**QUARTERLY REPORT**

**January – March: 2004**

The **Quarterly Report** provides information 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.

In this report:


**Valedictorians: Saying "Farewell"to an Honorary Position?** . . . . . 2
- The Valedictorian Competition . . . . . 2
- The Content of the Speech . . . . . 11
- Religious Content and Student Valedictories . . . . . 11
- No Child Left Behind Act of 2001 . . . . . 15
- Alternatives to Valedictories . . . . . 16
- Class Rank . . . . . 16

**Childhood Obesity and the "Cola Wars": The Battle of the Bulge Continues** . . . . . 19
- Congress Weighs In . . . . . 19
- Great Britain's "Ditch The Fizz" Study . . . . . 21
- Other School-Based Initiatives . . . . . 22

**Driver's License Suspension and School Attendance: Encouraging the "Road's Scholar"** . . . . . 23

**Court Jesters: HORSE FEATHERS!** . . . . . 29

**Quotable** . . . . . 31

**Updates** . . . . . 32
- Military Recruiters . . . . . 32
- Evacuation Procedures . . . . . 38

**Cumulative Index** . . . . . 41

## VALEDICTORIANS: SAYING "FAREWELL" TO AN HONORARY POSITION?

At one time, high school graduation ceremonies were considered more dignified affairs. Schools now struggle with boorish behavior from the audience, pranks that sometimes border on vandalism, and security concerns.

There are also concerns "up on the stage" as well, as competition for valedictorian[1] honors, the content of valedictory speeches, and the concept of class rank are all coming under increased scrutiny.

### *The Valedictorian Competition*

There is no Indiana law that dictates a high school must select a valedictorian much less how it should be done. This has always been a matter for local discretion and tradition. However, an increasing number of schools are reporting the competition for this scholastic honor has become unhealthy. In 2003, the New Albany-Floyd County Board of School Trustees reported they would phase out the recognition of valedictorians and salutatorians at graduation at the New Albany High School. Floyd Central High School, the school district's other high school, ceased to bestow these recognitions over 10 years earlier. Beginning with the graduating seniors in the Class of 2006, New Albany will honor the top 10 percent of graduating seniors. New Albany-Floyd County Consolidated Schools has 11,000 students.

"The trend nationally is to do away with valedictorians. There are some issues why but we think it is better to honor the top 10 percent instead of five or six students," Floyd Central Principal John Marsh said.[2]

The New Albany superintendent said the changes would standardize practices in the school district's two high schools. The changes would also "honor achievement while encouraging students to take demanding classes."[3]

> Some schools don't give extra credit for more difficult classes, prompting complaints that some students take easier classes to bolster their grade-point averages [GPAs]. At schools where classes are weighted, some complain that students miss out on the benefits of art and music classes because they instead choose honors calculus and

---

[1]"Valedictorian" is derived from the Latin *valedictus*, "to say farewell."

[2]"NAHS To Phase Out Valedictorian Recognition at Graduation," *The New Albany Tribune* (June 30, 2003).

[3]"At Issue: Should Schools Name Valedictorians?" *The Fort Wayne Journal Gazette* (July 28, 2003).

> other courses that will yield more points toward class rank. How should academic achievement be measured in determining valedictorians?[4]

The Hemet (California) Unified School District reached the same conclusion. The school board and the high school principal said that competition created an unhealthy educational environment. "If they are not number one, it could get their feelings hurt if they are self-motivating and high-achieving students," Principal Bill Black said. Tom DeSantis, a school board member, added, "Ideally, the valedictorian program should recognize the most successful students or student; but at this point we're wondering if it's recognizing the most successful strategist." DeSantis said students were boosting GPAs by taking easy electives rather than college-level courses. There is also intense lobbying occurring. "Maybe we need to look at an honor society-type recognition where every student who achieves over a certain threshold is honored," DeSantis added .[5]

Vestavia Hills High School located near Birmingham, Alabama, maintains a class-ranking system but no longer chooses a valedictorian. Nearly all of its students will attend a four-year college. In 1994, its graduating class of 281 had 33 seniors with GPAs in excess of 4.0, due to greater weights accorded AP and Honors courses. Instead of a valedictorian, the school gives all of the students with GPAs above 4.0 engraved plaques. According to the principal, Michael S. Gross, the system was changed eight years previous because of an intense rivalry. "The competition between the top two in the class was so keen, to me, it got bent out of shape. It wasn't healthy. It put a lot of pressure on the kids; it put a lot of pressure on the families."[6]

Others complain of the "vanishing valedictorian." Some of the problem is caused by the school itself by determining the valedictorian based on GPA alone, especially where grades are not weighted.

> Schools have tried to resolve this problem by weighting the harder honors and Advanced Placement courses.... While weighting provides an incentive for students to take difficult courses, it carries its own baggage. Class ranking can turn contentious.
>
> There are cases in which only a hair has separated the grade point averages of top students in a graduating class. That has led to debates over the difficulty of the courses taken by the individuals involved. In a few cases, the battle for the number one class rank boiled over into the courts when parents who believed their child was treated unfairly by the class-ranking process filed lawsuits against the school district.

* * *

---

[4]Id. (observation by the newspaper).

[5]"School Board Considers Banning Valedictorian Award," FOXNews.com (February 24, 2003).

[6]"Growing Number of Schools Reject Class Rankings," *Education Week* (June 15, 1994).

> To try to avoid such headaches in the future, school districts have devised a variety of alternatives to the valedictory tradition and class ranking. In some districts, the "vanishing valedictorian" actually is multiplying. One school district named 25 graduating seniors with 4.0 grade point averages as "valedictorians." But the effect is the same–to dilute the standard of excellence and diminish the stature of those designated as valedictorians. When the school board in Red Wing, Minnesota, terminated the honor of valedictorian and salutatorian for the Class of 2000 and sought a fairer way of honoring students, they decided to designate all students who performed well as "graduates of honor, distinction, and highest distinction." Other districts have adopted higher education's system of honoring top performing students and are graduating them summa cum laude, magna cum laude, and cum laude.[7]

How contentious has this been? Intense competition for valedictorian of the Normandy High School Class of 1994 eventually required court intervention. Two students in the Parma, Ohio, school district were embroiled in a battle for the honor. A school counselor advised one student that he could raise his "quality point" average and surpass the top-ranking student if he enrolled in certain summer and evening classes. The other student caught wind of this and, with her family, appealed to the school district's superintendent. He gave her the opportunity to accumulate more "quality points" through independent study. Sixty-eight (68) teachers signed a petition decrying the arrangement. When the dispute spilled over into the school board meeting, the school board decided not to name a valedictorian at all. This did not set well with the aspirants. Legal action was initiated. The judge ordered the district to select a valedictorian. Eventually, the school board named both students as co-valedictorians. Unfortunately, the dispute "left emotional scars in the middle-class Cleveland suburb," according to one report. One of the students had her house pelted with eggs and there were threatening phone calls. Her father, commenting on his daughter's being named co-valedictorian, observed, "It was a bittersweet recognition."[8]

A more contentious recent dispute, played out on the national stage, was the battle over who would be the valedictorian for the Class of 2003 for Moorestown High School in New Jersey. Hornstine v. Township of Moorestown *et al.*, 263 F.Supp.2d 887 (D. N.J. 2003) involved a student identified by the school district as disabled under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* Her Individualized Education Plan (IEP) contained a number of academic accommodations. After seven semesters in Moorestown High School, she had the highest weighted GPA in her class. More than two-thirds of her classes were Advanced Placement (AP) or Honors. She scored a 1570 out of a possible 1600 on her Scholatic Aptitude Test and had been accepted into Harvard University. Because of health problems that caused "substantial fatigue," her educational program was a "hybrid" one in that she attended morning classes at the high school but received the

---

[7]"Valedictorians and Class Rank: Headed for Extinction?" *Parent Power!* Vol. 2, Issue 5 (June 2000).

[8]"Trends: A New Order," *Teacher Magazine* (August 1, 1994).

remainder of her instruction at home from school personnel. This "hybrid program" was reflected in her IEP. 263 F.Supp.2d at 891.

The School Board's policy, as reflected in the student handbook, stated that the graduating "senior student with the highest seventh semester [weighted GPA] will be named the valedictorian, and the student with the second highest seventh semester [weighted GPA] will be named the salutatorian." According to the School Board's policy then in effect, Hornstine "should be named valedictorian of her class for the graduation ceremony...since she has attained the highest GPA." Id. at 892.

But that's not what happened. The local superintendent sought to change the policy to allow for multiple valedictorians and salutatorians. The impetus for this was, in part, the superintendent's belief the Plaintiff, because of the academic accommodations in her IEP, was realizing an "unfair advantage" over other students, resulting in "fundamental unfairness" that he sought to correct. Sentiment was apparently running high in the community towards Plaintiff and her father. The superintendent was allegedly told the "father intended to manipulate the special education laws to ensure that his daughter became valedictorian." Id. at 891-92. The superintendent described the father as an "overzealous parent" who wanted to ensure his daughter did not suffer "the same embarrassment" he suffered when he was "merely the salutatorian of his graduating class." Id. at 892. Although the superintendent and father disagree as to what exchanges occurred during their meetings, it was evident that there was considerable disaffection between the two.

The superintendent became inordinately interested in the homebound portion of Plaintiff's educational program. He requested a review by the school's physician as to whether her condition merited homebound instruction, refused to permit the Plaintiff to drop a class, and conducted impromptu meetings with school personnel regarding her IEP, the nature and extent of her disability, GPA, and valedictorian status. The homebound instructors were required to "validate and verify" her educational curriculum. No such inquiries were made of the curriculum for other homebound students. Id. at 892-93.

Beginning in January of 2003, the superintendent made public his intention to have the School Board's policy amended to read as follows:

> In determining the recipients of [the awards of valedictorian and salutatorian], the Board may review the program of study, manner of instruction, and other relevant issues, and in its discretion, with the assistance of the administration, may designate multiple valedictorians and/or salutatorians to ensure that all students have an equal opportunity to compete for these awards.

Id. at 893. The superintendent "does not disguise the fact that the proposed policy amendment to award multiple valedictorians is directed at plaintiff." Another student, who had a lower weighted GPA but who was apparently favored by the superintendent to be valedictorian, received a letter on May 6, 2003, informing him that he "certainly will be considered for the valedictorian award." No such letter was sent to the Plaintiff. The superintendent asserted that it would be "unfair" to award the valedictorian designation to the Plaintiff because other students "were not afforded the

accommodations which Plaintiff enjoyed." He also argued Plaintiff had an unfair advantage because she was not required to take physical education, which enabled her to enroll instead in higher weighted classes. Id. at 893-94. The factual disputes between the superintendent and the Plaintiff and her family are numerous. However, Plaintiff's IEP reflected that "standard grading practices" would apply, even to her homebound instruction. Although the superintendent stated that Plaintiff's homebound instruction status enabled her to take more heavily weighted classes than the student he would like to see named valedictorian, the record indicated the superintendent's candidate actually "took more weighted classes than plaintiff." At this high school, AP courses are more heavily weighted than Honors courses. Plaintiff took eight (8) AP courses while the other candidate took 10; she took 15 Honors course, while he took 12. Id. at 895. The court's decision is rather pointed and critical of the superintendent's actions, many of which are not detailed in this article.

> In his continued effort to denigrate plaintiff's accomplishments, [the superintendent] notes that he has "reviewed the transcripts of the past six valedictorians, and none of those students earned straight A+ grades, like Plaintiff received during her junior year." He is referring to plaintiff's junior year accomplishment of earning an A+ in all ten of her classes. Instead of applauding plaintiff's achievements, he insinuates that since no valedictorian in the past six years was able to achieve grades as high as plaintiff did in her junior year, then plaintiff's success must be due to some unfair advantage.

Id. It was clear the School Board and Superintendent had "no intention of allowing plaintiff to be the sole valedictorian" or even valedictorian at all. Id. To prevent the School Board from applying the amended policy retroactively, Plaintiff sought injunctive relief, relying in principal part on the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, two federal laws that prohibit discrimination against persons with disabilities. The court denied the School Board's Motion to Dismiss and granted Plaintiff's request for injunctive relief.

The federal district court judge was aware of the unhealthy attention this dispute had drawn locally (and then nationally).

> Given that this case has generated a firestorm of controversy, it is important to emphasize at the outset what this case is not about. First, it is not about whether plaintiff is disabled; that is undisputed by defendants. Second, it is not about the appropriateness of the accommodations plaintiff received through her IEP; she was afforded these accommodations by the Board to level the academic playing field for her, and in fact, her achievements are a model example of a successful IDEA program. This case is about an outstanding student who overcame the hardships of her disability to achieve the best grades in her class, and who is now in danger of having her accomplishments tarnished by her own school's administrators in the name of rectifying an imagined injustice. The record on this application for a TRO [temporary restraining order] makes clear that the Board and Superintendent..., in particular, apparently propelled by parental and community pressure, have sought to

> appease these uninformed interests by changing the rules. In so doing, they have embarked on a course to denigrate plaintiff's remarkable achievements as a special needs student, and thus, diminish the recognition due to her, by criticizing the accommodations which these same defendants approved and never challenged.

Id. at 891. The court noted that although it "does not have jurisdiction to enjoin the Board from modifying its policies," it can enjoin the School Board from doing so retroactively because Plaintiff is likely to succeed on her discrimination claims. Id. at 903. It isn't the policy itself that discriminates; it is its retroactive application. "Indeed, the circumstances underlying the proposal to amend the Board policy as well as the formulation of the amendment, make clear that any application to her would be based on her disability." Id. at 904. "Given the historical context of this amendment and [the superintendent's] expectation that it will go into effect before graduation, more than sufficient evidence exists to establish that the Board's proposed action was intended and designed to have a particular exclusionary effect on plaintiff because of her disabled status." Id. at 906.

The court also relied upon guidance from the U.S. Department of Education's Office for Civil Rights (OCR), the agency responsible for ensuring recipients of federal education funds comply with various non-discrimination laws, including Sec. 504 and the A.D.A. In Letter to Runkel, 25 IDELR 387 (OCR 1996), OCR stated that, absent individualized determinations, "grades earned by students with disabilities cannot categorically be disregarded or excluded, even if earned with the support of special education services. If a school district wishes to establish standards for eligibility for class ranking or honors, it may do so, as long as it does not arbitrarily discount or exclude grades earned by students with disabilities." Because of OCR's enforcement responsibility, the court indicated OCR's constructions are entitled to deference. 263 F.Supp.2d at 908. The court added: "[A]ny differential grading standards should be specified in a special needs student's IEP. Here..., defendants' proposed action contravenes the agency's pronouncement because plaintiff's IEP states that defendants' standard grading policy shall apply to her courses." Id.

Previous administrative rulings by the New Jersey Commissioner of Education were also instructive. In Shankar v. Board of Education of the City of New Brunswick, the school board's policy had been that the valedictorian would be decided based on the highest GPA. However, when Shankar was about to graduate, the school board attempted to apply retroactively a three-year residency requirement (Shankar had been in the school for two years). The Commissioner determined the school board could not retroactively apply conditions on a pupil that will affect him without proper notice**.** "Such notice could only have been provided following formal adoption of the requirements by the Board to all students in the high school at the time they entered [the school], through a uniform notification device, such as the student handbook," the Commissioner wrote. The residency requirement could only be applied "after all students have been apprised of such policy in a uniform and *prospective* manner." Id. at 910 (emphasis added by the court).

In the instant matter, the court noted that the School Board's policy that appeared in the student handbook would indicate that Plaintiff would be the valedictorian because she had the highest GPA after seven semesters. "Defendants now seek to diminish her award by naming another, non-

disabled valedictorian, pursuant to a policy that is to take effect *after* plaintiff has already completed seven semesters. I agree with the Commissioner's decision in Shankar–any new valedictorian policy cannot be applied retroactively to plaintiff." Id. at 910-11.

Plaintiff would suffer irreparable harm if she were not named the valedictorian, the court stated. The possible naming of multiple valedictorians diminishes Plaintiff's accomplishments. By doing so, the School Board "would be sending the message loud and clear: 'we have two valedictorians this year–a disabled one, and a non-disabled one.'" Id. at 911. "Instead of honoring her as the student who earned the highest grades in her class in spite of her disability, the Board would be demeaning her by insinuating that her grades are not as meaningful because she rightfully received accommodations on account of her disability." Id.

The judge stressed that the planned retroactive application of the revised policy would discriminate against the Plaintiff and, accordingly, the court restrained the School Board from doing so and obliged it to follow its own policy. The court also noted that "It is unfortunate that the burdens of competition imposed on these students by parents and the school community have further fanned the flames of this controversy." This lamenting of the mob mentality appears throughout the lengthy decision. However, the judge also questioned the School Board's decision to determine a valedictorian based on GPA criteria alone.

> I am also constrained to point out that the fierceness of the competition in Moorestown High School is evidenced by the widespread involvement of parents in this dispute, which may have been fueled by the school's emphasis on grade-based distinctions. While the School's Handbook states that it seeks to minimize competition by no longer reporting class rank..., elsewhere it heightens the level of competition by naming a valedictorian and salutatorian, and by further denoting [such] honors based on weighted GPA....

Id. at 913, *n*. 913.

This case drew considerable national attention. When the graduation ceremony was conducted on June 19, 2003, Hornstine did not appear due to the public sentiment against her. "The valedictorian was nowhere to be seen. The salutatorian was greeted like a conquering hero, with a long standing ovation." Moorestown, described as a "one-Starbucks town" located just outside Philadelphia, viewed Hornstine's "no-holds-barred effort to secure the top spot in the Moorestown class of 2003 as a Bobo version of the Texas cheerleader case–a combination of obsessive pursuit of academic credentials and parental ambition run amok."[9] Petitions circulated in the community in support of the superintendent. Nearly every member of the senior class signed it. "Students made computer icons of Blair's face with tears streaming from her eyes." A cartoon appeared in the local paper depicting Hornstine's father, a superior court judge in a neighboring county, "shining his shoes with

[9]"First in Her Class: The Valedictorian Sued, and the Town Turned on Her," *Weekly Standard* (July 7-14, 2003).

Lady Justice's robe." Hornstine's house was egged twice and hit with black paintballs once. She received a threatening letter, warning her not to appear at graduation. If she did appear, students threatened to boo her during her speech or turn their backs on her. Community members attempted to have Harvard withdraw its acceptance of her as a student. There were accusations of plagiarism, which did jeopardize her admission to Harvard.[10]

There have been several other relatively recent disputes over the designation of a valedictorian.

1. Jeffrey v. Board of Trustees of the Bells Intermediate School District *et al.*, 261 F.Supp.2d 719 (E.D. Tex. 2003) centered around a Spanish III course. The school district had four students sign up for Spanish III, but the Spanish teacher resigned. When a new Spanish teacher was hired, the only student continuing to express an interest was the plaintiff's competitor for valedictorian. The class would have a weighted grade. The school offered the Spanish III class to Jeffrey as well. To participate in the class would require schedule adjustments. The school attempted to accommodate both students, but this would have required Jeffrey to forego an agricultural class, an area of interest for which there were potential scholarship opportunities. Jeffrey eventually asked the school not to offer the class, adding that it's being offered was "unfair" to her. The school declined to do so. Jeffrey's competitor was named the valedictorian. Jeffrey sued. The federal district court declined to accept her argument the school district applied its rules and policies in an inconsistent and unequal manner, which denied her the right to compete equally for class valedictorian. "The obvious problem with this argument is that Ms. Jeffrey was offered the opportunity to take the Spanish III class, just not at the time that she preferred. Further, Ms. Jeffrey does not have a property interest in becoming class valedictorian." Id. at 725, *n*. 7. The court also found that Jeffrey did not have a "protected property interest in participating in a particular class at a particular time." Id. at 726. The student was not denied procedural or substantive due process rights, nor were her equal protection rights adversely affected. The court entered summary judgment for the school.[11]

2. In Townsend v. Board of Education of Robeson County *et al.*, 454 S.E.2d 817 (N.C. App. 1995), the student sued the school board for negligent infliction of emotional distress when a recalculation of grades revealed she was not first in her class but fourth, thus preventing her from being named the valedictorian. The court rejected her civil rights claim because

---

[10]Id. For additional stories, see "Judge Reaffirms Opinion in Valedictorian Case," *Philadelphia Inquirer* (May 31, 2003); and "New Jersey Judge Rules for One Valedictorian," *Education Week* (May 21, 2003). Hornstine originally sued for $2.7 million, an aggravating circumstance within the community. The school district settled the case, agreeing not to appeal and to pay Hornstine and her attorney $60,000. Harvard reportedly withdrew its offer of admission based on the allegations of plagiarism. "New Jersey District, Valedictorian Settle Lawsuit Over Ranking," *Education Week* (September 3, 2003).

[11]On May 7, 2004, the U.S. 5th Circuit Court of Appeals affirmed the district court's decision. Jeffrey v. Bd. of Trs. Of the Bells ISD, 2004 U.S. App. LEXIS 9004 (5th Cir. 2004).

she "did not obtain the right to be valedictorian." She was never told that she would be valedictorian. "The mere fact that plaintiff believed that she was going to be first in her class does not demonstrate negligence on the part of defendants simply because plaintiff failed to reach that goal." Id. at 819. The miscalculation of her GPA occurred near the end of the plaintiff's junior year when, because of computer system irregularities, the then-principal used a weighted grade average formula that did not follow school board policy. A new principal assumed responsibilities the following school year. He noticed the calculation errors and had the students' grades recalculated (five times actually). He then advised all affected students and their parents of the error. The plaintiff admitted the recalculations were not incorrect. The court also rejected plaintiff's conspiracy allegation.

3. Sylvester v. Texas Southern University *et al.*, 957 F.Supp. 944 (S.D. Tex. 1997) is a bit unusual in that it involves a law school and one of its students. In a sharply critical opinion by the federal district court of the school and its instructor, Sylvester's grade of "D" was changed to "pass," enabling her to be named valedictorian. The dispute began when Sylvester enrolled in James Bullock's Wills and Trusts course. Sylvester needed only a grade of "C" to remain first in her class. Bullock gave a final exam and posted the grades. Sylvester got a "D," which moved her from first to third in her class. She attempted to follow the school's procedures for review of an adverse grade, but the school would never respond to her many inquiries. "When she was about to graduate, Bullock informed Sylvester that her examination was lost. When Bullock was ordered to see that the examination was found, it was." Id. at 945. Sylvester initiated suit, primarily because school policy indicated a student could not challenge a grade after the student had graduated. Although the court declined initially to enjoin the school and Bullock, it eventually became necessary, especially as the school consistently failed to follow its own procedures and Bullock "was defiant" toward the school and the court. Even though the court ordered a session between Sylvester and Bullock to review her final examination, Bullock appeared but with no key to the answers and no comparable answers with which to compare Sylvester's responses. Bullock refused to appear for the next session. The U.S. Marshal had to bring him to court. The school agreed to have its Academic Standards Committee review Sylvester's examination but then expelled student members of the committee and issued a report indicating no inconsistencies were found–despite the fact the committee did not have a complete set of answers from Bullock or a complete key.[12] "Sylvester had a right to both procedural and substantive due process in contesting her grade; she received neither." Id. at 946-47. The court found the law school's actions in not following its own policies and procedures for reviewing contested grades was arbitrary because of the illegal constitution of the committee and its review without any meaningful way to compare Sylvester's answers with any key. Because Bullock and the law school repeatedly violated Sylvester's

[12]Bullock's contempt was obvious. "Despite swearing in court that he had long ago provided a complete key to the examination, Bullock gave 'yes' as the full answer to part of question V, and he gave no answer for another section. No student could have received a perfect score for answering 'yes' to an essay question on a law school final, yet that was the correct answer on Bullock's key." 957 F.Supp. at 946.

> constitutional rights through their "active manipulation and sullen intransigence," the court assigned her a grade of "pass," which changed her rank from third to first, allowing her to share the position with the current valedictorian. Id. at 947.

***The Content of the Speech***

Resolving who will be valedictorian and salutatorian is only the first hurdle. The content of the speeches is the next one. Bethel School District No. 403 v. Fraser, 478 U.S. 675, 106 S. Ct. 3159 (1986) has provided public school officials with guidance and support in reviewing student speeches. In Fraser, a student was suspended for three days and had his invitation to speak at graduation withdrawn for a speech he had given in an assembly. The speech–a nomination speech on behalf of a candidate for class office–was replete with sexual innuendo. The school district, the U.S. Supreme Court held, was within its authority when it imposed sanctions for the student's offensive, lewd, and indecent speech.

> The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

478 U.S. at 683, 106 S. Ct. at 3164.

But what if the content of the speech is religious?

***Religious Content and Student Valedictories***

Two high-profile cases from California illustrate the friction between student speech and a public school district's desire to avoid First Amendment litigation.

Cole, Niemeyer *et al.* v. Oroville Union High School District *et al.*, 228 F.3d 1092 (9th Cir. 2000), *cert. den.* 532 U.S. 905, 121 S. Ct. 1228 (2001) began when school officials would not permit a proselytizing valedictory speech or sectarian invocation at the high school graduation ceremony. The ceremony is a fairly standard one, with speeches provided by the class valedictorian and salutatorian, as well as a spiritual invocation by a student chosen by the student's classmates. Beginning around 1985, all student speeches for graduation were to be reviewed by the principal, who had the final say as to the content. The principal was chiefly concerned with speech that would be offensive or denominational. However, until 1998, his review consisted mainly of editing grammatical errors. Niemeyer was notified that he would be a co-valedictorian of the Class of 1998. Cole was selected by his classmates to deliver the invocation. Faculty advisors assisting in review of the speeches warned both Cole and Niemeyer that the content of their proposed speeches were too overtly denominational. Both students were late in submitting their final drafts, in part because they believed they would not be able to deliver their intended speeches. When they did submit their speeches (one just three days before the graduation ceremony), the principal advised them to "tone down the proselytizing and sectarian religious references." They did not do so. Eventually, the superintendent and the school district's attorney became involved. They agreed with the principal

that the two speeches were "impermissible sectarian prayer." Id. at 1096. School officials attempted to persuade the students to remove their sectarian references, but the students refused. One day before the graduation, the students sought injunctive relief from the federal district court. The court denied the motion because the issues were complex and there was insufficient time to consider them.

Both attended the graduation ceremony. Niemeyer attempted to deliver his valedictory speech in its unedited form, but the principal refused to permit him to do so. His speech referred repeatedly to God and Jesus, and indicated that if he offended anyone, they could leave the graduation. His speech was akin to a "religious sermon," advising that "we are all God's children, through Jesus Christ's death, when we accept his free love and saving grace in our lives." He also requested the audience to "accept God's love and grace" and "yield to God." Id. at 1097. The federal district court rejected the students' claims that they had a "clearly established right to speak at the Oroville graduation without content- or viewpoint-based restrictions." The court granted the school district's motion to dismiss. On appeal, the 9th Circuit Court of Appeals affirmed, concluding that school officials "did not violate the students' freedom of speech. Even assuming the Oroville graduation ceremony was a public or limited public forum, the District's refusal to allow the students to deliver a sectarian speech or prayer as part of the graduation was necessary to avoid violating the Establishment Clause [of the First Amendment][13] under the principles applied in Santa Fe Independent School District v. Doe, 530 U.S. 290, 120 S. Ct. 2266, 147 L.Ed.2d 295 (2000), and Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649, 120 L.Ed.2d 467 (1992)." Id. at 1101.

Sante Fe involved a school district policy that authorized a student–again, selected by the student's classmates–to deliver a nonsectarian and non-proselytizing "statement or invocation" to "solemnize varsity football games." The Supreme Court rejected the argument that the student's prayer–delivered over the public address system on government property at a government-sponsored event (the football game)–constituted private speech. "The Court reasoned that the district's control over and entanglement with the invocation not only would cause an objective observer to perceive the district endorsed the religious message of the invocation, but also constituted an actual endorsement of religion in public schools." Id. at 1102. This "impermissibly applied social and peer pressure to coerce dissenters to forfeit their right to attend the games as the price of resisting conformance to state-sponsored religious practice." Id. (internal punctuation and citation omitted). The Supreme Court also noted in Lee "that the singular importance of a high school graduation as a once-in-a-lifetime event and the susceptibility of adolescents to peer and social pressure left a dissenting student with the unduly coercive dilemma of participating in the prayer against [the student's] conscience or missing [one's] own high school graduation."[14] Id.

Applying Sante Fe and Lee to this dispute, "it is clear the District's refusal to allow...a sectarian invocation as part of the graduation ceremony was necessary to avoid an Establishment Clause

---

[13]"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof [.]"

[14]Lee involved clergy-provided invocation at a graduation ceremony.

violation." The school district authorized such an invocation as part of the graduation ceremony, the ceremony was conducted on public property, only a student selected by the student's classmates under the school policy could give the invocation, and the public address system would have been used to broadcast the invocation. Id.[15]

The 9th Circuit acknowledged that Niemeyer's valedictory speech "presents a more difficult issue as to whether the speech was private or attributable to the District." Id. at 1103. "Nonetheless, we conclude the District's plenary control over the graduation ceremony, especially student speech, makes it apparent Niemeyer's speech would have borne the imprint of the District." Id. The court enunciated four (4) reasons for this finding:

1. The school district authorized the valedictory speech as a part of its graduation ceremony, which is held on public property and financed in part by school district funds, and during which only selected students are permitted to speak;
2. The principal retains supervisory control over all aspects of the ceremony, including the right to approve the content of the student speeches;
3. The school district required students to sign a special contract obligating them to act and dress in a manner prescribed by the school district; and,
4. The speech is broadcast to the audience using the school's equipment. Id.

Allowing Niemeyer to give his proposed valedictory speech at the Oroville graduation would have constituted government endorsement of religious speech similar to the prayer policies found unconstitutional in Santa Fe and Lee. Because District approval of the content of student speech was required, allowing Niemeyer to make a sectarian, proselytizing speech as part of the graduation ceremony would have lent District approval to the religious message of the speech. Equally important, an objective observer familiar with the District's policy and its implementation would have likely perceived that the speech carried the District's seal of approval.

Id. Permitting his sectarian valedictory speech "would have constituted District coercion of attendance and participation in a religious practice because proselytizing, no less than prayer, is a religious practice." Id. at 1104. The court also concluded that "[a]voiding an Establishment Clause violation is also a sufficiently compelling interest to justify any burden the District officials' decisions had upon [the students'] right to the free exercise of religion." Id. at 1104, *n.* 9.

It didn't take long for a similar dispute to reach the 9th Circuit. In Lassonde v. Pleasanton Unified School District *et al.*, 320 F.3d 979 (9th Cir. 2003), *cert. den.* 124 S. Ct. 78 (2003), Lassonde was selected to be one of the co-salutatorians for the Amber Valley High School Class of 1999, which entitled him to deliver a speech at the graduation ceremony. He is a devout Christian. He drafted a speech that quoted extensively from the Bible, and he intended for his speech to encourage his classmates "to develop a personal relationship with God through faith in Christ in order to better their lives." Id. at 981. The principal, who has similar responsibilities and authority as in Cole,

---

[15]The 9th Circuit noted the issue of the constitutionality of the invocation policy was not raised in this dispute, but cautioned the school district that it may wish to review its policy and procedure in light of Sante Fe. 228 F.3d at 1103, *n.* 8.

*supra*, discussed Lassonde's draft with the school district's lawyer. They determined that "overtly proselytizing comments at a public high school's graduation ceremony would violate the Establishment Clause..." They advised the student that he could make references to God with respect to his own beliefs but he could not make proselytizing comments. Id. Lassonde attempted a compromise, suggesting the school district provide a "disclaimer" indicating that student speaker remarks did not necessarily represent the views of the school district. The school district rejected this suggestion. Eventually, a compromise was reached: "Under protest, Plaintiff agreed that he would deliver his speech without the proselytizing passages and would hand out copies of the full text of his proposed draft speech just outside the site where the graduation ceremony would be held." Id. at 981-82.

At the graduation ceremony, Lassonde delivered his speech and distributed handouts as agreed. "When he reached the portions of the speech that had been excised, he informed his fellow students that portions had been censored. He told the audience that he would distribute copies of the uncensored speech outside the graduation ceremony and that he would give the full speech on Sunday at his church." Id. at 982. Nearly a year later, he filed suit, claiming school officials violated his federal constitutional rights to free speech, religious liberty, and equal protection, as well as certain State constitutional rights. Relying upon the Cole decision, *supra*, the federal district court granted summary judgment to the school district. Id.

The 9th Circuit affirmed the district court's decision, noting, in part, the school district's "actions were necessary to avoid a conflict with the Establishment Clause." Id. at 983. Its decision in Cole controls every aspect of this case. Id. Lassonde, to avoid the holding in Cole, argued that the school district should have employed a "less restrictive" alternative to censorship by adopting the proposed disclaimer. The 9th Circuit rejected this argument for three reasons:

1. The school district had to take steps that were necessary to avoid running afoul of the Establishment Clause. "In other words, if the school had not censored the speech, the result would have been a violation of the Establishment Clause." Id. at 984.
2. Even if a disclaimer could sufficiently avoid governmental entanglement with religion, permitting a proselytizing speech at a publicly sponsored event "would amount to coerced participation in a religious practice... Although a disclaimer arguably distances school officials from 'sponsoring' the speech, it does not change the fact that proselytizing amounts to a religious practice that the school district may not coerce other students to participate in, even while looking the other way." Id. at 984-85.
3. "[E]ven if Defendants were obliged to provide a 'less restrictive' alternative to absolute censorship, they did. Defendants permitted Plaintiff to distribute copies of the complete draft just outside the graduation venue, and he did." Id. at 985.

***No Child Left Behind Act of 2001***

Both Cole and Lassonde occurred prior to the passage of the No Child Left Behind Act of 2001 (NCLB), which was signed into law on January 8, 2002. A section of NCLB conditions the receipt (and continued receipt) of federal funds under the Elementary and Secondary Education Act (ESEA) upon certain certifications by local educational agencies (LEAs) that the LEAs do not have a policy

that "prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary schools and secondary schools, as detailed in the guidance" supplied by the Secretary of the U.S. Department of Education. 20 U.S.C. § 7904. This certification must be provided by October 1st of each year.

The Secretary did issue such guidance on February 7, 2003 ("Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools"). One section of the "Guidance" specifically addresses graduation ceremonies.

**Prayer At Graduation**

> School officials may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer. Where students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's.

The 9th Circuit in Lassonde specifically rejected the use of a disclaimer, noting that this would not satisfy the perception of endorsement or the "coercion" effect upon those who are essentially held captive during such ceremonies.[16] There may not be such a creature as an "appropriate, neutral disclaimer." This may also be an open invitation to use such a disclaimer as a ruse, or at least run the risk of being accused of doing so.

Americans United for Separation of Church and State, in an April 7, 2003, letter to Chief State School Officers, criticized the "Guidance" in several areas, especially with respect to graduation ceremonies.

> This issue [student-initiated religious speech] falls into a legal gray area. Practices that are legal in some parts of the country may not be in others. The guidance errs by suggesting that this issue is settled when in fact it is not. Your school district should look to relevant case law to determine the legality of certain practices in your area. In order to comply with *both* the guidance and existing case law, school districts are advised to adopt policies that require school officials to pre-review all

---

[16]Courts have distinguished between graduation ceremonies at the public school level–where attendance is typically required–and ceremonies at the post-secondary level, where attendance is not usually mandated and people are considerably more at liberty to simply not attend or to get up and leave. See, for example, Chaudhuri v. Tennessee State University, 130 F.3d 232 (6th Cir. 1997) and Tanford v. Brand, 104 F.3d 982 (7th Cir. 1997).

> student speeches, and to omit any religious remarks, for all school-sponsored events.[17]

Americans United included its own guidance, which specifically referred to the Lassonde case, *supra.*

Although the Secretary's missive is styled as "Guidance," failure to comply with the certification process, or filing a certification in "bad faith," can have repercussions, including the withholding of federal funds. The Secretary's statement does not clarify the "legal gray area."

***Alternatives to Valedictories***

Not all school districts afford their valedictorians and salutatorians the outright privilege of addressing their classmates at graduation. At North Central High School in the Metropolitan School District of Washington Township (Indianapolis), speaker candidates are chosen from the graduating class. To be eligible for consideration, a student must meet graduation requirements and have at least a 2.0 GPA. Speaker candidates must submit ten (10) copies of the exact text of their speech (a two-to-three minute speech in a formal format) by a definitive date. The judges evaluate the written speeches through an anonymous format (that is, the judges do not know the author). Thereafter, there are try-outs where the speaker candidates deliver their speeches to the judges. The 10 judges include three seniors, three faculty members, two representatives of the Parent-Teacher Organization (PTO), and two senior class sponsors. After written and oral presentations have been evaluated by the judges, the evaluations are forwarded to school administration. Administration selects the two commencement speakers. The remaining candidates will be considered for speech opportunities at other senior activities and the Baccalaureate.

***Class Rank***

In 1993, the National Association of Secondary School Principals (NASSP) surveyed 2,175 high schools. NASSP found that 159 schools did not rank students. The number has reportedly grown considerably in the last eleven years, especially in high schools with senior classes that traditionally perform well academically.[18]

South Lakes High School in Fairfax County, Virginia, dropped class rankings in 1994. The school's self-governance council, which is composed of parents, teachers, students, and school personnel, researched the issue for 18 months before submitting its findings to the school board. South Lakes has a number of students who maintain high GPAs. To be in the top half of the class, a student would generally require at least a 3.0 GPA. "As a result, council members concluded, the class rankings could give the wrong impression to outsiders, especially admissions officers at elite colleges." The council consulted colleges as a part of the 18-month study. The colleges indicated

---

[17]Letter of April 7, 2003, p. 2.

[18]"Growing Number of Schools Reject Class Ranking," *Education Week* (June 15, 1994).

they would like to know the students' class rankings, "but could do without it if they still received the student's G.P.A., college-entrance examination scores, and teacher recommendations."[19]

High schools that have eliminated class rankings do not report any adverse impact on college scholarships. In addition, the schools reported that students were more inclined to take Advanced Placement courses they previously would have avoided because of the possible negative impact on their GPAs.

NASSP also surveyed 1,109 four-year colleges. Class rank was the fourth most important criteria they considered for admission. High schools, according to NASSP, place class ranking 10th on the list of important criteria.

In a recent commentary in *Education Week*, Perry A. Zirkel, Ph.D., J.D., LL.M., Professor of Education and Law at Lehigh University and a frequent author of education-related articles, reported a superintendent in a Pennsylvania school district noted that in the superintendent's school district, students with 3.2 GPAs were not in the top half of their high school class. The school district was considering dropping the use of class ranking because the process was actually hurting the students' chances of getting into college.

> Various high schools around the country have already dropped class rank, particularly those that have a high proportion of students going on to college and that otherwise perceive themselves as elite. Other such schools have instituted similar measures, such as having group valedictorians, deleting the grade of D, and adopting weighted grades. As a result, students with GPAs of 4.0, or a straight-A average or higher, are no longer a rare breed.[20]

Despite this inflationary trend, "objective data show no corresponding increase in students' overall academic performance." SAT and ACT scores have remained basically static. "[D]ropping class rank merely compounds the so-called 'Lake Wobegon effect': Everyone appears to be, like the children in humorist Garrison Keillor's mythical Minnesota town, 'above average.'"[21]

Zirkel worries that without a class ranking system, college admissions personnel will be less likely to lend credence to high school grades and rely more on "the much-maligned SAT. What else is likely to play a decisive role at competitive colleges and universities, which are buried in burgeoning applications that largely are filled with polished essays, superlative recommendations, and multiple

---

[19] Id.

[20] "No Child Left Average?" *Education Week* (April 28, 2004).

[21] Id.

extracurricular activities? 'Legacies,' meaning parents and grandparents who are alumni? Hefty financial contributions? Is that a level playing field?"[22]

Zirkel referred to eliminating class ranking as a form of "gamesmanship." He offered a series of recommendations to the elite high schools if they wish to assist their students in being admitted to competitive colleges and universities:

1. Eliminate grade inflation. One benefit would be in the establishment of the valedictorian of the class or recognition of other high-achieving students "by not having the better students squeezed into the 4.0 ceiling, or breaking through into an infinite, or least indefinite, level above 4.0."
2. Raise actual student performance rather than grades.
3. Ensure grading is criterion-referenced, reflecting mastery of essential skills rather than the accumulation of time-based credits.
4. Tout high proportions of AP successes, National Merit Scholars, high-achieving students in higher education, and other recognized signs of academic quality, "thus providing a cumulative advantage for their college-bound graduates."

"Any way you slice it," Zirkel wrote, "using inflated grade point averages and dropping class rank is an ultimately self-defeating pretense that is even beyond 'no child left behind,' confusing the aspiration with the accomplishment that every child is at the top."[23]

Other commentators agree. Although abandoning class rank and the designation of a valedictorian may appear to be "a promising route for high schools to pursue," there are other considerations. "Ultimately, class rank matters. If a school district doesn't recognize class rank, it makes it harder for colleges and universities to arrive at decisions about applicants. Also, no matter how hard educators try to shelter students from the fact that we all have different strengths and weaknesses, students intuitively know simply from sitting in the classroom which kids are the smartest and work the hardest."[24] In all other endeavors, we recognize and reward skill, prowess, or superiority but appear reluctant to do this for superior academic achievement. "Depriving students of academic competition and distinction sends the wrong signal to our children."[25]

## CHILDHOOD OBESITY AND THE "COLA WARS": THE BATTLE OF THE BULGE CONTINUES

---

[22] Id.

[23] Id.

[24] "Valedictorians and Class Rank: Headed for Extinction?" *Parent Power!* Vol. 2, Issue 5 (June 2000).

[25] Id.

The **Quarterly Report** October-December: 2003 reported on the dilemma school districts are facing in attempts to reconcile the national concern over childhood obesity and the financial advantages of entering into exclusive sales contracts with major soft-drink companies. Although litigation is relatively sparse, there has been considerable State legislative action, albeit all of it to date unsuccessful in balancing the twin concerns of childhood obesity and school funding. Several school districts have elected to cancel their exclusive sales contracts or severely restrict access by students to the vending machines. This trend continues. However, Congress may soon be entering the fray**.**

***Congress Weighs In***

The U.S. General Accounting Office (GAO), the investigative arm for the U.S. Congress, released a report in April of 2004 with the somewhat unwieldy title "School Meal Programs: Competitive Foods Are Available in Many Schools; Actions Taken to Restrict Them Differ by State and Locality."[26] In the study, the GAO reported that over 15 percent of children and adolescents between the ages of six (6) and 19 are overweight, a threefold increase from the 1960s. There is a corresponding increase in the frequency of Type II diabetes. "Trends in obesity and a low level of physical activity among children and adolescents may be a major contributor to this increase." Id. at 1, 8. Because most children between these ages are in school for a large portion of the day, "providing children with healthy food options throughout the school day can be an important step toward good child nutrition." Id. at 1. "Schools are well positioned to positively influence what children eat and what they know about good nutrition..." Id. at 32. This implicates the National School Lunch and School Breakfast Programs that provide millions of meals a day to eligible children. Although the federal government has been active in providing nutritional meals, there is significant competition that is undermining the nutritional benefits intended.

> Despite these efforts to improve the nutritional quality of meals offered through the school meal programs, other foods not provided through these programs are often available to children at school through *à la carte* lines in the cafeteria where individual foods and beverages can be purchased, snack shops, school stores, vending machines, and other venues. The nutritional value of these foods, often referred to as "competitive foods,"[27] is largely unregulated by the federal government.

Id. at 2 (internal punctuation added). Regulations of the United States Department of Agriculture (USDA) require schools participating in the National School Lunch and School Breakfast Programs prohibit the sale of "foods of minimal nutritional value" (FMNV) during school meal periods. At

---

[26]The report (GAO-04-673) can be accessed online at www.gao.gov.

[27]The USDA defines "competitive foods" to include foods that are offered for sale at school (not including the National School Lunch and School Breakfast Programs). "Current federal regulations restrict a small subset of competitive foods in schools by prohibiting the sale of foods of minimal nutritional value (FMNV) in the food service areas during mealtimes." Id. at 7.

one time, the USDA prohibited the sale of FMNV anywhere on school grounds until after the last lunch period ended, but the Federal Court of Appeals for the District of Columbia struck down these regulations for exceeding the USDA's regulatory authority. National Soft Drink Association v. Block, 721 F.2d 1348 (D.C. Cir. 1983). The Court of Appeals determined the USDA's authority extended only to those foods sold in the cafeteria and other food service areas in the school during meal periods. GAO Report at 12.

Despite USDA efforts to influence school policy to create a "healthy school nutrition environment," Id., "competitive foods" continue to be available both within the cafeteria and food service areas and in various locations on school campuses as well. According to the GAO:

- In 2000, 83.4 percent of all schools offered, *à la carte*, food or beverages other than milk.
- *Á la carte* sales have increased significantly, especially in middle and secondary schools. Id. at 13. Small-scale research "suggests that the presence of competitive foods in schools is related to a decrease in fruit and vegetable consumption and an increase in calories obtained from fat." Id. at 20.
- Financial pressures are cited by school personnel as the principal reason for serving "less healthful *à la carte* items because these items generate needed revenue." Id. at 13. "School officials told us that they rely on revenue generated by vending and other sales to fund special projects." Id. at 17.

Although State-based legislative initiatives have not had an impact on the influence of "competitive foods" within the public school context,[28] individual school districts have undertaken efforts to restrict competitive foods, efforts that exceed existing federal and state requirements.

The largest school district in the country–the New York City Public School District–eliminated "candy, soda, and other snack foods from all vending machines," beginning with the 2003-2004 school year. "Vending machines on school grounds are now limited to selling water, low-fat snacks, and 100 percent fruit juices." Id. at 29. The Los Angeles Board of Education–the second largest school district–initiated "a soda vending ban that went into effect January 1, 2004. In addition, the board passed a ban on fried chips, candy, and other snack foods in school vending machines and school stores that will go into effect July 1, 2004." Id.

The GAO also listed several other school districts that are addressing this issue. The Vineland High School South (Pennsylvania) removed vending machines in January of 2004, replacing them with machines that sell only water and juice. Mundelein High School (Illinois) removed soda and candy from vending machines in August of 2003, and now offers juices and cereal bars. Riggs High School (South Dakota) Has removed all vending machines selling soda and snack food, while the Syracuse Junior High School (Utah) removed sodas and other FMNV items from its vending machines beginning in 2001. Id. at 27.

---

[28]The GAO did note that Washington and New Mexico recently passed legislation to create committees to develop policies to address competitive foods in the schools. Id. at 25.

The GAO report was requested by Sen. Tom Harkin (D-Iowa), the ranking member of the Senate Committee on agriculture, Nutrition, and Forestry. Congress has expressed concerns over the increased rates of obesity among school-aged children and the relationship to the increased availability within the schools of foods that are high in fat, salt, and sugar. "...Harkin and others have argued that federal regulation is necessary to ensure the $6 billion spent each year to subsidize school meals should not be compromised by the sale of 'less nutritious food elsewhere on school grounds."[29] House Democrats had introduced an amendment to regulate competitive foods when the House considered its school lunch bill earlier this year, but the amendment failed. "The Senate has until June 30 to pass its own school lunch bill, or programs will have to be re-extended in their current form."[30]

***Great Britain's "Ditch The Fizz" Study***

At the same time the GAO released its study, in part lamenting the lack of any "national data on the link between competitive foods in schools and child nutrition" other than a few, small-scale studies, GAO at 19, a study published by the British Medical Journal (BMJ) reported on a comprehensive study of 644 children ages 7-11 who participated in a 12-month program aimed at reducing consumption of carbonated drinks in order to determine whether such school-based programs could prevent excessive weight gain.

Entitled "Preventing childhood obesity by reducing consumption of carbonated drinks: cluster randomised controlled trial,"[31] the authors noted that previous programs promoting physical activity, modification of dietary intake, and reduction of sedentary behaviors proved less than effective. This included one initiative that promoted consumption of healthy foods such as vegetables. However, this did not affect obesity rates, which the authors described as reaching "epidemic proportions." BMJ at 1. Childhood obesity likely results from a number of reasons, but a "contributory factor seems to be the consumption of carbonated drinks sweetened with sugar." Id.

The program–which also encouraged the students to write songs extolling "Ditch the Fizz"–discouraged the consumption of sweetened and unsweetened "fizzy" drinks while encouraging a balanced, healthy diet (including the perceived intellectual benefits from drinking water). Id. at 1-2. "At the end of our 12-month study, both the intervention group and the control group showed a significant increase in consumption of water, in part related to the promotion of drinking water during school to 'improve concentration.'" Id. at 4. A measurable improvement was realized in the reduction of overweight or obese children even though the reduction in consumption was considered modest at less than a can of soda a day. This was the first study that addressed solely the consumption of carbonated drinks. "Most studies on obesity prevention in children have

---

[29]"Senate Democrats Looking to Control School Junk Food," *Education Daily* (April 27, 2004).

[30]Id.

[31]*British Medical Journal*, doi:10.1136/bmj.38077.458438.EE (James, Thomas, Cavan, Kerr), April 23, 2004.

been multifaceted," the authors reported. "[O]nly one school-based U.S. study has shown benefit for reducing obesity rates, although this was limited to girls and probably a consequence of watching less television." Id.

The authors warn that there is being created a "toxic environment" that involves "myriad factors increasing a child's risk of becoming overweight or obese." There are a number of "external influences on children's eating habits and leisure activities [that] need to be debated widely in society. For most people, obesity still remains preventable." Id.

The British Soft Drink Association was not impressed. In a statement, the association noted the study "reduced the average daily consumption of carbonated soft drinks by about 150 milliliters, or 35 calories–half the reduction was in diet carbonated soft drinks. This represents about two (2) percent of a child's calorie intake, not a significant amount."[32]

***Other School-Based Initiatives***

There are school districts in addition to those mentioned in the GAO report developing local policies and procedures to address the childhood obesity epidemic, although not without realizing some costs for doing so. The Chicago Public Schools, the nation's third-largest public school district, announced on April 20, 2004, that the school district would ban soft drinks, candy, and fat-laden snacks from school-based vending machines. Healthier offerings will be made available in an effort to promote healthy eating habits.[33] The school district presently has an exclusive contract with Atlanta-based soft-drink giant, Coco Cola. However, the contract will soon expire. Under the current contract, the school district receives 52 percent of the sales, estimated at about $4 million a year, while Coca Cola receives 48 percent of the sales.

In New Haven, Connecticut, the Nathan Hale School, a K-8 school, declared itself a "junk food-free school." Candy bars are not permitted. Vending machines do not carry soda–only water, milk, or juice.[34] Baked chips will replace fried ones; granola bars will replace cookies. Fried foods will be phased out gradually throughout the school system, including the high school. Cooking classes are being offered to parents and science classes include nutrition lessons. Even bake sales are being discouraged in favor of plant sales and "penny drives." But this is not without costs. "The junk

---

[32]"Anti-Soda Plan Appeared to Cut Obesity," *Associated Press* dispatch, *Indianapolis Star* (April 23, 2004).

[33]"Chicago Schools To Ban Soda, Candy," *Reuters* dispatch, reported via CNN.Com (April 20, 2004).

[34]"School Takes Aggressive Swipe at Obesity," *Associated Press* dispatch, reported via CNN.Com (April 28, 2004).

food and soda-stocked vending machines pull in up to $10,000 in extra income for some of the high schools each year, and some schools fear income won't be as high with healthier snack options."[35]

Six other Connecticut schools, with federal grant assistance, will join a junk food-free vending machine project next year. "We can't guarantee they won't lose money," according to Susan Fiore, a nutrition specialist with the Connecticut Department of Education. "But maybe the payoff is worth it. There's a lot of research out there that kids who eat better learn better, and that's a pretty easy sell."[36]

## DRIVER'S LICENSE SUSPENSION AND SCHOOL ATTENDANCE: ENCOURAGING THE "ROAD'S SCHOLAR"

In 1991, Indiana joined other States in enacting legislation that associated driving privileges with continued attendance in school. Under I.C. 9-24-2-1, a driver's license or a learner's permit cannot be issued to anyone under eighteen (18) years of age who is deemed a "habitual truant,"[37] has been suspended from school at least twice during the school year, has been expelled from school, or has withdrawn from school for reasons other than financial hardship (*i.e.*, dropped out of school or withdrawn to avoid an expulsion).[38] The student's principal is to notify the Bureau of Motor Vehicles (BMV) when a student is considered a habitual truant, is suspended or expelled from school, or has withdrawn for reasons other than financial hardship. I.C. 9-24-2-4. The BMV will invalidate the student's license or permit until the student is eighteen (18) years of age; for 120 days after the suspension or the end of the semester when the student returns to school, whichever is longer; or where the student's suspension or expulsion has been reversed. The invalidation is for the earliest time period of these three options.

The BMV will "revalidate" the student's license or permit if the student's principal is satisfied the student is enrolled in a full-time or part-time educational program and has participated in the program for 30 days or more.[39] I.C. 9-24-2-4(h). Should the principal decline to verify this information so the student's license or permit can be "revalidated," the student can appeal the principal's refused action to the local school board.

---

[35]Id.

[36]Id.

[37]See I.C. 20-8.1-3-17.2.

[38]The law also restricts the issuance of a driver's license or a learner's permit to students who have been adjudicated delinquent for committing certain enumerated offenses. These circumstances are not addressed in this article.

[39]There are several areas of ambiguity in the law. For instance, it is not clear whether the "30 days" refers to "instructional" or "calendar" days.

The State Attendance Officer[40] has posted forms for use by schools in reporting to the BMV the information necessary to invalidate or revalidate a student's driver's license or permit. These documents can be accessed under "Forms" through http://www.doe.state.in.us/sservices/sao.htm.

Although the law has been "on the books" for over a decade, there have been no reported cases involving student challenges to school-initiated invalidation or revalidation actions. In December of 2003, the Kentucky Supreme Court addressed a law similar to Indiana's.

D. F. v. Codell *et al.*, 127 S.W.3d 571 (Ky. 2003) involved a class-action suit challenging the constitutionality of a Kentucky statute that provided for the revocation of driving privileges for students who dropped out of school or were declared "academically deficient." The statute, passed originally in 1990, was known as the "no pass-no drive" law. The trial court struck down the statute as unconstitutional, but the Kentucky Court of Appeals reversed. The Kentucky Supreme Court, 4-3, reversed the appellate court, agreeing with the trial court that the law is unconstitutional.

The statute provides that when a 16- or 17-year-old student drops out of school or is declared to be academically deficient, the school is to notify the Transportation Cabinet of such students and report their social security numbers as well.[41] The Transportation Cabinet is then required to revoke or deny the student's license, permit, or privilege to operate a motor vehicle.127 S.W.3d at 574. The "no pass-no drive" law applies only to students in school districts that have State-approved alternative education programs. Students in schools without State-approved alternative education programs would not lose their driver's licenses should they drop out of school or be declared academically deficient. Id.

At the time the lawsuit was filed, a complaint had been filed with the U.S. Department of Education, alleging that the "no pass-no drive" law violated the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, as implemented through 34 C.F.R. Part 99.[42] The DOE found the law violated FERPA in several respects:

- The "no pass-no drive" law required impermissible disclosure of personally identifiable information from a student's educational record;[43] and

---

[40]This is an office created by statute. For the duties of the State Attendance Officer, see I.C. 20-8.1-3-16.

[41]Indiana law does not require the social security number to be reported. On the revalidation form, there is a blank for the student's social security number, but the form indicates that a student is not required to provide such information.

[42]The court refers to "DOE" as the investigating and reporting entity. It likely was the Family Policy Compliance Office (FPCO) of the U.S. Department of Education that conducted the investigation. See 20 U.S.C. § 1232g(g), 34 C.F.R. §§ 99.60-99.67.

[43]"Personally identifiable information" includes, *inter alia*, a student's name; a "personal identifier, such as the student's social security number or student number"; a "list of personal characteristics that would make the student's identity easily traceable"; or "[o]ther information that would

- The disclosure of personally identifiable information from an educational record occurred without the prior written consent of the student's parent or guardian.[44]

The Kentucky Department of Transportation attempted to comply with the DOE investigation by creating a waiver form, but the trial court determined that the change in procedure to require prior parental consent would not cure the equal protection and substantive due process concerns raised by the Plaintiff class. As noted *supra*, the Court of Appeals reversed, finding the law constitutional and the new waiver form an appropriate regulatory action. Id. at 574-75.

The court noted the "simple goal" of the 14th Amendment's Equal Protection Clause[45] is to prevent government from treating persons differently who are in all relevant respects alike. "But, as a practical matter, nearly all legislation differentiates in some manner between different classes of persons, and the Equal Protection Clause does not forbid such classifications *per se*." Id. at 575 (emphasis original). Where a law makes such distinctions, there are three levels of judicial scrutiny: strict scrutiny[46]; rational basis[47]; and intermediate or heightened scrutiny.[48] Id.

No "suspect class" or readily identifiable group who had been historically victimized are involved in the "no pass-no drive" law. As a result, the trial court employed the "rational basis" test, which the Kentucky Supreme Court approved. One thing the courts agreed upon was that "the right to an adequate education is a fundamental right under the Kentucky Constitution." Id. at 576.[49] The "no

---

make the student's identity easily traceable." 34 C.F.R. § 99.3.

[44]See 34 C.F.R. § 99.30.

[45]"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*." (Emphasis added.)

[46]This is the highest level of review. It applies to a statute that makes a classification on the basis of a "suspect class," such as race, or significantly interferes with the exercise of a fundamental right. To survive judicial scrutiny, the statute must be narrowly tailored to serve a compelling State interest.

[47]This form of analysis applies where a statute does not create a "suspect class" but merely affects social or economic policy. To be constitutional, the statute needs to bear a rational relationship to a legitimate State end.

[48]This form of judicial review is, as it indicates, somewhere between "strict scrutiny" and "rational basis scrutiny." It is seldom used. It is applied where legislation creates irrational discrimination against a group that has been historically victimized but is not a "suspect class" (i.e., women). To survive this review, the statute must be "substantially related" to a legitimate State interest.

[49]Sec. 183 of the Kentucky Constitution provides: "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State." For Indiana's

pass-no drive" law itself "does not infringe on any student's fundamental right to an adequate education" but it does violate the students' right to equal protection under the law. The "fundamental right to an education includes the right to the equal opportunity to achieve academic success. But it includes no guarantee of success itself." Id. In short, the statute itself does not prevent a student seizing "the opportunity to learn and better himself or herself." Id. at 577.

However, the presence or absence of an alternative educational program as the triggering cause for the driving sanctions bears "no nexus between the classification made in the statute and the asserted purpose of the law," which is to encourage students to stay in school. Id. at 577-78. There is no "rational basis for using the existence of an alternative education program as the basis for classifying which students are subject to having their driver's licenses revoked or denied." This violates the students' "rights to equal protection under the law and, therefore, we hold that the statute is unconstitutional." Id at 578.

The Kentucky Supreme Court was not quibbling with the underlying purpose of the law–to encourage students to remain in school. The West Virginia Supreme Court of Appeals did have to address whether such a purpose did further a State's interest in providing an adequate education to its citizens.

In Means v. Sidiropolis, 401 S.E.2d 447 (W. Va. 1990), the student withdrew from school. Because he was under the age of 18, his driver's license was suspended. Under West Virginia law passed in 1988, a driver's license would be denied to any person under the age of eighteen who does not at the time of application have a diploma or other certificate of graduation, is not presently enrolled in school or working towards a General Educational Development (GED) certificate, or who has been excused from school attendance due to circumstances beyond the student's control (*e.g.,* similar to Indiana's "financial hardship" exception). The student argued that because he was over the age of sixteen years (the age limitation in West Virginia's compulsory attendance law at the time), he had left school lawfully. 401 S.E.2d at 448-49. The trial court found the State could condition the privilege of possessing a driver's license by a person under eighteen years of age with continued enrollment in some form of secondary education. Id. at 450.

The West Virginia Supreme Court of Appeals agreed with the trial court that the law itself–and its underlying purpose–was constitutional. However, there were due process lapses that resulted in a partial reversal. Whether a student's withdrawal from school was due to circumstances beyond his control is to be decided by the local school officials who are to be the "sole judge" as to whether such withdrawal is due to circumstances beyond the control of such person." Id.[50]

---

provision, see Article VIII, Sec. 1.

[50]Indiana does not use this terminology, but it does place the responsibility on the principal for determining whether a student's withdrawal prior to age 18 is for "financial hardship," the sole criterion. See I.C. 9-24-2-1(b).

The court acknowledged the student had a compelling argument that the law may be unconstitutional "because the means chosen by the legislature (namely forfeiture of a driver's license when a teenager voluntarily leaves school) to effect the legitimate public purpose of encouraging school attendance is not reasonably related to the end sought to be achieved." That is, "...if what the legislature wants is mandatory school attendance until the age of eighteen, the appropriate means to achieve that end is to amend [the State's compulsory attendance law] to require compulsory attendance through the age of eighteen." Id. However, this argument "makes sense as debating society logic" and does not serve as legally sufficient argument. Id. at 452.

> Further reflection instructed by an understanding of human nature, however, leads us to conclude that the legislature's selected method of encouraging education is not sufficiently irrational as to confound informed notions of substantive due process.

Id. The court added that students between sixteen and eighteen years of age "are not entitled to regular, unconditional drivers' licenses." Rather, their drivers' licenses are probationary.

> Sixteen-year-old drivers have by far the worst driving record of any age group, and it is their youth, not their lack of driving experience, which makes them dangerous. Thus, at the simplest level, a child who has a driver's license but is not meaningfully employed during the day by attending school or working at a serious job, has a higher likelihood than children so occupied of being out and about making mischief with his or her car. Indeed, the children who withdraw from school because of circumstances beyond their control are not necessarily any more irresponsible than other teenagers. But a child who has an opportunity to go to school and deliberately chooses not to avail himself or herself of such opportunity, demonstrates a general lack of responsibility.

Id. The court also recognized that "mandatory attendance is not necessarily the best way of effecting the goal of better education," adding that sometimes "stay-ins pose a greater threat to our nation's education than drop-outs." Their lack of interest in education often translates to disruption. "Keeping them in school will not educate them, but only allow them to hinder the efforts of students who do want to learn." Id. West Virginia law allows a student who turns sixteen years of age and dislikes school to withdraw, as the Plaintiff did in this case. Where the withdrawal is by mutual consent between the student and the school, State law permits a waiver of the license revocation action. "This permits the peaceful departure of those students who will profit not at all from continuing formal education, allowing, then, the schools to protect from disruptive influences the students who want to learn." Id. But this is not true of all students. "These children, often from peer pressure and immaturity, would throw away their opportunities in life if the legislature did not balance negative peer pressure with the positive incentive of conditioning their junior [probationary] operator's license upon continued school attendance. We cannot quarrel with the fact that the legislature has chosen to achieve its laudatory goal through the use of a rapier rather than through the use of a cudgel." Id. at 452-53.

But the court also acknowledged that "the U.S. Supreme Court [has] decided that possession of a driver's license constitutes a protectable property interest and that the state's suspension or revocation of a license implicates due process rights." Id. at 450, citing Mackey v. Montrym, 443 U.S. 1, 99 S. Ct. 2612 (1979). In this case, the appropriate school official, who is the "sole judge" for this purpose, never determined whether Plaintiff's withdrawal from school was due to circumstances beyond his control. The State's Department of Motor Vehicles (DMV) did conduct a hearing, but its hearing process is limited to establishing certain "bookkeeping" facts. The DMV does not have the authority to determine the Plaintiff's reasons for withdrawing from school, and did not have administrative appellate jurisdiction over the school's determination in this regard, had the school made such a determination.[51]

The DMV "performs nothing but a non-discretionary, administrative function." Because of this, in future cases similar to this one, the DMV should:

- Inform the student at the time DMV notifies him that his license will be suspended that he has a right to a hearing before the appropriate school official;
- Inform the student of the procedures he must take to avail himself of the hearing mechanism; and
- Inform the student that should he wish to contest issues of improper identity, incorrect age, or some other "bookkeeping error," then the hearing would be conducted by the DMV.

Id. at 453. Two justices dissented, arguing the law is unconstitutional in several respects, notably in the procedural due process aspects that permit school officials to be the "sole judge" of the critical factor as to whether the student withdrew from school based on circumstances beyond his control. Ironically, the dissent relied upon the Kentucky law found unconstitutional for other reasons in D.F. v. Codell, *supra*. Id. at 454-55.

## COURT JESTERS: HORSE FEATHERS![52]

---

[51]Indiana's law also limits its BMV hearing process where a minor's driver's license or learner's permit has been suspended to whether the information supplied by the school is "technically incorrect" or the BMV "committed a technical or procedural error," such as notifying the wrong student of a pending invalidation. See I.C. 9-24-2-1(c).

[52]A well known interjection for "nonsense," "foolishness," and "buncombe," *Horse Feathers* is also a euphemism for a vulgar expression that also begins with "horse." It is also an expression of the view that something is highly improbable or unlikely, similar to "when pigs can fly." Although no one knows when the expression became widely used, it was first published in a magazine in 1928. It was popularized by the Marx brothers (Groucho, Chico, Harpo, and Zeppo–the fun-loving Marxists) in the 1932 theatrical release "Horse Feathers," where Groucho played Professor Quincy Adams Wagstaff, the newly installed president of Huxley College who plots to beat rival Darwin College in a football game.

The citizens of the Commonwealth of Kentucky are serious about their horses. Their unbridled enthusiasm for equines is matched only by their resolve not to have their enjoyment of same saddled by governmental regulation. Such is the backdrop for R.J.Stevens *et al.* v. City of Louisville, 511 S.W.2d 228 (Ky. App. 1974).

In Stevens, the plaintiffs challenged a city ordinance that would have prohibited horseback riding upon the public ways and public property, except where bridle paths were established for this purpose or where riders are riding in recognized horse shows or civic events. Plaintiffs raised four major legal arguments, including one that asserted "[t]he city does not have a right to stop a lawful activity which is not a nuisance per se[.]"[53] Counsel for the plaintiffs did not stick to his "mane" argument but trotted to a different pace. His untethered arguments bordered on the facetious.

> [Because the ordinance applies only to horses,] [w]e, therefore, assume that kangaroo riders can employ bridle paths for their purposes but horse riders cannot. An elephant can be ridden on the bridle path, but a horse cannot. If a tiger could be trained, it could be ridden. Is a donkey or a jackass a horse? What about a mule? Does this relate to live horses only or does it forbid a child rocking on a hobbyhorse?... The ordinance forbids none of these but only relates to the valiant steed who is such a major part of Kentucky's heritage.... If a horse rider cannot ride his horse but can ride an animal which is not legally a horse, but is similar to a horse, then the ordinance discriminates against not only the horse but the horse rider....
>
> Saddling the descendents [sic] of Pegasus, Man O' War, Traveler, Silver, Dan Patch, Widow Maker, Trigger, Champion, Black Beauty, Bucephalus, Rosinante and Black Bess, to name only a few, with this asinine canon is to denigrate the legacy of the courser and the charger, the gigster and the stepper, the hunter and the racer, the clipper and the cob, the padnag and the palfrey, and capitulate at last to the gasoline-powered conveyance which has contributed little to our history but much to our ecological turning point.

511 S.W.2d at 229-230. The Kentucky Court of Appeals had no difficulties in finding the ordinance at issue to be a valid governmental regulation. However, the appellate court justices did note that the ordinance did not define "horse," which means that the "term is therefore subject to judicial interpretation." Id. at 230.

To do so, the appellate court resorted to an unusual precedent: an entirely fictitious case from Canada**.**

> The extent to which the term "horse" could possibly be extended to other animals by statutory construction and thus allay the fears of appellants that kangaroo and

[53]Plaintiffs' attorney obviously never participated in a marching band stuck behind the Shrine Horse Patrol.

> elephant riders may go unpunished under the ordinance and that donkeys, mules, jackasses and hobbyhorses may not be horses in the legal sense is aptly illustrated in Regina v. Ojibway, 8 *Criminal Law Quarterly* 137 (Toronto 1965) in which the question presented was whether a pony was a small bird under the provisions of the Small Birds Act.[54]

Id. In Ojibway, the Crown appealed from a decision in favor of Fred Ojibway, who had been acquitted of the charge of violating the Small Birds Act. Ojibway had been riding his pony through the Queen's Park. He had to hock his saddle so he used a downy pillow in its stead. The pony broke its leg during this misadventure, requiring Ojibway to shoot "the pony to relieve it of its awkwardness." He was charged for violating the Small Birds Act, which provides in relevant part, "Anyone maiming, injuring or killing small birds is guilty of an offense and subject to a fine not in excess of two hundred dollars." The magistrate acquitted Ojibway, finding that he had killed his horse and not a small bird. On appeal, the magistrate was reversed.

In a decision authored by "Blue, J."[55] the court, employing impressive legal reasoning,[56] determined that the pony was, in fact, a bird. First, the Small Birds Act defined a "bird" as "a two-legged animal covered with feathers." Although Ojibway presented testimony from an expert witness that the animal was a pony and not a bird, the court found that "this is not the issue. We are not interested in whether the animal in question is a bird or not in *fact*, but whether it is one in *law*. Statutory interpretation has forced many a horse to eat birdseed for the rest of its life." Id. (emphasis added).
The court also addressed Ojibway's argument that "the neighing noise emitted by the animal could not possibly be produced by a bird." The judges were neigh-sayers on this point of law as well. "With respect, the sounds emitted by an animal are irrelevant to its nature, for a bird is no less a bird because it is silent." Id.

Undeterred, Ojibway also argued that since the evidence demonstrated he rode the animal, "this pointed to the fact that it could not be a bird but was actually a pony." This "avoids the issue," the court rejoined. "The issue is not whether the animal was ridden or not, but whether it was shot or not, for to ride a pony or a bird is of no offense at all. I believe that counsel now sees his mistake." Id.

Apparently not. Counsel for Ojibway noted the animal had iron shoes, which must "decisively disqualify it from being a bird." The court was unpersuaded. "I must inform counsel...that how an animal dresses is of no concern to this court." Id. at 231.

---

[54]The court acknowledged the case "is entirely fictional" and that is was originally published in the *Criminal Law Quarterly* (1966). Id. at 230, *n.* 1.

[55]Get it?

[56]"Legal reasoning" is a type of oxymoron, similar to "political courage" and "journalistic integrity."

The court then explained its rationale. The Small Birds Act defines all two-legged, feather-covered animals as birds. "This, of course, does not imply that only two-legged animals qualify, for the legislative intent is to make two legs merely the minimum requirement." The statute in question, then, "contemplated multi-legged animals with feathers..." The statute does not qualify the "feathers" aspect of the legislation as limited to small animals "naturally covered" with feathers. "[H]ad this been the intention of the legislature, I am certain that the phrase 'naturally covered' would have been expressly inserted just as 'Long' was inserted in the Longshoreman's Act." Id.

"Therefore, a horse with feathers on its back must be deemed for the purposes of this Act to be a bird, and *a fortiori*, a pony with feathers on its back is a small bird." Id. Ojibway's counsel posed one last questions: "If the pillow had been removed prior to the shooting, would the animal still be a bird?"

The court recognized and sidestepped the logic trap. "To this let me answer rhetorically: Is a bird any less of a bird without its feathers?" Id.

As to the Stevens dispute, the Kentucky court declined to address whether the Louisville ordinance also restricted riders of mules, goats, cattle or other animals because the question as to whether these other animals meet the definition of "horse" was not "squarely presented" to the court. Those animals, the court mused, are, for the time being, horses of a different color.

## QUOTABLE . . .

> It is the nature of criticism that few welcome it and even fewer recognize it as justified. Nevertheless, receiving criticism–even unjust criticism–with grace is part of the job of being a public servant, and if unhappiness with criticism causes job disruption, this may be the fault of these being criticized rather than those doing the criticizing.
>
> Circuit Court Judge Alex Kozinski, Settlegoode v. Portland Public Schools, *et al.*, 362 F.3d 1118, 1127, *n.* 7 (9th Cir. 2004).

## UPDATES

### *Military Recruiters*

In "Military Recruiters and Educational Records," **Quarterly Report** January-March: 2002, isolated provisions in the expansive No Child Left Behind Act of 2001 (NCLB) were discussed, especially 20 U.S.C. § 7908, which is intended to provide greater access to high school students' names, addresses, and telephone numbers by recruiters for the armed forces. This NCLB provision affects the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g as implemented through 34 C.F.R. Part 99, which is designed to protect the confidentiality of "personally identifiable information" with respect to a student's educational record by preventing disclosure to third parties without first obtaining the written permission of the parent (or the student, if the student is at least 18 years of age).[57] "Directory information" can be disclosed to third parties without prior consent.

"Directory information" is information "that would not generally be considered harmful or an invasion of privacy if disclosed." §99.3. "Personally identifiable information" is "information that would make the student's identity easily traceable." §99.3. This would include "[t]he student's name...[or] the address of the student or student's family." Oddly enough, "directory information" includes "the student's name, address, [and] telephone listing..." Id.[58] The NCLB requires public school districts and private schools receiving federal financial assistance under the NCLB to "provide military recruiters the same access to secondary school students as is provided generally to post-secondary educational institutions or to prospective employers of those students." However, a student or the student's parent may request that this information "not be released without prior written parental consent." Affected schools are to notify parents and students of this option.[59]

Similar language was included in the National Defense Authorization Act for Fiscal Year 2002. "Typically, recruiters are requesting information on junior and senior high school students that will be used for recruiting purposes and college scholarships offered by the military," the Family Policy Compliance Office (FPCO) wrote in a memo released on April 10, 2002, explaining changes to FERPA and the Protection of Pupil Rights Act (PPRA), 20 U.S.C. § 1232h, occasioned by the NCLB.

During the 2000 session of the Indiana General Assembly, the Access to High School Student Information by Military Organizations Act was passed (P.L. 81-2000, adding I.C. 20-10.1-29 *et seq.*

---

[57]There are a number of exceptions to the general requirement that written consent must be first obtained. These are found at 34 CFR §99.31(a).

[58]This cross-over of identical items in the definitions for "directory information" and "personally identifiable information" has caused problems. See, for example, Palmyra Area Sch. Dist. v. Palmyra Area Education Assoc., 644 A.2d 267 (Pa. Cmwlth. 1994), where the school district, by policy, declared names and addresses of parents and guardians to be "personally identifiable information" and not "directory," but the bargaining unit used a mailing list obtained from teachers to send copies of its newsletter to the parents and guardians.

[59]These requirements do not apply to a private secondary school "that maintains a religious objection to service in the Armed Forces if the objection is verifiable through the corporate or other organizational documents or materials of that school."

to the Indiana Code). Unlike the NCLB, the Indiana law is directed only to public schools. It declares that a student's name, address, and telephone number (if listed or otherwise published) will be considered "directory information," and that military recruiters are entitled to access to the high school campus and the "directory information" in order to inform "students of educational and career opportunities available in the armed forces...." This was subject to the right of the student or the student's parent to submit "a signed, written request to a high school at the end of the student's sophomore year that indicates the student or the parent...does not want the student's directory information to be provided" to a military recruiter. A school must notify parents and students of the this option and comply with this request.

Although the state law attempted to define "directory information" and permit greater access, public schools expressed concern that the state law did not satisfy the requirements of FERPA. At issue was 34 CFR §99.37.

Under §99.37, a public school may disclose "directory information" without first obtaining written and dated permission from a parent or eligible student; however, the public school must first provide public notice to parents of students in attendance at the public school or eligible students in attendance at the public school of the following:

- The types of "personally identifiable information" the public school has designated as "directory information" (in this case, the student's name, address, and telephone number);

- The right of a parent or eligible student to refuse to let the public school release such "directory information"; and

- The period of time within which a parent or eligible student has to notify the public school, in writing, that he or she does not authorize the release of such information about the student.

Although the Indiana law, at I.C. 20-10.1-29-3(b), has a provision similar to §99.37(a)(2),(3) that permits a parent, guardian, or custodian of a student to submit to a public high school a signed, written request at the end of a student's sophomore year that such "student directory information" not be released to military recruiters, FERPA requires that notice of this right—which is broader than that provided by the Indiana law—be provided in advance of releasing such information without regard to what year in school the student is enrolled or has completed. The NCLB language does not contain the "sophomore year" restriction either.[60]

---

[60]Written consent permitting disclosure must be dated, specify the records that may be disclosed, the purpose of the disclosure, and the identity of the party or class of parties to whom the disclosure may be made. §99.30(a),(b). However, the right to refuse disclosure of "directory information" does not require the same specifications. The affected school is to notify parents and students of the right to refuse to permit disclosure and must indicate the "period of time within which a parent or eligible student has to notify the agency...in writing that he or she does not want any or all of those types of information about the student designated as directory information." §99.37(a)(2), (3).

The effect of the NCLB language would be that a student's name, address, and telephone listing are, by law and for this purpose, "directory information," and that parents or students who do not wish to have such "directory information" provided to military recruiters will need to indicate such a reservation in writing.

These legislative attempts to provide preferential access to such information by military recruiters were likely to generate litigation. The first such case has been reported.

In Forum for Academic and Institutional Rights, Inc., *et al.* v. Rumsfeld, 291 F.Supp.2d 269 (D. N.J. 2003), the federal district court was required to address a long-festering dispute between law schools and the Department of Defense. The dispute centers around the so-called Solomon Amendment, a federal statute that allows the U.S. Secretary of Defense to deny federal funding to institutions of higher education that prohibit or effectively prevent on-campus recruiting.[61] The plaintiffs are mostly law schools and law school faculty. They object to on-campus recruiting by the military because the military, in their view, discriminates on the basis of sexual orientation.[62] Nearly every law school has a non-discrimination policy that prohibits discrimination on the basis of sexual orientation, as well as certain other categories. The law schools also attempt to teach their respective students certain core values, including tolerance. The plaintiffs argued the Solomon Amendment is unconstitutional because it conditions a benefit (federal funding) on the surrendering of the law schools' First Amendment rights of academic freedom, free speech, and freedom of expressive association; discriminates on the basis of viewpoint by punishing those schools that exclude the military recruiters because they object to the military's policy regarding homosexual conduct; and violates the void-for-vagueness doctrine because there are insufficient guidelines such that military officials have unbridled discretion to decide which institutions to target and what acts or omissions will constitute non-compliance with the Solomon Amendment. 291 F.Supp.2d at 274-75

As the court noted, there has been a long-standing friction between military recruiters and post-secondary schools. Congressional actions in the 1960s and 1970s were designed to remove such barriers to recruitment efforts. "The apparent impetus for the Solomon Amendment was the continued refusal of many educational institutions to allow the military to engage in on-campus recruiting." Id. at 278. As of 1997, the Solomon Amendment provided that a "covered education entity" that prevented access to military recruiters to campuses, students or student information risked losing not only Department of Defense (DOD) funding but virtually all federal funding, including funding through the U.S. Department of Education. Id. at 279.[63]

---

[61]This is an additional avenue for access to students by military recruiters. This statute is found at 10 U.S.C. § 983(b).

[62]The military's prohibition against homosexual conduct is codified at 10 U.S.C. § 654.

[63]Like the NCLB version, the Solomon Amendment contains exclusions or exemptions from compliance, notably for those schools with "a long-standing, religious-based policy of pacifism." 10 U.S.C. § 983(c). Also exempted are those schools that prohibit all potential employers from on-campus recruitment activities. Military recruiters are seeking the same level of access as other potential

Prior to 2001, a number of law schools engaged in "ameliorative measures" as a means of accommodating the presence of military recruiters so as to satisfy the letter of the Solomon Amendment but otherwise maintained some barriers. Some of these measures included:

- Permitting the military to recruit on campus, but refusing to schedule student interviews;
- Permitting the use of university facilities for military recruitment purposes but not law school facilities;
- Permitting military recruiters on-campus but keeping military recruitment literature separate from career services offices and arranging interviews through the dean's office.
- Permitting military recruiters on campus and permitting access to students and student directory information, but excluding military recruiters from school-sponsored off-campus interview programs.

Although little dissatisfaction with these measures was expressed prior to 2001, "in or about 2001, the military began to express dissatisfaction with the law schools." The DOD expressed its belief that the law schools were not complying with the Solomon Amendment and threatened them with the loss of federal funding. Id. at 281-83.

Plaintiffs sought to enjoin the DOD's enforcement of the Solomon Amendment, claiming its enforcement would be an unconstitutional infringement of their First Amendment rights (academic freedom, freedom of expressive association, and free speech). They also asserted the enforcement discriminates on the basis of viewpoint, and the Solomon Amendment and its implementing regulations are void for vagueness. The DOD represented the Solomon Amendment was within the broad power of Congress under the Spending Clause and its constitutional mandate to raise and support armies.[64] "The salient issue, then," the court wrote, "is whether Congress has rightly exercised its broad power under the Spending Clause to achieve the policy objective of maintaining an effective military through on-campus recruiting efforts." Id. at 299.

The court determined the Solomon Amendment does not directly target any speech, protected or otherwise, and does not discriminate on the basis of viewpoint. It is not designed or applied in such a fashion as to suppress ideas thought to be inimical to the government's own interests. Id. at 299-300. In order to find that an unconstitutional condition exists, there must be a relinquishment of a constitutional right. "In other words, the Solomon Amendment, as an exercise of the congressional spending power, will not create an unconstitutional condition unless the alleged infringement on Plaintiffs' First Amendment interests rises to the level of a constitutional violation." Id. at 301. Although the Plaintiffs represented the law school's non-discrimination policy (and its application to employer recruiting) had pedagogical value in that the policy promotes "free and open discourse" in a nurturing environment, and that the DOD's application of the Solomon Amendment essentially dictated the law school's curriculum choices, the court disagreed. "An educational institution should not be able to erect an insurmountable or impenetrable wall against opposing public interests.

---

employers. 32 C.F.R. § 216.4(c)(3).

[64]Both the Spending Clause and the mandate to raise and support armies appear in the U.S. Constitution at Article I, § 8.

Rather, the interests of educational institutions to shape their own pedagogical environments must be considered in proper context and not in disregard of any controlling facts or competing interests." Id. at 302.

There appears to be little distinction among the Plaintiffs' First Amendment concerns. "The concept of academic freedom seems to be inseparable from the related speech and associational rights that attach to any expressive organization or entity." Id.

> The Solomon Amendment, on its face, does not interfere with academic discourse by condemning or silencing a particular ideology or point of view. While the Solomon Amendment undoubtedly interferes with law school recruiting policies, the effect on speech and associational rights is more attenuated than in the [reported] cases [on this issue]. Thus, notwithstanding the broad acknowledgment of the constitutional importance of academic freedom, those cases fail to provide the Court with an independent path to review an alleged infringement on the right to academic freedom; which is to say, without reference to the related and attendant rights of free expression.

Id. at 302-03. An "expressive association" claim is subject to the three-part test established by the U.S. Supreme Court in Boy Scouts of America v. Dale, 530 U.S. 640, 648, 120 S. Ct. 2446 (2000).

1. Are the Plaintiffs Engaged in "expressive association"?

2. Does the governmental action at issue significantly affect the Plaintiffs' ability to advocate public or private viewpoints? and

3. Is the governmental interest implicated outweighed by the right to associational expression such that any burden imposed is justified?

"Expressive activity" is rather broadly defined. "A group must merely engage in some form of expression, whether it be public or private, that could be impaired in order to be entitled to protection." 291 F.Supp.2d at 303. Given this relatively low threshold, "there appears to be no doubt that the law schools qualify as expressive associations entitled to constitutional protection." Id. However, the "forced inclusion on [a law school] campus of an unwanted periodic visitor" does not compel any speech or suppress any speech the law schools may wish to express. Id. at 304-05. The presence of military recruiters does not dilute the law schools' message of tolerance and diversity. The military recruiters are present only on a periodic basis and do not seek to be members of the law school community. "He or she is a visitor, and, in fact, a periodic visitor among many competing visitors.... [H]e or she does little to compromise the free speech and expressive association rights of the law schools. " Id. at 305. There "is no realistic danger" that the law schools' ability to disseminate its message is any way hampered. "On the contrary, the message of non-discrimination is at the heart of the annual controversy, and is therefore replayed and re-endorsed every time there is a controversy on any law school campus." Id. at 306.

Likewise, "[t]here is nothing in the record to indicate that the Solomon Amendment requires law schools to speak, in the linguistic or verbal sense, on behalf of the military recruiters or the military's alleged recruiting message." Id. Military recruiting efforts are not "an inherently expressive activity." Id. at 307. "[A] recruiting function does not proclaim an overall message which could be destroyed by the presence of an individual recruiter, especially where disclaimers can expressly disavow any ideological connection to that recruiter." Id. at 308. The law schools are not being compelled to endorse any "speech." "The Court believes that the law schools' actions in assisting military recruiters are insufficiently imbued with elements of communication to require the protection of the First Amendment. The Solomon Amendment does not compel law schools to say anything." Id. at 309. "Facilitating interviews and even disseminating recruiting literature on behalf of military recruiters, when a law school does all these things for every other potential employer in the context of a large recruiting function, are not obvious endorsements of a particular ideological point of view." Id. at 310.

Although it was unnecessary to analyze the Plaintiffs' argument under the third part of the Dale test, the federal district court judge decided to do so. The "balance of interests" analysis utilizes three levels of scrutiny that can be applied. Under a "heightened level of scrutiny," the governmental action must directly affect the groups' associational activities. The court had already found that the Solomon Amendment did not do so. Hence, "heightened scrutiny" does not apply. Id. An "intermediate level" applies where the governmental action "has only an incidental effect on the right to free expression." A substantial amount of government action can be characterized as having some indirect effect on First Amendment interests; however, "indirect and attenuated effects on expression do not rise to the level of a constitutional violation." Because the Solomon Amendment is not a direct regulation of protected speech but does have an incidental effect on associational rights, intermediate scrutiny is the appropriate analysis. Id. at 311. The test to be employed would be a "medium scrutiny test" because the governmental action has an incidental effect on the right to free expression. Id.

"It is well established that the government may constitutionally regulate conduct even if such regulation entails an incidental limitation on speech." Id. at 312, citing U.S. v. O'Brien, 391 U.S. 367, 375, 88 S. Ct. 1673 (1968). A governmental regulation is sufficiently justified where (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Id. There is no question that Congress has the authority to raise and support armies and that this is a substantial governmental interest; that the Solomon Amendment furthers this substantial governmental interest; that the presence of periodic military recruiters on campus does not compel or suppress speech; and any restriction on First Amendment rights is incidental and no more than is essential to further the governmental interest. Id. at 312-13. "Moreover, as previously stated, the Solomon Amendment is not a regulatory restriction; educational institutions remain free to reject military recruiters. But if educational institutions desire the assistance of federal funding, they must allow the military to fulfill its congressional directive 'to conduct intensive recruiting campaigns to obtain enlistments.' 10 U.S.C. § 503(a). More importantly, these institutions remain free to voice objections to the military and its

internal policies and to take ameliorative actions to distance themselves from the military's discriminatory policy." Id. at 313.

### *Evacuation Procedures*

Schools are abundantly aware of the need for emergency preparedness in order to address natural or man-made occurrences. Some preparations involve alterations to the physical plant, such as the installation of appropriate warning systems or the posting of evacuation routes. With the increased concern for man-made disasters, emergency preparedness has evolved to include crisis intervention. Indiana requires accredited schools to have emergency preparedness and crisis intervention plans that involve, *inter alia*, coordination with other local agencies; training for staff and students; procedures for the safe, orderly evacuation of buildings; procedures to address chemical contamination; and measures for ensuring student safety during intruder alerts.[65]

While many of the emergency preparedness measures address general population concerns, there are special circumstances that must be addressed as well. Such special circumstances involve students and staff who are wheelchair users or have other mobility impairments or limited ambulatory functions. For students with disabilities, each public agency is required to have "provisions for warning and evacuating students whose disabilities require special warning or evacuation procedures." 511 IAC 7-21-5(b). Several complaint investigations through the Department of Education's Division of Exceptional Learners and Letters of Finding (LOFs) from the U.S. Department of Education's Office for Civil Rights (OCR) have been previously reported.[66]

1. In Complaint No. 2067.04,[67] four students who were wheelchair users attended a large elementary school. The school did have accessible entrances and exits, but some of them were closed, including the main entrance, while the school was being renovated. There were also four modular buildings. Two of the students had Individualized Education Programs (IEPs) that indicated their educational placements were "full-time inclusion." However, the students' actual programs resulted in certain "pull out" activities for the provision of certain services, including certain health care services. Paraprofessionals working with the students were not adequately trained in the students' respective needs. The school's emergency

---

[65]The State Board of Education's rule can be found at 511 IAC 6.1-2-2.5. See "Emergency Preparedness and Crisis Intervention," **Quarterly Report** October-December: 1998.

[66]See "Evacuation Procedures: Students with Disabilities," **Quarterly Report** October-December: 1998.

[67]Complaint investigations are conducted where there is an allegation that a public agency is not complying with the requirements of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, 34 C.F.R. Part 300, or its State counterpart, 511 IAC 7-17 *et seq.* ("Article 7"). The investigations are conducted pursuant to 511 IAC 7-30-2, as authorized under IDEA's regulations at 34 C.F.R. §§ 300.660-300.662.

preparedness plan, especially with regard to fire and tornado drills, did not contain instructions for evacuating students with mobility impairments, including students who were wheelchair users. Because the school did not have such plans in place for these students, nor were there individualized plans so that trained personnel would even know where the students were during the school day should a drill or actual emergency arise, the school was determined to be out of compliance with 511 IAC 7-21-5(b). The school was required to prepare and implement the requisite warning and evacuation plans for the students.

2. Belpre (Ohio) City School District, 40 IDELR 268 (OCR 2003) originally involved a number of accessibility and accommodations issues under the non-discrimination provisions of Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act (ADA) of 1990. All issues were resolved between OCR and the School District save one: whether the School had an adequate emergency evacuation plan for persons with mobility impairments for the second floor of the Belpre Middle School. The complainant acknowledged the middle school had a wheelchair lift to provide access to the second floor for persons with mobility impairments; however, the complainant said the middle school had no signage on the second floor instructing where an individual using a wheelchair would go to leave the building in case of an emergency. OCR, in its investigation, noted that it interprets the accessibility requirements of the ADA "to require that public school districts make reasonable modifications to emergency evacuation plans and procedures, as necessary, to render the plans and procedures effective for the evacuation of disabled individuals from district facilities." In this case, the School District "installed an emergency removal chair near a staircase on the second floor of the middle school building to provide an additional means of egress from the second floor in case of emergency." A person with a mobility impairment could also use the wheelchair lift located at the opposite stairwell. This lift can be manually operated should there be a power failure. At the time of the investigation, there was one student in the middle school who was a wheelchair user. There were eight (8) staff members trained to use the evacuation devices. The staff members trained included teachers and paraprofessionals whose classrooms were located near the evacuation devices. The School District had also issued written directions to all staff. "The memorandum indicates that in emergency situations, students requiring special assistance to leave the building will be taken to the stairwell where the emergency evacuation mechanism is located." Based on its investigation, OCR concluded the School District was in compliance with federal law. "Contrary to the allegation, an adequate emergency evacuation plan for persons with mobility impairments is available for the second floor of the Belpre Middle School."

Date: _____

_____
Kevin C. McDowell, General Counsel
Indiana Department of Education

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/>.

**Policy Notification Statement**

It is the policy of the Indiana Department of Education not to discriminate on the basis of race, color, religion, sex, national origin, age, or disability, in its programs, activities, or employment policies as required by the Indiana Civil Rights Law (I.C. § 22-9-1), Title VI and VII (Civil Rights Act of 1964), the Equal Pay Act of 1973, Title IX (Educational Amendments), Section 504 (Rehabilitation Act of 1973), and the Americans with Disabilities Act (42 U.S.C.§ 12101, *et seq*.).

Inquiries regarding compliance by the Indiana Department of Education with Title IX and other civil rights laws may be directed to the Human Resources Director, Indiana Department of Education, Room 229, State House, Indianapolis, IN 46204-2798, or by telephone to 317-232-6610, or the Director of the Office for Civil Rights, U.S. Department of Education, 111 North Canal Street, Suite 1053, Chicago, IL 60606-7204

# Index for Quarterly Report
# Through January – March: 2004

Legend

J-M (January-March)
A-J (April-June)
J-S (July-September)
O-D (October-December)


Access to Public Records and Statewide Assessment . . . . . (A-J: 98, J-S: 98)
Administrative Procedures: Extensions of Time . . . . . (J-S: 96)
Age Discrimination, School Bus Drivers . . . . . (O-D: 98)
Athletic Conferences, Constitutional Rights, and Undue Influence . . . . . (A-J: 01, O-D: 01)
Athletics: No Paean, No Gain . . . . . (A-J: 97, J-S: 97)
Attorney Fees: Athletics . . . . . (A-J: 01)
Attorney Fees and "Catalyst Theory" . . . . . (J-S: 03, O-D: 03)
Attorney Fees: Special Education . . . . . (J-M: 95, J-S: 95, O-D: 95, J-M: 96)
Attorney Fees: Parent-Attorneys . . . . . (A-J: 96, J-S: 96)
Basketball in Indiana: Savin' the Republic and Slam Dunkin' the Opposition . . . . . (J-M: 97)
Being Prepared: the Boy Scouts and Litigation . . . . . (O-D: 02)
Bibles, Distribution . . . . . (J-M: 95, J-S: 95, A-J: 98, O-D: 98)
Board of Special Education Appeals . . . . . (J-S: 95)
Boy Scouts and Litigation . . . . . (O-D: 02, J-M: 03, A-J: 03)
Breach of Contract . . . . . (A-J: 01)
Bricks and Tiles: Wall of Separation . . . . . (J-S: 03)
Bus Drivers and Age Discrimination . . . . . (O-D: 98)
Bus Drivers and Reasonable Accommodations . . . . . (A-J: 95)
Bus Drivers, Performance Standards and Measurement for School . . . . . (J-S, 00)
Causal Relationship/Manifestation Determinations . . . . . (O-D: 97)
"Catalyst Theory" and Attorney Fees . . . . . (J-S: 03)
Censorship . . . . . (O-D: 96)
Charter Schools . . . . . (O-D: 98, A-J: 99, J-M: 01, A-J: 01)
Chartering a New Course in Indiana: Emergence of Charter Schools in Indiana . . . . . (J-M: 01)
Child Abuse Registries . . . . . (J-S: 96)
Child Abuse: Reporting Requirement . . . . . (O-D: 95, J-S: 96)
Child Abuse: Repressed Memory . . . . . (J-M: 95, A-J: 95)
Child Obesity and the "Cola Wars" . . . . . (O-D: 03, J-M: 04)
Childhood Obesity and the "Cola Wars": The Battle of the Bulge Continues . . . . . (J-M: 04)
Choral Music and the Establishment Clause . . . . . (A-J: 96, J-M: 98)
Class Rank . . . . . (J-M: 96, J-M: 04)
Confidentiality of Drug Test Results . . . . . (A-J: 99)
"Cola Wars" and Child Obesity . . . . . (O-D: 03, J-M: 04)
Collective Bargaining . . . . . (O-D: 95, J-S: 97)
Collective Bargaining Agreements and Discrimination . . . . . (A-J: 96)
Collective Bargaining: Fair Share . . . . . (J-M: 97, J-S: 97, O-D: 99)
Commercial Free Speech, Public Schools and Advertising . . . . . (O-D: 99)
Community Service . . . . . (O-D: 95, J-M: 96, J-S: 96)
Computers . . . . . (J-M: 96, A-J: 96)
Confederate Symbols and School Policies . . . . . (J-M: 99, J-S: 99)
Consensus at Case Conference Committees . . . . . (J-S: 96)

Contracting for Educational Services . . . . . (A-J: 97, J-M: 98, O-D: 98)
Court Jesters:
Bard of Education, The . . . . . (A-J: 97)
Brewing Controversy . . . . . (J-S: 01)
Brush with the Law, A . . . . . (J-S: 99)
Bull-Dozing . . . . . (A-J: 99)
Burning the Candor at Both Ends . . . . . (A-J: 00)
Butterflies Are Free . . . . . (O-D: 02)
Case of the *Sham Rock,* The . . . . . (J-S: 02)
Cat with the Chat, The . . . . . (A-J: 02)
Caustic Acrostic . . . . . (J-S: 96)
Court Fool: Lodi v. Lodi . . . . . (A-J: 96)
Education of H E R S K O W I T Z, The . . . . . (J-M: 01)
End Zone: Laxey v. La. Bd. of Trustees . . . . . (J-M: 95)
Girth Mirth . . . . . (A-J: 98)
*Grinch* and Bear It . . . . . (J-S: 00)
Horse ¢ent$ . . . . . (J-M: 03)
Horse Feathers! . . . . . (J-M: 04)
Hound and The Furry, The . . . . . (O-D: 00)
Humble π . . . . . (O-D: 97)
Incommodious Commode, The . . . . . (J-M: 99)
Junk Male . . . . . (A-J: 03)
Kent © Norman . . . . . (J-M: 96)
Little Piggy Goes to Court . . . . . (O-D: 98)
Missing Link, The . . . . . (O-D: 03)
Omissis Jocis . . . . . (O-D: 96)
Poe Folks . . . . . (J-M: 98)
Pork-Noy's Complaint . . . . . (J-M: 02)
Psalt 'N' Pepper . . . . . (J-M: 00)
Re: Joyce . . . . . (J-M: 97)
Satan and his Staff . . . . . (J-S: 95)
Smoke and Ire . . . . . (A-J: 01)
Spirit of the Law, The . . . . . (J-S: 97, O-D: 98)
Subordinate Claus . . . . . (J-S: 03)
Things That Go Bump . . . . . (J-S: 98)
Tripping the Light Fandango . . . . . (A-J: 95)
Waxing Poetic . . . . . (O-D: 95)
Well Versed in the Law . . . . . (O-D: 99)
What A Croc! . . . . . (O-D: 01)
"Creationism," Evolution vs. . . . . (O-D: 96, O-D: 97, O-D: 99)
Crisis Intervention, Emergency Preparedness . . . . . (O-D: 98)
Crisis Intervention Plans, Suicide Threats and . . . . . (O-D: 99)
"Current Educational Placement": the "Stay Put" Rule and Special Education . . . . . (J-S: 97)
Curriculum, Challenges to . . . . . (J-S: 96)
Curriculum and Religious Beliefs . . . . . (J-M: 96, A-J: 98, J-S: 98)
Decalogue: Epilogue . . . . . (O-D: 00, A-J: 01, O-D: 01, A-J: 03)
Decalogue: Thou Shalt and Thou Shalt Not, The . . . . . (A-J:00)
Decalogue Wars Continue; Holy Moses, Roy's Rock, and the Frieze: The . . . . . (A-J: 03)
Desegregation and Unitary Status . . . . . (A-J: 95)

Distribution of Religious Materials in Elementary Schools . . . . . (J-M: 97)
"Do Not Resuscitate" Orders and Public Schools . . . . . (J-S: 99)
Dress Codes . . . . . (J-S: 95, O-D: 95, J-S: 96, J-M: 99)
Dress Codes: Free Speech and Standing . . . . . (A-J: 02)
Dress and Grooming Codes for Teachers . . . . . (J-M: 99)
Driving Privileges, Drug Testing . . . . . (A-J: 99)
Driving Privileges, Suspension and Expulsion . . . . . (J-M: 04)
Drug Testing . . . . . (J-M: 95, A-J: 95)
Drug Testing Beyond *Vernonia* . . . . . (J-M: 98)
Drug Testing and School Privileges . . . . . (A-J: 99)
Drug Testing of Students: Judicial Retrenching . . . . . (A-J: 00)
Dual-Enrollment and the "Indirect Benefit" Analysis in Indiana . . . . . (O-D: 03)
Due Process, 'Zero Tolerance' Policies . . . . . (J-S: 00)
Educational Malpractice: Emerging Theories of Liability . . . . . (A-J: 01)
Educational Malpractice Generally . . . . . (A-J: 01, A-J: 03)
Educational Malpractice In Indiana . . . . . (A-J: 01, A-J: 03)
Educational Records: Civil Rights And Privacy Rights . . . . . (A-J: 02)
Educational Records and FERPA . . . . . (A-J: 99)
Emergency Preparedness and Crisis Intervention . . . . . (O-D: 98)
Empirical Data and Drug Tests . . . . . (A-J: 99)
Equal Access, Religious Clubs . . . . . (J-S: 96, A-J: 97)
Er the Gobble-Uns'll Git You . . . . . (J -S: 96)
Evacuation Procedures . . . . . (O-D: 98, J-M: 04)
Evolution vs. "Creationism" . . . . . (O-D: 96, O-D: 97, O-D: 99)
Evolution of "Theories," The . . . . . (O-D: 01)
Exit Examinations . . . . . (J-M: 96, O-D: 96, J-M: 97, A-J: 98, J-S: 98, O-D: 98)
Extensions of Time . . . . . (J-S: 96)
Facilitated Communication . . . . . (O-D: 95)
"Fair Share" and Collective Bargaining Agreements . . . . . (J-M: 97, J-S: 97, O-D: 99)
FERPA, Educational Records . . . . . (A-J: 99)
First Friday: Public Accommodation of Religious Observances . . . . . (J-S: 98, O-D: 99)
Free Speech, Grades . . . . . (J-M: 96)
Free Speech, Graduations . . . . . (J-M: 04)
Free Speech, Teachers . . . . . (J-M: 97, A-J: 97)
Gangs and Gang-Related Activities . . . . . (A-J: 99, J-S: 99)
Gangs: Dress Codes . . . . . (O-D: 95)
Gender Equity and Athletic Programs . . . . . (J-M: 95)
Golf Wars: Tee Time at the Supreme Court, The . . . . . (O-D: 00)
Grades . . . . . (J-M: 96)
Graduatoin Ceremonies and Free Speech . . . . . (J-M: 04)
Graduation Ceremonies, School Prayer . . . . . (A-J: 97, J-M:98, O-D: 98)
Grooming Codes for Teachers, Dress and . . . . . (J-M: 99)
Growing Controversy over the Use of Native American Symbols as Mascots, Logos, and Nicknames, The . . (J-M: 01)
Habitual Truancy . . . . . (J-M: 97)
Halloween . . . . . (J-S: 96)
Hardship Rule . . . . . (A-J: 01)
Harry Potter in the Public Schools . . . . . (J-M: 03)
Health Services and Medical Services: The Supreme Court and *Garret F* . . . . . (J-M: 99)
High Stakes Assessment, Educational Standards, and Equity . . . . . (A-J: 98)

Holy Moses, Roy's Rock, and the Frieze: The Decalogue Wars Continue . . . . . (A-J: 03)
IHSAA: 'Fair Play,' Student Eligibility, and the Case Review Panel . . . . . (J-M: 00)
Indiana Board of Special Education Appeals . . . . . (J-S: 95)
Interstate Transfers, Legal Settlement . . . . . (A-J: 99)
Juvenile Courts & Public Schools: Reconciling Protective Orders & Expulsion Proceedings . . . . . (J-M: 98)
Latch-Key Programs . . . . . (O-D: 95)
Legal Settlement and Interstate Transfers . . . . . (A-J: 99)
Library Censorship . . . . . (O-D: 96)
Limited English Proficiency: Civil Rights Implications . . . . . (J-S: 97)
Logos . . . . . (J-M:01)
Loyalty Oaths . . . . . (J-M: 96)
Mascots . . . . . (J-S: 96, J-M: 99, J-M: 01, J-S:03)
Medical Services, Related Services, and the Role of School Health Services . . . . . (J-S: 97, O-D: 97, J-S: 98)
Meditation/Quiet Time . . . . . (A-J: 97)
Metal Detectors and Fourth Amendment . . . . . (J-S: 96, O-D: 96, J-M: 97, J-S: 97)
Methodology: School Discretion and Parental Choice . . . . . (J-M: 99)
Moment of Silence . . . . . (J-S: 01)
Military Recruiters and Educational Records . . . . . (J-M: 02, J-M: 04)
*Miranda* Warnings and School Security . . . . . (J-S: 99, J-M: 02)
National Motto, The . . . . . (O-D: 01, J-M: 03)
Native American Symbols . . . . . (J-M: 01, A-J: 02, J-S: 03)
Negligent Hiring . . . . . (O-D: 96, J-M: 97)
Negligent Misrepresentation . . . . . (A-J: 01)
Opt-Out of Curriculum and Religious Beliefs . . . . . (J-M: 96)
Orders and Public Schools: "Do Not Resuscitate" . . . . . (J-S: 99)
"Parent " Trap, The . . . . . (O-D: 01)
*Parent Trap*: Variations on a Theme, The . . . . . (J-S: 02)
"Parental Hostility" Under IDEA . . . . . (A-J: 98)
Parental Rights and School Choice . . . . . (A-J: 96)
Parental Choice, Methodology: School Discretion . . . . . (J-M: 99)
Parochial School Students with Disabilities . . . . . (J-S: 95, O-D: 95, J-M: 96, A-J: 96, A-J: 97, J-S: 97)
Parochial School Vouchers . . . . . (A-J: 98)
Participation Rule: Student-Athletes and Out-of-Season Sports, The . . . . . (J-M: 02)
Peer Sexual Harassment . . . . . (O-D: 97)
Peer Sexual Harassment: Kindergarten Students . . . . . (J-S: 02)
Peer Sexual Harassment Revisited . . . . . (J-S: 98, A-J: 99)
Peer Sexual Orientation Harassment . . . . . (J-M: 03)
Performance Standards and Measurements for School Bus Drivers . . . . . (J-S: 00)
Pledge of Allegiance, The . . . . . (J-S: 01, J-S: 02, O-D: 02, J-M: 03, A-J: 03, O-D: 03)
Prayer and Public Meetings . . . . . (J-M: 97, J-M: 98, O-D: 98, A-J: 99, J-S: 02)
Prayer and Schools . . . . . (A-J: 97, O-D: 98)
Prayer, Voluntary Student . . . . . (A-J: 97)
Privileged Communications . . . . . (A-J: 97)
Proselytizing by Teachers . . . . . (O-D: 96)
Protection of Pupil Rights Act, The . . . . . (O-D: 02)
Public Records, Access to . . . . . (A-J: 98, J-S: 98)
"Qualified Interpreters" for Students with Hearing Impairments . . . . . (J-M: 98)
Quiet Time/Meditation . . . . . (A-J: 97)
Racial Imbalance in Special Programs . . . . . (J-M: 95)

Real Estate Sales and School Accountability Laws . . . . . (O-D: 03)
Religion: Distribution of Bibles . . . . . (J-M: 95)
Religious Clubs . . . . . (J-S: 96, A-J: 97)
Religious Expression by Teachers in the Classroom . . . . . (J-S: 00)
Religious Observances, First Friday: Public Accommodations . . . . . (J-S: 98)
Religious Symbolism . . . . . (J-S: 98)
Repressed Memory, Child Abuse: . . . . . (J-M: 95, A-J: 95)
Residential Placement: Judicial Authority . . . . . (J-S: 95)
Restitution Rule and Student-Athletes, The . . . . . (A-J: 01)
Resuscitate" Orders and Public Schools, "Do Not . . . . . (J-S: 99)
School Accountability . . . . . (A-J: 01)
School Accountability: "Negligent Accreditation" . . . . . (A-J: 01)
School Accountability and Real Estate Sales . . . . . (O-D: 03)
School Accountability: Standardized Assessment . . . . . (A-J: 01)
School Construction . . . . . (J-S: 95)
School Discretion and Parental Choice, Methodology: . . . . . (J-M: 99)
School Health Services . . . . . (J-S: 97)
School Health Services and Medical Services: The Supreme Court and *Garret F.* . . . . . (J-M: 99)
School Policies, Confederate Symbols and, . . . . . (J-M: 99)
School Prayer . . . . . (A-J: 97, O-D: 98)
School Privileges, Drug Testing . . . . . (A-J: 99)
Security, *Miranda* Warnings and School . . . . . (J-S: 99)
Service Dogs . . . . . (O-D: 96)
Sexual Orientation, the Equal Access Act, and the Equal Protection Clause . . . . . (J-S: 02, J-M: 03, J-S: 03)
Standardized Assessment and the Accountability Movement: The Ethical Dilemmas of Over Reliance . . . . . (J-S: 01)
"State Action," U.S. Supreme Court . . . . . (A-J: 01)
Statewide Assessments, Public Access to . . . . . (A-J: 98, J-S: 98)
Statute of Limitations . . . . . (J-S: 03)
"Stay Put" and "Current Educational Placement" . . . . . (J-S: 97)
Strip Search . . . . . (J-S: 97, J-M: 99)
Strip Searches of Students . . . . . (A-J: 00)
Student–Athletes & School Transfers: Restitution, Hardship, Contempt of Court, & Attorney Fees (A-J: 01, J-M: 02)
Suicide: School Liability . . . . . (J-S: 96, J-S: 02)
Suicide Threats and Crisis Intervention Plans . . . . . (O-D: 99)
Symbolism, Religious . . . . . (J-S: 98)
Symbols and School Policy, Confederate . . . . . (J-M: 99, J-S: 99)
Symbols and Native Americans . . . . . (J-M: 01)
Tape Recordings and Wiretapping . . . . . (O-D: 02)
Teacher Competency Assessment & Teacher Preparation: Disparity Analyses & Quality Control . . . . . (J-M: 00)
Teacher Free Speech . . . . . (J-M: 97, A-J:97)
Teacher License Suspension/Revocation . . . . . (J-S: 95)
Ten Commandments (see "Decalogue") . . . . . (A-J: 00, O-D: 00)
Terroristic Threats . . . . . (O-D: 99)
Textbook Fees . . . . . (A-J: 96, O-D: 96)
Time-Out Rooms . . . . . (O-D: 96)
Time-Out Rooms Revisited . . . . . (J-S: 02)
Title I and Parochial Schools . . . . . (A-J: 95, O-D: 96, A-J: 97)
Triennial Evaluations . . . . . (J-S: 96)
Truancy, Habitual . . . . . (J-M: 97)

"Undue Influence" and the IHSAA . . . . . (A-J: 01)
Uniform Policies and Constitutional Challenges . . . . . (O-D: 00)
Valedictorian . . . . . (J-M: 96, J-M: 04)
Valedictorians: Saying "Farewell"to an Honorary Position? . . . . . (J-M: 04)
Video Games, Popular Culture and School Violence . . . . . (J-M: 02)
Video Replay: Popular Culture and School Violence . . . . . (A-J: 02)
Visitor Policies: Access to Schools . . . . . (J-M: 00)
Voluntary School Prayer . . . . . (A-J: 97)
Volunteers In Public Schools . . . . . (O-D: 97, J-S: 99)
Vouchers and the Establishment Clause: The "Indirect Benefit" Analysis . . . . . (J-M: 03)
Vouchers and Parochial Schools . . . . . (A-J: 98)
Wiretapping, Tape Recordings, and Evidentiary Concerns . . . . . (O-D: 02)
'Zero Tolerance' Policies and Due Process . . . . . (J-S: 00)