

QUARTERLY REPORT
October – December 2001

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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THE “PARENT” TRAP: SCHOOL SECURITY AND STUDENT SAFETY ISSUES

Apparently, whether a parent is a “parent” is not always apparent. With the increased fragmentation of families, it is becoming more difficult to determine who is a child’s “parent” and for what reasons. The Family Educational Rights and Privacy Act (FERPA) attempts to balance the interests of “custodial” and “non-custodial” parents by presuming that parents have the same access rights to the education records of their children “unless the agency or institution has been provided with evidence that there is a court order, State statute,¹ or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.” 34 CFR §99.4. It is not uncommon for local public school districts and state educational agencies that maintain “education records” to be asked by the custodial parent not to grant access to the non-custodial parent based on the mere fact they are divorced. Federal law places the burden for producing to the local or state educational agency a “legally binding document” that restricts the other parent’s access on the parent asserting the existence of such a document.

There is often marked familial discord, especially where children are involved. This has resulted in a number of legal imbroglios for state and local officials attempting to balance the interests of divorced parents who wish to remain involved in their children’s education and lives with the interests of ensuring the safety of the children themselves while attending school. Local schools are being encouraged, as a part of their emergency preparedness and crisis intervention procedures, to address the growing problem of child-abduction by non-custodial parents. In one school safety plan, the following appears:

IV. UNAUTHORIZED REMOVAL OF STUDENTS (KIDNAPPING)

Prevention is the key to unauthorized removal of students. This guideline suggests steps to take prior to an incident occurring.

A. Prevention

Each school site should:

1. Have a list of those students who are not to be released to anyone except a specific parent or authorized person. Tag enrollment cards and emergency health records of such students.
2. Check with custodial parent/guardian for approval before releasing a student to anyone else. Record the time and date of phone approval.

¹Indiana statute mirrors the FERPA requirements, requiring the same access to education records for custodial and non-custodial parents alike, unless “a court has issued an order that limits the non-custodial parent’s access to the child’s education records” and “the school has received a copy of the court order or has actual knowledge of the court order.” I.C. 20-10.1-22.4-2.

3. Verify the identity of any parent who telephones a request for a student's release, with a return phone call to the parent's number listed in the student's folder. Tell parents when a student is added to this list, what the procedure will be, and if not at a number listed in the student records, the child will not be released.
4. Presume that custodial and non-custodial parents have equal opportunity to see the child at school and pick up the child from school. Where either parent disputes the right of the other, the parent disputing the right of the other should produce a file-stamped copy of the most current court order governing custody of the child. If the order does not specify that the non-custodial parent shall have the right to visit the child at school or pick up the child from school, the non-custodial parent should be denied those rights.
 - a. Tag enrollment and health records of such students to indicate the situation.
 - b. Keep a file of all relevant court records on file.

B. When A Removal Is Attempted

1. Hold in the office any student who seems reluctant to go with the person picking up the student.
 - a. Ask for the person's driver's license or other picture identification and record the name, address, date of birth, and driver's license number.
 - b. Notify the custodial parent/guardian of the student's reluctance and abide by the parent's wishes.
2. If law enforcement/school security has been called, try to use your best verbal intervention skills to keep the possible abductor at school. Do not physically attempt to keep the child at school. Have someone obtain the vehicle description and license plate number.
3. Notify the parent/guardian listed on the student enrollment form.
4. Notify the superintendent or deputy/assistant superintendent.
5. Do not release any information about the incident to the media. Refer requests from the media to the director of school/community relations.
6. Isolate any other siblings of the child involved who may have information about the event.

7. When law enforcement/school security arrive, share all information and records with them.²

There have been a number of recently reported altercations inside and outside of school buildings, including school shootings between warring parents. Child abduction from a school building is an increased possibility.

Sole Custody; Visitation Rights; Child Abduction

Pauley v. Anchorage Sch. Dist., 31 P.3d 1284 (Alaska 2001), has all the ingredients for a major brouhaha: bitter divorce, sole custody eventually vested in one parent, parents residing in separate states, continual sniping, and—ultimately—a child abduction. The father eventually obtained sole custody with the mother to have certain specified visitation rights, including the right to have the child reside with her over the Christmas holidays. The school requested and received a copy of the court documents detailing the relative rights of the parents, as contemplated by 34 CFR §99.4.

The father alerted the school that he feared the mother would attempt to abduct the child. The mother appeared at the school, escorted by a police officer, to pick up the student for the Christmas visitation permitted by the terms of the divorce decree. However, it was three days before the school's scheduled holiday break. The principal contacted the father, who vehemently disagreed with the school releasing the child to the mother. Nevertheless, the school did release the child to the mother, who then kept the child in Washington with her for more than five months.

The father sued the school and the principal for the negligent interference with his custodial rights. However, the trial court found (as did the Alaska Supreme Court) that the principal had qualified immunity. The principal had to make a decision under less-than-clear conditions (non-specific visitation rights in a legal document, positive identification of mother, presence of police officer who verified identity of mother). His actions were unequivocally discretionary. These factors—coupled with a lack of evidence that such decision-making was motivated by any maliciousness, corrupt purposes, or bad faith—entitled the principal to qualified immunity against the father's claim.

In Burge v. Richton Municipal Separate School District, 797 So. 2d 1062 (Miss. App. 2001), the father had sole custody of the child. He presented to the school documentation indicating that the non-custodial mother was not to be allowed to pick up the child from school without a signed court order allowing her to do so. On December 17—again, just before the holiday break—the mother was observed on school grounds. The mother later abducted the child from an unsupervised classroom. Although the father and child sued the school for negligence in allowing the mother to take the child off

²From "Emergency and Crisis Intervention Guidelines," pp. 10-11, made available through the Indiana Department of Education's Indiana School Safety Specialist Academy. See <http://www.doe.state.in.us/safeschools/pdf/sample01.pdf>.

school property, the case was dismissed because it was not brought timely.

These recent cases underscore the growing need for state policy makers to address issues such as non-custodial parental rights vis-a-vis children's rights, including access to education records and continued involvement in their children's education. However, the problem of child abduction is also present. Most children reported as abducted have been abducted by a non-custodial parent. This has been a motivating factor in legislative enactments by a number of states that now require certain documentation when students are presented for enrollment. If information appears to be fraudulent or inaccurate, there may be requirements to report such instances to certain child welfare authorities or to the clearinghouse for information on missing children. Indiana has such a statute:

I.C. 20-8.1-3-17.1 Enrollment Documentation; Notice to Clearinghouse for Information On Missing Children

Sec. 17.1. (a) Each public school shall and each private school may require a student who initially enrolls in the school after July 1, 1988, to provide:

- (1) the name and address of the school the student last attended, if any; and
- (2) a certified copy of the student's birth certificate or other reliable proof of the student's date of birth.

(b) If the document described in subsection (a)(2):

- (1) is not provided to the school within thirty (30) days of the student's enrollment;
- or

- (2) appears to be inaccurate or fraudulent;

the school shall notify the Indiana clearinghouse for information on missing children under IC 10-1-7 and determine if the child has been reported missing.

(c) If a student initially enrolls in a school after July 1, 1988, the school shall, within fourteen (14) days of enrollment, request the student's records from the last school the student attended, if any.

(d) A school in Indiana receiving a request for records shall promptly send the records to the requesting school. However, if a request is received for records to which a notice has been attached under IC 31-36-1-5 [law enforcement report of missing child] ... the school:

- (1) shall immediately notify the Indiana clearinghouse for information on missing children;
 - (2) may not send the school records without the authorization of the clearinghouse;
- and
- (3) may not inform the requesting school that a notice under IC 31-36-1-5 ... has been attached to the records.

States and local school districts are also wrestling with growing difficulties in determining where a child has residency in order to determine further which school district the student should attend. Joint custody, abandonment by the custodial parent, assumption of responsibility by the non-custodial parent

without modifying existing court documents, and assumption of responsibilities by guardians other than the parents (usually, a relative) all affect these decisions.³ Nowhere are these concerns more evident than where a child with a disability is involved.

“Parent” under the Individuals with Disabilities Education Act

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, 34 CFR Part 300, contains a number of provisions designed to include the parent in the program development and design for a child with a disability that is adversely affecting educational performance. These provisions include, *inter alia*, advising the parent of available procedural safeguards and obtaining informed consent prior to the conduct of certain evaluations or the implementation of certain educational placements.⁴

This becomes more complicated when the parents are divorced but maintain joint custody. The Office of Special Education Programs (OSEP) of the U.S. Department of Education has attempted to balance the interests of divorced parents under such circumstances, although recognizing that on some occasions state law will affect the determination of who has the right to make ultimate determinations. See, for example, Letter to Arnold, *Education of the Handicapped Law Reporter* (EHLR) 211:297 (OSEP 1983) (where divorced parents have joint custody but one parent objects to the proposed Individualized Education Program (IEP), the parent objecting may request a due process hearing while the other parent may approve the proposed program); and Letter to Biondi, *29 Individuals with Disabilities Education Law Report* (IDELR) 972 (OSEP 1997) (state law governs which school district is required to provide a free appropriate public education (FAPE) to a student with disabilities where the parents are divorced, have joint custody, but live in different school districts; IDEA is satisfied so long as the student is provided a FAPE by the district the State educational agency (SEA) deems responsible). Also see Linda W. v. Indiana Department of Education et al., 927 F.Supp. 303 (N.D. Ind. 1996) (divorced parents with joint custody of a student with a disability but residing in different school districts established “legal settlement” for the student in both public school districts).

The IDEA regulations (1999) greatly expanded the definition of “parent” over previous versions. See 34 CFR §300.20, defining “parent” to include natural or adoptive parents; a guardian when the child is the “ward of the State” (a term not defined by federal law); a person standing *in loco parentis* to a child (which may arise from legal proceedings or operative facts); an educational surrogate parent; and a foster parent, under certain conditions. This could also include the student if the student is 18 years old or older and does not require the appointment of a guardian and state law so provides. See 34

³See, for example, “Joint Custody and the Effect of a Dissolution Decree,” Recent Decisions 1-12: 1999, and related topics contained therein.

⁴For relevant Indiana regulations, see 511 IAC 7-17-18 (defining “consent”), 511 IAC 7-22-1 (Notice of Procedural Safeguards), and 511 IAC 7-27-3 (Case Conference Committee Participants).

CFR §300.517.⁵ Recent cases and complaint investigations underscore the difficulty in determining who is a “parent” or when a parent can or cannot act on behalf of the parent’s child.

Navin v. Park Ridge Sch. Dist. 64, 270 F.3d 1147 (7th Cir. 2001), involves the continuing difficulties in attempting to determine who is the “parent” for a student eligible for services under the IDEA. In Navin, the parents were divorced but the ultimate right to make educational decisions rested with the mother. The father, displeased with the tutoring assistance provided to his dyslexic son, initiated a hearing under the IDEA procedures to challenge the appropriateness of the program. The hearing officer and the federal district court determined he did not have standing as a “parent” under IDEA to initiate the proceeding and, accordingly, dismissed the action. The 7th Circuit, however, noted that the mother had been silent throughout the process and the divorce decree did not terminate all of the father’s rights and interests in the education of his son.

On remand the district court must decide whether [the father’s] claims are incompatible, not with the divorce decree itself, but with [the mother’s] use of her rights under the decree.... If [the mother disagrees with the father’s actions], then the parents are at loggerheads and [the father] cannot use the IDEA to upset choices committed to [the mother] by the state court.... The district court must determine the precise nature of [the father’s] claims, evaluate their status under the divorce decree, and proceed to adjudicate those claims that [the father] retains under the decree and that are not trumped by [the mother’s] use of her own powers under that decree.

270 F.3d at 1149-50.

In Somerville Bd. of Education v. Manville Bd. of Education, 768 A.2d 779 (N.J. 2001), two school districts sought to resolve the issue as to which one had the responsibility for providing a FAPE to a child whose divorced parents maintained joint legal and physical custody but lived in the separate school districts. The child alternated living with one parent week to week. The two school districts initially shared the costs of the child’s education but eventually disagreements arose. The New Jersey Supreme Court determined that the mutual agreement should continue. The court also noted that the matter could be resolved through state regulations. However, two justices, in a concurring opinion, cautioned against the court’s decision being viewed as “overturning the unitary concept of domicile. Rather, the court recognized that [the child] has alternating domiciles and therefore that the two school districts involved should share the costs as they had agreed.” 768 A.2d at 781. In addition, the SEA is not precluded “from promulgating regulations that are consistent with the theory that a school-aged child can have only one domicile. Those regulations, however, would presumably be prospective.” Id.

⁵Indiana’s analogous definition for “parent” can be found at 511 IAC 7-17-57. Indiana also transfers such rights to a student who becomes 18 years of age but does not require the appointment of a guardian. See 511 IAC 7-28-4 (Transfer of Rights to the Student). “Ward of the State” is defined in Indiana for IDEA purposes at 511 IAC 7-17-78.

The divorce court should have been specific as to the domicile of the child when it granted the divorced parents joint legal and physical custody. Id.⁶

“Parent” issues are appearing more frequently in complaint investigations.⁷ Complaint investigations are conducted by the Indiana Department of Education’s Division of Exceptional Learners (formerly, Division of Special Education). In Complaint No. 1813.01, the divorced parents had joint custody of their two minor children, although the father had physical custody. The school district had on file a copy of the divorce decree, which indicated the joint custody arrangement and the right of the parents to be involved in decisions regarding the education of the children. The mother asked to reconvene the Case Conference Committee (CCC)⁸ to discuss the educational programs of the children. The school contacted the father, who indicated he did not wish to reconvene. The school then declined the mother’s request to reconvene the CCC. The school was found to have violated special education laws by failing to reconvene the CCC upon the request of the parent.⁹ The school was aware the mother had joint custody of the children. The father’s disinclination to reconvene will not effect the mother’s right to request such a meeting.¹⁰

⁶The Indiana State Board of Education recently addressed this issue for the first time. In In Re the Matter of G.H., SBOE Cause No. 0103005, the parents of a child in the first grade were divorced, had joint legal and physical custody, but lived in different public school districts. The child was enrolled in the school district where the father lived. The school district challenged the child’s “legal settlement,” but the State Board found that the divorced parents shared physical custody and had selected the father’s domicile as the one for establishing “legal settlement.” The State Board determined that, under such situations, the parents should select one school district and not attempt to maintain “legal settlement” in two separate districts.

⁷Complaint investigations are required under IDEA where there are allegations that a public agency is violating federal or state special education laws. See 34 CFR §§300.660-300.662 and 511 IAC 7-30-2.

⁸The “Case Conference Committee” is the team of persons responsible for developing, implementing, reviewing, and revising, when necessary, the IEP of a student eligible for special education and related services.

⁹Specifically, the school violated 511 IAC 7-27-4(a)(3), which requires a CCC to convene “[u]pon request of a teacher, parent, or administrator.”

¹⁰Also see Complaint No. 784.93, where the non-custodial parent attempted to initiate an educational evaluation but the school refused. The school was determined to be in compliance with special education law because the non-custodial parent had not been awarded custody nor did he have joint custody. All rights had been reserved to the biological mother. The non-custodial father did not meet the definition of “parent” for IDEA purposes.

THE NATIONAL MOTTO: STATE LEGISLATURES AND THE FIRST AMENDMENT

Although various state legislatures were involved in attempts to secure a presence of religion in publicly funded schools prior to September 11, 2001 (such as the posting of the Ten Commandments, see *infra*), such efforts gained momentum in the aftermath of the terrorist attacks on the World Trade Center and the Pentagon. There has been a renewed emphasis on the reciting of the Pledge of Allegiance¹¹ and the institution of Moments of Silence.¹² The posting of the National Motto¹³ in public school classrooms has now been added to this mix, although with some evident trepidation on the part of legislators fearful that such efforts can be sabotaged through litigation invoking the Religion Clauses of the First Amendment.¹⁴

It was recently reported that the Education and Health Committee of the Virginia Senate voted 9-6 to endorse legislation that would require the posting of “In God We Trust” in public school classrooms so long as it was emphasized that Congress made this the National Motto in 1956.¹⁵ The bill’s sponsor, Sen. Nick Rerras (R-Norfolk), noted the National Motto has long been recognized as inspirational, adding, “The motto gives us hope for the future, and it helps us persevere in difficult times.” Sen. R. Edward Houck (D-Spotsylvania) proposed the amendment that would add the notation “National motto enacted by Congress, 1956” to “In God We Trust.” He indicated that he wanted students to view the National Motto from a historical perspective rather than from a religious one.

Indiana has been engaged in the same exercise. Senate Bill No. 89-2002 passed the Indiana Senate by a 43-6 margin. The bill would not just require the posting of the National Motto. It must also be framed with an appropriate background, have minimum dimensions of eleven inches by fourteen inches, and include the phrase “The National Motto of the United States of America, adopted by Congress, July 30, 1956.” However, the public school districts could not

¹¹See “The Pledge of Allegiance in Public Schools,” **Quarterly Report** July-September: 2001.

¹²See “A Moment of Silence,” **Quarterly Report** July-September: 2001.

¹³“In God We Trust” was made the official National Motto by Congress in 1956. See 36 U.S.C. §302. However, the motto has appeared on American coinage since 1908.

¹⁴State Boards of Education have likewise been interested in this matter. According to *The Denver Post*, June 27, 2000, the Colorado State Board of Education passed a non-binding resolution that would allow local school officials to post the National Motto. The resolution called for the placing of a phrase that would indicate President Lincoln ordered the printing of “In God We Trust” on U.S. coins in 1864 and that the phrase was made the national motto by President Eisenhower in 1956.

¹⁵*The Washington Times*, February 12, 2002.

use public funds to implement this law. The bill languished in the Indiana House, where it later died.¹⁶

In the background of the activities in the Virginia and Indiana legislatures was a concern that the posting of the National Motto might pose the type of Establishment Clause problems that have waylaid similar legislative initiatives to post the Ten Commandments. The qualification of “In God We Trust” by including a reference to its statutory imprimatur is an attempt to emphasize the “historical context” of the National Motto. This, however, is apparently unnecessary.

*U.S. Supreme Court’s Dicta*¹⁷

The U.S. Supreme Court has never directly addressed the question whether the National Motto runs afoul of the Establishment Clause of the First Amendment. Nevertheless, it has made numerous references to its existence and its function while explaining a position on other cases. These references have appeared in majority, concurring, and dissenting opinions. The unequivocal conclusion to be derived from these numerous references is that the Supreme Court members do not view the National Motto in any proscribed religious context.

The genesis for the current discussion began with Justice Hugo L. Black’s observation in Engel v. Vitale, 370 U.S. 421, 435, *n.* 21, 82 S.Ct. 1261 (1962) (recitation of daily classroom prayers unconstitutional):

There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the

¹⁶*The Indianapolis Star*, a newspaper noted for its conservative views, lamented the surge of patriotic and religious mandates issuing forth from the Indiana General Assembly. In an editorial in its February 7, 2002, edition, the *Star* specifically targeted Sen. Bill No. 89, noting that it mandates a detailed posting that would be expensive but “amazingly, the bill prohibits schools from using public funds to pay for all these items.” Similar mandates to force the posting of the Golden Rule and recitation of the Pledge of Allegiance “thankfully died.” The *Star*, which typically criticizes public schools, stated that the legislature’s “Mandates are admirable for their spirit and motivation,” but that such mandates interfere with the essential teaching process by preventing the type of flexibility “needed to nurture creativity and encourage young imaginations.” The *Star* added: “Left to their own devices, schools can usually come up with something better than what is mandated from Indianapolis. Honey Creek Middle School in Terre Haute is just one example. Walk in the lobby, turn right and you’ll see the Freedom Wall filled with replicas of all the great documents of U.S. history.”

¹⁷“Dicta” refers to statements, remarks, or observations of a judge contained in a written opinion but which go beyond the facts before the court. These statements, remarks, or observations are often individual views of the author of the opinion and are not typically binding in subsequent cases.

composer's professions of faith in a Supreme Being,¹⁸ or with the fact that there are many manifestations in our public life of belief in God.

Justice Black referred to such occasions as "patriotic or ceremonial occasions." *Id.*

The following year, Justice William H. Brennan, Jr., concurring in Abington School District v. Schemp, 374 U.S. 203, 303, 83 S.Ct. 1560, 1613 (1963) (reading from the Bible and recitation of the Lord's Prayer violated the constitution), noted that Supreme Court precedent had determined the Establishment Clause did not ban government regulation of personal conduct merely because government reasons for doing so happened to coincide with tenets of some or all religions (e.g., forbidding murder, theft, and other crimes against persons, property, and social order).

This rationale suggests that the use of the motto "In God We Trust" on currency, on documents and public buildings, and the like may offend the [Establishment] clause. It is not that the use of those four words can be dismissed as "de minimus"—for I suspect there would be intense opposition to the abandonment of that motto. The truth is that we have simply interwoven the motto so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits.

Chief Justice Warren E. Burger, writing for the majority in Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428 (1977) (affirming that a state could not levy criminal sanctions against a New Hampshire couple who, for religious reasons, obscured the New Hampshire motto "Live Free or Die" on their license plate), reacted at 430 U.S. 717, 97 S.Ct. at 1436, *n.* 15, to the suggestion that the court's holding would sanction vandalism of the National Motto:

It has been suggested that today's holding will be read as sanctioning the obliteration of the national motto, "In God We Trust" from United States coins and currency. That question is not before us today but we note that currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto.

Then-Justice William H. Rehnquist, in dissent, decried the majority opinion.

¹⁸A number of states reported difficulties and misunderstandings from local school districts following "9/11" as to whether students could sing "God Bless America" or teachers could post student artwork that contained the same message. In Indiana, the advice was that such activities did not violate the constitution.

The logic of the Court's opinion leads to startling, and I believe totally unacceptable, results. For example, the mottoes "In God We Trust" and "E Pluribus Unum" appear on the coin and currency of the United States. I cannot imagine that the statutes [citations omitted] proscribing defacement of the United States currency impinge upon the First Amendment rights of an atheist. The fact that an atheist carries and uses United States currency does not, in any meaningful sense, convey an affirmation of belief on his part in the motto "In God We Trust." Similarly, there is no affirmation of belief involved in the display of state license tags upon the private automobiles involved here.

430 U.S. at 722, 97 S.Ct. at 1439.

In Lynch v. Donnelly, 465 U.S. 668, 104 S.Ct. 1355 (1984) (inclusion of crèche in municipality's annual Christmas display is not unconstitutional), the National Motto is referenced in the majority opinion, in a concurring opinion, and in a dissenting opinion.

Writing for the majority, Chief Justice Burger noted the long history of government acknowledgment of religious heritage as well as government sponsorship of graphic manifestations of that heritage.

Other examples of reference to our religious heritage are found in the statutorily prescribed national motto "In God We Trust," 36 U.S.C. §186, which Congress and the President mandated for our currency, see 31 U.S.C. §5112(d)(1) (1982 ed.), and in the language "One nation under God" as part of the Pledge of Allegiance to the American flag.

465 U.S. at 676, 104 S.Ct. at 1360.

Justice Sandra Day O'Connor, in a concurring opinion, echoed this sentiment:

[Including the crèche in a seasonal display along with many other secular symbols, such as candy canes and Santa Clause] combine to make the government's display of the crèche in this particular physical setting no more an endorsement of religion than such governmental "acknowledgments" of religion as legislative prayers of the type approved in Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330 (1983), government declaration of Thanksgiving as a public holiday, printing of "In God We Trust" on coins, and opening Court sessions with "God save the United States and this honorable court." Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging recognition of what is worthy of appreciation in society.

465 U.S. at 692-93, 104 S.Ct. at 1369-70.

Not to be outdone, Justice Brennan, in his dissenting opinion at 465 U.S. at 716-17, 104 S.Ct. at 1381-82, observed:

[G]overnment cannot be completely prohibited from recognizing in its public actions the religious beliefs and practices of the American people as an aspect of our national history and culture. [Citations omitted.] While I remain uncertain about those questions, I would suggest that such practices as the designation of “In God We Trust” as our national motto, or the references to God contained in the Pledge of Allegiance, can best be understood...as a form of “ceremonial deism,” protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content. [Citation omitted.]

Moreover, these references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases. [Citation omitted.] The practices by which the government has long acknowledged religion are therefore probably necessary to serve certain secular functions, and that necessity, coupled with their long history, gives those practices an essentially secular meaning.

Finally, the majority and concurring opinions in Allegheny Co. v. Greater Pittsburgh ACLU, 492 U.S. 573, 109 S.Ct. 3086 (1989) (crèche’s placement on the grand staircase in the courthouse was unconstitutional) mentioned with favor the use of the national motto.

Our previous opinions have considered in dicta the [national] motto and the pledge [of allegiance], characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief.

492 U.S. at 602-03, 109 S.Ct. at 3105-06. Justice O’Connor, in concurring, repeated, nearly verbatim, her previous observation in Lynch that the printing on American coins of “In God We Trust” and similar government acknowledgments of religion serve a secular purpose of “solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.” 492 U.S. at 625, 109 S.Ct. 3086.

The Federal Courts Apply Dicta

Although the Supreme Court can find much with which to disagree with one another, there does not appear to be any disagreement as to the niche the national motto has found in American society. The U.S. 10th Circuit Court of Appeals, in addressing whether the reproduction of “In God We Trust” on U.S. currency violates the Establishment Clause in Gaylor v. U.S., 74 F.3d 214 (10th Cir. 1996), noted the many favorable statements by diverse Supreme Court justices when it comes to the National Motto.

“While these statements are dicta,” the court wrote at 74 F.3d at 217, “this court considers itself bound by Supreme Court dicta almost as firmly as by the Court’s outright holdings, particularly when the dicta is recent and not enfeebled by later statements.”

Gaylor v. U.S. involved a three-pronged challenge under the Establishment Clause to 36 U.S.C. §186 (establishing “In God We Trust” as the National Motto), 31 U.S.C. §5112(d)(1) (requiring inscription of the motto on U.S. coins), and 31 U.S.C. §5114(b) (requiring inscription of the motto on U.S. currency). The 10th Circuit, applying the test created by Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971), found that the statutes in question had a secular legislative purpose, did not advance nor inhibit religion, and did not create excessive government entanglement with religion. “The statutes establishing the national motto and directing its reproduction on U.S. currency clearly have a secular purpose,” the court stated at 216. “The motto symbolizes the historical role of religion in our society ..., formalizes our medium of exchange..., fosters patriotism...,and expresses confidence in the future....” (Citations omitted). Id. “The motto’s primary effect is not to advance religion; instead, it is a form of ‘ceremonial deism’ which through historical usage and ubiquity cannot be reasonably understood to convey government approval of religious belief [citations omitted]. Finally, the motto does not create an intimate relationship of the type that suggests unconstitutional entanglement of church and state.” Id.

Although Gaylor is the latest challenge to the National Motto, it was not the first. The first reported case was Aronow v. U.S., 432 F.2d 242 (9th Cir. 1970), a *pro se* challenge under the Establishment Clause. Although the federal district court determined Aronow did not have standing to raise this claim, and the 9th Circuit Court of Appeals affirmed, the 9th Circuit decided to expand its ruling at 243 to address Aronow’s claim.

It is quite obvious that the national motto and the slogan on coinage and currency “In God We Trust” has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise.

Although the court acknowledged that “Separation purists like [Thomas] Jefferson might have theoretic objections” to the National Motto and its use on American currency, he would have to recognize that, as a practical matter, such ceremonial usages could not be avoided. In fact, Jefferson invoked God in both his Declaration of Independence and his Virginia Religious Freedom statute.” 432 F.2d at 243-44, *n.* 2.

It is not easy to discern any religious significance attendant [to] the payment of a bill with coin or currency on which has been imprinted “In God We Trust” or the study of a government publication or document bearing that slogan. In fact, such secular use of the motto was viewed as sacrilegious and irreverent by President Theodore Roosevelt. Yet Congress has directed such uses. While “ceremonial” and “patriotic” may not be particularly apt words to describe the category of the national motto, it is excluded from

First Amendment significance because the motto has no theological or ritualistic impact.

432 F.2d at 243. The court also cited to the Senate and House reports from 1955 and 1956 when the legislation creating the National Motto was being debated. According to the Congressional reports, the National Motto would have “spiritual and psychological value” and “inspirational quality.” At 242-43, 243 *n.* 3. The National Motto, the court held, does not reflect a situation where the coercive power of government is being employed to aid religion. “As we have seen, the national motto has no such purpose, either in Congressional intent or practical impact on society.”

A federal district court in Texas later rejected similar claims in O’Hair v. Blumenthal, 482 F.Supp. 19 (W.D. Tex. 1978), *affirmed*, O’Hair v. Murray, 588 F.2d 1144 (5th Cir. 1978) (per curiam), *cert. den.*, 442 U.S. 930, 99 S. Ct. 2862 (1979), citing with favor to Aronow. “In that case,” the district court wrote, “the Ninth Circuit held that the ‘national motto and the slogan on coinage and currency ‘In God We Trust’ has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise.’” At 19-20.

From this it is easy to deduce that the Court concluded that the primary purpose of the slogan was secular; it served a secular ceremonial purpose in the obviously secular function of providing a medium of exchange. As such it is equally clear that the use of the motto on the currency or otherwise does not have a *primary* effect of advancing religion. Moreover, it would be ludicrous to argue that the use of the national motto fosters an excessive government entanglement with religion.

462 F.Supp. at 20. The district court observed that Supreme Court dicta favors such a conclusion. The district court also found wanting the plaintiffs’ claims that the criminal sanctions for defacing currency to remove the offensive National Motto violates their free speech and free exercise rights as atheists. Citing to then-Justice Rehnquist’s dissent in Wooley v. Maynard, *supra*, the court found that “The language of Justice Rehnquist, in his dissent, is especially relevant to Plaintiffs’ claims that penalties for defacing the motto on the coins and currency are unconstitutional: ‘I cannot imagine that the statutes [citations omitted] proscribing defacement of U.S. currency impinge upon the First Amendment rights of an atheist. The fact that an atheist carries and uses U.S. currency does not, in any meaningful sense, convey any affirmation of belief on his part, in the motto ‘In God We Trust.’”

THE EVOLUTION OF “THEORIES”

Although the U.S. Supreme Court struck down an Arkansas law in 1968 that attempted to restrict the teaching of the theory of evolution and advance a literal reading of the Biblical account in *Genesis*

regarding the creation of the world (often called “Creationism”), the tension remains.¹⁹ Epperson v. Arkansas, 393 U.S. 97 (1968). The court noted at 103:

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

Nineteen years later, the Supreme Court revisited the issue. In Edwards v. Aguillard, 482 U.S. 578, 107 S. Ct. 2573 (1987), the court found unconstitutional Louisiana’s “Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act,” which forbade the teaching of the theory of evolution in public schools unless accompanied by instruction in “creation science” (also known as “creationism”). The court found that “creationism” is a religious belief, and the state legislature’s attempt “to discredit evolution by counter balancing its teaching at every turn with the teaching of creationism” runs afoul of the Establishment Clause of the First Amendment. The primary effect of the state law was to endorse a particular religious doctrine. 482 U.S. at 595, 107 S. Ct. at 2583.

“Disclaimers”

The Supreme Court has been less than enthusiastic to revisit any variation on this theme. It declined to review the 5th Circuit Court of Appeals decision in Tangipahoa Parish Bd. of Education v. Freiler, 185 F.3d 337 (5th Cir. 1999), *reh. en banc den.*, 201 F.3d 602, *cert. den.*, 120 S. Ct. 2706 (2000), albeit by a 6-3 vote. In Tangipahoa, the school board, by resolution, created a disclaimer for teachers to read prior to teaching the theory of evolution to students. The disclaimer, although ostensibly promoting “critical thinking,” was actually promoting “creationism.” The resolution read in relevant part:

It is hereby recognized by the Tangipahoa Board of Education that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept.

According to the school board, the disclaimer served a three-fold purpose: (1) to encourage informed freedom of belief; (2) to disclaim any orthodoxy of belief that could be inferred from the exclusive placement of evolution in the curriculum; and (3) to reduce offense to the sensibilities and sensitivities of

¹⁹See “Evolution vs. ‘Creationism,’” **Quarterly Report** October-December: 1996, as well as updates on this topic in **Quarterly Report** for October-December: 1997 and October-December: 1999.

any student or parent caused by the teaching of evolution. 185 F.3d at 344. The 5th Circuit found the disclaimer did not encourage “informed freedom of belief.” Rather, the disclaimer, “as a whole, furthers a contrary purpose, namely the protection and maintenance of a particular religious viewpoint.” At 344-45, 346. As a result, the court found the “disclaimer” violated the Establishment Clause.

Teaching Responsibilities

In LeVake v. Independent School District #656, 625 N.W.2d 502 (Minn. App. 2001), *cert. den.*, 122 S. Ct. 814 (2002), the Supreme Court let stand the state court’s decision that the school district’s interest in enforcing its prescribed curriculum—along its legitimate concern that school personnel remain religiously neutral—outweighed a teacher’s claims that the school district infringed on his right to free speech, academic freedom, and free exercise of religion. LeVake was assigned to teach 10th grade biology. He was aware of the curriculum requirements, including the teaching of the theory of evolution. However, when the time arrived to cover the topic, he gave it—at best—a cursory review. He later explained to his supervisors that he could not teach evolution according to the prescribed curriculum, and that he personally believes evolution is impossible from a “biological, anatomical, and physiological standpoint.” He added that there is “no evidence to show that it [evolution] actually occurred.” His written position in the matter indicated further that he would not follow the school district’s prescribed curriculum guides. He was removed from this teaching position and assigned to teach 9th grade students. The lawsuit followed, alleging, *inter alia*, violations of his free exercise of religion, academic rights, and free speech rights.²⁰ The court had little difficulty in granting the school defendants’ summary judgment motion. The appellate court, likewise, had little difficulty in affirming. The school’s important pedagogical interest in establishing the curriculum and its legitimate concern with ensuring that the school remain religiously neutral outweighed any personal interest of the teacher. Although LeVake claimed he was reassigned to silence his criticism of evolution, he does not possess the same rights as a private citizen when he is acting under contract as a public school teacher. “[T]he established curriculum and LeVake’s responsibility as a public school teacher to teach evolution in the manner prescribed by the curriculum overrides his First Amendment rights as a private citizen.” 625 N.W.2d at 508-09. Not only was LeVake on notice as to the curricular objectives when he accepted the biology teaching assignment, his contract with the school district obliged him to follow the curricular dictates of the school district.²¹

Before LeVake there was Webster v. New Lenox Sch. Dist. No. 122, 917 F.2d 1004 (7th Cir. 1990).

²⁰Although the teaching of “creationism” was never established in the course of these school discussions, during the pendency of the legal action, LeVake appeared as part of a CNN segment regarding evolution and “creationism.” 625 N.W.2d at 508.

²¹For a similar case dealing with a public school science teacher who objected, based on religious grounds, to teaching evolution—with similar results—see Pelozza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1994.)

Webster was a social studies teacher at an Illinois junior high school. He began teaching “creation science” to his students, ostensibly to “rebut a statement in the social studies textbook indicating that the world is over four billion years old.” He believed that teaching “nonevolutionary theories of creation” helped develop “an open mind in his students,” enabling them “to explore alternative viewpoints.” 917 F.2d at 1006. Following complaints, the school board advised him in writing that he was to restrict his classroom instruction to the curriculum and refrain from advocating a particular religious viewpoint.

When Webster sought further guidance, the superintendent reiterated the schools board’s admonishment, warning Webster that the teaching of “creation science” has been found by the federal courts to violate the constitution. Webster was advised that he could “discuss objectively the historical relationship between church and state when such discussions were an appropriate part of the curriculum.” *Id.*

Webster sued, asserting the school board was engaged in censorship in violation of the First and Fourteenth Amendments. The federal district court dismissed the suit, noting there is no First Amendment right to teach “creation science” in a public school. The 7th Circuit agreed with the district court, adding that the school board provided Webster with clear direction. In addition, the school board had two duties that outweighed any interest of Webster: (1) The school board could not develop and implement curriculum that would inject religion into the public schools; and (2) The school board had the responsibility to ensure that the First Amendment’s Establishment Clause was not violated. *Id.*

The First Amendment, the 7th Circuit wrote, does not provide a teacher with a license for uncontrolled expression that may be at variance with the established curriculum. At 1007. The 7th Circuit rejected the allegation of censorship. “Rather, the principle that an individual teacher has no right to ignore the directives of duly appointed education authorities is dispositive of this case.” At 1008. “Given the school board’s important pedagogical interest in establishing the curriculum and legitimate concern with possible establishment clause violations, the school board’s prohibition on the teaching of creation science to junior high students was appropriate.”

Textbook Challenge

Moeller v. Schrenko, 554 S.E.2d 198 (Ga. App. 2001) involved a challenge by a 14-year-old freshman to the use of a textbook, *Biology Principles and Exploration*, in her ninth grade honors biology course. Although the textbook has 1,072 pages, the student found two passages offensive to her religious beliefs, which include “creationism.” In a chapter entitled “The Mystery of Life’s Origins,” the textbook’s authors attempted to distinguish between a scientific hypothesis and a religious belief, with the former subject to observation and experimentation but the latter not susceptible to testing. The textbook acknowledges that there are a number of theories as to the origin of life on earth, including divine intervention. “This is not to say that the [religious] belief is wrong, but rather that science can never test it,” the authors noted. 554 S.E.2d at 200. The authors acknowledged the limitations on the scientific hypothesis regarding the origins of life, calling it “at best a hazy outline viewed from a long

distance through dark glasses. While scientists cannot disprove the hypothesis that life originated naturally and spontaneously, little is known about what actually happened.” They concluded: “How life might have originated naturally and spontaneously remains a subject of intense interest, research, and discussion among scientists” especially since scientists are “currently unable to resolve disputes concerning the origin of life.” *Id.* The trial court granted summary judgment to the defendants. The appellate court affirmed.

The Georgia Court of Appeals rejected the student’s claims, noting that the textbook does not sponsor religious actions or belief. “To the contrary, it points out that the origin of life is, to date, unknown, and it lists the most prevalent ideas regarding this issue, including creationism and evolution.” *Id.* The textbook does not pass judgment on the efficacy of creationism. “It merely states that creationism is not a scientific theorem capable of being proven or disproven through scientific methods.” At 201. The textbook’s statements are neutral. The student’s subjective interpretation of these statements as offensive to her do not create Establishment Clause problems.

The appellate court also rejected her claims that the textbook hindered her in the practice of her religion. However, she failed to demonstrate how the use of the textbook forced her to refrain from practicing her religious beliefs. “And it does not impinge on her parents’ religious instruction of their daughter.” *Id.*

Opposing “Theories”

According to a recent newspaper article,²² the Ohio State Board of Education is engaged in “heated discussions” regarding an emerging theory known as “Intelligent Design.” Proponents assert that this theory is “not the old foe creationism.” Supporters accept that the earth is billions of years old and that organisms will change over time.

But they dispute the idea that the astounding complexity of the earth’s plants and animal could have just happened through natural selection, the force that Darwin suggested drives evolution. An intelligent designer—perhaps the God of Genesis, perhaps someone or something else—had to get the ball rolling...

Proponents allege that established science censors other views about the origins of life. They also assert that they are not a “fringe movement.” Supporters are seeking to have “intelligent design” inserted into Ohio’s new teaching standards alongside evolution. Critics argue that “intelligent design” is a theological or political viewpoint and not a scientific one. Although supporters argue that “origins science” is the “study of intelligent causes that are empirically detectable in nature,” Lynn E. Elfner, a

²²“In Ohio School Hearing, A New Theory Will Seek A Place Alongside Evolution,” *New York Times* (February 11, 2002).

member of the State Board's science advisory panel and the chief executive of the Ohio Academy of Science, described "intelligent design" as a political movement "dressed in scientific jargon presenting 'the old seductive argument' of being fair to both sides. But it doesn't play well in science if the other side is not a science."

COURT JESTERS: WHAT A CROC!

"In my youth," said his father, "I took to the law,
And argued each case with my wife;
And the muscular strength, which it gave my jaw,
Has lasted the rest of my life."

Lewis Carroll, "You Are Old, Father William,"
*Alice's Adventures in Wonderland*²³

Certainly a lawyer's stock-in-trade is the lawyer's ability to vocalize his client's case. Such enunciations, especially before a jury, have met with their own denunciations as deliberate attempts to prejudice the jury and place the opposing party in a bad light.²⁴ Court opinions vary with regard to the prejudicial effect of such oratory.

But what about "crocodile tears"?²⁵

In Ferguson v. Moore, 98 Tenn. 342 (Tenn. 1897), the Tennessee Supreme Court had to address this

²³"Lewis Carroll" is the pseudonym of Charles L. Dodgson (1832-1898), who was also a mathematician and a cleric.

²⁴For example, in a recently reported case, Bowles v. State, 737 N.E.2d 1150 (Ind. 2000), the Indiana Supreme Court upheld Bowles' conviction on eight counts of child molestation despite the fact the prosecutor, in closing argument, read a poem about a cockroach— using such terms as "vile creature," "vermin," "beast," "filth," and spreading disease—while drawing an analogy between the cockroach and Bowles. The trial court did not abuse its discretion in allowing the "cockroach" poem to be read to the jury.

²⁵"Crocodile tears" represent hypocritical sorrow through fake or affected tears. This stems from an ancient myth that a crocodile would sob as though grieving in order to lure prey near its jaws. It then would shed tears as it devoured the victim. The analogy has long been a popular one, especially in British literature. See, for example, Shakespeare's *Henry VI, Part II*, Act III, Scene 1 (1590) ("[A]s the mournful crocodile/With sorrow snares relenting passengers...") and *Othello*, Act IV, Scene 1 (1604) ("If that the earth could teem with woman's tears,/Each drop she falls would prove a crocodile").

very issue. Ferguson involved a breach of a contract to marry and seduction dispute. Counsel for the plaintiff woman, in closing argument, called the defendant a “villain,” “scoundrel,” “fiend,” and “hellbound,” but the court declined to reverse the verdict in favor of the plaintiff based on these “rather harsh terms” even though “other language could have been used no doubt equally as descriptive and not so vituperative.” 98 Tenn. at 350. But the defendant also objected to the plaintiff’s counsel’s other histrionics.

It is next assigned as error that counsel for plaintiff, in his closing argument, in the midst of a very eloquent and impassioned appeal to the jury, shed tears and unduly excited the sympathies of the jury in favor of the plaintiff, and greatly prejudiced them against defendant. Bearing upon this assignment of error, we have been cited to no authority, and after diligent search we have been able to find none ourselves. The conduct of counsel in presenting their cases to juries is a matter which must be left largely to the ethics of the profession and the discretion of the trial Judge. Perhaps no two counsel observe the same rules in presenting their cases to the jury. Some deal wholly in logic and argument, without embellishments of any kind. Others use rhetoric and occasional flights of fancy and imagination. Others employ only noise and gesticulation, relying upon their earnestness and vehemence instead of logic and rhetoric. Others appeal to the sympathies—it may be the passions and peculiarities—of the jurors. Others combine all [of] these, with variations and accompaniments of different kinds.

At 350-51. The court acknowledged that “No cast iron rule can or should be laid down.” However, the shedding of tears—even crocodile tears—before a jury is likely one of the weapons every attorney should have in his litigation arsenal.

Tears have always been considered legitimate arguments before a jury, and while the question has never arisen out of any such behavior in this Court, we know of no rule or jurisdiction in the Court below to check them. It would appear to be one of the natural rights of counsel, which no Court or constitution could take away. It is certainly, if no more, a matter of the highest personal privilege. Indeed, if counsel has them at command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises, and the trial Judge would not feel constrained to interfere unless they were indulged in to such excess as to impede or delay the business of the Court.

At 351-52. The court added that “the trial Judge was not asked to check the tears, and it was, we think, an eminently proper occasion for their use, and we cannot reverse for this.” At 352. Unfortunately for the poor put-upon plaintiff, however, the judgment was reversed for other reasons and remanded for a new trial. Now that was a crying shame.

QUOTABLE . . .

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.

Supreme Court Justice Louis D. Brandeis,
dissenting in Olmstead v. United States, 277
U.S. 438, 479 (1928).

UPDATES

Decalogue: Epilogue

As noted in **Quarterly Report** April-June: 2001, the 7th Circuit Court of Appeals, by a 2-1 count, upheld the federal district court's decision that a proposed monument containing the Ten Commandments intended for the south lawn of the State Capitol building in Indianapolis would be unconstitutional. Although there had been a smaller monument on the grounds for a number of years, it was removed because of repeated vandalism (oddly enough, by a religious zealot, who is one of the named plaintiffs in this case). The impetus for the proposed monument was the passage of P.L. 22-2000 by the Indiana General Assembly, which 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 State’s 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 documents and objects to be displayed. See I.C. 4-20.5-21 and I.C. 36-1-16, as added by P.L. 22-2000. Indiana Civil Liberties Union, Inc., et al. v. O’Bannon, 259 F.3d 766 (2001). The State appealed to the Supreme Court.

On February 25, 2002, the U.S. Supreme Court declined, without comment, to review the 7th Circuit’s opinion. O’Bannon v. ICLU, Inc. et al., 122 S. Ct. 1173. This was the second “Ten Commandments” case from Indiana to be denied review in the past year. Last May, the Supreme Court denied certiorari for Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000), also a 2-1 decision. See City of Elkhart v. Books, 121 S. Ct. 2209 (2001). In the O’Bannon appeal, nine other states joined Indiana through an *amici brief*, asking the Supreme Court to hear the Indiana dispute.²⁶ The *amici* argued the law is unclear, resulting in difficulties for state legislatures attempting to balance constitutional requirements. According to the *Chicago Tribune*, judges in Indiana, Illinois and Wisconsin (all 7th Circuit states) have

²⁶The nine states were Texas, Alabama, Mississippi, Nebraska, Oklahoma, South Carolina, South Dakota, Utah, and Virginia.

forbidden monuments depicting the Ten Commandments on public property, while judges in Oklahoma, New Mexico, Colorado, Kansas, Wyoming, and Utah have allowed them.²⁷ “The importance of the issue in this case goes beyond simply whether government may display the 10 Commandments on a monument on public policy, the *amici* contended. “The larger issue is the extent to which government may acknowledge and accommodate religion as being an important part of our nation’s heritage.”²⁸

Athletic Conferences, Constitutional Rights, and Undue Influence

The U.S. Supreme Court, in Brentwood Academy v. Tennessee Secondary School Athletic Association (TSSAA), 531 U.S. 288, 121 S. Ct. 924 (2001), determined that the TSSAA’s regulatory activity constituted “state action” even though the TSSAA is a private organization.²⁹ The Supreme Court noted that the TSSAA is delegated public functions by the state and is pervasively “entertwined” with public institutions and public officials. “Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards,” the majority opinion held at 121 S. Ct. at 933 in the 5-4 decision. Brentwood Academy is a private school and TSSAA member. It wrote letters to incoming students and their parents, advising them of spring football practices. There were also follow-up telephone contacts. It was also alleged that Brentwood provided free tickets to athletic contests. TSSAA found this violated its by-law proscribing “undue influence” and levied sanctions against Brentwood.³⁰ Brentwood argued that these sanctions violated federal constitutional provisions for free speech and due process. Although the district court agreed with Brentwood, the 6th Circuit Court of Appeals reversed the district court. The Supreme Court reversed the 6th Circuit, finding that the TSSAA’s “pervasive entwinement” with public officials, public institutions, and public duties made it a “state actor” such that it could be sued for alleged civil rights violations by a member school. See 121 S. Ct. at 935. However, the Supreme Court did not determine whether TSSAA had committed any constitutional violations. It remanded to the 6th Circuit to decide this.

In Brentwood Academy v. Tennessee Secondary School Athletic Association, 262 F.3d 543 (6th Cir. 2001), the 6th Circuit acknowledged the TSSAA is a “state actor subject to constitutional challenges.” 262 F.3d at 549. The TSSAA argued on remand that Brentwood, by voluntarily choosing to become a TSSAA member and agreeing to abide by its by-laws, waived any right to question the

²⁷*The Chicago Tribune*, “Justices Sidestep Church-State Case: 10 Commandments Ban Left Intact,” February 26, 2002, p. 6.

²⁸*Id.*

²⁹See **Quarterly Report**, April-June: 2001.

³⁰Brentwood’s athletic program was placed on probation for four years, its boys’ football and basketball teams were declared ineligible to compete in playoffs for two years, and the school was assessed a \$3,000 fine.

constitutionality of the TSSAA recruiting rule. The 6th Circuit rejected this argument, noting that other Supreme Court rulings have held that parties do not give up First Amendment rights by contracting with or being employed by a public agency. In this case, Brentwood did not waive its right to challenge the constitutionality of the recruiting rule when it chose to join the TSSAA. At 551. However, the court did agree with TSSAA that “strict scrutiny” was too onerous an analysis to apply to the recruiting rule; rather, the regulation in question is content-neutral in the sense that the restrictions were to time, place, and manner of speech, analogous to certain zoning ordinances, and should be subjected to intermediate scrutiny. Under the latter review, content-neutral regulations must be narrowly tailored to serve a significant governmental interest that leave open adequate alternative channels for communication of information. *Id.* Also see at 553. In this case, the recruiting rule does not impose a total ban on communications with prospective student-athletes: It prohibits the use of “undue influence” in recruiting such students for athletic purposes.

It is clear to us that the greatest restriction imposed by the recruiting rule is the prohibition on coaches, coaching staff, and school representatives from initiating contact with middle school students for the purpose of recruiting student athletes.

At 552. Such restrictions on coaches from contacts with prospective students and their parents prior to enrollment in the school is “a limitation on the manner in which secondary schools can communicate with students about their athletic programs.” *Id.* This doesn’t limit Brentwood from utilizing other outlets to provide information to prospective students regarding the school, such as through real estate agents, responding to direct inquiries, advertisements, or direct mail contacts with 7th and 8th grade students so long as the contact is to all students and not just the athletes. *Id.* Recruiting and communicating are not banned altogether, the court noted, just the use of “undue influence.” At 553.

The TSSAA’s recruiting regulation is content-neutral because the restrictions it places on certain “speech” (in this case, recruiting prospective athletes) is reasonable as to time, place, and manner. Supreme Court decisions, the court noted, have recognized “that content-neutral regulations can have a dampening effect on the substance of the protected speech, but that such limitations are constitutionally permissible.” At 554. The regulation is designed to serve a purpose unrelated to the content of Brentwood’s message and, as a consequence, the regulation is “content neutral” even though it does have an “incidental effect on some speakers or messages but not others.” *Id.*

The 6th Circuit also found the recruiting rule was not overbroad nor vague. Its terms were defined, either in the by-law itself or in the question-and-answer format that followed. “As a whole, the rule gives reasonable notice of what is prohibited,” the court wrote, noting that Brentwood’s providing free tickets to prospective students and a coach’s contact with prospective athletes prior to their enrollment, if such occurred, would unequivocally violate this rule. At 557.

The TSSAA asserted three interests that justifies its recruiting rule: (1) to keep high school athletics in their proper place as subordinate to academics; (2) to protect student athletes from exploitation; and

(3) to foster a “level playing field between the various member schools.” *Id.* However, the “exploitation” and “level playing field” interests were not addressed when this matter was before the district court. These interests “cannot be decided in the abstract as a matter of law. We therefore remand this case to the district court for an evaluation of these asserted interests after TSSAA has had the opportunity to present whatever support it deems appropriate to justify its position.” At 558. After the district court decides if the asserted interests are legitimate, it will need to decide whether the punishment exacted for the alleged violations “was appropriate regulatory action narrowly tailored to further TSSAA’s legitimate interests as a state actor.” *Id.*

Brentwood again sought review from the U.S. Supreme Court. However, on April 1, 2002, the Supreme Court denied the private school’s petition, declining to review the matter any further.

Date: _____

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