

Indiana Department of Education



Room 229, State House - Indianapolis, IN 46204-2798

Telephone: 317/232-6676

QUARTERLY REPORT

January -- March: 2005

The **Quarterly Report** provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at [<kmcdowel@doe.state.in.us>](mailto:kmcdowel@doe.state.in.us).

In this report:

Ethical Testing Procedures: Reliability, Validity, and Sanctions	2
• Ethical Test Administration	2
• Ethical Test Preparation	6
• Test Security and "Fair Use"	16
Visitor Access to Public Schools: Constitutional Rights and Retaliation	18
• Authorized and Unauthorized Visitors with Weapons	18
• Parental Confrontations with School Personnel	20
• Visitor Policies and Non-Discrimination Laws	24
Court Jesters: Poetic Justice	28
Quotable	30
Updates	30
• Boy Scouts of America	30
• Theory of Evolution	35
Index	43

ETHICAL TESTING PROCEDURES: RELIABILITY, VALIDITY, AND SANCTIONS

Federal and state accountability laws rely substantially upon standardized assessments as the principal measurement of progress. Such assessments, it follows, must be reliable and valid for this purpose. However, with the stakes so high, there is widespread concern that test results are being affected by unethical test preparation, outright cheating during the administration of the test itself, and premature release of test items to the public.¹

Ethical Test Administration

The Indiana Statewide Testing for Educational Progress (ISTEP+) is Indiana's principal standardized assessment. There is an ISTEP+ Program Manual published annually that addresses a number of testing issues including "Ethical Test Preparation." Beginning with the 2004-2005 school year, the "Ethical Test Preparation" section (Chapter Two) contained a new provision:

2.3.1 Display of Reference Materials

Please note that new guidelines are in effect regarding the display of reference materials during testing at all grades. Testing spaces must be appropriately prepared for administration of ISTEP+/GQE.² Specifically, the following kinds of materials **should be covered or removed from walls or bulletin boards** during testing in all rooms or areas in which students will be assessed.

- 1) All posted materials such as wall charts, visual aids, posters, graphic organizers, and instructional materials that relate specifically to the content being assessed. This includes, but is not limited to, the following items:
 - Multiplication tables
 - Tables of mathematical facts or formulas
 - Fraction equivalents
 - Writing aids
 - Punctuation charts
 - Spelling or vocabulary lists
 - Phonics charts
- 2) All reference materials that a "reasonable person" might conclude offers students in that classroom or space an unfair advantage over other students.

¹For additional information, see "Standardized Assessment and the Accountability Movement: The Ethical Dilemmas of Over Reliance," **Quarterly Report** July-September: 2001.

²"GQE" refers to the Graduation Qualifying Examination. See I.C. 20-10.1-16-13 [**I.C. 20-31-4 et seq.**] Title 20 of the Indiana Code has been recodified, effective July 1, 2005 (P.L. 1-2005). New code provisions will appear in brackets after former code provisions.

- 3) All support materials that teachers might remove if they were giving their own unit tests in those subject areas.

The new guideline was the result of concerns raised that some schools were displaying multiplication tables, vocabulary lists, and similar visual aids for student use only during the ISTEP+ testing period. Although there were complaints the new guideline was not disseminated early enough, this turned out to be the least of concerns during the administration of the ISTEP+ during the 2004-2005 school year.

The ISTEP+ Program Manual indicates that “**In no event is it appropriate to...** Coach students by indicating in any way (*e.g.*, facial expressions, gestures, or the use of body language) that an answer choice is correct or incorrect, should be reconsidered, or should be checked.” (Chapter Two: Ethical Test Preparation: **2.3.0 Proper ISTEP+ Test Administration.**) Notwithstanding the above, a third grade teacher and her student-teacher devised a set of pre-arranged hand signals to indicate to students when they should “reconsider” an answer on the ISTEP+. Students were also told when they had missed some of the questions on the test. The class reported dramatic improvements in its scores until an unidentified source reported the cheating. The scores were invalidated by the Department of Education. The teacher has not had her license suspended or revoked. In fact, no licensed teacher to date has had a license revoked or suspended for unethical testing practices. This is likely not to be the case in the future. See *infra*.

Indiana was hardly alone. In September of 2004, Mississippi invalidated scores at nine schools after discovering more than two dozen cases of cheating. One fifth grade teacher was fired because the teacher helped students on the writing portion of the test. In July, nine Arizona school districts invalidated portions of test scores after discovering inappropriate teacher intervention. This was Arizona’s 21st case of confirmed cheating since 2002.³

In Texas, *The Dallas Morning News* reported widespread, teacher-assisted cheating on the Texas Assessment of Knowledge and Skills (TAKS) in the Fort Worth, Dallas, and Houston school districts. More than 200 schools were involved. One Houston fifth-grade class had the highest TAKS math scores in the state, and by a wide margin, despite scoring very poorly on the math test the previous year as fourth graders.⁴

The Indiana Professional Standards Board (IPSB) is authorized to suspend a teacher’s license for immorality, misconduct in office, incompetency, or willful neglect of duty.⁵ The IPSB has revoked a number of teacher licenses, some permanently. However, to date the IPSB has never been asked to suspend a teacher license for unethical test preparation or intervention. This has not been the case in other states.

³“When Tests’ Cheaters Are The Teachers,” *Christian Science Monitor* (January 11, 2005).

⁴“Newspaper Bares Evidence of Widespread Cheating on Math, Reading Achievement Tests,” *Education Daily* (December 21, 2004).

⁵See I.C. 20-1-1.4-7(a)(4) [**I.C. 20-28-2-6(a)(4)**] and I.C. 20-6.1-3-7(a) [**I.C. 20-28-5-7**].

In Kentucky Education Professional Standards Board v. Gambrel, Thompson, 104 S.W.3d 767 (Ky. App. 2003), the Kentucky Court of Appeals affirmed the Education Professional Standards Board's suspension of the licenses of a secondary supervisor and a principal for violating Kentucky's testing procedures. The EPSB found the two committed "misconduct in office and incompetency" by encouraging teachers to assist students during the test, permitting the administration of the test to two students in locations other than the high school, scheduling extended-time for testing in an inappropriate manner, permitting social studies teachers to review the State test before it was administered and create a "bullet sheet" of critical content about the test, knowing others were using materials during the test that were not permitted, and failing to exercise appropriate leadership and effectively monitor and supervise.⁶ The EPSB also filed charges against eighteen (18) other teachers and the district's assessment coordinator. All 19 reached a settlement with the EPSB. Gambrel and Thompson would not settle and asked for a hearing.

Through the hearing process, the EPSB determined Gambrel and Thompson did not know of the social studies "bullet sheet" or the use of prohibited materials during the testing. The EPSB also found they were not guilty of the administration of the test outside of the high school. However, the EPSB found them guilty of the other charges, suspending Gambrel's license for 12 months and Thompson's license for 18 months. The trial court reversed the EPSB in part, but the appellate court reversed the trial court, reinstating the EPSB's decision and rejecting Gambrel's and Thompson's arguments that they did not "knowingly" or "intentionally" violate the State testing requirements.

Both administrators knew of the assessment materials provided by the State, including information on permitted and prohibited practices in the administration of the Kentucky test. It is not a defense that one did not read the instruction manual or the appropriate assessment practices form, as Gambrel had argued. Thompson had read the material but did not believe that he, in good faith, violated the appropriate assessment practices such that his conduct would be considered "misconduct."

The Kentucky Court of Appeals was not persuaded by these arguments, although it did note that there is no State definition of "misconduct in office" other than one manufactured through judicial decisions. The operative definition employed here included "[b]ad behavior; improper conduct; mismanagement; or wrong conduct, in usual parlance, a transgression of some established and definite rule of action, where no discretion is left except what necessity may demand." 104 S.W.3d at 774 (citations omitted). In this case, the directions and directives in the State assessment guide were explicit in what is permitted and what is prohibited.

As to the appropriate assessment practice violation for encouraging test administrators to help students understand the test questions, we believe the above language [from the State's assessment instruction manual] clearly forbids such conduct such that Thompson cannot legitimately claim that he in good faith believed that helping students understand the questions was permissible. Further, common sense dictates that if the test administrator cannot even read a question to the student, then he certainly cannot explain a question. In his testimony at the hearing, Thompson also attempted to justify his belief by pointing out that helping students understand questions had always been an accepted practice in years past at [the

⁶Kentucky, like Indiana, has a program manual that details appropriate test preparations, test administration, and post-test security measures.

school district]. We would note that this kind of thinking is what perpetuates incompetent practices within our schools.

Id. at 776. Both Thompson and Gambrel were aware that teachers were using a “student accountability scale” that gave additional points to students for such things as asking for assistance from test administrators during testing, a practice specifically prohibited by the State. Students were also permitted to have unmonitored breaks and move unmonitored to other areas with their test booklets, both of which are forbidden by the Kentucky instruction manual.

Kentucky had developed “definite rules” regarding State testing procedures “which left no room for discretion and of which Gambrel and Thompson had a duty to be aware... In our view, Gambrel’s ignorance of these rules and Thompson’s failure to insure that these rules were followed rose to the level of misconduct.” Id. The appellate court also agreed that Gambrel’s conduct constituted “incompetency.” Id. at 777. Thompson’s conduct “demonstrated a failure in leadership” regarding administration of the State test, “which we believe was further evidence of incompetency.” Id. at 777-78.

The following are other recent cases involving misconduct in the administration of standardized assessments.

Haynes v. Board of Education of the City of Bridgeport, 783 A.2d 1 (Conn. App. 2001). Haynes had been a 24-year employee of the school district. She sought an administrative post within the school district. During the time she was seeking administrative positions, she was also the test proctor for the administration of the State-mandated “Connecticut Mastery Test.” When she collected test booklets, she completed answers for some students and changed the answers for other students. As a result, 96 percent of her students exceeded the goal for achievement on the part of the test she proctored. This was the highest pass rate in the State. Although this did enhance her reputation in the short run, the students were placed in advanced classes the following year because of their test scores. The ruse was discovered, resulting in the students being retested. On retest, only 15 percent exceeded the achievement goal. An investigation indicated a number of testing improprieties and irregularities, including not giving the students enough time to finish the test so she could have time to review their answers. The court upheld her termination.

Professional Standards Commission v. Denham, 556 S.E.2d 920 (Ga. App. 2001) involved a kindergarten teacher whose license was temporarily suspended after she altered answers to a student’s standardized test. The court sustained her suspension despite her otherwise spotless record, noting the State’s interest in ensuring the integrity of standardized test results outweighs Denham’s spotless record and any impact her suspension might have on the operation of the local school district.

Rivera v. Community School District Nine, 145 F.Supp.2d 302 (S.D. N.Y. 2001) involved a probationary teacher who was terminated for helping students cheat on a standardized test. She was accused of assisting in creating a “cheat sheet” for third-grade students to use on a standardized reading and math test to be given the next day. Rivera denied any involvement, but the students indicated that she did, in fact, help them cheat. For this, she received a “strong letter of reprimand.” Four years later, Rivera was again accused of helping students cheat on the citywide standardized reading test, pressured other students to do likewise, and attempted to strike a teacher who refused to engage in the cheating scheme.

For this, she was terminated. She filed a civil rights claim against the school district (the subject of this suit), which was dismissed.

In Indiana, the typical response to confirmed instances of cheating or inappropriate testing procedures has been to invalidate the scores. However, adhering to appropriate ISTEP+ testing procedures is a legal standard for accreditation. See 511 IAC 6.1-7-2(a). During the 2001-2002 school year, the publisher of the ISTEP+ alerted the Department of Education that it had discovered testing irregularities in the Gary Community School Corporation (GCSC). A further investigation by GCSC administration indicated that three high schools were affected. Scores were invalidated. The irregularities at two of the high schools were so pervasive, the Indiana State Board of Education reduced the accreditation status of the two high schools to probationary accreditation status. A third high school's irregularities were not so severe, but the high school's accreditation was downgraded the same as the other two. GCSC appealed the State Board's decision to downgrade the accreditation status of West Side High School, arguing the mistakes were inadvertent.

In Gary Community School Corporation, Cause No. 0208019 (SBOE 2003), the State Board upheld its Hearing Examiner's findings that GCSC violated three different legal standards in the administration of the ISTEP+ at West Side High School. Fourteen (14) students eligible for special education and related services participated in the ISTEP+ in a separate room. The students' respective Individualized Education Programs (IEPs) called for various testing accommodations, including the use of a scribe. There were at least two adults in the classroom during the administration of the test. The room was only 400 square feet, so that students could easily hear the exchanges between scribes and the students who required this accommodation. Some students' accommodations were not implemented; others received the assistance of the scribes even though this was not listed as an accommodation for those students. The school was found to have violated State Department of Health rules for classroom size (at a minimum, 30 square feet a student), as required by 511 IAC 6.1-2-1(3), 410 IAC 4-5.1-5(d); failure to implement the IEPs of students with disabilities, as required by I.C. 20-10.1-16-8(b) [**I.C. 20-32-5-16**] and State Board regulation; and failure to administer the ISTEP+ in accordance with State law, as required by 511 IAC 6.1-7-2(a). West Side's accreditation remained probationary.⁷

Ethical Test Preparation

The ISTEP+ Program Manual stresses test security. Test booklets are provided to the schools about three (3) weeks before the start of the testing period and remain at the schools until a week after the "testing window" is closed. Booklets, then, are in the schools for six to seven weeks. Test security has been—and remains—a concern. All test booklets have to be accounted for and returned to the publisher. The Program Manual provides in relevant part:

2.4.0 Proper ISTEP+ Testing Materials Security

⁷Important State Board of Education adjudications are available through the web site of the Legal Section of the Indiana Department of Education. See www.doe.state.in.us/legal. The GCSC decision is available under "Accreditation/Probationary" by reference to its Cause Number. See <http://mustang.doe.state.in.us/HE/result.cfm>. All three high schools have since obtained full accreditation.

* * *

It is a violation of ISTEP+ test security to:

- Give examinees access to test questions prior to testing.
- Copy, reproduce, or use in any manner any portion of any secure test booklet, for any reason.
- Share an actual ISTEP+/GQE test instrument in a public forum.
- Deviate from the prescribed administration procedures specified in the ISTEP+/GQE Examiner's Manual in order to boost student performance.
- Make answer keys available to examinees.
- Participate in, direct, aid, counsel, assist, encourage, or fail to report any of the acts prohibited in this section.
- Score student responses on ISTEP+ before returning the tests to [the publisher]. After testing is completed, test booklets are to be returned to the [school's main] offices, packaged, and kept secure until they are picked up.

During the 2004-2005 school year, it became apparent that one public school corporation had provided access, in some form, to its third and sixth-grade students prior to the administration of the ISTEP+. As noted *supra*, the test booklets are shipped to the schools about three weeks prior to the testing period. An elementary school principal directed a school counselor to use the secure ISTEP+ test booklets to develop "test preparation" materials for use in the third and sixth-grade classrooms immediately before the administration of the ISTEP+. The "test preparation" materials, according to the investigation, "replicated the State Standards in the order presented in the actual test; closely paralleled each test question in the actual test; reviewed the style and/or format of the test questions in the order appearing in the test; reviewed the concepts to be tested in the order appearing in the test; and, in some examples, mimicked the position of the correct answer in the test booklet."

There were "multiple, significant, and direct violations of the Indiana Code of Ethical Testing Practices & Procedures." Corrective action included invalidation of the scores for all third and sixth-grade students. The school corporation also had to notify the parents or guardians of each affected student of the invalidation and why this occurred. Definitive testing procedures had to be developed and submitted for approval, including specific roles of administrators, teachers, and proctors. All remaining copies of the "test preparation" materials had to be located and turned over to the Department of Education, and the school had to insure that no secure test items remained in the district. This also affected the school's remediation grant because the testing security lapses invalidated all the scores.

At present, no license suspensions have been recommended, but the facts in this case parallel with those in Kentucky Education Professional Standards Board v. Gambrel, Thompson, *supra*, and even may be more egregious. Four (4) examples of the breach of ISTEP+ test security and misuse in the creation of the "test preparation" materials follow. The actual ISTEP+ question, now a released item, is bordered by "Do Not Write Here." The "test preparation" item created from the ISTEP+ question immediately follows as a "school-created item." See pages 8-15.

Test 3: English/Language Arts

A New Park

Read the writing prompt below and complete the writing activity.

Your town has a park that is very old and needs improvements. The mayor has asked the students of your school for some suggestions. Some people want a park where they can take their pets to play. Some want to change it into a garden. What do you think should be done, and what would be the main purpose of the park? What would you name it?

Write an essay in which you try to persuade the mayor to choose your idea for the park. Give the park a specific name and explain why the park would be valuable for the students at your school and for the citizens in your town.

Be sure to include

- the name of the park
- suggested ideas about the purpose of the park
- the value of the park to the students at your school and local citizens
- persuasive details and arguments that will convince the mayor that your suggestions are good ones
- an introduction, a body, and a conclusion to your essay

Go On



DO NOT WRITE HERE

DO NOT WRITE HERE

Directions

Read the writing prompt and complete the activity.

<p style="text-align: center;">Football</p> <p>_____ does not have a high school football team, but many of the parents and students would like to have one at the school. What do you think about this issue? Do you think that _____ should have a football team? What would you name the football field?</p> <p>In a persuasive essay, convince the board members, administrators, and community members that _____ should/should not have a football team. Would this be valuable to our community and our school?</p>
--

Include:

The name of the field

Why it would be valuable (or not) to our community

What population of students could possibly benefit from this activity
(and how they would benefit)

Persuasive arguments that would convince the school board,
administrators and community members

An introduction, body and conclusion

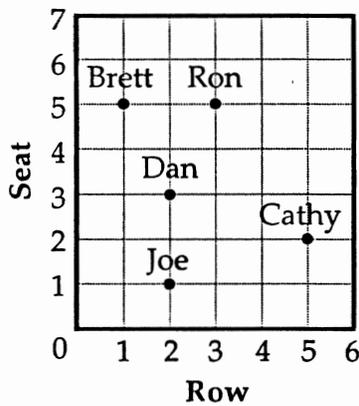
Test 7: Mathematics

Since you may receive partial credit for many of the problems, it is important to show ALL work in the spaces provided in this book. When you see the words **Show All Work**, be sure to

- show all the steps needed to solve the problem
- make your handwriting clear and easy to read
- write the answer on the answer line

1 The seating chart on the grid below shows where 5 students are seated in their classroom.

Seating Chart



Identify the ordered pairs that show where each student is seated.

Brett (_____ , _____)

Ron (_____ , _____)

Cathy (_____ , _____)

Joe (_____ , _____)

Dan (_____ , _____)

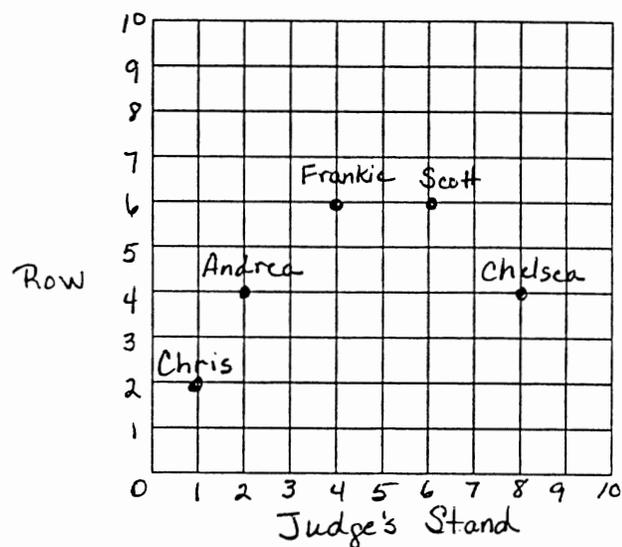
Go On

STANDARD 7 – Problem Solving

Students use strategies, skills, and concepts in finding and communicating solutions to problems.

6.7.8 Use graphing to estimate solutions and check the estimate with analytic approaches.

54. The band will be marching in the Homecoming parade. When they are at the judge's stand, this is the formation they are to use.



Identify the ordered pairs of where the students are to be during the performance.

Chris (____, ____)

Andrea (____, ____)

Frankie (____, ____)

Scott (____, ____)

Chelsea (____, ____)

- 3 Tom used 5 metal objects labeled A, B, C, D, and E in an experiment. He used a balance scale to measure the weight of object A. Then he added object B to the scale and recorded the combined weight of both objects. He continued to add one object at a time and record the weight until all the objects were on the scale and their combined weight was measured. He made the table below to show his results.

Combined Weights

Object(s)	Weight (in grams)
A	14.6
A, B	21.5
A, B, C	32.0
A, B, C, D	41.2
A, B, C, D, E	52.8

On the lines below, explain how to find the weight of object C.

Which of the objects is the heaviest?

Show All Work

Answer _____



STANDARD 7 – Problem Solving

Students make decisions about how to approach problems and communicate their ideas.

6.7.1 Analyze problems by identifying relationships, telling relevant from irrelevant information, identifying missing information, sequencing and prioritizing information, and observing patterns.

56. Connie took some kittens to the veterinarian's office for their first visit. All of the kittens were weighed on a large scale in the front office. First one kitten was put on the scales, then the next, and so on. A chart was made of the kittens' weight. The chart shows the combined weight of all of the kittens.

Kittens	Weight
Pooh	3.5
Pooh & Tigger	6.2
Pooh, Tigger & Piglet	8.2
Pooh, Tigger, Piglet & Eyeore	11.1
Pooh, Tigger, Piglet, Eyeore & Roo	13.0

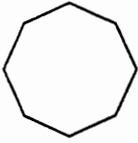
Explain how to find Roo's weight.

Which kitten weighs the most?

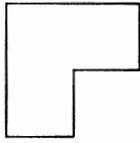
Show work!

Answer _____

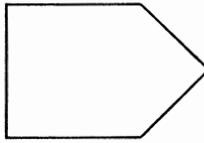
7 Look at the polygons below.



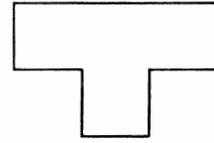
Polygon 1



Polygon 2



Polygon 3



Polygon 4

Which two polygons have the same number of sides?

Answer _____ and _____

What is the name of the polygons shown above with the same number of sides?

Answer _____

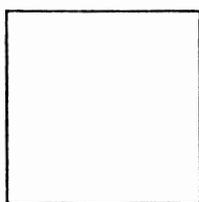


STANDARD 4 – Geometry

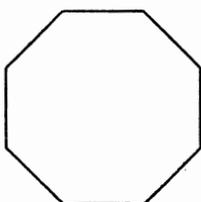
Students identify describe and classify the properties of plane and solid geometric shapes and the relationships between them.

6.4.5 Identify and draw two-dimensional shapes that are similar.

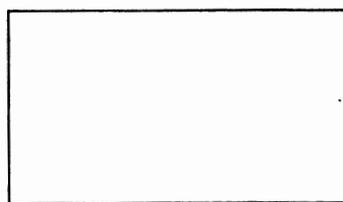
60. Look at the polygons.



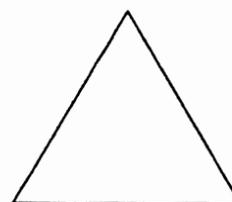
Polygon 1



Polygon 2



Polygon 3



Polygon 4

Which two polygons have the same number of sides?

Answer _____ and _____

What is the name of the polygons shown that have the same number of sides?

Answer _____

Test Security and “Fair Use”

Test security is a major concern for all states as this affects the reliability and validity of the assessments. This past year, New York City experienced a number of difficulties in the administration of its third-grade reading test, including instances where students were able to see previous tests that included “anchor items” (test items used from year to year)⁸ and the airing of secure test items on television prior to the administration of the test.⁹ But this pales in comparison to the continuing battle between George Schmidt and the Chicago School Board.

The Chicago School Board created a series of tests to assess educational levels of its freshmen and sophomores. It invested over \$1.3 million in this effort. To protect its investment, the school board copyrighted the tests. The school board also created the “Chicago Public Schools Test Security Guidelines” and distributed these to all school personnel who would handle test materials. Schmidt, a teacher with the school district, is also the editor of a newspaper called *Substance, Inc.*, a publication primarily for teachers. Schmidt opposed standardized testing and, even though he was aware of the “Security Guidelines” and the copyright, published five of the tests in their entirety and a substantial portion of a sixth test, including the school board’s copyright notice. The school board sued Schmidt for copyright infringement. The federal district court found in the school board’s favor, enjoining Schmidt from publishing the tests and ordering him to pay \$500. Chicago School Reform Board v. Substance, Inc., 79 F.Supp.2d 919 (N.D. Ill. 1999). Schmidt appealed to the U.S. Seventh Circuit Court of Appeals.

The 7th Circuit was not sympathetic. In Chicago Board of Education v. Substance, Inc., 354 F.3d 624 (7th Cir. 2003), the 7th Circuit affirmed the substantial part of the federal district court’s decision that directly affected Schmidt. At the core of Schmidt’s argument is whether the “Fair Use” doctrine permits him to publish otherwise copyrighted material.

The 7th Circuit noted that the Chicago School Board’s tests are known as “secure tests,” which is defined at 37 C.F.R. § 202.20(b)(4) as follows:

A secure test is a nonmarketed test administered under supervision at specified centers on specific dates, all copies of which are accounted for and either destroyed or returned to restricted locked storage following each administration. For these purposes a test is not marketed if copies are not sold but it is distributed and used in such a manner that ownership and control of copies remain with the test sponsor or publisher.

354 F.3d at 626. Schmidt published the six tests because he thought the tests were not valid and the best way to demonstrate this would be to publish them. When the school board sued, he claimed the unauthorized copying and publication were “fair use” and not a copyright infringement. *Id.* at 627.

⁸“Retest is Option for Third Graders Who Got Peek,” *New York Times* (April 29, 2004).

⁹“City May Sue Over Showing of Tests on TV,” *New York Times* (April 23, 2004).

Schmidt argued that in order to facilitate criticism of the copyrighted work, he had to publish a sufficient amount of the tests in order “to make his criticisms intelligible.” *Id.* at 628. The court disagreed that “fair use” entitles one to unlimited copying of protected works, even though “there is no *per se* rule against copying in the name of fair use an entire copyrighted work if necessary.” *Id.* at 629. Indeed, “[t]he fair use defense defies codification.” The question is resolved by what is “necessary.” *Id.*

The general standard, however, is clear enough: the fair use copier must copy no more than is reasonably necessary (not strictly necessary—room must be allowed for judgment, and judges must not police criticism with a heavy hand) to enable him to pursue an aim that the law recognizes as proper, in this case the aim of criticizing the copyrighted work effectively.

Id. This is where Schmidt failed to carry his burden of proof. Although Schmidt maintains he had to publish the six tests, “he does not explain why, or indicate witnesses or documents that might support such an argument. Granted that he had to quote some of the test questions in order to substantiate his criticisms, why entire tests? Does he think all the questions in all six tests bad? He does not say. What purpose is served by quoting the good questions? Again, no answer.” *Id.* at 629-30.

Schmidt argued that he could present expert testimony to show the Chicago tests are “dramatically inadequate.”

There is more than a suspicion that Schmidt simply does not like standardized tests. That is his right. But he does not have the right, as he believes he does (he claims a right to copy any test that an expert will testify is no good), to destroy the tests by publishing them indiscriminately, any more than a person who dislikes Michelangelo’s statue of David has a right to take a sledgehammer to it. From the *amicus curiae* briefs filed in this case, moreover, it is apparent that many other teachers share Schmidt’s unfavorable opinion of standardized tests. (A cynic might say that this is because such tests can make teachers look bad if their students don’t do well on them.) So if Schmidt can publish six tests, other dissenters can each publish six other tests, and in no time all 44 will be published. The board will never be able to use the same question twice, and after a few years of Schmidtian tactics, there will be such difficulty in inventing new questions without restructuring the curriculum that the board will have to abandon standardized testing. Which is Schmidt’s goal.

Id. at 630. “If Schmidt wins this case, it is goodbye to standardized tests in the Chicago public school system; Schmidt, his allies, and the federal courts will have wrested control of educational policy from the Chicago public school authorities.” *Id.* at 631. Accordingly, he didn’t win.

Schmidt didn’t win at the next level either. His petition for a writ of certiorari was denied by the Supreme Court on October 4, 2004. *Substance, Inc. v. Chicago Board of Education*, 125 S.Ct. 54 (2004).

VISITOR ACCESS TO PUBLIC SCHOOLS: CONSTITUTIONAL RIGHTS AND RETALIATION¹⁰

By Terra S. Martin, Legal Intern¹¹

The Indiana General Assembly has not required public school corporations to establish visitor policies or procedures to govern access by members of the public to public schools and school-sponsored events. The Indiana Administrative Code does, however, specify that school corporations have a duty to outline and implement emergency preparedness plans. 511 I.A.C. 6.1-2-2.5.¹² 511 I.A.C. 6.1-2-2.5 justifies the implementation of visitor access policies, as it dictates that schools must implement “provisions to protect the safety and well-being of staff, students, and the public. . .” 511 I.A.C. 6.1-2-2.5(a)(7).

Conflicts involving access to school facilities are on the rise, due in part to non-existent policies or procedures, unwritten and inconsistent procedures, and the administration of *ad hoc* procedures for visitors who have posed disruptions in the past. Fortunately, Indiana case law is limited as to these types of disputes. However, the case law is growing in this area, as well as the administrative decisions by such investigative agencies as the Office for Civil Rights.

Authorized and Unauthorized Visitors with Weapons

The courts have been consistent in upholding a school district’s right, if not obligation, to ensure that a school campus remain free of weapons. Although there are some disagreements over what constitutes a “weapon,” where an object is fashioned to look like a weapon, the courts have treated the object as such for balancing school safety concerns with whatever individual constitutional rights might be implicated.

Nuding v. Board of Educ. of Cerro Gordo Community Unit Sch. Dist. No. 100, 730 N.E.2d 96 (Ill. App. 2000). The School District had recently imposed a dress code designed to enhance student safety. Tamara Nuding, a parent, protested the dress code by conducting a “demonstration” during a school board meeting and tour of the school. Nuding hid a pocketknife and a realistic-looking black toy gun on her person and a squirt gun in her purse during the tour and meeting. During the meeting, she asked the School Board whether she, dressed in shorts and a blouse, was dressed appropriately. The Board agreed that she was, whereupon she pulled out the gun and knife and waved them around the room. Witnesses reported that she failed to announce her intent, and, upon waving the gun around, caused great fear among those in the room. Nuding disputes this, saying she announced it was a toy

¹⁰ See also “Visitor Policies: Access to Schools,” **Quarterly Report** January-March: 2000.

¹¹ Terra S. Martin is a third-year law student at the Indiana University School of Law – Indianapolis. She worked as a Legal Intern in the Legal Section, Indiana Department of Education, during the Spring Semester 2005 through the Law School’s Program on Law and State Government.

¹² I.C. 5-14-1.5-6.1(b)(3) allows school boards to hold executive sessions to discuss “the assessment, design, and implementation of school safety and security measures, plans, and systems.”

before pulling it out and that it was only done to demonstrate that the dress code would not stop students from bringing weapons to school. The following week, the Board banned the plaintiff from all school events and activities for the next year. The school board had a policy that prohibits any person from impeding or disrupting a school activity. Nuding filed a 13-count complaint against the school. The trial court denied Nuding's request for a preliminary injunction, upholding the school board's ban on her attendance at all school activities and board meetings.

On appeal, Nuding's constitutional claims of freedom of speech did not stand, as "[a] state may impose reasonable restrictions on the time, place, and manner of constitutionally protected speech occurring in a public forum. The time, place, and manner restriction must (1) be content neutral, (2) be narrowly tailored to serve a significant government interest, and (3) leave open alternative channels of communicating the information."¹³ The Board's policy was aimed at conduct of the public while on school property and therefore fell into the content neutral restriction – it applied to anyone coming onto school property regardless of the ideas or views expressed. The policy was also "narrowly tailored to serve a significant government interest," as the policy was focused on disruptive behavior on school property. The "open communication" requirement is satisfied as the policy only bans disruptive communication, not the ideas or views themselves. Further, a ban from school board meetings was appropriate, as the Board had statutory authority to promulgate rules for its meetings. The Illinois Court of Appeals upheld the trial court's decision to uphold the ban.

Cina v. Waters, as Principal of John F. Kennedy Elementary School, 779 N.Y.S.2d 289 (A.D. 3 Dept. 2004). Mary Cina, a probation officer licensed to carry a gun, arrived at the school with the gun on her person. Her intent in coming to the school was to discuss her child's bus transportation. The school security officer refused her admittance and she became increasingly angry. She left the building and then returned with the gun still in her possession. She became loud and volatile, causing the principal to fear for his safety. The following day, Cina was notified that she was banned from the school premises until further notice. The trial court found the School was justified in its actions, as a probation officer was not a person authorized to have a weapon on school property. The claim was dismissed on appeal, as she has since been allowed back at school, albeit without her gun.¹⁴

North Carolina v. Gerald Haskins, 585 S.E.2d 766 (N.C. App. 2003). Gerald Haskins was a licensed bail runner who followed a fugitive into an elementary school. Haskins was armed when he entered school property. The school called law enforcement and placed the elementary school on lock down. Haskins was arrested and later convicted for possession of a weapon on school grounds. On appeal, he argued that he cannot be punished for having a weapon on school property because he lacked criminal intent and that he was statutorily exempt under North Carolina law as he qualified as either

¹³Citing Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753 (1989).

¹⁴The Indiana Statute regulating who can properly be on school property with a weapon is found at I.C. § 35-47-9-1 and I.C. § 35-47-9-2. It is a class D felony to possess a firearm on school property or at a school event unless one is a law enforcement officer, has been employed or authorized by the school to perform security functions, or is legally licensed to carry a firearm and the weapon remains in one's vehicle and that vehicle is being used to transport someone to and from the school. Any other person who brings a gun onto school property can be banned and face criminal prosecution.

emergency service personnel or law enforcement official, both of whom are permitted to carry guns while on school property. The appellate court held that violation of the statute did not require criminal intent as an element because the statute was designed to ensure school safety, and that anyone on school property in possession of a firearm that was not within the direct requirements of the North Carolina statute could be properly convicted. In addition, a bail runner does not meet any of the statutory exemptions, such as emergency service personnel, private police, or anyone acting in a law enforcement role. “Bail bondsmen and runners are not officers of the State.” 585 S.E.2d at 771.

Parental Confrontations with School Personnel

The right of a parent to direct the education and upbringing of the parent’s child has long been recognized as a constitutional guarantee through the due process clause of the Fourteenth Amendment. Pierce v. Society of Sisters, 268 U.S. 510, 534, 45 S.Ct. 571, 573 (1925); Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626 (1923). The guarantee, however, has certain prudential limitations, notably the lack of a right of unfettered access to the school building or classroom where the parent’s child is in attendance. No court has yet found such a constitutional right exists.

Lovern v. Edwards, 190 F.3d 648 (4th Cir. 1999). Lovern was the non-custodial parent of three children who attended the Henrico County Public Schools in Virginia. Lovern moved from Texas to Virginia to be closer to his children. Shortly after arriving, he became incensed when his son’s basketball coach was evicted from a game and received a one-game suspension. Lovern felt the school should have contested the eviction and suspension. Later in the year, when his son was not selected to be on the varsity basketball team, Lovern began a series of telephone calls to the coach and others, both at school and at their homes, complaining about his son’s exclusion. He even appeared at a basketball practice and attempted to raise the issue with the coaches. The principal then wrote Lovern, indicating that the children’s mother—the custodial parent—wanted to be notified of any discussions that involved her children. Lovern was also advised that he should limit his entry onto school property to those situations where the school is open generally to the public. Lovern began a series of telephone calls to the principal and to the person who authored the letter, complaining that it violated his constitutional rights.

At a meeting of the Henrico County Board of Supervisors, Lovern represented to the Board that his company had investigated the finances of the school and found instances of misuse of funds and corruption. He attended a Board meeting a week later and increased his barrage of telephone calls. Finally, Edwards, the superintendent and the named defendant, wrote Lovern, banning him from school property due to his pattern of verbal abuse and threatening behavior. Lovern was advised that should he come onto school property, he would be arrested for trespass. Lovern’s response was to threaten suit against a number of school and other local officials, including several federal officials.

Eventually, Lovern sued only Edwards, alleging violations of his First and Fourteenth Amendment rights. The federal district court eventually dismissed the complaint, adding that Lovern’s intimidation tactics seemed calculated to advance the interests of his company and not his children. Id. at 654, *n.* 9.

The U.S. Fourth Circuit Court of Appeals affirmed, noting that Lovern’s claims were without merit and were “so attenuated and insubstantial as to be absolutely devoid of merit, wholly insubstantial, obviously frivolous, plainly insubstantial, or no longer open to discussion.” Id., citing Hagans v. Lavine, 415 U.S. 528, 536, 94 S.Ct. 1372 (1974). In this case, Lovern’s claims are premised on Edwards’ letter barring his entry onto school property. “School officials have the authority to control students and school personnel on school property, and also have the authority and responsibility for assuring that parents and third parties conduct themselves appropriately while on school property.” Id. at 655. State law will dictate “the specific contours of the authority and responsibility of school officials,” but “such officials should never be intimidated into compromising the safety of those who utilize school property.” Id.

Lovern’s claims against Superintendent Edwards in this case are plainly insubstantial and entirely frivolous. His assertions that school administrators must provide him with boundless access to school property are “obviously without merit.” [Citation omitted.] As the district court noted, “this case is a monument to what ought not to be in a federal court.”

Id. at 656.

McCook v. Springer School District, et al., 44 Fed.Appx. 896 (10th Cir. 2002). The McCooks were the parents of a high school student, Jake. They had also been frequent critics of the New Mexico school district, having filed numerous suits alleging, *inter alia*, failure to award a scholarship to Jake (it went to the school board president’s son) and reverse racial discrimination in the selection of a teacher candidate. The parents also alleged in letters, both signed and anonymous, to the New Mexico Athletic Association (NMAA) that the school was violating the NMAA’s by-laws. A network administrator discovered audio clips on a laptop borrowed by Jake. The audio clips were from a cable television animated series called “South Park,” noted for its vulgarity and sexually explicit language. Jake later admitted he was the one who downloaded the audio clips. He was suspended from school for five days, which meant he would miss the homecoming pep rally scheduled for the next day. Despite his suspension, Jake and his father arrived at school the next day, principally to attend the pep rally. A physical confrontation occurred between the superintendent and Mr. McCook. The superintendent, later that day, sent a letter, indicating that all three McCooks were banned from the property. When Jake’s suspension was over, the superintendent informed him there may be further consequences as a result of the confrontation, but the suspension of the father from school property remained in effect. The school board later expelled Jake at the recommendation of the superintendent, barring Jake from school property during his expulsion.

The McCooks brought suit under 42 U.S.C. § 1983 against the school and its officials, alleging retaliation for their exercise of their First Amendment rights (free speech, association and assembly). They also claimed deprivation of “equal protection” under the Fourteenth Amendment. The trial court granted summary judgment to the defendants, with this appeal following.

Although the McCooks—in some of their activities—were engaged in the exercise of their constitutional rights (attending board meetings, speaking out on matters of public concern), and the school district’s ban on them could be viewed as “chilling” the exercise of these rights (preventing

them from voting at school board election), the school district's actions were not motivated by the McCooks' exercise of their constitutional rights. Jake's suspension was "objectively reasonable" in that it occurred within the "temporal proximity" of the discovery of the audio clips and was not related to the McCooks contemporaneous activities directed at the school district and its officials. There was no evidence the school district, its officials, or the school board retaliated against the McCooks because of the exercise of any constitutional right.

Nichols v. Western Local Board of Education, 805 N.E.2d 206 (Ohio Com. Pleas 2003). Nichols, the mother of a middle school student, was banned from school property and school activities for three months after an altercation with her daughter's volleyball coach following a game. Nichols sought review of the decision, arguing that she didn't receive due process. The court held that parents do not have a constitutional liberty interest to be present on school property or attend school activities. Therefore, Nichols was not entitled to due process when the school board upheld the school administration's decision to ban her from school property and activities for three months. School authorities have the right to exclude persons (other than students) from school property and activities without providing a due process hearing. Further, the school board had full discretion to make rules regarding the safety of the students and faculty within the school district. In this case, the school board had no formal rules regarding the presence of persons at school activities. The school board allowed the parent to address them and allowed unsworn statements from others. In upholding the ban, the school board warned the parent that should she violate the ban, she would be considered trespassing. The school board was not conducting a quasi-judicial proceeding that was subject to judicial review. Ohio law does not provide due process rights for such administrative actions. The school board is not required to have a rule for every conceivable instance where its governance function is implicated.

Van Deelen v. Shawnee Mission Unified School District, 316 F.Supp.2d 1052 (D. Kan. 2004). The Court denied a claim by Van Deelen, who alleged that his banishment from school property was a denial of constitutional guarantees. Van Deelen had filed several *pro se* lawsuits against his son's school district and certain school administrators and coaches. His disputes were many but stemmed mostly from disagreements with the football coaches over medical and safety concerns involving his son as well as the seeming disinclination of school administrators to investigate his complaints. The disaffection grew as did Van Deelen's inappropriate behavior, which became threatening. The school described him as "out of control." He was banned from school property other than to drop off or pick up his son, a ban he repeatedly violated. Later, at a wrestling meet held at another high school, Van Deelen and his son engaged in further inappropriate behavior, including foul language and obscene gestures. At one point, Van Deelen's son "moonied" the opposing school's students. The school's attorney informed Van Deelen he was permanently banned from school property. The court noted there is no constitutional right to enter school property. Citing Carey v. Brown, 447 U.S. 455, 470-71, 100 S.Ct. 2286 (1980), the court noted that "school officials have the authority to control students and school personnel on school property, and also have the authority and responsibility for assuring that parents and third parties conduct themselves appropriately while on school property." 316 F.Supp.2d at 1057. Van Deelen, a parent, was not engaged in any constitutionally protected activity.

Rodgers v. Duncanville Independent School District, 2005 U.S. Dist. LEXIS 5705 (N.D. Tex. 2005). Plaintiff had an escalating pattern of threatening, abusive, and disruptive conduct toward school

personnel at the elementary school where his children attended. Some of his conduct included yelling at his son's first grade teacher and then following her into the parking lot and using profanity when addressing school administrators. At first, he was restricted from entering the classroom but was allowed to eat lunch with his son and daughter in a separate area of the cafeteria. He was also informed that he would have to work through the principal if he wished to communicate with any teacher. Rodgers ignored these directives, resulting in his total ban from the school campus. Nevertheless, he continued to enter the campus and taunt teachers. Twice, law enforcement removed him from the school campus. He even confronted his son's teacher while the class was on a field trip to a zoo, using profanity during the exchange. He filed a *pro se* action in federal court alleging the School violated his parental rights of access to the school; retaliated against him for exercising his right to free speech; and discriminated against him on the basis of his race, gender, and disability. The school district moved for summary judgment, arguing there is no constitutional right of unlimited parental access to a school; Rodgers' speech did not involve matters of public concern and disrupted the educational environment; and there was no evidence of race, gender, or disability discrimination. The Court dismissed the freedom of speech claim because the speech involved was not a "matter of public concern."¹⁵ His confrontations with school staff were about private matters and they had not interfered with his picketing in front of the school. The retaliation claim did not stand because of Plaintiff's pattern of volatile behavior. Further, the Court denied his claim of race, gender, or disability discrimination because no evidence was introduced to this effect. "Without evidence that defendants treated similarly-situated non-minority parents differently than plaintiff, he cannot establish an equal protection violation." *Id.* at 12.

The court acknowledged Rodgers' fundamental right to direct the upbringing and education of his children.

However, no court has ever interpreted the due process clause to create a parental right of unfettered access to school facilities. To the contrary, courts have consistently upheld the authority of school officials to control activities on school property. This includes third parties, including parents, from access to the premises when necessary to maintain order and prevent disruptions to the educational environment.

Id. at 6. The federal district court granted the school district's Motion for Summary Judgment on Rodgers' federal claims.

An overarching theme emerging from the case law is that courts are encouraging schools to create an atmosphere of cooperation between parents and school personnel. Though there is no constitutional right for parents to be present on school property, it is in the child's better interest to have parents who are involved in the educational experience but do not interfere to the extent that it actually hinders the child's educational opportunities. Parents, teachers, and administrators should work towards a comfortable level of cooperation and involvement. Further, the Indiana Code authorizes schools to implement safety procedures and statutorily criminalizes, with exceptions, the act of bringing a firearm onto school property despite a lack of criminal intent. Most importantly, all visitor policies and safety procedures relating to schools should be consistently and uniformly applied to create maximum safety

¹⁵ Citing Connick v. Myers, 461 U.S. 138, 146-47, 103 S.Ct. 1684, 1690 (1983).

for the students and prevent claims of discrimination and retaliation by parents and visitors who are denied or given limited access to school property.

Visitor Policies and Non-Discrimination Laws

The Office for Civil Rights (OCR) is responsible for enforcing various nondiscrimination laws to ensure recipients of federal education funding do not discriminate in the conduct of the recipient's programs and services. All public school districts in Indiana are recipients of such funding. OCR often addresses disputes arising under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990 (ADA). Both laws prohibit discrimination based on disability. Children affected by Section 504 are often included in the Individuals with Disabilities Education Act (IDEA) programs as well. The IDEA¹⁶ mandates that all children identified as having special education needs are provided an Individualized Education Program (IEP) that will provide them a "free appropriate public education" (FAPE) in the "least restrictive environment" (LRE). The IEP is developed through an IEP Team¹⁷ that includes the parent and various school personnel. The IDEA and Section 504 both provide procedural safeguards, including the right to a due process hearing, but IDEA's procedural safeguards are more extensive and particular. When a parent requests a hearing, it is often after communication has broken down between the parent and school personnel as to how to appropriately address the special education needs of the student. When tension already exists between the parent and the school, and a parent is then denied access to classrooms and facilities, it is not uncommon for the parent to believe the restriction is in retaliation for requesting a hearing under Section 504 or the IDEA. Retaliation is proscribed by Section 504. OCR has recently issued a number of Letters of Finding involving parental access to school facilities. Oftentimes, the parent has been or is involved in a "protected activity" (exercising rights afforded under the IDEA or Section 504), but OCR has found no violation of the non-discrimination laws where the school district has been able to articulate a non-discriminatory reason for the restriction that is not a mere pretext for discrimination.

In Holbrook (MA) Public Schools, 34 IDELR ¶ 42 (OCR 2000), a parent-advocate complained the school district retaliated against the advocate and the parent by adopting a classroom observation policy that limited observations to one hour a day. The school district, however, had a legitimate, non-pretextual, non-discriminatory reason for implementing its classroom observation policy: The presence of adults as observers was often distracting for the children and disruptive of the overall classroom program. The change in policy was not directed at the advocate or the child's parent; rather, the policy was to be applied to all visitors. The advocate and the parent were offered an IEP Team meeting to discuss whether an extended observation period was necessary.

Wooster (OH) City Schools, 33 IDELR ¶ 253 (OCR 2000). A parent claimed that the Wooster City School District retaliated against her for invoking her due process rights by requesting a hearing to

¹⁶IDEA, 20 U.S.C. § 1400 *et seq.*, is implemented in Indiana through 511 IAC 7-17 *et seq.* ("Article 7").

¹⁷States vary in their description of the IEP Team. In Indiana, the IEP Team is referred to as the "Case Conference Committee."

challenge the placement of her child in the District's Severely Behaviorally Handicapped program. The school district had denied her access to all District facilities and events, and later reported her to child welfare authorities. The OCR's guidelines to determine whether a retaliation claim can be made are: "(1) the parent engaged in an activity protected by the regulation; (2) the recipient was aware that the parent engaged in a protected activity; (3) the recipient took action adverse to the parent contemporaneously with or subsequent to her protected activity; and (4) there was a causal relationship between the adverse action and her protected activity. If each of these elements is established, the District must articulate a legitimate, non-discriminatory, non-pretextual justification for the adverse actions." In this case, OCR found that all four conditions were met; however, the parent had made threats to school personnel on two occasions, detailing violence she would carry out against the staff. The parent claimed to be adept at both martial arts and in weapons. She threatened two staff members with potential death. She even indicated which building she was likely to use to "scope her target." The school reported this to local law enforcement and banned the parent from school property and school events. OCR determined that the threats constituted a legitimate, non-discriminatory reason for the denial of access to school facilities.

Pflugerville (TX) Independent School District, 35 IDELR 43 (OCR 2001). A parent alleged the school district retaliated against her for her advocacy for her son when an administrator would not let her meet with her son's teacher without the administrator present. The parent also alleged her daughter—who had graduated from school—was prevented from having lunch at the school with her friends. OCR found the school district did not violate Section 504 or Title II of the ADA. Although the school district has no official written policy, it is the school district's practice to have an administrator participate in parent/teacher conferences. OCR found the school administrator was present at other parent/teacher conferences, and that the administrator had been requested by the teacher to assist in mediating interactions with the parent. OCR also found no retaliation with respect to the complainant's daughter. She had already graduated from the high school. The school district's policy permits only parents and guardians to visit the school campus, and does not permit other visitors.

In Vandalia-Butler (OH) City Schools, 38 IDELR 218 (OCR 2002), the parent had filed an IDEA complaint with the Ohio Department of Education (ODE) under 34 CFR §§ 300.660-300.662. Thereafter, the parent believed the school district retaliated against him by first requiring him to provide 24-hour notice before visiting his child's classroom and then later refusing him the opportunity to visit the classroom despite providing the requisite 24-hour notice. The initial complaint was resolved through the ODE. As to the second allegation, OCR found the parent did provide the school with 24-hour notice. However, the school notified the parent by e-mail that the occupational therapist would not be present that date. The parent, in response, sent an e-mail indicating that he "would not bother coming in." The parent changed his mind but didn't advise the school. When he appeared, the school was not prepared for his visit and denied him access to the classroom. OCR found "the parent was denied access to his son's classroom because he failed to follow the school's visitation policy, of which he was aware."

Los Angeles (CA) Unified School District, 37 IDELR 102 (OCR 2002). Parents of a child with unspecified disabilities asserted their child required a one-to-one aide. (This issue was later resolved between the parties.) They also alleged the school district retaliated against them when school

personnel required the mother to submit requests to visit her child's classroom at least 24 hours in advance although other parents did not have to follow these procedures. The school had recently implemented a "permission form" that explained the requested 24-hour notice requirement along with other guidelines for parents to follow when visiting the school. The assistant principal informed the mother she had to complete the form, including providing the exact date and time of her anticipated visit. The parent complained that the District's Parent-Student Handbook did not contain this policy. The Handbook's visitation policy does not require 24-hour notice with exact time and date. The Handbook does specify that visitors are expected to follow established school policy in requesting a classroom visitation and must complete a visitor's permit and obtain approval from the principal or a designee before proceeding to the classroom. This policy has been in place for years although it had not been routinely provided to parents. This was the first year the permission form—which contained the 24-hour notice—was discussed with parents. The 24-hour notice is requested and not required. The school does request the parent to indicate the time and date in order to notify the teacher. Once a parent has signed the form, it is maintained in the office. Thereafter, the parent need only sign in at the main office. In this dispute, the mother is the only one who refused to sign the form. OCR interviewed seven parents. Although their recollections were sketchy in parts, the majority did not have any particular complaints or problems with the classroom visitation policy or permission form. Although the policy and procedure were inconsistently applied, the inconsistencies were minor. OCR concluded that the complaint could be resolved by the school issuing a letter to all parents indicating what the procedures for visiting would be, that they would be required to sign a permission slip, and that the procedures would be applied uniformly.

Laurel (PA) School District, 39 IDELR 196 (OCR 2003). The complainant alleged the school discriminated against her because of her child's disability when the school banned her from visiting her child's school. This retaliation occurred purportedly after the mother brought a video camera into the school. (This issue was not investigated because it occurred more than 180 days previously.) With respect to the claim for retaliation, the OCR determined that it was acceptable for a school to require escorts for parent visitors but not require escorts for parent volunteers. The parent had filed a claim of discrimination under Section 504 and Title II of the ADA because the school would not let her roam freely within the building while parent volunteers were allowed to do so. She was required to report to the main office, leave her driver's license, be escorted to her destination within the school, and be escorted back to the main office to retrieve her driver's license before leaving. OCR determined that this was not discriminatory, as all parent visitors were subject to this procedure. Further, parent volunteers were required to submit to security background checks prior to volunteering as a means of ensuring the safety of the students.¹⁸ Accordingly, parent volunteers were "not similarly situated to the complainant."

¹⁸ In Indiana, school districts are permitted, but not required, to perform background checks on volunteers. I.C. 5-2-5-5(a)(9) states "Except as provided in subsection (b), on request, law enforcement agencies shall release or allow inspection of a limited criminal history to noncriminal justice organizations or individuals only if the subject of the request: (9) has volunteered services at a public school (as defined in IC 20-10.1-1-2 [I.C. 20-18-2-15]) or non-public school (as defined in IC 20-10.1-1-3 [I.C. 20-18-2-12]) that involve contact with, care of, or supervision over a student enrolled in the school."

In Westside (CA) Union School District, 42 IDELR 146 (OCR 2004), a parent's verbal harassment of her child's one-on-one aide was sufficient justification to reduce the number of hours she was allowed to observe her child in his classroom. The parent had been volunteering in the classroom, but then became embroiled in disagreements with the aide, especially with regard to activities involving the parent's child. OCR concluded that limiting her visitation and volunteer activities to times when the aide was not present would limit the disruption in the classroom and ensure control by the school's instructional staff. These limitations are legitimate and non-discriminatory.

Walled Lake (MI) Public School District, 42 IDELR 114 (OCR 2004). This dispute arose from disagreements with an IEP developed for a thirteen-year-old student in the seventh grade. The student had a learning disability. The school district proposed an IEP. The parent made a number of amendments to the IEP and indicated that if the school did not implement the amended IEP, she wanted an IDEA due process hearing. The school initiated the due process hearing. The parent decided to withdraw her hearing request. When she attempted to hand-deliver her withdrawal notice to the receptionist at the school district's administrative building, the receptionist informed her she had to direct the correspondence to the district's lawyer. An ugly situation ensued, with the parent flinging the letter at the receptionist and using obscenities. Two administrators had to escort the parent from the building. Thereafter, the district's lawyer wrote the parent and informed her that because of this incident and past instances of inappropriate behavior, the parent was banned from school property or school functions without the advance permission of the superintendent or the building principal. The parent asserted the access restrictions were in retaliation for her exercising her due process rights. OCR noted that "under certain circumstances, restrictions on parents' visitation rights at their child's school might constitute an adverse action." However, OCR did not find those circumstances present in this case. The school district's restrictions occurred only four days after the incident at the administrative building. In contrast, the hearing had been requested over 46 days earlier. OCR does consider length of time in analyzing whether adverse action is retaliation for exercise of a protected activity. In this case, the adverse action stemmed from the confrontation at the administrative building and not because of the hearing request.

Letter to Mamas, 42 IDELR 10 (OSEP 2004). Office of Special Education Programs (OSEP) was asked whether IDEA "guarantees parents and their representatives a reasonable opportunity to observe their children's classrooms and proposed placement options." OSEP agreed that IDEA "encourages school district personnel and parents to work together in ways that meet the needs of both the parents and the school, including providing opportunities for parents to observe their children's classrooms and proposed placement options. In addition, there may be circumstances in which access may need to be provided." However, OSEP concluded that "neither statute nor the regulations implementing the IDEA provide a general entitlement for parents of children with disabilities, or their professional representatives, to observe their children in any current classroom or proposed educational placement." OSEP further stated that this issue may be addressed by state or local policy.

COURT JESTERS: POETIC JUSTICE

Chicago-born Finley Peter Dunne (1867-1936) has long been a legendary journalist in a city that has produced numerous other legends of the Fourth Estate. Dunne rose through the ranks from copy writer to editor. He was particularly adept at editorial writing, which evolved into a series of vignettes in Irish dialect where the mythical “Mr. Dooley,” Irish saloon keeper and homespun philosopher, held forth on topics of the day, usually in discussions with his good friend and saloon patron, Mr. Hennessy. In one such exchange, Mr. Dooley explained the intricacy of the American judicial process.

An appeal, Hinnessy, is where ye ask wan coort to show its contempt f'r another coort.¹⁹

Sometimes the contempt is by invitation of one court with response in kind—but not too kind—by the other.

Sometime in 1974, at a “very convivial celebration” in Savannah, Georgia, “the distinguished Judge Dunbar Harrison, Senior Judge of Chatham Superior Courts, arose and addressed those assembled, and *demande*d that if Judge Randall Evans, Jr. [of the Georgia Court of Appeals] ever again was so presumptuous [sic] as to reverse one of his decisions, that the opinion be written in poetry.” Brown v. State, 216 S.E.2d 356, 357 n. 3 (emphasis original).

Into Judge Harrison’s court came defendant Brown, who faced conviction for a drug violation. Unfortunately for Brown, a critical witness failed to appear on his behalf. Judge Harrison would not grant a one-day adjournment so Brown could locate his witness. Brown was convicted and appealed, asserting that Judge Harrison’s refusal to grant the one-day adjournment denied him a fair trial. As a further unfortunate matter, the appeal landed before a three-judge panel that included Judge Randall Evans, Jr.

Judge Evans recalled the events of the year past in Savannah, including the poetic gauntlet thrown at his judicial feet by Judge Harrison. As a harbinger of things to come, Judge Evans lamented that “I readily admit I am unable to comply [with Judge Harrison’s challenge] because I am not a poet, and the language used, at best, is mere doggerel. I have done my best, but my limited ability just did not permit the writing of a great poem.²⁰ It was no easy task to write the opinion in *rhyme*.” Id. (emphasis original).

But write it he did, and reverse Judge Harrison he did.

¹⁹“The Big Fine,” Mr. Dooley Says (1906).

²⁰English Majors: This is an example of foreshadowing.

The D.A. was ready
His case was red-hot.
Defendant was present,
His witness was not.

He prayed one day's delay
From His honor the judge.
But his plea was not granted;
The Court would not budge.

So the jury was empaneled,
All twelve good and true,
But without his main witness,
What could the twelve do?

The jury went out
To consider his case,
And then they returned
The defendant to face.

“What verdict, Mr. Foreman?”
The learned judge inquired.
“Guilty, your honor.”
On Brown's face—no smile.

“Stand up,” said the judge,
Then quickly announced:
“Seven years at hard labor.”
Thus his sentence pronounced.

“This trial was not fair,”
The defendant sobbed.
“With my main witness absent
I've simply been robbed.

“I want a new trial--
State has not fairly won.”
“New trial denied,”
Said Judge Dunbar Harrison.

“If you say I'm, wrong,”
The able judge did then say,
“Why not appeal to Atlanta?
Let those Appeals' Judges earn
part of their pay.”

“I will appeal, sir”—
Which he proceeded to do—
“They can't treat me worse

Than I've been treated by you.”

So the case has reached us—
And now we must decide:
Was the guilty verdict legal—
Or should we set it aside?

Justice and fairness
Must prevail at all times;
This is ably discussed
In a case without rhyme.²¹

The law of this State
Does guard every right
Of those charged with crime
Fairness always in sight.

To continue civil cases
The judge holds all aces.
But it's a different ball-game
In criminal cases.

Was one day's delay
Too much to expect?
Could the State refuse it
With all due respect?

Did Justice applaud
Or shed bitter tears
When this news from Savannah
First fell on her ears?

We've considered this case
Through the night,
through the day.

As Judge Harrison said,
“We must earn our poor pay.”

This case was once tried—
But should now be rehearsed
And tried one more time.
This case is reversed!

Id. (emphasis original).

²¹Id. at 357 (citation omitted). The court's opinion has been slightly edited.

QUOTABLE . . .

Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind that brings new political administrations into temporary power.

Supreme Court Justice Hugo L. Black, dissenting in Turner v. United States, 396 U.S. 398, 426, 90 S. Ct. 642 (1970).

UPDATES

BOY SCOUTS OF AMERICA

The Boy Scouts of America (BSA), despite its historical support from Congress,²² continues to be challenged through litigation because of its theistic underpinnings that deny eligibility for its scouting programs to atheists and others who do not profess a belief in God.²³ Litigation strategies are now employing State civil rights or anti-discrimination laws, with the target not just the BSA itself but the sponsoring entities, especially where the sponsoring entity is a public school.

Michigan

Scalise v. Boy Scouts of America, et al., 692 N.W.2d 858 (Mich. App. 2005) is the latest dispute involving the Boy Scouts of America (BSA). The plaintiffs are a father and son. The son wanted to join a cub scout group associated with the BSA. The BSA conducts its scouting activities through a number of sponsors that are private and public, faith-based and secular. In this case, the BSA sponsor was a Michigan public school district. When the father learned that the BSA required certain declarations of faith,²⁴ he requested an exemption because he found such declarations to be

²²Congress chartered the BSA in 1916 as a non-profit charitable organization. 36 U.S.C. § 30902. More recently, Congress established the “Boy Scouts of America Equal Access Act,” which is designed to ensure the BSA has equal access to public elementary and secondary schools. 20 U.S.C. § 7905.

²³See “Being Prepared: The Boy Scouts and Litigation,” **Quarterly Report** October-December: 2002, with updates in **Quarterly Report** January-March: 2003 and **Quarterly Report** April-June: 2003.

²⁴Specifically, the Boy Scout Oath requires the following declaration: “On my honor I will do my best; To do my duty to God and my country and to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight.” The corresponding “Cub Scout Promise” requires the cub scout to “promise to do my best, To do my duty to God and my country, To help other people, and To obey the Law of the Pack.” See www.scouting.org.

“repugnant to his humanist beliefs.” The BSA refused and the father withdrew his son from scouting. 692 N.W.2d at 865-66.

The father sued the BSA and the public school district, alleging violations of certain constitutional rights under the Michigan constitution, notably Establishment Clause, Free Exercise Clause, and Equal Protection Clause. Because of the similarity between Michigan’s constitution and the United States’ constitution, federal court decisions are employed along with Michigan court decisions in analyzing Michigan law. *Id.* at 868, 872.

The trial court eventually ruled in favor of the defendants, dismissing the action. The plaintiffs appealed. The Michigan Court of Appeals employed the three-prong test from *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971) to analyze the Establishment Clause allegation.

Secular Purpose: The school district has a “facilities use” policy that makes its facilities available to the public, which is a secular purpose in itself.

Advancement of Religion: The “facilities use” policy does have four tiers for usage, with “school directed” groups having first priority among applicants. “School related” groups (which included BSA, 4-H, and similar clubs and groups) are in a secondary group. Thereafter, groups wishing to use the facilities are charged for use of the facilities (third-tier groups are nonprofit community groups; fourth-tier groups are for-profit and non-community groups). The court disagreed with the plaintiffs that this arrangement gave the BSA a “special advantage” over other groups, thus advancing the religious positions of the BSA. “Although the policy created priorities among groups and waived costs for some, the structure allocated resources reasonably, impartially, and thus secularly.” *Id.* at 869. The school district’s policy was neutral, had a secular purpose, and did not advance religion over non-religion. As for the latter observation, the court noted the plaintiffs’ argument advocates a “blanket prohibition on any group with a scintilla of faith-based philosophy.” This would create a “constitutional straightjacket” that would prevent “any sentiment of religious belief, however mild, from being expressed by a group or individual in a school,” an argument that is not countenanced by either the constitution or the Supreme Court. “Incidental, indirect, or remote benefits to religion do not alone render a particular activity unconstitutional.” *Id.* at 869-70. In this case, the school district’s policy acted in a neutral fashion in the allocation of community access to its facilities. *Id.* at 870.

The plaintiffs also complained of the school district’s permitting the BSA to distribute its literature and post its notices in the school district’s buildings. The court noted that several organizations are permitted to distribute flyers to students, sometimes on a weekly basis. These flyers are not discussed in the classroom, not incorporated into the curriculum, and not made a part of the school day’s activities. BSA flyers received no special focus, nor did the BSA’s posters. The BSA’s literature and posters do “not denote the religious aspect of the group” and did not until a “religious disclaimer” was added to such literature at the behest of the plaintiffs. “Since plaintiffs requested the addition of the disclaimer, thereby affecting their purported injury, they lack standing to challenge those advertisements with the added disclaimer.” *Id.* at 870-71.

At one time the school district permitted presentations by BSA officials during the school day. The practice was halted during the pendency of the litigation. Originally the trial court found such presentations offended the Establishment Clause but later dismissed the plaintiffs' claims in their entirety. The appellate court found the visits did not violate the Establishment Clause. The "primary effect" of these presentations was not to advance religion. The BSA is not primarily a religious organization. "Rather, it is an organization whose mission it is to prepare young people to make ethical choices by instilling in them certain values, some of which are religiously based." The school district's allowing a BSA representative to invite students to an informational meeting did not have the primary effect of advancing religion over non-religion (or "irreligion," a term employed by some courts). "Boy Scouts was not admitted so it could proselytize students." *Id.* at 871-72. Although the Scout Oath and Cub Scout Promise do contain references to God, recitation "occurs at private gatherings where students and adult members attend freely and willingly." The line between these private meetings and school-day functions is distinct; there is no blurring that would serve to confuse. In short, there is no coercive effect. *Id.* at 872.

Excessive Entanglement: The BSA had to comply with the same school district policies governing school access and literature distribution. "These general regulations applied to all organizations that sought access to school mailboxes, hallways, and facilities. Such general regulations do not create the excessive entanglement barred by *Lemon*." Further, the school district did not monitor BSA gathers but restricted its activities to reviewing proposed literature for compliance with its distribution policy. *Id.*

The Court of Appeals was likewise unpersuaded by the plaintiffs' Equal Protection claims, noting that the Michigan constitution "only protects individuals from discriminatory 'state action.'" *Id.* The BSA is a private organization. For its activities to be considered "state action," there would have to be a "sufficiently close nexus between the State and the challenged action" such that the "private behavior may be fairly treated as that of the State itself." *Id.* at 873 (internal punctuation and citations omitted). In this case, the school district did not provide any preferential treatment for the BSA. It "simply allowed Boy Scouts to use [school district] facilities in the same manner as other similarly situated organizations. Although Boy Scouts was given a level-two priority and could use the facilities free of cost, the group was on equal footing with all other level-two priority groups." *Id.*

Thus, because [the school district] did not ration its facilities, but rather distributed access evenhandedly, Boy Scouts' policy of requiring endorsement of religious principles cannot be attributed to [the school district] on the basis of Boy Scouts' use of [the school district's] facilities.

Id. at 873-74. The plaintiffs raised additional issues, many variations on the Establishment Clause and Equal Protection Clause arguments discussed above, including allegations of violations of the State's civil rights laws. The appellate court addressed each allegation in turn and ultimately affirmed the trial court's decision in favor of the BSA and the school district.

Oregon

Powell, et al. v. Bunn, et al., 108 P.3d 37 (Ore. App. 2005) involved an allegation of discrimination under an Oregon law that essentially incorporates First Amendment Establishment Clause principles.²⁵ Under the Oregon law, “[n]o person in Oregon shall be subjected to discrimination in any public elementary, secondary or community college program or service, school or interschool activity...where the program, service, school or activity is financed in whole or in part by moneys appropriated by the Legislative Assembly.” “Discrimination” is defined as meaning “any act that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on age, disability, national origin, race, marital status, religion or sex.” 108 P.3d at 42, citing *ORS 659.850*. The State Board of Education was directed to establish rules, which it did, requiring an initial local procedure to address allegations of discrimination with an appeal to the State Superintendent. The State Superintendent would initially review the local school district’s procedures and findings of fact to determine whether proper procedures were followed. From this review, the State Superintendent can find there was no substantial evidence to support the allegation of discrimination or find that it *may* have existed and order the parties to a conciliation conference. Should conciliation not be successful, the State Superintendent was to conduct a contested hearing. *Id.*, citing *OAR 581-021-0049*. *Id.*

As noted in previous articles, the BSA is a private organization that requires its members to adhere to “general theistic principles that are not tied to any specific religion.” BSA “explicitly excludes atheists from eligibility for participation in its activities.” 108 P.3d at 40-41. The BSA recruits in public schools by sending representatives to the schools to recruit potential scouts. In this school district, a teacher handed out promotional flyers for the BSA. At a later time and during the lunch period, a school district employee introduced a BSA representative, who encouraged the students to join the scouts. Each student was given a bracelet with the time and date of an organizational meeting. Plaintiff’s son was a first-grade student. She represented that he is an atheist, and she knew that he would be ineligible for BSA membership. There were subsequent presentations at school, but school personnel did not play any active role. Plaintiff filed a discrimination complaint with the school district, which resulted in the school creating guidelines for the distribution of literature and presentations by community groups during non-instructional time. Otherwise, the school district denied her discrimination complaint. She appealed to the State Superintendent.

The State Superintendent reviewed the record, determined there was no substantial evidence of discrimination, and declined to take any further action. The trial court reversed, finding the State Superintendent abused his discretion and remanded the matter to him. The trial court also awarded attorney fees to the petitioners, to be paid by all respondents. *Id.* at 40, 42.

The Oregon Court of Appeals, sitting *en banc*, found the State Superintendent committed “errors of law” rather than engaged in “abuse of discretion.” The State Superintendent relied upon U.S. Supreme Court cases that were not sufficiently analogous to the fact situation presented. *Id.* at 45-48. The Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905, which is part of the No Child

²⁵The related case—Powell v. Bunn, 59 P.3d 559 (Ore. App. 2002), *rev. den.*, 77 P.3d 635 (Ore. 2003)—was reported in “Being Prepared: The Boy Scouts and Litigation,” **Quarterly Report**, October-December: 2002.

Left Behind Act of 2001, does not apply to this case. That law—which requires schools that receive federal money to provide equal access to the BSA—is not implicated in this dispute. *Id.* at 47, *n.* 9. “The question before us is not whether the district has established a religion by its relationship with the Boy Scouts; rather, again, the question is whether there is substantial evidence that the district subjected [Plaintiff’s son] to discrimination in a school activity.” *Id.* at 48.

The majority of the court in this 6-3 decision found that the school district does subject persons to differential treatment in a school activity on religious grounds. “All students must listen to the introductory presentation, but only those students who meet a religious test may accept the invitation to join.” *Id.*²⁶ Although “differentiation in treatment that is based on religion constitutes unlawful discrimination,” it may not be unlawful if “the differentiation is reasonable.” *Id.* at 49. “Reasonable” is subject to interpretation, but where discrimination is involved, there are not gradations such that “limited discrimination” would be permissible. In this case, students who are rejected for membership in BSA programs “feel ostracized by their peers. The record, and common sense, teach us that such reactions are neither idiosyncratic nor trivial.” *Id.* at 50. Although the BSA may play “a constructive role in the development of youth character,” this does not alter the conclusion that there exists “substantial evidence of discrimination” on the basis of religion. *Id.* at 51.

Our conclusion should not be taken to suggest that discriminatory organizations such as the Boy Scouts may not, under any circumstances, be permitted to conduct recruiting or other programs on school premises. Here, however, the district’s policy authorizes school administrators to provide practical support for such programs during school activities for which student attendance and attention are mandatory. In those circumstances, there is substantial evidence from which, under the applicable statutes and rules, a reasonable factfinder could determine that the differentiated treatment to which the school district subjects school children by virtue of the Boy Scouts’ recruitment activities is unreasonable. The superintendent therefore erred in concluding that there is no substantial evidence that the district discriminated.

Id. The court reiterated that the “superintendent made a reasonable mistake” by relying upon Supreme Court decisions that were not sufficiently analogous. Such a “reasonable mistake” does not “support the award of attorney fees against the department.” *Id.* At 52. The attorney fee award was reversed and the matter remanded to the State Superintendent, as ordered by the trial court.

THEORY OF EVOLUTION

²⁶There is considerable debate between the majority and dissent over the preposition “in.” The majority opinion stresses that “there is substantial evidence that the district subjected students to differential treatment *in* a school activity on the ground of religion,” *Id.* at 49 (emphasis original), while the dissent criticizes the majority for “cherry-picking an obscure dictionary definition of ‘in’ to reach a result that the legislature did not intend.” *Id.*

July of 2005 will mark the 80th anniversary of the famous prosecution in Dayton, Tennessee, of high school teacher John T. Scopes for teaching evolution. Scopes was a 24-year-old science teacher with Darwinian views who agreed to be the nominal defendant in a test case to challenge the Butler Act, a public law passed by the Tennessee legislature in February of 1925. The Butler Act made it unlawful for a teacher in any school supported by state funds “to teach any theory that denies the story of divine creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.” This became the so-called “Monkey Trial” and is remembered more for the clash between William Jennings Bryan and Clarence Darrow.²⁷ The 12-day “Monkey Trial” was high on drama but short on legal effect. The Butler Act, although never again enforced, remained “on the books” until repealed in 1967.²⁸

American historian Frederick Lewis Allen, who wrote extensively on the 1920s, thought that the Scopes’ trial would put an end to the friction between fundamentalists who believe in the literal six-day creation of the world versus those who find merit in evolution.

Legislators might go on passing anti-evolution laws, and in the hinterlands the pious might still keep their religion locked in a science-proof compartment of their minds; but civilized opinion everywhere had regarded the Dayton trial with amazement and amusement, and the slow drift away from fundamentalism certainly continued.²⁹

Historians, of course, can be wrong. History has repeated itself again and again. Current battlegrounds include Kansas, Missouri, Ohio, Pennsylvania, and South Carolina.³⁰ And, of course, Georgia.

On January 13, 2005, Federal District Court Judge Clarence Cooper issued his 44-page decision in Selman v. Cobb Co. Board of Education, 2005 U.S. Dist. LEXIS 432 (N.D. Ga. 2005) regarding the decision of the Cobb County, Georgia, Board of Education to place a sticker in its science textbooks that reads as follows:

²⁷The iconoclast H. L. Mencken, in town to cover the proceedings for *The Baltimore Sun*, coined the term “Monkey Trial” to describe the July 1925 events in Dayton, Tennessee. The trial is also well known because of *Inherit The Wind*, a 1955 stage play and later a movie (1960) by Jerome Lawrence and Robert E. Lee. The movie *Inherit The Wind* starred Spencer Tracy, Frederic March, and Gene Kelly. (The title “Inherit The Wind” is taken from Hebrew Scripture: “Those who trouble their households will inherit the wind, and the fool will be servant to the wise.” Proverbs 11:29.)

²⁸Also see “Evolution vs. ‘Creationism,’” **Quarterly Report** October–December: 1996; and “The ‘Theories’ of Evolution,” **Quarterly Report** October–December: 2001.

²⁹Quoted by Susan Jacoby, “Caught Between Church and State,” *New York Times* (January 19, 2005).

³⁰Jacoby, “Caught Between Church and State.”

This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered.

Slip Opinion at 8. Suit was brought, alleging the School Board's actions violated the First Amendment's Establishment Clause. Plaintiffs sought, *inter alia*, declaratory and injunctive relief as well as nominal damages.

Judge Cooper was aware that this dispute involves an issue that "historically has generated intense controversy and debate precisely because of its religious implications and the belief of some that science and religion cannot coexist," adding that "[s]ince at least the 1920s, courts throughout the Nation have been struggling to determine the constitutional limitations that should be placed on public school curriculum concerning the origin of the human species and to delineate clearly the line that separates church and state." Id. at 2.

He was quick to point out that his opinion "resolves only a legal dispute...[:] whether the sticker placed in certain Cobb County School District science textbooks violates the Establishment Clause of the First Amendment..."³¹ Id. The court pointedly declined to address whether science and religion are mutually exclusive, whether the teaching of "intelligent design" ("only an intelligent or supernatural cause could be responsible for life, living things, and the complexity of the universe") would pass constitutional muster, or whether the theory of evolution is or should be taught as a theory or as fact. Id. The court did not have to contend merely with the parties; he also had the "help" of numerous *amici curiae* for both sides, including a person described in passing as "J. Foy Guin, Jr., a district court judge from another district" who was supporting the School Board "in his capacity as a citizen." Id. at 3, n. 2.³²

In the Beginning...

The genesis for this dispute began in the Fall of 2001 when the Cobb County School District initiated the textbook adoption process specifically for science textbooks. Id. at 5. The School District—which at times appears to be at some odds with the School Board—has had a policy since 1979 that addressed the teaching of evolution. Its last revision prior to the textbook adoption process was in 1995. Id. at 4. The policy tried to walk the thin line between respecting the religious views of many of the School District's parents while satisfying State curricular objectives. Id. However, the policy failed to do so by weighing too heavily in favor of those who disparage the teaching of evolution. Teachers were limited in what they could discuss, and "it was a common practice in some science classes for textbook pages containing material on evolution to be removed from the students' textbooks." Id. at 5.

³¹"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

³²According to current records, Judge Guin was appointed to the federal bench in 1973. He is presently a Senior District Court Judge and is stationed in Birmingham, Alabama.

During the textbook adoption process, it became evident that textbooks under consideration would conflict with the 1995 policy. It was decided the 1995 policy should be revised so as to “strengthen evolution instruction and bring Cobb County into compliance with statewide curriculum requirements.” *Id.* at 5-6. Before the 1995 policy could be revised, however, science textbooks were recommended to the School Board. Parents were permitted to review the proposed textbooks. However, only three parents did so. One supported the textbooks; one expressed no opinion; the third, however, objected, asserting the textbooks should include criticisms of the theory of evolution and that alternative theories—creationism and intelligent design—should be included in any balanced instruction. A number of like-minded individuals began to express their views to the School Board. *Id.* at 6-7.

The complainant identified herself as a “six-day biblical creationist.”³³ *Id.* at 7. The complainant became “the most vocal of the parents who complained to the School Board,” organizing a petition drive that obtained the signatures of 2,300 Cobb County residents, urging the School Board to present a balanced treatment of the origins of life “and place a statement prominently at the beginning of the text that warned students that the material on evolution was not factual but rather was a theory.”³⁴ *Id.* at 7. The School Board consulted with its legal counsel. From these discussions, the language quoted *supra* emerged. On March 28, 2002, the School Board unanimously adopted the recommended textbooks “with the condition that the Sticker would be placed in certain of the science textbooks.” *Id.* at 8.

The court provided a concise summary of the various reasons and rationales from members of the School Board for their collective decision to place the Sticker in the textbooks. All were in agreement that they were not actively engaged in promoting or interjecting religion. They were attempting to “promote tolerance and acceptance of diversity of opinion” and “critical thinking.” *Id.* at 9-12. The School Board received a mixed review: Some applauded their effort; others expressed dismay at the inclusion of the Sticker. Still others—the complainant, notably—were dissatisfied with the Sticker because “it did not go far enough.” The complainant sought a revision to the Sticker, but the School Board rejected her request. *Id.* at 12-13.

³³This is a person who believes the world was created literally in six standard days, based on the accounts in *Genesis*. In the *Scopes* trial, William Jennings Bryan held himself out as an expert on the King James Version of the Bible and actually took the stand to testify as to his belief in the literal account of creation in six days. Under cross-examination, he was forced to admit that he did not think the earth was actually created in six 24-hour days. Many early Christian writers indicated that the “days” in the *Genesis* account were not actually solar days, especially since the sun was not created until the fourth “day.” The use of poetic and figurative language, according to theologians, is a method of revealing truth in a variety of ways. See, e.g., St. Augustine’s fifth century work, *De Genesi ad Litteram*.

³⁴There is considerable debate over the use of “theory.” For an expansive discussion of evolution, see the November 2004 issue of *National Geographic*, which has the catchy headline “Was Darwin Wrong?”

Some personnel of the School District were not happy with the Sticker and opposed its placement in the textbooks. Although the School Board had already approved the Sticker language—but had not yet had them printed or placed in the texts—the School District proposed an alternative version. *Id.* at 13. The School Board declined to revisit its Sticker language. One School Board member considered the School District’s proposal to be “highhanded.” *Id.* at 14. Between the Summer and Fall of 2002, the Stickers were produced and affixed to the textbooks. *Id.* at 14.

The School Board did not adopt a revised policy until September of 2002, nearly six months after it adopted the science textbooks and agreed on the Sticker language. *Id.* The revised policy was considerably more detailed than the previous ones. It did contain one interesting passage:

It is the intent of the Cobb County Board of Education that this policy not be interpreted to restrict the teaching of evolution, to promote or require the teaching of creationism, or to discriminate for or against a particular set of religious beliefs, religion in general, or non-religion.

Id. at 15. Revised regulations to implement the policy were adopted in January of 2003. *Id.* Notwithstanding the language in the revised policy and concomitant regulations, the Sticker language continued to pose problems for teachers, especially as a result of the School Board’s purported misuse of the word “theory.” This gave students the impression that evolution does not exist at all or is “just” a theory, thus “diminishing the status of evolution among all other theories.” *Id.* at 16. Other parents perceived the Sticker to be the result of religious influence and initiated this suit on behalf of their children, all students in the School District. *Id.* at 16-17.

The Legal History of Evolution

Judge Cooper took great pains to read and incorporate—as much as possible—published opinions involving disputes between the teaching of evolution and competing religious views. The following are cases he referred to in his opinion.

Epperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266 (1968) (striking down a state statute that made it unlawful for public school teachers to teach the Darwinian theory of evolution).

Edwards v. Aguillard, 482 U.S. 578, 107 S.Ct. 2573 (1987) (striking down a state statute that proscribed the teaching of evolution in the public schools unless “creation science” was also taught).

Freiler v. Tangipahoa Parish Board of Education, 185 F.3d 337 (5th Cir. 1999), *reh. en banc den.*, 201 F.3d 602, *cert. den.* 530 U.S. 1251, 120 S.Ct. 2706 (2000) (invalidating disclaimer required to be read to students prior to the teaching of evolution because the disclaimer had the primary effect of endorsing a particular religious viewpoint).

Daniels v. Waters, 515 F.2d 485 (6th Cir. 1975) (declaring unconstitutional a Tennessee statute that required a disclaimer to accompany all theories of origin except the Biblical theory of creation and that precluded the teaching of occult or satanical beliefs of human origin).

McLean v. Arkansas Board of Education, 529 F.Supp. 1255 (E.D. Ark. 1982) (striking down an Arkansas statute that required balanced treatment of “creation science” and evolution in the public schools).

Mozert v. Hawkins County Board of Education, 827 F.2d 1058 (6th Cir. 1987) *cert. den.* 484 U.S. 1066, 108 S.Ct. 1029 (1988) (plaintiff, a “born-again Christian,” objected to a reading series, specifically objecting to the presentation of evolution in a factual manner, even though there were disclaimers in the textbooks stating that “evolution is a theory, not a proven fact”; court found textbooks posed no burden on their Free Exercise rights).

Peloza v. Capistrano Unified School District, 37 F.3d 517 (9th Cir. 1994), *cert. den.* 515 U.S. 1173, 115 S.Ct. 2640 (1995) (high school biology teacher, who was a practicing Christian, brought a civil rights action to oppose teaching of “evolutionism,” which he equated with a religion).

Scopes v. State of Tennessee, 289 S.W. 363 (Tenn. 1927) (reversing the judgment against Scopes but upholding the Anti-Evolution Act under which he was convicted).

The court also reviewed a number of articles from law reviews. See Slip Opinion at 35.³⁵

The *Lemon* Test

Fortified with the factual record and advised by the number of published legal challenges, the court applied the three-prong *Lemon* test derived from Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105 (1971). Under this test, “a government-sponsored message violates the Establishment Clause of the First Amendment if: (1) it does not have a secular purpose, (2) its principal or primary effect advances or inhibits religion, or (3) it creates an excessive entanglement of the government with religion.” If the government-sponsored message fails any one of these prongs, the message is unconstitutional. The court combined the second and third prongs into a “single ‘effect’ inquiry.” Slip Opinion at 19.

First Prong: *Purpose*

³⁵Cases of interest in this area not included in the court’s opinion include: LeVake v. Independent School District #656, 625 N.W.2d 502 (Minn. App. 2001), *cert. den.* 534 U.S. 1081, 122 S.Ct. 814 (2002)(biology teacher’s Free Speech, Academic Freedom, and Free Exercise rights were not infringed upon by school district that reassigned him from teaching biology because he would not follow the prescribed curriculum, in part because of his opposition to the theory of evolution). See also Webster v. New Lenox Sch. Dist. No. 122, 917 F.2d 1004 (7th Cir. 1990)(junior high school teacher’s Free Speech rights were not violated when school board ordered him to cease teaching “creation science” to his students); Moeller v. Schrenko, 554 S.E.2d 198 (Ga. App. 2001)(high school student, who believed in “creationism,” was unsuccessful in challenging her high school’s biology textbook as a burden on her Free Exercise rights)

An initial inquiry is whether the government’s purpose is to endorse or disapprove of religion. The court noted that the government’s purpose need not be “exclusively secular”; rather, where there is a religious purpose present, it “must not be preeminent.” The court should defer to the government’s stated secular purpose “so long as the statement is sincere and not a sham.” This would require the court to inspect the language of the statement itself—in this case, the Sticker language—especially within the context the language was devised, including its “contemporaneous legislative history.” *Id.* at 21 (citations omitted).

The court found the School Board’s purpose for the Sticker was sufficiently secular to satisfy this first prong of the *Lemon* test. The court relied, in part, on the revised policy, although with some reservation because the policy was adopted almost six (6) months after the Sticker was devised, and “[c]ourts generally frown upon evidence of purpose that is not contemporaneous with the challenged action.” *Id.* at 23 (citation omitted). The revised policy stated that the purpose was to “foster critical thinking among students,” “allow academic freedom,” “promote tolerance and acceptance of diversity of opinion,” and “ensure a posture of neutrality toward religion.” *Id.* at 24.

Although fostering critical thinking “is a clearly secular purpose for the Sticker,” this goal is undermined somewhat by language in the Sticker that states “evolution is a theory and not a fact” because it predetermines “that students should think of evolution as a theory when many in the scientific community would argue that evolution is factual in some respects.” *Id.* On the other hand, the Sticker contains no religious references or alternative theories of human origins at all, and “[t]his weighs heavily in favor of upholding the Sticker as constitutional” with respect to its purpose. *Id.* at 25. The court did not believe that “critical thinking” was “the Sticker’s main purpose. Rather, the chief purpose of the Sticker [was] to accommodate or reduce offense to those persons who hold beliefs that might be deemed inconsistent with the scientific theory of evolution.” Notwithstanding, the purpose of the Sticker is primarily secular and not a sham. *Id.* at 26, 27-30.

Second and Third Prongs: *Effect*

This combined inquiry “asks whether the statement at issue in fact conveys a message of endorsement or disapproval of religion to an informed, reasonable observer.” *Id.* at 31 (citations omitted). This amounts to a “judicial interpretation of social facts” through “the view of a disinterested, reasonable observer,” who would be “keenly aware of the sequence of events that preceded the adoption of the Sticker.” *Id.* at 31, 32. The “reasonable observer” would also know that “a significant number of Cobb County citizens had voiced opposition to the teaching of evolution for religious reasons,” and that these “citizens and parents largely motivated by religion put pressure on the School Board to implement certain measures that would ...dilute the teaching of evolution, including placing a disclaimer in the front of certain textbooks that distinguished evolution as a theory, not a fact.” This mythical person would also “be aware that the language of the Sticker essentially mirrors the viewpoint of these religiously motivated citizens.” *Id.* at 33.

In this case, the Court believes that an informed, reasonable observer would interpret the Sticker to convey a message of endorsement of religion. That is, the Sticker sends a message to those who oppose evolution for religious reasons that they are

avored members of the political community, while the Sticker sends a message to those who believe in evolution that they are political outsiders. This is particularly so in a case such as this one involving impressionable public school students who are likely to view the message on the Sticker as a union of church and state....

Id. at 31-32. Although the court believed the School Board adopted the Sticker “for sincere, secular purposes,” its actions could be viewed as “endorsing the viewpoint of Christian fundamentalists and creationists that evolution is a problematic theory lacking an adequate foundation.” Id. at 33. This serves to advance this particular “religious viewpoint.”

The Sticker statement that “Evolution is a theory, not a fact, concerning the origin of living things” is problematical for the School Board’s position. The debate preceding the adoption of the Sticker involved “advocates of evolution and proponents of religious theories of origin specifically concerning whether evolution should be taught as a fact or as a theory, and the School Board appears to have sided with the proponents of religious theories of origin in violation of the Establishment Clause.” Id. at 33-34. “[I]n light of the sequence of events that led to the Sticker’s adoption, the Sticker communicates to those who endorse evolution that they are political outsiders, while the Sticker communicates to the Christian fundamentalists and creationists who pushed for a disclaimer that they are political insiders.” Id. at 36. Although religion is not explicitly stated, the Sticker language suggests “that evolution is a problematic theory in the field of science” when, in fact, “evolution is the dominant *scientific* theory of origin accepted by the majority of scientists.” Id. (emphasis original). “By denigrating evolution, the School Board appears to be endorsing the well-known prevailing alternative theory, creationism or variations thereof, even though the Sticker does not specifically reference any alternative theories.” Id.

Judge Cooper was likely aware that his opinion would be unpopular to a substantial population in Cobb County. In a further attempt to indicate how his opinion should be interpreted and applied, he wrote:

[T]he basis for this Court’s conclusion that the Sticker violates the effects’ prong is not that the School Board should not have called evolution a theory or that the School Board should have called evolution a fact. Rather, the distinction of evolution as a theory rather than a fact is the distinction that religiously-motivated individuals have specifically asked school boards to make in the most recent anti-evolution movement, and that was exactly what parents in Cobb County did in this case. By adopting this specific language, even if at the direction of counsel, the Cobb County School Board appears to have sided with these religiously-motivated individuals.

Id. at 39. The court ordered the Stickers removed from the science textbooks and permanently enjoined the dissemination of the Sticker in any form. Id.

The school board has appealed to the U.S. 11th Circuit Court of Appeals. The school board asked the 11th Circuit to stay the district court’s order requiring the removal of the disclaimer sticker from

its science textbooks. The 11th Circuit denied the motion. The stickers will need to be removed despite the appeal.

Date: 7/21/05

/s/Kevin C. McDowell
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