on the grounds of the State Capitol, where there had once been such a monument. In Indiana Civil Liberties Union, Inc., et al. v. O’Bannon, 110 F.Supp.2d 842 (S.D. Ind. 2000), the federal district court enjoined the erecting of the monument. The State has appealed to the 7th Circuit. Oral arguments were conducted on January 9, 2001, and a decision is likely imminent. The Books case does not bode well for O’Bannon, especially as there is no lengthy history involving the monument in the O’Bannon dispute, the monument as constructed does draw attention to the Ten Commandments, and the authority to erect the monument is derived from statute making the case more analogous to Stone v. Graham.

The Golf Wars: Tee Time at the Supreme Court

“Golf,” Mark Twain is reported to have said, “is a good walk spoiled.” According to the U.S. Supreme Court, golf may not even be a good walk.

PGA, Tour Inc. v. Casey Martin, 204 F.3d 993 (9th Cir. 2000) was affirmed by the U.S. Supreme Court, 7-2, on May 29, 2001. See PGA Tour, Inc. v. Martin, 532 U.S. ___, 121 S.Ct.1879 (2001). The case involved application of Title III of the Americans with Disabilities Act of 1990, and whether this law permitted Martin, who has a degenerative circulatory disorder in his right leg, to use a golf cart as a “reasonable accommodation.” PGA asserted that walking the course was an integral part of professional golf, and that the ADA was not intended to apply to professional golfers while in competition but was intended for the public viewing such spectacles. The court was not persuaded that the fatigue factor from walking the course was such a significant factor that permitting Martin the use of a cart would be a “fundamental alteration” to the game. Martin’s condition resulted in considerable fatigue, even with the use of the cart. It was estimated that he would still walk 25 percent of a typical course during competition. The ADA has three main parts: Title I (employment), Title II (public services), and Title III (public accommodations). As a general rule, Title III of the ADA forbids discrimination on the basis of a disability to an otherwise qualified individual “in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of

public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. §12182(a). “Discrimination” occurs where a party fails to make reasonable modifications that would afford equal opportunity for an individual with a disability to participate. However, such modifications or accommodations do not have to be made or provided where the party can “demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.” 42 U.S.C. §12182(b)(2)(A)(ii). The court noted that a “golf course” is specifically listed as a “public accommodation.” 42 U.S.C. §12181(7)(L). It declined to restrict application of Title III only to those areas where spectators would be and not to the restricted areas where the competitors were. The law did not provide for such selective application.⁵²

The court noted the PGA Tour was essentially open to anyone who had the requisite entrance fee and letters of recommendation and who successfully competed in the challenge tournaments that resulted in one being on the PGA Tour. Martin was a gifted golfer. The PGA did not dispute the fact that he was disabled as well as qualified to be a professional golfer, nor did it argue that the use of the cart might provide him an unfair advantage. However, not all potential cases would present the same operative facts, and the use of a cart could suffice to be a “fundamental alteration” to the professional game of golf because walking the course (estimated to be between 5-6 miles each day of competition) and the resulting fatigue factor were important elements of the game. “Walking the course,” the PGA asserted, is a “substantive rule of competition, and that waiving it as to any individual for any reason would fundamentally alter the nature of the competition.” 121 S.Ct. at 1886. However, golf carts are permitted in some of the rounds in the qualifying tournaments as well as on the senior tour. The use of a golf cart is not addressed by the Rules of Golf. As the 9th Circuit observed below—and the Supreme Court held now—the issue is not so much whether the use of a golf cart would fundamentally alter the competition but whether, based on an “intensely fact-based inquiry,” the use of a cart by Martin would do so. 121 S.Ct. at 1888.⁵³ The parties did not seem to be in disagreement that Martin’s use of a cart would not do so. The concern is how a decision in Martin’s favor would be applied thereafter to other potential competitors asserting the need for a cart as a “reasonable modification.”

The court addressed accommodations and modifications that are reasonable. It opined that changing the diameter of a golf hole from three to six inches would be unacceptable even though it affected all competitors equally. This would constitute a “fundamental alteration.” Also, there are modifications that are reasonable but not necessary. These types of modifications would provide a competitor an

⁵²The district court noted that Title III does not “create private enclaves” on a golf course, thus relegating “the ADA to hop-scotch areas.” 984 F.Supp. 1320, 1326-1327 (Ore. 1998).

⁵³This statement has resulted in a number of commentators suggesting this case is so fact-sensitive that it only applies to Martin. See, for example, “No Free Ride for Rest of Golfers,” *Chicago Tribune*, May 30, 2001; “Justices say disabled golfer can use cart on PGA Tour,” *Chicago Tribune*, May 30, 2001; “Pros worry about Martin decision,” *Indianapolis Star*, May 30, 2001.

advantage over others, even though the impact might be peripheral. Such a modification would also “fundamentally alter the character of the competition” and would not have to be permitted. 121 S.Ct. at 1893. But this is not the situation in Martin’s case.

The court also addressed the game of golf itself.⁵⁴ “[T]he essence of the game has been shot-making using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible.” At 1893-94. Even with changes over time in golf course design, equipment, rules, and method of transporting clubs, the essence of the game remains the same. “There is nothing in the Rules of Golf that either forbids the use of carts, or penalizes a player for using a cart.... [T]he walking rule is not an indispensable feature of tournament golf either.” At 1894. The court was unpersuaded by the “fatigue factor” argument that can affect the “skill of shot-making” such that one stroke so affected can mean the difference between winning and losing a tournament. Golf, the court stated, is a game for which it is impossible for all competitors to play under the same exact conditions, noting that “hard greens,” head winds, and changes in the weather often affect such tournaments. Walking a golf course is not “significant” as far as exercise is concerned. Quoting the district court, one walking a typical course would expend approximately 500 calories—“nutritionally...less than a Big Mac.” 994 F.Supp. at 1250. “[G]olf,” Justice Stevens wrote, “is a low intensity activity” with “fatigue from the game” being “primarily a psychological phenomenon in which stress and motivation are the key ingredients.” Even under severe heat and humidity, the critical factor is “fatigue [from] fluid loss rather than exercise from walking.” The “walking the course” rule is not an “essential rule” but “at best peripheral to the nature of Petitioner’s athletic events, and thus it might be waived in individual cases without working a fundamental alteration.”⁵⁵

Justice Antonin Scalia dissented, with Justice Clarence Thomas joining him. He questioned whether the majority were motivated more by compassion than by the dictates of law. Although the case involves a peculiar set of facts, there nevertheless can be repercussions not contemplated by the majority opinion. He included several examples, some of them facetious: open casting for a movie or stage production or walk-on tryouts for other professional sports, such as baseball. By making the courts arbiters of what is “essential” and “nonessential” regarding what will constitute an impermissible “competitive effect” in

⁵⁴The author is Justice John Paul Stevens, who is reportedly an avid golfer. “Justices say disabled golfer can use cart on PGA Tour,” *Chicago Tribune*, May 30, 2001.

⁵⁵There was predictable disagreement from professional golfers on the “fatigue factor” from walking the course. Stewart Appleby stated that walking was an essential factor in the professional game. “I know and every player knows that when it’s hot and the course is long or you play 36 holes (in one day), it’s difficult to get through the day. Your body deteriorates. Your hamstrings get tired, your back gets tired. Your swing deteriorates.” “Pros worry about Martin decision,” *Indianapolis Star*, May 30, 2001. Jack Nicklaus, whose expert testimony on this matter was not persuasive to the court, said, “I think we ought to take [the justices] all out to play golf. I think they would change their minds. I promise you it’s fundamental [to the game].” “Justices say disabled golfer can use cart on PGA Tour,” *Chicago Tribune*, May 30, 2001.

sanctioned sports, the Court's decision in Martin "guarantees that future cases of this sort will have to be decided on the basis of individualized fact findings. Which means that future cases of this sort will be numerous, and a rich source of lucrative litigation." The ADA, the dissent noted, is intended to provide "equal access" and not an "equal chance to win." (Emphasis original.)

One can envision the parents of a Little League player with attention deficit disorder trying to convince a judge that their son's disability makes it at least 25% more difficult to hit a pitched ball. (If they are successful, the only thing that could prevent a court order giving the kid four strikes would be a judicial determination that, in baseball, three strikes are metaphysically necessary, which is quite absurd.)

121 S.Ct. at 1904. All rules for athletic competition are "entirely arbitrary" and it is not the business of a court to "pronounce one or another of them to be 'nonessential' if the rulemaker (here the PGA TOUR) deems it to be essential." At 1902. PGA Tour golf does not have to meet the court's concept of what is "classic golf" anymore than the American League had to play "classic baseball" when it decided to eliminate the pitcher's turn at bat in favor of a "designated hitter."

The dissent refers sarcastically to its new role as one of "awesome responsibility."

It has been rendered the solemn duty of the Supreme Court of the United States, laid upon it by Congress in pursuance of the Federal Government's power "[t]o regulate Commerce with foreign Nations, and among the several States," U.S. Const., Art. I, §8, cl. 3, to decide *What Is Golf*. I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archer, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this August Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot *really* a golfer? The answer, we learn, is yes. The Court ultimately concludes, and it will henceforth be the Law of the Land, that walking is not a "fundamental" aspect of golf.⁵⁶

At 1902. The ADA does not mandate, nor can it, an even distribution of talent, yet the dissent believes the majority opinion attempts to do this.

1, Although commentators have questioned how the PGA Tour or any sanctioning body for

⁵⁶The dissent sided with the expert witnesses that walking is "*the central feature* of the game of golf—hence Mark Twain's classic criticism of the sport: 'a good walk spoiled.'" At 1903 (emphasis original).

athletics will be able to evaluate adequately whether a modification is “reasonable,”⁵⁷ the Supreme Court did provide some guidance by establishing a three-part inquiry that need not be in any particular order: (a) Is the requested modification “reasonable”? (b) Is it “necessary” for the individual with a disability? and (c) Does the modification, if granted, “fundamentally alter the nature of” the competition? 121 S.Ct. at 1893, *n.* 38. There are other preliminary determinations that must also be made, but these are not addressed specifically by the Court. These determinations include whether the person is “disabled” as defined (substantial limitation on a major life activity), 42 U.S.C. §12102, and, if so, whether the individual is otherwise a “qualified person” with a disability (able to perform the function if reasonable modifications or accommodations are employed).

2. The dissent warns of possible backlash by sanctioning bodies. Because the majority determined the use of a golf cart was “nonessential” in part because the PGA permitted its use in some of its other sanctioned golfing activities and allowed the public at large to attempt to qualify for the Tour, the PGA and other similar bodies have “every incentive” to “make sure that the same written rules are set forth for all levels of play, and never voluntarily...grant any modifications. The second lesson is to end open tryouts. I doubt that, in the long run, even disabled athletes will be well served by these incentives that the Court has created.” 121 S.Ct. at 1905.
3. There is uncertainty as to the effect the Martin decision will have on other sports.⁵⁸ There have been notable accommodations in other professional sports. The National Football League (NFL) has permitted kickers with artificial limbs; Jim Abbott pitched baseball in the major leagues although he had only one hand; Craig Bodzianowski boxed professionally with a prosthesis on his partially amputated right leg, and Gary Bettenhausen was allowed to continue Indy-style auto racing after sustaining a disabling arm injury.⁵⁹ There are two Indy Racing League drivers competing on lesser racing circuits at present who use hand controls because they are paralyzed from the waist down. The Martin decision “sets a broad precedent for legal

⁵⁷Hal Sutton, who is one of the nine members of the PGA Tour Policy Board that sets goals and policy for the Tour, said in an article from *The Indianapolis Star* (May 30, 2001): “Pandora’s box has been opened. The next person might not really have the need for the golf cart that Casey does. And secondly, who’s going to decide that? Is every issue going to go to the court system in order to find out?”

⁵⁸See, for example, “Ruling on Disabled Golfer Could Be Applied to Schools,” *Education Week*, June 6, 2001, p. 29.

⁵⁹“Other sports don’t see ruling as a threat,” *Chicago Tribune*, May 30, 2001. However, the NFL did alter its rules after Tom Dempsey of the New Orleans Saints, who was missing the front half of his right foot, kicked a 63-yard field goal in 1970, which is still a record. Dempsey had a box-toed shoe fitted on his right foot. The NFL now requires that kickers with artificial limbs on their kicking legs must wear shoes that “conform to that of a normal kicking shoe.”

rights in getting the disabled athlete to the same starting line as a non-disabled athlete,” William Goren, chairman of the paralegal studies department at MacCormac College told the *Chicago Tribune*. “But it is really a narrow precedent because disabled athletes who have the exceptional talent to compete without fundamentally altering the sport are few.” The number of athletes who have such exceptional talent (and would, hence, be a “qualified” person with a disability) may be few, but the dissent warned that the litigants may be many. In addition, there is nothing in the Martin decision that restricts it to professional athletes or professional athletic competition. It is more likely that the pool of athletes of comparable ability would be available at the secondary and post-secondary level. This may result in more of the three-part analyses referenced by the court being conducted by high schools and colleges. It is conceivable that a “reasonable” modification or accommodation for a student-athlete with a visual impairment but with the requisite athletic ability would include certain lane assignments in track or swimming. Depending upon the distance of the race, the inside lane may be the preferable assignment. Although necessary for the athlete to compete, a certain lane assignment, although “reasonable,” may fundamentally alter” the competition but only for certain races. The potential applications are more real than theoretical.

4. The PGA Tour originally sought to have it exempted from the coverage of the ADA by representing that it was a “private club.” The district court, noting that the PGA generates in excess of \$300 million in revenue a year through its various tournaments and related media outlets and sponsorships, determined that the PGA is really a “commercial enterprise” that operates in the entertainment industry for the economic benefit of its members. PGA holds tournaments on sometimes exclusive golf courses, but these are nonetheless open to the public for the tournament. The ADA will apply to the PGA. The PGA did not continue its argument that it is a “private club” before the Supreme Court. Nevertheless, the district court’s finding illustrates how certain sanctioning bodies, including those at the secondary and post-secondary level, may experience various legal incarnations depending upon the legal issue presented and the party in opposition. See, for example, the discussion of the nature of the Indiana High School Athletic Association with respect to a student-athlete as opposed to its member schools. IHSAA v. Carlberg, 694 N.E.2d 222 (Ind. 1997) *reh. den.* (1998) and IHSAA v. Reyes, 694 N.E.2d 249 (Ind. 1997). This incarnation can be further distorted depending upon the judicial forum. A member school of the IHSAA will be considered a “voluntary member” with limited recourse to challenge IHSAA decisions in a state court, but will have greater rights, including constitutional guarantees, in a federal court, applying Brentwood Academy v. Tennessee Secondary Sch. Athletic Assoc., 121 S.Ct. 924 (2001). Although the IHSAA does not generate the revenue the PGA does, a recent reported case indicated that its assets are nearly \$7.5 million. See IHSAA v. Martin, 741 N.E.2d 757 (Ind. App. 2000). The relationship between sanctioning bodies and their member schools at the secondary and post-secondary level will be more complicated by the Martin case than any difficulties the PGA Tour will experience. Most of the member schools of interscholastic organizations are publicly funded and, as such, will need to comply with Title II of the ADA. The Martin case may result

in the interscholastic organizations, which usually represent themselves as non-public entities, being required to comply with Title III of the ADA. Potential conflicts are likely to occur where a member school determines a need for a reasonable accommodation that is necessary for a student-athlete with a disability to compete, but the member school and the sanctioning body disagree as to the effect on overall competition. Although the dissent in Martin was concerned with litigation by or on behalf of the athletes themselves, there is real potential for internecine legal warfare over this issue between the sanctioning bodies and their member schools.

5. Although the Martin decision makes reference to the 7th Circuit's decision in Olinger v. U.S. Golf Association, 205 F.3d 1001 (7th Cir. 2000), it did not decide the case. Olinger, like Casey Martin, has a debilitating condition that warrants a golf cart in order for him to compete professionally. However, the 7th Circuit determined that walking the course is an essential element, and its elimination for a competitor would "fundamentally alter" the competition. The Supreme Court noted that, although the 7th Circuit reached a conclusion contrary to the 9th Circuit, both courts recognized that the ADA applied. The Supreme Court granted certiorari and vacated the 7th Circuit's decision in Olinger. It remanded the case to the 7th Circuit on June 4, 2001, to reconsider its decision in light of the Martin case. Olinger v. USGA, 121 S.Ct. 2212 (2001). Olinger and USGA are anticipating the 7th Circuit will reverse its earlier decision. Marty Parkes, USGA's communications director, reported that USGA will "have to set up a mechanism where we evaluate these [requests for modifications] on a case-by-case basis to determine if we feel someone is covered by the Supreme Court ruling [in Martin]." ⁶⁰

Date: _____

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The **Quarterly Report** and other publications of the Legal Section of the Indiana Department of Education can be found on-line at www.doe.state.in.us/legal/.

⁶⁰“Hoosier golfer gets break with Supreme Court ruling,” *Indianapolis Star*, June 5, 2001.

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