



QUARTERLY REPORT

July – September: 2007

The Quarterly Report provides information on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at kmcowel@doe.state.in.us.

In this report:

Uniform Policies and Procedures: Constitutional Rights, Student Safety, and School Climate	2
• Supreme Court Framework	3
• Uniform Policies and School Safety	4
• Recent Events in Indiana	5
• IDEA Claim	8
• First Amendment Claims	9
• Parental Rights	9
• Uniform Policies and Constitutional Issues	10
• Self-Expression	12
• Uniform Policies and Student Protests	14
• “Opt Out” Issues	18
Teacher Free Speech Rights	21
• The <i>Pickering/Connick</i> Balancing Test	21
• Teacher Comments on Current Events	21
• Civil Disobedience	23
• Political Activity	26
• Elsewhere	28
• Religious Proselytizing By Teachers	30
Court Jesters: One Ring to Rue Them All	35
Quotable	35
Updates	36
• T-shirts: Free Speech Rights Vs. Substantial Disruption	36
• Pledge of Allegiance	40
Cumulative Index	46

UNIFORM POLICIES AND PROCEDURES: CONSTITUTIONAL RIGHTS, STUDENT SAFETY, AND SCHOOL CLIMATE

Pearl Pugsley chafed at complying with the new dress code regulation established by the school board for School District No. 11 of Clay County, Arkansas:

The wearing of transparent hosiery, low-necked dresses or any style of clothing tending toward immodesty in dress, or the use of face paint or cosmetics, is prohibited.

Pugsley v. Sellmeyer, 250 S.W. 538 (Ark. 1923). Contrary to this prohibition, Pearl came to school with talcum powder on her face. Her teacher told her to wash it off and not return to school in this fashion. She did, however, and was expelled from school until she complied with the regulation. *Id.*

Instead of removing the talcum powder, Pearl went to court. She did not appeal her expulsion to the school board, but as it turned out, this would have been futile. The secretary of the board testified that “the board regarded...breach [of its rule] as a challenge of their authority, and that under the circumstances its rescission or cancellation would have been subversive of all discipline in the school.” *Id.*

A majority of the Arkansas Supreme Court found the regulation did not involve “any element of oppression or humiliation” to Pearl and was a reasonable regulation of student conduct. *Id.* at 539-40. This is not to say the Supreme Court thought this was a good use of their time.

Courts have other and more important functions to perform than that of hearing the complaints of dissatisfied pupils of the public schools against rules and regulations promulgated by the school boards for the government of the schools.

Id. at 539. Not everyone agreed. Associate Justice Jesse C. Hart noted that Pearl was 18 years old. Any rule forbidding a girl of her age from wearing talcum powder as a cosmetic was unreasonable and an abuse of the school board’s authority,” Justice Hart wrote. “Useless laws diminish the authority of necessary ones.” *Id.* at 540.

The Perils of Pearl began in 1921, making this dispute one of the earliest legal challenges to a public school’s dress code. The intervening years have been marked with increased efforts to establish dress codes in the public schools, including the wearing of uniforms.¹ These efforts have often been met by constitutional challenges, principally under the First and Fourteenth Amendments.

¹Dress codes fall into two categories: uniform policies, where apparel and accessories are prescribed; and general dress codes, where apparel and accessories are proscribed. This article will address only uniform policies and procedures.

Supreme Court Framework

The U.S. Supreme Court has never directly ruled on a dress code dispute, but there may be adequate guidance from Supreme Court decisions in analogous situations. The Supreme Court has issued four decisions addressing student speech:

Tinker v. Des Moines Ind. Community Sch. Dist., 393 U.S. 503, 89 S. Ct. 733 (1969) (school improperly suspended students for wearing black armbands to protest the Vietnam War; a school, to justify a prohibition of student speech, would have to show the student speech would or was likely to materially and substantially interfere with functioning of the school).

Bethel v. Fraser, 478 U.S. 675, 106 S. Ct. 3159 (1986) (school could discipline a student for speech at school assembly that was laced with sexual innuendo; lewd and vulgar speech is different from speech that expresses a certain viewpoint).

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562 (1988) (school can exercise editorial control over the content of the school-sponsored newspaper where such action is “reasonably related to legitimate pedagogical concerns”).

Morse v. Frederick, 127 S. Ct. 2618 (2007) (a message reasonably viewed as advocating illegal drug use—“Bong HiTS 4 Jesus”—need not result in a substantial disruption before school officials could restrict such speech on school property or at a school event).

From these four cases, lower courts have distilled the following:

1. Public schools have wide discretion to prohibit speech that is vulgar, lewd, indecent, or plainly offensive, even if not obscene (*Fraser*).
2. If the speech may be considered “school sponsored,” school personnel may censor the speech so long as the censorship is “reasonably related to legitimate pedagogical concerns” (*Kuhlmeier*).
3. School personnel may censor speech that is “reasonably perceived as promoting illegal drug use” (*Morse*).
4. For all other student speech (speech that is not vulgar, lewd, indecent, or plainly offensive; does not promote illegal drug use; or is not considered “school sponsored”), the rule of *Tinker* will apply, and school personnel may not regulate student speech unless such speech would materially interfere or substantially disrupt classwork and discipline within the school, or violate the rights of others.

Uniform Policies and School Safety

On January 23, 1996, then-President Bill Clinton, during his State of the Union address, said, “I challenge all of our schools to teach character education, to teach good values and good citizenship. And if it means that teenagers will stop killing each other over designer jackets, then our public schools should be able to require their students to wear school uniforms.”²

The Clinton Administration pursued the possibility that school uniforms would promote “safe and disciplined learning environments.” The U.S. Department of Education (DOE) and U.S. Department of Justice (DOJ) studied school uniform policies in eight public school districts (Long Beach, Ca.; Seattle, Wash.; Richmond, Va.; Kansas City, Mo.; Memphis, Tenn.; Baltimore, Md.; Norfolk, Va.; and Phoenix, Az.) and issued a report in 1998 entitled *Manual on School Uniforms*.³ The potential benefits of the school uniforms, the report stated, include:

- Decreases in violence and theft among students, especially over designer clothing or expensive shoes or sneakers;
- Prevents gang members from wearing gang colors and insignias at school;
- Instills students with sense of discipline;
- Helps parents and students resist peer pressure;
- Helps students concentrate on their school work; and
- Helps school officials recognize intruders who come into the school or onto the school property.⁴

From its study, the DOE and DOJ derived eight (8) areas for schools to consider when adopting a school uniform policy.

1. **Get parents involved from the beginning.** The report noted that many school uniform policies were actually instigated by parents and parent groups. “Many schools that have successfully created a uniform policy survey parents first to gauge support for school uniform requirements and then seek parental input in designing the uniform.”

2. **Protect students’ religious expression.** The report cautioned public schools to ensure that any school uniform policy permit students to display religious messages on items of clothing to the same extent that students are permitted to display other comparable messages. This would

²State of the Union Address, quoted at *Lowry v. Watson Chapel School District*, 508 F.Supp.2d 713, 715, n. 1 (E.D. Ark. 2007), discussed *infra*.

³See <http://www.ed.gov/updates/uniforms.html> (last visited February 25, 2008).

⁴Another benefit often touted is that parents or guardians will save money on the purchase of clothes through the restricted repertoire of permissible dress inherent in a uniform policy, thus reducing the “competition” that is said to occur in the middle and high schools.

also apply to the wearing of attire particular to the exercise of one's faith, such as yarmulkes and head scarves.

3. **Protect students' other rights of expression.** The DOE and DOJ urged schools not to prohibit students from wearing or displaying expressive items that do not disrupt or substantially interfere with school discipline or the rights of others. Buttons supporting political candidates were specifically mentioned.

4. **Determine whether to have a voluntary or mandatory school uniform policy.**

5. **When a mandatory school uniform policy is adopted, determine whether to have an "opt out" provision.** The report cautions that "in the absence of a finding that disruption of the learning environment has reached a point that other lesser measures have been or would be ineffective, a mandatory school uniform policy without an 'opt out' provision could be vulnerable to legal challenge."

6. **Do not require students to wear a message.**

7. **Assist families who need financial help.** Although school uniforms typically are less expensive than clothing students would normally wear to school, the costs of purchasing a uniform could be a burden on some families. School districts have addressed this in several ways: providing uniforms to students who cannot afford to purchase them; obtaining financial support from third parties in order to purchase uniforms; making school uniforms available for economically disadvantaged students; and maintaining used uniforms from graduated students for use by incoming students.

8. **Treat school uniforms as part of an overall safety program.** School uniforms can be a contributing factor to improved discipline and safety, the report stressed. Additional efforts should address truancy reduction, drug prevention, student-athlete drug testing, gang intervention, zero tolerance for weapons, character education, and conflict resolution. "Working with parents, teachers, students, and principals can make a uniform policy part of a strong overall safety program, one that is broadly supported in the community."

Recent Events in Indiana

The Indiana Court of Appeals in *Hines v. Caston School Corporation*, 651 N.E.2d 330 (Ind. App. 1995) upheld the effect and application of local community standards in the development and implementation of a dress code that, in part, prohibited males from wearing earrings in school. The community considered earrings to be feminine accessories. The Court of Appeals found it reasonable for a locally elected school board to consider and reflect community values when developing discipline policies, which are themselves a "valid educational function to instill discipline and create a positive educational environment by means of a reasonable, consistently

applied dress code.” *Id.* at 335. However, such dress codes must also be “within constitutional strictures.” In this case, personal preference—not free speech—was at issue.⁵

Shortly after the *Hines* decision, the Indiana General Assembly passed what is now Ind. Code § 20-33-8-12(a)(1)(A), which requires the governing body of a school corporation to establish written discipline rules that “may include...appropriate dress codes.”

Several Indiana school districts have implemented dress codes, including uniform policies. The Board of School Commissioners for the Indianapolis Public Schools (IPS) adopted a dress code for all grades on June 19, 2007, effective at the beginning of the 2007-2008 school year.⁶ The Board believes “that how students dress affects how they behave, which impacts student learning.”⁷

IPS established a task force in the fall of 2006, which consisted of students, parents, staff, and community members. The task force reviewed the dress code from the MSD of Wayne Township in Indianapolis, as well as dress codes from other public school districts outside Indiana (Birmingham, AL; Dallas, TX; Jackson, MS; Long Beach, CA; Nashville, TN; Philadelphia, PA; and Savannah, GA).

The new dress code requires students in grades K-8 to select from tops that are solid red, navy blue, or white, while bottoms can be solid black, navy blue, or khaki. Shoes must be white, navy blue, brown, or black. Solid-colored athletic shoes are preferred. Blue jeans, clothing made of denim, and “hoodies” are not allowed. High school students can wear solid black, navy blue, or khaki bottoms, while tops can be in the high school’s colors. There was a phase-in period at the beginning of the school year to allow students and their parents to become accustomed to the new dress code. The dress code also provides information for those who require financial assistance to purchase appropriate clothing.

The list of restricted attire includes skin-tight pants or tops; halter tops and spaghetti-strap tops; oversized pants and shirts, sweat pants and athletic pants; “heelies” or “wheelies” (gym shoes with built-in wheels); flip-flops or house slippers; hats, caps, do-rags, bandanas, or sweatbands; spandex clothing or clothing made primarily of spandex; pajamas or pajama-like clothing; sunglasses, T-shirts, visible underwear; hair rollers or combs in the hair; outdoor coats and jackets; attire that is considered by school administration to be provocative, disruptive, offensive or crude; shirts that display the use of drugs, alcohol, tobacco, violence, sexual activity, or gang

⁵See “Dress Codes: Free Speech and Standing,” **Quarterly Report** April-June: 2002.

⁶The IPS Dress Code can be found at www.dresscode.ips.k12.in.us.

⁷Eugene White, “‘Revolution’ Will Reveal Fruits of Labor in IPS,” *Indianapolis Star*, August 19, 2007.

activity; and jewelry, buttons or other accessories that display the use of drugs, alcohol, tobacco, violence, sexual activity, or gang activity. Shirts cannot contain logos other than school logos.⁸ The dress code does allow for the observances of certain religious customs, such as “Muslim female head coverings” or “Jewish male head covering.”

The IPS Dress Code specifically addresses student free-speech issues:

Students may wear buttons, armbands, or other accessories to exercise their legal rights to freedom of expression. However, no clothing or other accessory may be worn that displays language, slogans, and symbols or pictures that...are plainly offensive, indecent, lewd, vulgar, or obscene; ...[or] are substantially disruptive to the school environment. This includes, but is not limited to anything that is related to criminal gangs or membership in or activity of such gangs, items or accessories that display criminal gang insignia, that are racially divisive or that connote racial hatred, or that advertise or promote use of illegal drugs, alcohol, and tobacco.

The IPS Dress Code also permitted a parent or guardian to request in writing an exemption from the mandatory uniform policy “based on religious grounds or strongly held philosophical beliefs or a substantial physical or psychological rationale.” There are also guidelines for school administrators to follow in meting out discipline for dress code violations and for identifying and responding to students in financial hardship. There are other exemptions to the dress code policy, such as for military programs (JROTC) on required uniform days. Beginning with the 2009-2010 school year, an individual school may “opt out” of the uniform dress code if the school’s total number of suspensions and expulsions is below the district-wide average for that level (elementary, middle, or high school), provided that 75 percent of the parents/guardians and faculty are in favor of opting out as determined through a secret ballot.

There were no reported legal challenges to the IPS Dress Code. This was not the case with the dress code implemented by the Anderson Community School Corporation.

Bell v. Anderson Community Schools, 2007 U.S. Dist. LEXIS 57428 (S.D. Ind. 2007) began in May of 2007 when the school board for Anderson Community Schools (ACS) adopted a dress code to begin August 20, 2007, for the 2007-2008 school year. The dress code has a number of provisions. Shirts must have collars (or turtle or mock turtle necks). Solid colors are required. Students cannot wear cargo pants or clothes with slits, cuts, tears, frays, laced sidings, brand names, slogans, or handmade messages. Much of the dress code resembles the IPS Dress Code, including the list of restricted attire.

⁸The list of restricted attire is more detailed than this. Language or pictures that are considered lewd, vulgar, obscene, hateful or offensive are also prohibited, as are some more esoteric items such as “detachable gold teeth or fangs” or “grills.”

Scott and Laura Bell, acting *pro se*, filed suit against ACS in a State court on July 17, 2007, claiming as parents they do not have any clothes for their children that would satisfy the Dress Code, and that, as a result, they would have to purchase a new wardrobe for each child.⁹ They also asserted claims on behalf of their children under the First Amendment, claiming that being able to wear the clothes they wished to wear is fundamental to their children's "freedom of speech, expression, and freedom of happiness." They also raised claims on behalf of two of their children under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, stating that the "wearing of such bland colors will promote...or increase their [children's] emotional disorders as well as depression. Therefore[,] we feel all children should be allowed to exercise their freedoms as best suited to their individual personality." 2007 U.S. Dist. LEXIS 57428 at *4-6.¹⁰

The school district removed the matter from State court to the Federal district court. The Federal district court judge referred to the parents' "legal theories, if any" as "moving targets." *Id.* at *5. He characterized their arguments presented to the court as "political statements or policy arguments more appropriate for a school board meeting than legal arguments appropriate for a court." *Id.* at *8. Their court "filings have been primitive and vague." *Id.* at *13. "[T]heir unhappiness with ACS's ultimate decision on the Dress Code does not translate into a viable legal claim." *Id.* at *8.

IDEA Claim

The court was quick to clarify a misunderstanding emanating from the U.S. Supreme Court's recent decision in *Winkelman v. Parma City School District*, 127 S. Ct. 1994 (2007).¹¹ While a parent "may in some situations bring a suit as a representative of a child, Federal Rules of Civil Procedure 17(c), that does not mean that the parent may represent the child *pro se*, *Navin v. Park Ridge Sch. Dist.* 64, 270 F.3d 1147, 1149 (7th Cir. 2001)." *Id.* at *11-12. It is not in the interest of children that they be represented by non-attorneys. Where children or others who are not competent have claims that require adjudication, "they are entitled to trained legal assistance so their rights may be fully protected." *Id.* at *12, citing *Cheung v. Youth Orchestra Foundation of Buffalo, Inc.*, 906 F.2d 59, 61 (2nd Cir. 1990). "Where parents attempt to litigate *pro se* on behalf of their children, the court may dismiss those claims without prejudice." *Id.* *Winkelman* did not alter this dynamic. "Parents themselves have limited rights pursuant to the IDEA and may,

⁹Laura Bell said it would cost the family \$641 for five sets of pants and shirts to satisfy the Dress Code. *USA Today*, August 6, 2007.

¹⁰The parents also raised a "parents' right" claim under the Ninth Amendment ("The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"). The federal district court characterized this amendment as an "empty vessel" and substituted the Fourteenth Amendment as the basis for this claim. *Id.* at *6-7, *n.* 4.

¹¹See "Pro Se Parents and the Federal Courts: Representing a Child's Interests Under The *IDEA*," *Quarterly Report* October-December: 2006.

therefore, bring an action on their own behalf and represent themselves *pro se*.” *Id.* at *26, citing *Winkelman*, 127 S. Ct. at 2002. To the extent the parents were attempting to represent their children’s separate issues, the court dismissed such claims without prejudice, adding that the court was not “granting judgment on the children’s IDEA claims. Although parents have rights in their own capacity, they may not litigate related claims on behalf of their children *pro se*. [Citation omitted.] The Supreme Court’s holding in *Winkelman* did not change this. [Citation omitted.]” *Id.* at *27-28, n. 13. The IDEA claims were dismissed without prejudice.

First Amendment Claims

Addressing the parents’ First Amendment free-speech challenge to ACS’s Dress Code, the court acknowledged that “actions, such as wearing particular items of clothing, may indeed constitute speech in limited circumstances.” *Id.* at *20. However, there is a two-part test for such symbolic speech: (1) a particularized message must be meant to be conveyed; and (2) there must be a great likelihood that the message will be understood by those who view it. *Id.*, citing *Blau v. Fort Thomas Public School District*, 401 F.3d 381, 288 (6th Cir. 2005), a constitutional challenge brought by a father on behalf of his sixth-grade daughter, claiming the middle school’s new dress code violated her constitutional right to wear clothing of her choosing. The 6th Circuit noted that the 12-year-old girl did not intend to convey any particularized message, and thus her personal choice in clothing was not entitled to constitutional protection. *Id.* at *20-21. *Blau* is discussed in more detail *infra*.

The Federal judge found *Blau* to be “very persuasive. The Bells have not shown that their children wish to convey any particularized message at all.” Self-expression, especially where, as here, such expression is “vague and attenuated,” is not to be equated with the expression of ideas or opinions. *Id.* at *22-23, citing *Brandt v. Chicago Bd. of Education*, 480 F.3d 460, 465 (7th Cir. 2007), which viewed *Blau* favorably. *Brandt*, a T-shirt dispute, is discussed *infra*. The parents’ First Amendment challenge was dismissed.

Parental Rights

Lastly, the court addressed the purported infringement on the parents’ right to direct the upbringing and education of their children, finding that parents do have the right to decide whether to send their children to the public schools, but there is no fundamental right to dictate to the public school how the public school will teach their children. These issues of public education, including such matters as curriculum, length of school days, and dress codes, are committed to state and local authorities. The court granted summary judgment to ACS on this claim. *Id.* at *24-25, relying upon *Blau*, 401 F.3d at 395-96.

There were no reasons to maintain jurisdiction over the separate State law claims. Accordingly, the Federal district court remanded these to the State court. *Id.* at *28-29. The court denied the

parents' request for a preliminary injunction and awarded costs to ACS on the Federal claims. *Id.* at *31.¹²

Uniform Policies and Constitutional Issues

Littlefield, et al. v. Forney Independent School District, et al., 268 F.3d 275 (5th Cir. 2001) began with an enactment by the Texas legislature that permitted local school boards to adopt rules requiring students to wear uniforms if the local school board determines this would improve the learning environment at the school.¹³ The Texas law also has several “opt out” provisions for parents who disagreed with such a policy based upon a bona fide philosophical or religious objection. Such an objection could result in an exemption from the policy or transfer to another school where there would be no such policy.

The school district did make findings that such a uniform policy would promote several important interests, including student academic performance and school safety (Forney students could be identified by their uniforms, making trespassers on the campus more easily identifiable). Parents were surveyed and public hearings were conducted. Eventually a uniform policy was developed with procedures for parents and students to follow in seeking exemptions or appealing denials of exemptions. In order to determine whether an objection to uniform policy was the result of a “bona fide” religious or philosophical objection, parents were asked to complete a questionnaire that, in part, asked whether the student had ever previously worn a uniform (e.g., scouts, an athletic team, etc.).

The plaintiffs sued, alleging the requirement to wear uniforms violated the First Amendment because the forced wearing of uniforms amounted to “coerced speech,” infringing upon free speech rights. The plaintiffs also claimed the uniform policy infringed upon the parents’ right to control and direct the upbringing and education of their children. Lastly, the plaintiffs asserted the compulsory requirement that students wear uniforms violated certain religious beliefs by delving into the substance of one’s religious beliefs and by promoting certain established religious beliefs at the expense of other beliefs.

The district court and the 5th Circuit were not persuaded with these arguments. The court referenced *Tinker* but based its decision primarily on *Hazelwood* and *Fraser*. Although words on clothing can be considered protected speech, certain content-neutral restrictions on expressive conduct will not violate the First Amendment if the restriction (in this case, the uniform policy) (1) is within the constitutional power of the government or pursuant to state law; (2) promotes a substantial governmental interest (improving educational process, health, safety of school); (3) is

¹²The costs, including attorney fees, amount to nearly \$41,000, which the judge ordered the parents to pay the school district in a December 2007 order.

¹³The federal district court case was discussed in “Uniform Policies and Constitutional Challenges,” **Quarterly Report** October-December: 2000.

unrelated to the suppression of student expression but was adopted for other legitimate reasons; and (4) is incidental on First Amendment activities and is designed to do no more than facilitate the legitimate governmental interest (limited in scope in that the policy applies only during school hours and does not attempt to restrict student expression off campus). *U.S. v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673 (1968). In this case, the school district's uniform policy is justified on all *O'Brien* criteria.

The court was somewhat dismissive of the parents' reading of a "fundamental" right to direct the upbringing and education of their children, finding that there is no "fundamental right for parents to control the clothing their children wear to public schools..." Parental rights are not absolute in the public school context and can be subject to reasonable regulation. Accordingly, the uniform policy is rationally related to the state's interest in fostering the education of its children and furthering the legitimate goals of improving student safety, decreasing socioeconomic tensions, increasing attendance, and reducing drop-out rates. The court found no merit to the Establishment Clause allegations.

The 5th Circuit earlier decided a case similar to *Littlefield. Canady, et al. v. Bossier Parish Sch. Bd.*, 240 F.3d 437 (5th Cir. 2001) began when the Louisiana legislature authorized public schools to require mandatory uniforms so long as parents were provided prior written notice of the intent to implement such a policy.¹⁴ The school board gradually implemented such a policy. Parents were informed by letter of the new policy and its specifications, along with a list of local vendors supplying the required clothing. Several parents filed suit to enjoin the implementation of the policy, alleging violations of their children's First Amendment right to free speech. The parents also asserted the policy failed to account for religious preferences. The parents also raised a Fourteenth Amendment claim, stating their children had a liberty interest in wearing clothing of their choice. The school countered with statistics demonstrating a decline in behavior problems and a rise in test scores since the implementation of the uniform requirement.

The 5th Circuit employed the *O'Brien* test (see *supra*) to analyze "speech" in light of time, place, and manner. "[T]he School Board's uniform policy will pass constitutional scrutiny if it furthers an important or substantial government interest; if the interest is unrelated to the suppression of student expression; and if the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest." 240 F.3d at 443.

In this case, the school board's reasons for implementing the uniform requirement—to increase test scores and reduce disciplinary problems—was not intended to suppress student speech. Students were still able to express their views through other means. *Id.*

The 5th Circuit also rejected the parents' claims that requiring parents to buy uniforms created a significant financial burden on the parents and denied some students the right to a free education

¹⁴*Canady* was discussed in greater detail in "Uniform Policies and Constitutional Challenges," **Quarterly Report** October-December: 2000.

as provided by the state constitution. The school board demonstrated that “school uniforms are donated by organizations to the less fortunate.” In addition, “[b]ecause uniforms are available at inexpensive retail stores, it is hard to imagine how the purchase of uniforms consisting of a certain color of shirt and pants could be any more expensive than the normal cost of a student’s school clothes.” *Id.* at 444.

Self-Expression

While *Canady, supra*, touched upon an alleged liberty interest students might have in self-expression through the clothes they choose to wear, it was a later case arising out of Kentucky that addressed this issue more thoroughly.

Blau v. Fort Thomas Public School District, et al., 401 F.3d 381 (6th Cir. 2004) started when several parents at the middle school proposed a dress code with the intent of enhancing school spirit and pride, improving school safety and the learning environment, improving test scores, reducing behavior problems, bridging socio-economic gaps, helping to eliminate stereotypes, improving the self-respect and self-esteem of children, and producing a cost savings to families. A committee was formed to study the proposal and gather information, including feedback from the community. A student member was Amanda Blau, then a sixth-grade student in the middle school. The dress code committee eventually submitted a proposed dress code that was eventually adopted. The dress code contained proscriptions similar to dress codes discussed *supra*. *Id.* at 385-86.¹⁵

Amanda’s father filed suit in an attempt to invalidate the dress code. He argued the dress code violated the First and Fourteenth Amendments, as well as the Kentucky Constitution. However, Amanda did not have any particular message she wished to convey through her choice in clothing. She opposed the dress code because she wanted to wear clothes that “looked nice” on her or that she “feel[s] good in” and that express her individuality. *Id.* at 386.

The Federal district court granted summary judgment to the school district, finding that the dress code did not violate Amanda’s First Amendment right to freedom of speech, adding that there is no fundamental Fourteenth Amendment right to wear clothes of one’s own choosing to a public school. The Federal district court also determined that the Fourteenth Amendment right of a parent to control the education of his child does not prevent the school district from adopting a reasonable dress code. *Id.* at 387. The parent and Amanda appealed to the U.S. Sixth Circuit Court of Appeals.

The 6th Circuit noted that Amanda did not intend to convey any particular message other than her desire to wear clothes that “look nice” on her.

¹⁵The dress code policy, both the original and subsequent version, is reprinted in its entirety at Appendix A and Appendix B to the decision. See 401 F.3d at 397-400.

The protections of the First Amendment do not generally apply to conduct in and of itself. To bring a free-speech claim regarding actions rather than words, claimants must show that their conduct “convey[s] a particularized message” and “the likelihood [is] great that the message [will] be understood by those who view[] it.” *Spence v. Washington*, 418 U.S. 405, 411, 94 S. Ct. 2727 (1974) [display of American flag with superimposed peace symbol in protest of Vietnam war and the killings at Kent State University]; *Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533 (1989) [setting fire to the American flag during a demonstration]. The threshold is not a difficult one, as “a narrow, succinctly articulable message is not a condition of constitutional protection.” *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569, 115 S. Ct. 2338 (1995) [state cannot compel a speaker to affirm a message with which the speaker disagrees; parade organizer, as a private actor, is not required to permit a gay-rights organization]. Otherwise, the First Amendment “would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.”

Id. at 388. Amanda’s “message” is “nothing more than a generalized and vague desire to express her middle-school individuality.” *Id.* at 389. The 6th Circuit was mindful that choice in clothing, “in the eyes of a 12-year old,” would be important and, “rightly or wrongly, may be enough to make or break a kid’s day.” It is even true that style and taste in clothing may be one of the first ways a child learns to express her individuality, engage in self-expression, or challenge authority. *Id.* at 389-90.

Even so, the First Amendment does not protect such vague and attenuated notions of expression—namely, self-expression through any and all clothing that a 12-year old may wish to wear on a given day.

Id. at 390. The dress code itself “does not regulate any particular viewpoint but merely regulates the types of clothes that students may wear.” *Id.* at 391. In addition, the dress code “furthers important governmental interests,” as noted *supra* when the parents first proposed the creation of a dress code. *Id.* The dress code is designed so as to ensure that expressive conduct is not suppressed any more than is necessary to further these governmental interests. The dress code applies only to middle-school students and then only during the school day. The students are otherwise free to dress as they please. There are also other avenues for the students to express themselves during school hours, including the school newspaper (which Amanda did) or through involvement in other activities. Students could still “wear buttons expressing other viewpoints, as permitted by the dress code.” The school district satisfied the *O’Brien* tests. *Id.* at 392.¹⁶

¹⁶The court specifically rejected Amanda’s argument that the dress code’s prohibition on the wearing of blue jeans violated her substantive due process rights under the Fourteenth Amendment. The list of “fundamental rights is short,” and “it does not include the wearing of dungarees.” *Id.* at 393.

Lastly, the 6th Circuit rejected the parent’s claim that the dress code violated his fundamental right to direct the education of his child.

The critical point is this: While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally committed to the control of state and local authorities.

Id. at 395-96 (internal punctuation omitted; citations omitted). The parent in this case “does not have a fundamental right to exempt his child from the school dress code.” *Id.* at 396.¹⁷

Uniform Policies and Student Protests

Uniform policies that satisfy judicial scrutiny do not suppress student speech any more than is necessary to accomplish the governmental interest underscoring the need for the dress code in the first place. *Blau, supra*, recognized the need for outlets for student expression, and specifically made reference to messages that may appear on buttons. See *Blau*, 401 F.3d at 392.

DePinto, et al. v. Bayonne Board of Education, et al., 514 F.Supp.2d 633 (D. N.J. 2007) involved this very issue. The school district instituted a mandatory dress code. Two fifth-grade students wore buttons reading “No School Uniforms” within a red circle with a slash through the circle. The printed message overlaid a historical photograph that appeared to depict a gathering of the Hitler Youth. There are no Nazi swastikas or Hitler salutes in evidence, but the boys are all wearing the same uniform and facing the same direction. 514 F.Supp.2d at 636.

The school district threatened to suspend the students, asserting that the background photograph was offensive and not protected by the First Amendment. The students and their parents sued, seeking injunctive relief. *Id.*

The Federal district court analyzed the challenged speech in light of *Tinker*, *Fraser*, *Kuhlmeir*, and *Morse*, noting that public schools could restrict student expression where such speech would substantially interfere with school purposes; was vulgar, lewd, obscene, or plainly offensive; was

¹⁷An unpublished Ohio case tracked *Blau*. In *Plater v. Toledo Public Schools*, 2006 U.S. Dist. LEXIS 78077 (N.D. Ohio 2006), the Federal district court, in denying injunctive relief, noted that Ohio law authorized the school district to adopt a student dress code. The court found that self-expression through one’s choice of wardrobe is not protected expression under the First Amendment, nor is there a fundamental right to wear clothing of one’s choosing. “Plaintiff does not indicate any reason why developing a uniform policy to support the educational process does not have a rational basis, and therefore it is unlikely that Plaintiff would succeed on a due process claim.” *Id.* at *5.

school-sponsored; or promoted illegal drug use. *Id.* at 637-40. The court decided that *Tinker* would apply because the photograph displayed on the buttons was not vulgar, lewd, obscene, or plainly offensive (*Fraser*), did not promote illegal drug activity (*Morse*), and could not be deemed to be school-sponsored speech. *Id.* at 640-44.

The court noted that the buttons did not display any obvious symbol of hate or racial divisiveness, such as the Nazi swastika, the Confederate Battle Flag, or a burning cross. Even though the organization depicted in the photograph was sponsored “by one of history’s greatest miscreants—a man who committed some of history’s most horrific crimes against humanity,” the photograph is otherwise innocuous. The image is not profane. It does not contain sexual innuendo. There are no visible Nazi symbols or infamous “sieg hiel” salutes. “The image may be interpreted as insulting or thought to be in poor taste, but it is not ‘lewd,’ ‘vulgar,’ ‘indecent,’ or ‘plainly offensive’ as set forth in *Fraser*.” *Id.* at 644-45.

Because *Tinker* will apply, the school district would need to show the students’ buttons would “substantially interfere with the work of the school or impinge on the rights of other students.” *Id.* at 645, citing *Tinker*, 393 U.S. at 509. The school district failed to convince the court in this regard. The school district’s censorship was unwarranted. The buttons “did not cause any disruption and Defendants failed to demonstrate a specific and significant fear of disruption, not just some remote apprehension of disturbance.” *Id.* (citation and internal punctuation omitted). Indeed, the school district was unable to provide any “evidence that the educative process will be disrupted or that the Button will result in a failure in the discipline process.” *Id.* at 650.

Although it may be possible under some circumstances to separate an image from the total message, that isn’t possible in this case. The photograph is an integral part of the message itself. *Id.* at 646.

The Federal district court judge issued the injunction, permitting the students to wear their buttons. However, the students were not permitted to distribute buttons at school. The school district could also ask the court to revisit the matter should the wearing of the buttons result in a substantial disruption or material interference with school purposes, as contemplated by *Tinker*. *Id.* at 650.

Lowry, et al. v. Watson Chapel School District, 508 F.Supp.2d 713 (E.D. Ark. 2007) also involved students protesting a mandatory school uniform policy. In 1999, the Arkansas General Assembly adopted “The School Uniform Initiative Act,” which authorized public school districts to adopt school uniform policies. The Act was based in part on findings that in schools where uniforms have been required, “disparities in student socioeconomic levels are less obvious and disruptive incidents are less likely to occur.” 508 F.Supp.2d at 715.

The Watson Chapel School District adopted a mandatory school uniform policy in the spring of 2006, in part “to promote equal educational opportunity through economical access to appropriate school clothing and orderly, uniform apparel standards for students.” *Id.*

Some students wore black armbands to school in protest. The armbands were not worn over any part of the school uniform. The students were disciplined for violating the school uniform policy even though the same policy permitted jewelry, including wristbands, to be worn so long as these were not worn over any part of the school uniform.

The students and their parents sued, seeking injunctive relief to prevent further discipline. The court issued a preliminary injunction. The Plaintiffs later amended their complaint to assert First and Fourteenth Amendment claims, stating the school district's uniform policy constitutes prior restraint on student speech, the disciplinary action violated the students' freedom of expression, and the manner of enforcement of the policy violated the students' due process rights. *Id.* at 716.

The Federal district court noted that although the U.S. Supreme Court has addressed student speech in other decisions, it has never decided a case where there was a facial challenge on First Amendment grounds to a school uniform policy or dress code. *Id.* at 717. The court relied substantially on the 5th Circuit's decision in *Littlefield, supra*, and the 6th Circuit's decision in *Blau, supra*. As in *Blau*, the students in this case were unable to articulate any particular message they wished to convey through the personal selection of their wardrobe for school, other than they did not wish to look like everyone else. *Id.*

The governmental interests underlying the Kentucky middle school uniform policy in *Blau* are nearly the same as the articulated interests of the school district in this case. *Id.* As such, any restrictions of student expressive conduct will be upheld if (1) the restriction is unrelated to the suppression of expression, (2) the restriction furthers an important or substantial governmental interest, and (3) it does not burden substantially more speech than is necessary to further the governmental interest. *Id.*, citing *O'Brien*, 391 U.S. at 377.

The Watson Chapel school uniform policy does not regulate any particular viewpoint but merely regulates the types of clothes that students may wear; it is intended to further important government interests, including bridging socioeconomic gaps between families in the school district, focusing attention on learning rather than on fashion, and improving school security; and it does not suppress substantially more expressive conduct than necessary to further these interests.

Id. at 719. The court noted the uniform policy applies only during school hours. Students also have other means of expression, including the wearing of jewelry, necklaces, wristbands, and bracelets that have messages, so long as these items do not overlap the school uniform. Students can compose guest editorials in the student newspaper. Students are also free to engage in discussions regarding the school uniform requirement. *Id.* at 719-20. The court found the school uniform policy did not contravene any provision of the U.S. Constitution. *Id.* at 720. However, the disciplinary action meted out to the students who wore black armbands in protest was unconstitutional.

[A] reasonable person could find that the black armbands did not violate the school uniform policy, which permitted wristbands and jewelry; that the students who wore the black armbands were disciplined because the armbands were used to express disagreement with school policy.... In other words, there is evidence that discipline was imposed to suppress a particular viewpoint. Absent evidence that wearing the armbands...would substantially interfere with the work of the school, the right of students to engage in such conduct was clearly established in 1969.¹⁸

Id. at 722-23, citing to *Tinker*, 393 U.S. at 514.

Grzywna v. Schenectady Central School District, et al., 489 F.Supp.2d 139 (N.D. N.Y. 2006) presents a different consideration. The student did not wish to wear an accessory to protest a school policy but to support American troops serving in the conflict in Iraq. The student was 12 years old and in middle school. She made a necklace out of red, white, and blue beads and began wearing the necklace to school. She did so to demonstrate her support for American soldiers and her love of America. The school district advised the student she could not wear the necklace because it could be considered “gang related.” School policy prohibits the wearing of gang-related items. *Id.* at 142.

The student sued, claiming the school policy and its enforcement against her wearing of the necklace violated her rights under the First Amendment. The school district moved the court to dismiss the complaint. *Id.*

The federal district court judge rejected the school district’s argument that, due to the relatively young age of the student, she did “not enjoy the full panoply of First Amendment rights.” Although under *Fraser* the constitutional rights of public school students are not automatically coextensive with the rights of adults in other settings, “it is clear that middle-school-aged students do have a constitutionally protected right to engage in non-disruptive, non-violent, silent speech to express views disapproving of war.” *Id.* at 143, citing *Fraser*, 478 U.S. at 682 and *Tinker*, 393 U.S. 503.

In this case, Defendant has presented no argument that Plaintiff was disruptive or that she engaged in any conduct other than quietly wearing her necklace. Accordingly, neither Plaintiff’s age nor the particular manner of her conduct precludes her from asserting First Amendment rights.

Id. The question for the court was whether the student’s wearing of the red, white, and blue necklace was “expressive conduct” for First Amendment purposes. In order for her conduct to be protected expression, “the reviewing court must find, at the very least, an intent to convey a

¹⁸The reference to “1969” is the year the *Tinker* decision was issued.

particularized message along with a great likelihood that the message will be understood by those viewing it.” *Id.* at 144 (citations, internal punctuation omitted).

In this matter, the court found that the student did intend to convey a message: support for her country, support for American troops, and support for family members serving in the Iraqi conflict. *Id.* “The First Amendment exists to protect expressions we love, not only those we hate.” *Id.*

The student, then, did have a “particularized message” she wished to convey. Next, the court had to decide whether this message would be comprehended by those who viewed it.

Here, it cannot be questioned that Plaintiff’s wearing of the red, white and blue necklace coincided with the ongoing war in Iraq and that there is public debate about that war. While Plaintiff claims that she was showing support for her country, for her family members who served in Iraq, and for her support of members of the military in general, people do not automatically associate the colors red, white, and blue (or a red, white, and blue beaded necklace) as necessarily demonstrating support for the troops. It is unclear at this point in the litigation whether anything about the necklace itself or the context in which Plaintiff wore the necklace gave any particular expressive meaning to it.

Id. at 146. It may be possible that the student could provide evidence that, given the conditions in the middle school at the time, viewers may have understood the message the student intended to convey. In like manner, the school district may be able to demonstrate that there was a continuing gang problem in the middle school where beaded necklaces were considered gang related. Because at this juncture there was insufficient evidence, the school district’s motion to dismiss was denied. *Id.* at 146-47.

“Opt Out” Issues

Some dress codes, including school uniform policies, contain an “opt out” provision whereby parents can request that their children be excused from complying with the school district’s policy.

In *Wilkins v. Penns Grove-Carneys Point Regional School District*, 123 Fed. Appx. 493 (3rd Cir. 2005), the New Jersey school district instituted a school uniform policy that, as originally drafted, exempted students who had “moral” objections to the wearing of uniforms. This proved too general for application. The next year, the school district narrowed the “moral” exemption to objections based on “sincerely held religious beliefs.” There were also other exemptions to the school uniform policy, such as for financial hardship. Wilkins, an atheist, sought but was denied an exemption for her two children. Her original objection was based on the “militarism” inherent in uniforms. The school district rejected this argument. Wilkins then sought an exemption based on her atheism. The superintendent denied her request, observing that there is no evidence that the wearing of a school uniform is incompatible with atheism. 123 Fed. Appx. at 494.

Wilkins filed suit, alleging in part violations of the Equal Protection Clause of the Fourteenth Amendment. The federal district court denied Wilkins' request for injunctive relief but granted the school district's motion for summary judgment. Wilkins appealed to the U.S. Third Circuit Court of Appeals. *Id.* at 494-95.

The 3rd Circuit defined the issue for appeal as "whether the religious exemption to the school uniform policy is a rational means of achieving a legitimate state end." *Id.* at 495. The school district argued that its "opt out" provision for "sincerely held religious beliefs" furthered the educational goals of the school uniform policy while protecting the free exercise rights of students. The 3rd Circuit agreed. *Id.*

The religious exemption is rationally drawn to further the legitimate interest in accommodating students' free exercise of religion without undermining the pedagogical goals of the school uniform policy.

Id. The judgment of the federal district court was affirmed.

Land v. Los Angeles Unified School District, et al., 2007 Cal. App. Unpub. LEXIS 3843 (Cal. App. 2007) also involved a school uniform policy with an "opt out" provision. The school had been identified as one of the lowest performing middle schools in California. The middle school was made a part of the "Ten Schools Program," an initiative that had proven successful in the past in transforming poor-performing schools. A requirement of the "Ten Schools Program" is the institution of a strict dress code for faculty and a uniform policy for students. *Id.* at *2-3.

The uniform policy would also help address safety concerns, including the very real problem of non-students entering the campus and assaulting students. The uniforms would also assist students in avoiding gang incidents going to and from school and help students concentrate on their studies. The uniform policy for the school required students to wear a white collared shirt and navy blue bottoms. Appropriate clothing was provided for students who could not afford the uniforms. The middle school experienced improvements in attendance and test scores along with a decrease in behavior problems. *Id.* at *3-4.

The uniform policy did have an "opt out" provision whereby a parent or guardian could merely inform school administrators that the parent did not wish for the parent's child to have to wear the uniform. "For students whose parent or guardian did not opt out, the uniform was mandatory." *Id.* at *4-5.

Land attended the middle school. She did not "want to look like everyone else, thought the uniforms were ugly, and thought...that 'wearing a uniform meant they were getting you ready for prison.'" *Id.* at *6. Her guardian, who shared these sentiments, requested that Land not be required to wear the uniform. Although the guardian had expressed his wish that Land not be required to wear the school uniform, the message did not seem to filter through the ranks. There were a number of instances where Land was confronted by teachers, security personnel, the school photographer, or administrators and asked why she was not in uniform. See, generally,

Id. at *7-12. Although there were a number of such instances, Land was never disciplined or sent home to put on the uniform. *Id.* at 12.

She sued the school district and its personnel, claiming, *inter alia*, discrimination and intentional infliction of emotional distress. Following a jury trial, judgment was entered on behalf of the school district. Land then appealed. *Id.* at 12-13.

Although Land did not plead a First Amendment deprivation at the trial court level, she appeared to do so on appeal. The California Court of Appeals found that the school district did not violate her right to freedom of expression. The wearing of clothing of one's choosing is not expressive conduct protected by the First Amendment. *Id.* at *15-16.

This is not a case in which plaintiff wore or was forbidden to wear clothing imprinted with speech or political symbols, or clothing that, in context, had a specific symbolic significance. [Citations omitted.] Rather, plaintiff wore her regular street clothes. Although clothes are certainly a way in which people express themselves, clothing as such is not—not normally at any rate—constitutionally protected expression. [Citation and internal punctuation omitted.] Indeed, the court in *Tinker* expressly distinguished between a school's regulation of a student's right to wear a symbolic black armband, which was an impermissible restriction on conduct “akin to ‘pure speech,’” and a school's “regulation of the length of skirts or the type of clothing...hair style, or deportment.” *Tinker*, 393 U.S. at 507–08 [other citations omitted]. Self-expression is not to be equated to the expression of ideas or opinions and thus to participation in the intellectual marketplace. Nor is the kind of “message” that clothing normally sends—“I am rich,” “I am sexy,” “I have good taste,” and so forth—intended to contribute to the competition in that marketplace.

Id. at *19-20, relying in significant part on the 6th Circuit's decision in *Blau* and on *Brandt v. Board of Education, City of Chicago*, 480 F.3d 460 (7th Cir. 2007), discussed *infra* under **Updates**.

Land's reasons for not wearing the uniform could not be considered a form of protest (did not want to look like everyone else, thought the uniforms were ugly, thought the uniforms looked like prison garb). She did not mean to communicate any particular message to others. She wore “normal, non-symbolic clothing.” She “did not wear any buttons, armbands or signs to protest the uniform policy, nor did she wear clothing that an observer would understand to communicate an anti-uniform message or any other particularized message.” *Id.* at *25-26. Land has failed to make a First Amendment claim. *Id.* at *26.

The appellate court also agreed with the trial court that Land failed to prove a deprivation of equal protection under the Fourteenth Amendment. She was not treated any differently from any other similarly situated students. *Id.* at *29.

TEACHER FREE SPEECH RIGHTS

The *Pickering/Connick* Balancing Test

Critical to a legal analysis of a dispute involving the purported free speech rights of a public school teacher would be the application of the so-called *Pickering/Connick*¹⁹ balancing test, which seeks to balance the interests of a public employee as a citizen commenting upon matters of public concern with the interests of the governmental entity as a public employer in its promotion of the efficiency of the public services it performs through its employees. There are typically three general areas of inquiry:

- (1) Is the public employee's speech a matter of public concern?
- (2) Was the public employee's protected speech a substantial or motivating factor in the public employer's adverse employment action?
- (3) If the protected speech was a substantial or motivating factor in the adverse employment decision, would the public employer have made the same employment decision in the absence of the protected speech?

The U.S. Supreme Court recently decided *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006), which will also have an effect upon free speech issues involving public school teachers. In *Garcetti*, a deputy district attorney wrote a memorandum regarding his concerns about inaccuracies in an affidavit used to obtain a search warrant in a pending criminal case. His supervisors reportedly retaliated against him for writing this memorandum. The memorandum was prepared as a part of his official duties. The Supreme Court found that he did not suffer unconstitutional retaliation because his speech was not as a citizen for First Amendment purposes. Rather, he prepared the statements pursuant to his official duties. The First Amendment does not prohibit discipline of a public employee for the employee's expressions made pursuant to official responsibilities.

Teacher Comments on Current Events

Mayer v. Monroe County Community School Corporation, 474 F.3d. 477 (7th Cir. 2007), *cert. den.*, 128 S. Ct. 160 (2007) involved *Pickering*, *Connick*, and *Garcetti*. Mayer was a probationary teacher in the elementary school. Although there were other indications of

¹⁹The "balancing test" cases refer to *Pickering v. Board of Education of Township H.S. District 205*, 391 U.S. 563, 88 S. Ct. 1731 (1968) (school board violated teacher's Free Speech rights when it fired him for sending a letter to the editor that was critical of the school board. The letter addressed a matter of public concern and did not contain false or reckless statements); and *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983) (public employee who refused a transfer and then circulated a questionnaire designed to undermine her supervisor's authority was not engaged in protected speech that touched upon matters of public concern; she was insubordinate and undermined the effectiveness of the public employer).

dissatisfaction with her work,²⁰ the school district's intent to not renew her contract became distilled to a principal issue: Had she been subjected to unconstitutional retaliation under the First Amendment for taking a political stance during a current events session in her class? During this session, she had reportedly expressed her opposition to the military intervention in Iraq. She sued the school district, claiming violation of her free-speech rights.

The Federal district court found in favor of the school district. Although the Iraq conflict is a matter of public importance and Mayer did have a right to express her views on the subject, this right was qualified based on the fact that her views were expressed within the workplace where her expression cannot unduly disrupt the employer's business. On appeal, Mayer claimed the *Pickering* balance weighed in her favor. The school district argued that *Garcetti* was dispositive.

Mayer conceded that the current events class was part of her official duties. She argued that "principles of academic freedom supersede *Garcetti* in classrooms." 474 F.3d at 479. The 7th Circuit noted that "[w]hether teachers in primary and secondary schools have a constitutional right to determine what they say in class is not a novel question in this circuit." *Id.* For example, in *Webster v. New Lenox School Dist. No. 122*, 917 F.2d 1004 (7th Cir. 1990), a teacher did not have the right to teach his social studies class that they should consider divine creation as an alternative to scientific understanding or that the world is much younger than the stated four billion years. "We held that Webster did not have a constitutional right to introduce his own views on the subject matter but must stick to the prescribed curriculum—not only the prescribed subject matter, but also the prescribed perspective on the subject matter." *Id.*

This is so in part because the school system does not "regulate" teachers' speech as much as it *hires* that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary. A teacher hired to lead a social-studies class can't use it as a platform for a revisionist perspective that Benedict Arnold wasn't really a traitor, when the approved program calls him one; a high-school teacher hired to explicate *Moby Dick* in a literature class can't use *Cry, The Beloved Country* instead, even if Paton's book better suits the instructor's style and point of view; a math teacher can't decide that calculus is more important than trigonometry and decide to let Hipparchus and Ptolemy slide in favor of Newton and Leibniz.

Id. (emphasis original). This case, the court noted, is easier than *Garcetti* because the "speech" in *Garcetti* was within the employee's official duties and was not "speech" he was paid to create. Also, this case involves children who are required to attend public schools.

Education is compulsory, and children must attend public schools.... Children who attend school because they must ought not be subject to teachers'

²⁰See *Mayer v. Monroe Co. Comm. Sch. Corp.*, 2006 U.S. Dist. LEXIS 26137 (S.D. Ind. 2006) for a more detailed history.

idiosyncratic perspectives. Majority rule about what subjects and viewpoints will be expressed in the classroom has the potential to turn into indoctrination; elected school boards are tempted to support majority positions about religious or patriotic subjects especially. But if indoctrination is likely, the power should be reposed in someone the people can vote out of office, rather than tenured teachers. At least the board's views can be debated openly, and the people may choose to elect persons committed to neutrality on contentious issues. That is the path Monroe County has chosen; Mayer was told that she could teach the controversy about policy toward Iraq, drawing out arguments from all perspectives, as long as she kept her opinions to herself. The Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials....

Id. at 479-80. Rather than definitively state whether *Garcetti* would apply, the court noted that “[i]t is enough to hold that the *First Amendment* does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system.” *Id.* at 480. The decision of the federal district court was affirmed. The Supreme Court has denied certiorari.

Civil Disobedience

James, et al. v. Sevre-Duszynska, et al., 173 S.W.3d 250 (Ken. App. 2005) involves a more difficult question: When does an act of civil disobedience, occurring off-grounds and not within the scope of employment, and where one has acted according to the dictates of one's conscience, constitute sufficient grounds for terminating a teaching contract?

Many of the same grounds for terminating a teacher contract are the same ones for suspending or revoking a teacher license (insubordination, incompetence, misconduct in office, neglect of duty, immorality, inefficiency, impairment, violation of a code of ethics, and various catch-all categories such as “conduct unbecoming of a teacher” or “for good and just cause”). In many states, some of these concepts are not specifically defined. In Kentucky, however, “insubordination” is defined.²¹

Sevre-Duszynska was “an excellent and dedicated teacher” at the high school. She also belonged to a religious-based political organization called the “School of the Americas Watch,” one of the groups that engages in protests at Ft. Benning, Georgia. Sevre-Duszynska, while engaged in one of these protests, led a prayer group onto the Fort's property. She was arrested. She was later tried for trespass and convicted, receiving a 90-day sentence and a \$500 fine. Shortly before the next school year started, Sevre-Duszynska was advised by her probation

²¹“Insubordination” is defined as “including but not limited to violation of the school laws of the state or administrative regulations adopted by the Kentucky Board of Education, the Education Professional Standards Board, or lawful rules and regulations established by the local board of education for the operation of schools...” 173 N.W.3d at 257.

officer that she was to report on September 10 to the federal women's prison camp in Lexington to begin her sentence. *Id.* at 252-53.

She notified her principal the next day. A few days later, the interim superintendent sent her a letter suspending her with pay for 20 workdays so he could investigate the matter surrounding her conviction and sentence. Sevre-Duszynska was escorted from the building. She requested a leave of absence from September 10 to December 10 in order to serve her federal prison sentence, but the interim superintendent denied her request. She reported to the federal women's prison camp as ordered. She was released on December 6. *Id.* at 253.

The following day, she was notified by the interim superintendent that her teacher contract had been terminated based upon "insubordination and conduct unbecoming a teacher, as well as upon her violation of the Professional Code of Ethics for Kentucky School Certified Personnel," although no provisions of the Professional Code were cited. *Id.* The proffered reason for terminating her contract was "her absence from work without leave beginning on September 10, which...constituted a material breach of her contract." She was also suspended without pay pending any appeal she might pursue. *Id.*

Sevre-Duszynska did appeal, challenging the interim superintendent's purported failure to follow state statute when he did not forward her leave request to the school board, failure to include a "written record of teacher performance" to support the charge of insubordination, and failure to cite any specific ethics code violations. A three-member tribunal conducted a two-day hearing. In its written decision, the tribunal found that Sevre-Duszynska was "technically insubordinate because she was absent without leave," but otherwise concluded that she should be reinstated with full back pay to the date of her termination. The tribunal noted "she did not intend to defy a direct order" and that it could not know what the school board would have done had the interim superintendent forwarded her leave request as required by law. *Id.* at 253-54.

The tribunal also listed certain matters a school board should consider when a leave request is made:

- The circumstances giving rise to the teacher's request;
- The circumstances that render the teacher unable to teach during this period;
- The length of absence;
- The inconvenience to the school district;
- The teacher's performance record;
- The teacher's overall effectiveness; and
- Whether retaining the teacher would benefit the students.

Id. at 254. None of these considerations was made. *Id.* The interim superintendent also acted improperly "in thwarting Ms. Sevre-Duszynska's attempt to obtain leave" and "ignored her record as a valuable member" of the high school faculty. Rather, he "treated her in a manner that impugned her character and caused her to suffer unnecessary embarrassment and expense." The investigation of her circumstances should have been more thorough; the interim superintendent

“should have responded more compassionately to one of its own who had the courage to face prison for her convictions.” *Id.*

The school board sought judicial review solely on the insubordination charge. Sevre-Duszynska continued her challenge to the sufficiency of the insubordination charge. The circuit court addressed only the school board’s appeal, affirming the tribunal’s findings and conclusions, noting that its decision to impose no sanction was supported by substantial evidence. *Id.* at 254-55.

The school board appealed, arguing that Sevre-Duszynska breached her contract with the school by failing to perform and by being absent without leave, the latter tantamount to a resignation. Sevre-Duszynska cross appealed, arguing the lack of foundation for the insubordination charge. *Id.* at 255.

The Court of Appeals was unimpressed with the school board’s common-law breach of contract claim, noting that it framed the context of this dispute when it charged Sevre-Duszynska with insubordination and conduct unbecoming a teacher. *Id.* at 256. In addition, there could not be a constructive resignation because the terms of her contract required her to resign in writing. She never submitted a written resignation and never intended to resign. *Id.* The appellate court found no error and affirmed the circuit court’s decision against the school board.

The court spent a great deal of time discussing the merits of Sevre-Duszynska’s challenge to the underlying charge of insubordination, which the tribunal had found she had been, albeit “technically.” The circuit court found that despite this characterization, Sevre-Duszynska suffered no penalties and, as a result, the issue was moot. The appellate court disagreed that it was moot. She still has the right to argue that the charge should not have been made in the first place. Should she prevail, she could have the charge of insubordination removed from her record. *Id.*

The Court of Appeals noted that any charge of insubordination must be supported by “a written record of teacher performance” by an appropriate administrator. Sevre-Duszynska argued that no such “written record” was ever submitted and, as a consequence, this charge against her should have been dismissed at the administrative level. *Id.* at 257. The court rejected a “substantial compliance” argument that existing laws put a teacher on notice of the underlying foundation for a charge of insubordination. A “written record,” the appellate court noted, goes beyond mere recitations of local and state laws and “must necessarily be unique to the teacher who is charged and must logically document prior instances of insubordination or other acts that led to and support the charge.” *Id.* at 258. There also was no reason the interim superintendent could not have documented her alleged absence without leave or notify her that this conduct, should it continue, would constitute insubordination. He didn’t do so. *Id.* Because the charge of insubordination was not supported by a “written record of teacher performance,” the charge against Sevre-Duszynska must be dismissed. *Id.* at 259.

The Court of Appeals affirmed the circuit court's decision against the school board, but reversed and remanded the circuit court's decision on the insubordination charge, directing the circuit court to dismiss the charge. *Id.* at 259-60.

Political Activity

Public employers have more leeway in proscribing certain "speech" of those operating within the scope of their public employment, including speech that constitutes "political activity." One of the first cases decided after *Garcetti* involving a public school teacher was *Montle v. Westwood Heights School District, et al.*, 437 F.Supp.2d 652 (E.D. Mich. 2006).

Montle was a probationary teacher. At the end of the probationary period, the high school principal did not recommend that his teaching contract be renewed. Montle asserted this decision was based on his race and on the exercise of his free speech rights in advising the public that teachers in the school district were working without a contract. His race and First Amendment claims went to trial. A jury returned a verdict in favor of the school district on the race discrimination claims. However, the jury found against the principal on the First Amendment claim, assessing compensatory and punitive damages. The jury provided conflicting answers to special questions posed to it by court. Although the jury found in favor of Montle on his free-speech claims, it also determined that Montle's act of wearing a T-Shirt during school hours that stated the teachers' union members were working without a contract either caused or could have caused disharmony in the workplace at the high school. 437 F.Supp.2d at 653, 654. The federal district court was left to resolve these conflicting positions. During this time, the Supreme Court issued *Garcetti*.

The underlying conduct for this dispute involved Montle's wearing of a bright green T-Shirt on certain Fridays during the school term. The T-Shirt bore the name of his teacher union as well as a statement, "Working Without a Contract." Other teachers wore the T-Shirt on these days as well. Montle said he wore the T-Shirt as a way of making parents and students aware that the school board had not yet negotiated a labor contract with the teaching staff, and that teachers were working without a collective bargaining agreement. He also confronted teachers who did not wear the T-Shirt, prompting complaints to the principal. *Id.*

Under *Pickering*, one of the first elements Montle needs to show in order to establish a First Amendment claim is that he engaged in constitutionally protected speech. *Id.* at 654. However, this element itself has three (3) factors: (1) whether the speech addressed a matter of public concern; (2) if so, then the court must balance the interests of the public employee, as a citizen, in commenting upon matters of public concern with the interest of the government employer in promoting the efficiency of the public services it performs through its employees; and (3) the court must determine whether the public employee's speech was a substantial or motivating factor in the employer's decision to take the adverse employment action against the employee. *Id.*

These factors account for the twin concerns of protecting the speech rights of citizens who happen to be government employees, and avoiding undue restrictions on public employers to control and direct their employees, who happen to be citizens. As the Supreme Court explained just last month, “public employees do not surrender all their First Amendment rights by reason of their employment.” *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 1957 (2006). However, “[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services. *Garcetti*, 126 S. Ct. at 1958 (citations omitted).

Id. Where a public employee contends he has been disciplined because of his speech, the critical inquiry is: “whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.” *Id.*, citing *Garcetti*, 126 S. Ct. at 1958.

The Supreme Court reiterated the key components of this “delicate balance”: “[a] government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity’s operations.” *Id.* The source of the limitations on such restrictions is the First Amendment, which “limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.”

Id. The Federal district court agreed that, in this case, Montle’s speech touched upon matters of public concern. Matters of public concern include speech related to “any matter of political, social, or other concern to the community.” *Id.* at 654-55, citing *Connick v. Myers*, 461 U.S.138, 146, 103 S. Ct. 1684 (1983).

The absence of union contracts is a matter of great concern to parents and students, if not all citizens interested in public education. It is a matter of importance to the vitality of the school district and the community, and it can call into question the effectiveness of the management overseen by the elected school board.

Id. at 655. As Montle’s speech is a matter of public concern, “[t]he next question under *Pickering*...is whether ‘the interest of the employee as a citizen, in commenting on matters of public concern, outweighs the employer’s interest in promoting the efficiency of the public services it performs through its employees.’” *Id.* In this case, the jury “specifically determined that the plaintiff’s act of wearing the T-shirt during school hours caused or could have caused disharmony in the workplace” at the high school. In its verdict, the jury also found that this was a factor in the principal’s decision to recommend non-renewal of Montle’s teaching contract. *Id.* at 655-56.

Given these determinations, the Court’s task is to balance Montle’s interest “as a citizen, in commenting upon matters of public concern” and the interest of the school district, through its principal, “as an employer, in promoting the efficiency of the public services it performs through its employees.” ...*Pickering*, 391 U.S. at 568.... “The [school district] bears a burden of justifying the discharge on legitimate grounds. ... *Connick*, 461 U.S. at 150.... The State may curtail the plaintiff’s speech on matters of public concern if it “impair[s] discipline by superiors, ha[s] a detrimental impact on close working relationships, undermine[s] a legitimate goal or mission of the employer, impede[s] the performance of the speaker’s duties, or impair[s] harmony among co-workers.” *Meyers v. City of Cincinnati*, 934 F.2d 726, 730 (6th Cir. 1991).

Id. at 656. The district court found the school district carried its burden in demonstrating that Montle’s speech caused disharmony in the workplace. Although Montle wore his T-Shirt on certain days, he also “upbraided coworkers who did not conform to the once-per-week practice, and his confrontational behavior actually prompted complaints to the principal by other teachers.” *Id.* Although the status of labor negotiations is certainly a matter of public concern, “the school district’s interest in ensuring professional demeanor and good relations among its faculty has been recognized as an interest that outweighs the right to speech during the workday. The Court believes that such a limitation was reasonable to ensure ‘the efficient provision of public services,’ *Garcetti*, 126 S. Ct. at 1958, which in this case was educating high school students.” *Id.*

After reviewing the decisional authorities, the Court concludes that, in light of the jury’s determination of the disruption that was or could have been wrought by the plaintiff’s speech, the plaintiff’s right to speak out on a matter of public concern must be subjugated to his employer’s interest in maintaining order in the workplace. The Court, therefore, will enter judgment for the defendants on all counts of the complaint.

Id. at 653.

Elsewhere...

For other cases involving similar circumstances, please see the following (all of which were decided before *Garcetti*).

- *Trulock Joint Elementary School District v. Public Employment Relations Board*, 5 Cal. Rptr. 3d 308 (Cal. App. 2003), ordered not published, 2004 Cal. LEXIS 455 (Cal. 2004). The bargaining unit and school reached an impasse in negotiations. The bargaining unit employed a letter-writing campaign, pickets, attendance at school board meetings, phone calls to parents, and rallies in an attempt to resurrect the bargaining. One strategy involved the teachers wearing two-inch circular buttons while teaching. The buttons

contained unflattering symbolism to reflect how the ranking of the school's benefits had slipped over the years. The buttons could be read by any student anywhere in the classroom. No student or parent complained; there was no evidence that the wearing of the buttons resulted in any disruption. This strategy had been employed once before. The school had a policy that prohibited "political activity" during instructional time. The school asked the teachers not to wear the buttons. The teachers complied but filed an unfair practice charge with the Public Employment Relations Board (PERB). An Administrative Law Judge (ALJ) recommended dismissal of the complaint because the buttons constituted "political activity" that could be restricted during instructional time. PERB disagreed with the ALJ and found instead that the wearing of the buttons did not constitute "political activity." The California Court of Appeals reversed the PERB. A divided California Supreme Court decided not to review the appellate court decision, but did agree to order the decision to be unpublished.

- *California Teachers Association, et al. v. Governing Board of San Diego Unified School District*, 53 Cal. Repr. 2nd 474 (Cal. App. 1996). The ALJ in *Trulock* relied upon this case. This decision is an interesting one. The governing body *and* the teacher union both opposed an initiative on the State's November 1993 ballot that would have adopted a voucher system. The governing body passed a resolution, indicating its opposition. The teacher union wished for its teachers to wear buttons, indicating teacher opposition to the initiative. However, the governing body prohibited its employees from wearing political buttons during school time. The court found the school district had the power to prevent its employees from wearing political buttons in its classrooms and when they are otherwise engaged in providing instruction to the district's students. The district would have no such power when its employees are not engaged in instructional activities, such as attending meetings of the governing body.
- *Green Township Education Assoc. v. Rowe, et al.*, 746 A.2d 499, 506 (N. J. Super. A.D. 2000), a case similar to *Trulock* in that the New Jersey school district's conflict-of-interest policy barred teachers, during a bargaining impasse, from wearing during instructional time union buttons reading "NJEA SETTLE NOW":

The first rule of teaching should be that teachers shall teach. A classroom is not a place for proselytizing students to advance a teacher's financial interests. Nor should a classroom be transmogrified into a teacher's soapbox. [Citation omitted.] Just as a board of education may set the curriculum, it may also require teachers to confine their classroom activities to providing students with a thorough and efficient education.

It is also noteworthy that in the New Jersey dispute—as in *Trulock*—the wearing of such buttons had occurred in the past during bargaining impasses but without any attempts to interpose restrictions. Neither the California nor the New Jersey courts found the failure to object in the past waived any present right to restrict "political activity" of teachers while engaged in teaching.

Religious Proselytizing By Teachers

M. Naji Aljadir v. Substitute Teacher Service, 2004 U.S. Dist. LEXIS 19879 (D. Del. 2004) involved M. Naji Aljadir, who held a Ph.D. in nuclear physics from the University of Pennsylvania. 2004 U.S. Dist. LEXIS at *9, n. 1. Despite formerly working as a nuclear physicist, he has worked as a substitute teacher since the late 1980s. *Id.* at *1-2. Aljadir is also a Muslim.

He began his career as a substitute teacher with a school district in Delaware. The school district later contracted with Substitute Teacher Service (STS), a company that provides substitute teachers for school districts in Delaware and Pennsylvania. STS hired Aljadir, who was compensated in the same manner as other substitutes (a minimum of \$104 a day beginning in 2000). He was also provided the option of becoming a “district substitute” for an additional \$10 a day, which he accepted. A “district substitute” is required to teach at any school the dispatcher directs.

STS received numerous complaints regarding Aljadir from schools, teachers and its own dispatchers. *Id.* at *3, *10-11. Teachers complained he would not follow lesson plans and had poor class management. STS, in the fall semester of 2000 alone, received 50 requests that he not be assigned to particular classrooms as a substitute teacher. Several schools did not want him as a substitute in any of their classrooms. *Id.* at *11.

STS fired Aljadir on January 3, 2001. He asserted that he was a popular substitute teacher and complained that he was being terminated due to his religious beliefs.

As an example, he describes a classroom incident where he was discussing the conflict of Crusaders²² versus Muslims in the Middle Ages. During the discussion, he commented that “Muslims know that historically, scientists have affirmed the existence of Mohammed, a Muslim profit [sic], unlike Jesus Christ.”

²²“Crusaders” refers to the eight (8) principal Crusades that occurred between 1095 and 1270. The Crusades have had broad ramifications to this date, not only with the Muslim world, where today “Crusader” is considered a pejorative term, but with the Orthodox Church as well. In 1202, one Crusade diverted from its intended course and sacked Constantinople, an occurrence that has strained dialogue between the Orthodox Church and the Roman Catholic Church to this date. There were lesser efforts that are not counted among the Crusades, including the bizarre “Children’s Crusade,” where 40,000 German children attempted to cross the Alps to get to Genoa and Rome, only to be told by Pope Innocent III to go home. Most of them perished either coming or going. About 30,000 French children began a similar trek and were also advised to go home. Some of the German and French children actually set sail for the Holy Land, only to be killed, lost, or sold as slaves to Muslims. The children’s fairy tale “The Pied Piper of Hamelin” was inspired by the Children’s Crusade.

Id at *3. He represented to the court that this event, “coupled with the atmosphere created by the events of September 11 toward those from Islamic background had much to do with...[his] dismissal.” *Id.* at *10-11.²³

Aljadir filed a discrimination claim, but when the Equal Employment Opportunity Commission (EEOC) closed its file on his claims, he filed the instant claim *pro se*, alleging he was fired based on his religious beliefs, purportedly in violation of Title VII, 42 U.S.C. § 2000(e) *et seq.* Title VII prohibits an employer from discriminating against any individual on the basis of race, color, religion, sex, or national origin.

A Title VII discrimination claim is analyzed under the now-familiar three-step burden-shifting framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). In order to establish a *prima facie* case, Aljadir must demonstrate that (1) he is a member of a protected class, (2) he was qualified for the employment position, and (3) he was terminated under circumstances where one could reasonably infer discrimination. If Aljadir can establish all three elements, the burden would shift to STS to rebut the presumption of discrimination by producing one or more legitimate reasons for terminating Aljadir. The burden would then shift again to Aljadir, who would have to prove STS’s reasons were merely pretextual (that is, false) and that the real reason for his termination was employment discrimination. *Id.* at *6-7.

The court allowed that Aljadir was a member of a protected class (a Muslim) and that he was sufficiently qualified to be a substitute teacher (a Ph.D. in nuclear physics). He suffered an adverse employment action when he was terminated. *Id.* at *8. However, he could not satisfy the third element.

Although Aljadir had claimed that he was a popular and effective substitute teacher who received no complaints, he later admitted in his deposition that some teachers had complained to him about not following lesson plans and that several schools asked him not to come back as a substitute teacher. *Id.* at *11-12. STS, on the other hand, provided sufficient reasons why Aljadir was terminated, including complaints from its own staff (the dispatchers). There was no evidence of religious discrimination beyond Aljadir’s statement he was fired because he was a Muslim. He couldn’t show disparate treatment either. “Lastly,” the court wrote, “Aljadir has failed to identify any similarly situated non-Muslim that STS still employed after receiving numerous complaints about his or her class management and teaching.” He has failed to establish a *prima facie* case. *Id.* at *12. Summary judgment was awarded to STS.

Even though Aljadir was terminated for his work record and not for his religion or religious views, it is possible he could have been discharged even for those. There have been five interesting cases involving this issue that have made it to the Circuit Court of Appeals level.

²³This is a curious argument for two reasons: (1) He was terminated from his employment on January 3, 2001, a full nine months before September 11; and (2) neither the court nor STS chose to point out this time discrepancy.

1. *Grossman v. South Shore Public School District*, 507 F.3d 1097 (7th Cir. 2007). Grossman was hired as a guidance counselor for the public school system. At the end of the contract period, the school district decided not to renew her contract, resulting in a suit where she claimed the school district was hostile to her religious beliefs, violating both Title VII of the Civil Rights Act of 1964 and the Free Exercise Clause of the First Amendment. The Federal district court disagreed and granted summary judgment to the school district. She appealed to the U.S. Seventh Circuit Court of Appeals.

The 7th Circuit agreed with the Federal district court. On several occasions, Grossman had inserted her religious beliefs in her function as a guidance counselor. The 7th Circuit rejected her claims that the school district was hostile to her religious beliefs. It was not her beliefs that resulted in non-renewal; rather, it was her conduct. 507 F.3d at 1098-99. Although her religious beliefs militate against artificial birth control in favor of abstinence, Grossman was not authorized to remove literature on artificial birth control and replace it with literature on abstinence. The marked increase in teen pregnancies in the small school district was cause for concern. “Six teenage pregnancies among the students at the school seem like a lot, and it is easy to understand how the people running the school would think it imprudent to retain a guidance counselor who throws out pamphlets instructing in the use of condoms and replaces them with pamphlets advocating abstinence.” *Id.* at 1099.

There were also at least two instances where students seeking assistance from the guidance counselor were asked to join her in prayer. “Teachers and other public school employees have no right to make the promotion of religion a part of their job description and by doing so precipitate a possible violation of the First Amendment’s establishment clause [citations omitted], even if the religious composition of the local community makes a legal challenge unlikely. The First Amendment is ‘not a teacher license for uncontrolled expression at variance with established curricular content.’ *Palmer v. Bd. of Education*, 603 F.2d 1271, 1273 (7th Cir. 1979); see also *Mayer v. Monroe County Comm. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007).” *Id.* at 1099-1100.

2. In *Helland v. South Bend (IN) Community School Corp.*, 93 F.3d 327 (7th Cir. 1996), *cert. den.* 519 U.S. 1092, 117 S. Ct. 769 (1997), the 7th Circuit affirmed summary judgment for the school district, which removed Helland from its list of substitute teachers because he failed to follow lesson plans, failed to control his students, and improperly interjected religion into his classrooms. Helland’s religious beliefs require him to carry and read the Bible. He had received several negative performance evaluations. Several principals and teachers had asked that he not return to their classrooms and schools. He also had proselytized to his classes of middle and high school students by reading aloud to them from the Bible, distributing Biblical pamphlets, and professing his belief in the literal creation of man. This latter conduct occurred during a fifth-grade science class. Helland agreed not to give the students an assignment

if they would not tell anyone about the discussion. Helland claimed that his removal from the substitute list violated his civil rights and his “Free Exercise” rights.

The Court found that the school had sufficient nondiscriminatory reasons for removing him from the list: (1) he was a sub-par teacher who did not follow lesson plans and did not control his classes; and (2) despite “numerous admonitions...that he stop interjecting religion into his classrooms,” he continued to do so. Because public schools must make certain that “subsidized teachers do not inculcate religion” into their classrooms, the school had a legitimate, nondiscriminatory reason to remove Helland from the list so as to avoid a violation of the First Amendment’s Establishment Clause. This was not a pretext for discriminating against Helland based upon his religious beliefs. 93 F.3d at 330.

Helland also claimed the school terminated him for refusing to cease carrying his Bible to school and to cease reading it in privacy during breaks in classroom assignments. However, the court noted that there was no evidence the school ever proscribed these activities. The school did admonish him for reading the Bible aloud to students and discussing religion during class. A school can direct a teacher to “refrain from expressions of religious viewpoints in the classroom and like settings,” at 331, citing *Bishop v. Aronov*, 926 F.2d 1066, 1077 (11th Cir. 1991). The Court noted that Helland received ample notice and warning regarding his activities, and his religious practices were accommodated by not assigning him to schools where his past practices were objectionable. Had the school not terminated him, it “would have opened up another constitutional can of worms.” *Id.*

3. *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), *cert. den.* 505 U.S. 1218, 112 S.Ct. 3025 (1992). The *Helland* court alluded to this case . Sec 93 F.3d at 331, n.1. Roberts was a veteran teacher of 19 years who taught fifth-grade students. As a part of teaching reading skills, each day was devoted to a “silent reading period” of fifteen minutes where students could read from materials brought from home, from the school library, or from Roberts’ classroom library of 239 books. Roberts also read silently during this period, frequently from the Bible, which he kept on his desk throughout the day. He never read aloud from the Bible and did not “overtly proselytize about his faith to his students.” *Id.* at 1049. Two of the 239 books in Roberts’ classroom library were Christian books. There was also a poster which included a religious message. Following a parent complaint, the principal directed Roberts to remove the two books and to keep his Bible out of sight during classroom hours. Roberts complied with these directives. However, the principal found Roberts reading his Bible silently on two subsequent occasions. She directed him to keep his Bible in his desk during school hours. The professional relationship deteriorated. Roberts was given a directive that provided in part that the school must “avoid the appearance of teaching religion,” and should he not comply with the principal’s directions, he would be considered insubordinate. Roberts instituted this action claiming a violation of his First Amendment right to free speech, academic freedom, and access to information. He also claimed a violation of the Establishment Clause by the school “by treating Christianity in a non-neutral, disparaging manner.”

The 10th Circuit Court of Appeals affirmed the district court's finding that "the balance between Mr. Roberts' rights to freedom of expression and academic freedom on the one hand, and the students' rights to be free from religious indoctrination on the other, the students' interest must prevail." *Id.* at 1050. Although the court also upheld the removal of the two books from Roberts' classroom library because the proffered reason for doing so was related to a compelling governmental reason, it added that "[i]t is neither wise nor necessary to require school officials to sterilize their classrooms and libraries of any materials with religious references in order to prevent teachers from inculcating specific religious values." *Id.* at 1055. The "Establishment Clause focuses on the manner of *use* to which materials are put; it does not focus on the content of the materials *per se*." *Id.*

4. *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994), *cert. den.* 515 U.S. 1173, 115 S. Ct. 2640 (1995) is also pertinent here. Peloza, a biology teacher, alleged his civil rights were violated because he was required to teach "evolutionism," which he called a "religious belief" and one of "two world views on the subject of the origins of life and the universe." (The other "world view," according to Peloza, is "creationism," which he also acknowledges as a "religious belief system.") The court upheld the school's restrictions on Peloza from discussing religious beliefs with students during contract hours and on the school campus. Such speech has no secular purpose, has the primary effect of advancing Peloza's religious beliefs, and excessively entangles the school with religion.
5. *Marchi v. Board of Cooperative Educational Services of Albany, Schoharie, Schenectady, and Saratoga Counties*, 173 F.3d 469 (2nd Cir. 1999), involved a special education teacher who experienced a dramatic conversion. He began to discuss with his students such topics as forgiveness, reconciliation, and God. He was repeatedly directed to cease these practices, but he refused to do so. He was eventually charged with insubordination and was suspended indefinitely. Marchi's return to teaching was conditioned on his "written affirmation" that he would obey the school's directive. He indicated that he would conform his behavior. But he didn't. There was one more incident where he wrote a note to a parent of one of his students. The note had several religious references. Although admonished by school administration, no further action was taken against Marchi. Marchi, nevertheless, filed suit, claiming a host of constitutional deprivations. The Federal district court granted the school summary judgment, which the 2nd Circuit affirmed. Although Marchi claimed the directive was vague and overbroad, the 2nd Circuit found that it was neither. Although the directive did infringe upon Marchi's First Amendment rights, not all restraints are *ipso facto* invalid. An employee—especially a public school teacher—will sometimes find that the scope of his rights must sometimes yield to the legitimate interest of the governmental employer in avoiding litigation, including Establishment Clause litigation.

COURT JESTERS: ONE RING TO RUE THEM ALL

A diamond apparently doesn't last forever, especially where a lowlife Lothario is involved.²⁴

In *Mewborn v. Weitzer*, 84 S.E. 141 (Ga. App. 1915), "Mrs. Mewborn" sued Lizzie Weitzer in an attempt to recover a diamond ring that had been pledged to both (at one time or another) by an unnamed resident of the reformatory, who, despite his criminal proclivities, had the good sense not to intervene.

The courts below found for Weitzer. Mewborn appealed, only to lose before the Georgia Court of Appeals, where she not only lost the diamond ring but a considerable measure of dignity as well.

The appellate court decried the dispute as "an unseemly and disgraceful wrangle between two ladies of 'easy virtue' for the possession of a diamond ring, bestowed upon each of them, on different occasions (and no doubt for value (?) received), by their common and generous admirer—a Federal convict." 84 S.E. at 142 ("?" original with the appellate court).

It was not enough to disparage the two combatants. The Court also thought little of the sought-after prize.

And a curious coincidence is that this ring (as described in the record) has upon it "the figures of two women." It is not disclosed whether or not these figures are nude, but considering their environment, we do not imagine that their charms are concealed by excessive drapery. No doubt our gallant convict-lover and his two fair lady-friends agreed in thinking that "beauty when unadorned's adorned the most."²⁵

Id. While affirming the judgment, the Court fired off a final salvo: "From having to wade through such another nauseating mess, may the good Lord deliver us." *Id.*

QUOTABLE . . .

It is axiomatic that the Bill of Rights serves as an aegis of protection for the insular minority from what Alexis De Tocqueville coined "the tyranny of the

²⁴The expression "A diamond lasts forever" comes from *Gentlemen Prefer Blondes* (1925), a book by American humorist, screenwriter, and playwright Anita Loos (1888-1981) ("Kissing your hand may make you feel very, very good, but a diamond and sapphire bracelet lasts forever").

²⁵Although the Court does not indicate the source of this quotation, it is reminiscent of John Milton's more straight-forward and less Victorian, "In naked beauty more adorn'd/More lively, than Pandora." *Paradise Lost*, Book IV.

majority,” and that under this regime, it is essential that each citizen be afforded the same set of fundamental rights necessary for a free and open society. This umbrella of rights does not exclude viewpoints unacceptable to the majority or embraced by only a few. Nevertheless, courts must carefully draw a line between protection of individual interests and interference with public administration. This is particularly true with judicial imposition on the administration of public schools.

Federal District Court Judge James C. Cacheris,
Myers v. Loudoun County School Board, 500
F.Supp.2d 539, 544 (E.D. Va. 2007).

UPDATES

T-SHIRTS: FREE SPEECH RIGHTS VS. SUBSTANTIAL DISRUPTION

Any First Amendment analysis of student speech within a public school context must begin by reference to the U.S. Supreme Court’s four school-speech cases, none of which actually involved a T-Shirt:

1. *Tinker v. Des Moines Independent Community School District*, 393 U.S.503, 507-08, 514 (1969) (addressing “pure speech” as opposed to “regulation of the length of skirts or the type of clothing” to find that “pure speech” in a school context cannot be banned absent a reasonable forecast of “substantial disruption”).
2. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 681, 683, 685-86 (1986) (student’s sophomoric speech— which contained offensive, indecent, lewd references— was not protected speech and could be regulated because vulgar or indecent speech and lewd conduct in the classroom or school context is inconsistent with the fundamental values of public school education).
3. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 270-71, 273-76 (1988) (school could exercise editorial control over the style and content of student articles in school newspaper because newspaper was part of journalism class experience and, accordingly, was part of a school-sponsored expressive activity; however, such editorial control must be “reasonably related to legitimate pedagogical concerns.”).
4. *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (a message reasonably viewed as advocating illegal drug use—“Bong HiTS 4 Jesus—need not result in a substantial disruption before school officials could restrict such speech on school property or at a school event).

As noted in previous articles,²⁶ T-Shirts and their intended messages continue to spark controversies within the public schools.

The Gifties versus the Tards

In the **Quarterly Report** for April-June: 2006, the Federal district court decision in *Brandt v. Board of Education of the City of Chicago*, 420 F.Supp.2d 921 (N.D. Ill. 2006) was reported. This dispute arose out of a T-Shirt design contest, an annual eighth grade event in an elementary school. A student in the gifted class (the “Gifties”) submitted a design, which didn’t win. (A design by another student—the “Tards,” in Giftie lingo—won.) He decided to use his submission as a T-Shirt for the Gifties. When school officials declined to permit this—and meted out some punishment—a federal lawsuit followed, which failed. The students appealed to the U.S. Seventh Circuit Court of Appeals.

In *Brandt, et al. v. Chicago Board of Education*, 480 F.3d 460 (7th Cir. 2007), the students did not fair any better.

De minimis non curat lex, wrote the often erudite Richard A. Posner, Circuit Judge for the U.S. Seventh Circuit Court of Appeals, writing for the three-judge panel. Loosely translated, this means “No one likes a sore loser.”²⁷

Judge Posner was not *that* blunt in his opinion in *Brandt*, but he was blunt enough. “An air of unreality clings to every aspect of this litigation,” he noted. 480 F.3d at 465.

Although there has been a spate of free-speech cases of late involving T-Shirts, this one fails to invoke protected student speech under *Tinker v. Des Moines Ind. Community School District*, 393 U.S. 503, 89 S. Ct. 733 (1969). Rather, it ends up more under the permissible regulation of student speech allowed by *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562 (1988) (school-sponsored speech).

This dispute began with 24 eighth grade students in an elementary school in Chicago. These 24 students were drawn from throughout the district and, because of their participation in the gifted program, referred to themselves as “Gifties.”²⁸ All other students in the school (72) were local products. The “Gifties” referred to them as “Tards,” an apparent abbreviation for “retards.” This did not endear the Gifties to the other students. There were reported strains. *Id.* at 462-63, 466.

²⁶See “T-Shirts: Free Speech vs. Substantial Disruption,” **Quarterly Report** July-September: 2005 and April-June: 206 (Update).

²⁷Actually, the phrase translates as “The law does not concern itself with trifles.” See 480 F.3d at 465.

²⁸There are actually 27 “gifties,” but three of them did not participate in this litigation.

Each year, the eighth grade chose a class T-Shirt. In all, some 30 designs were submitted by eighth-grade students. One of them was by Brandt, one of the “Gifties.” The “Gifties” decided to vote *en bloc* for Brandt’s design, thus almost certainly assuring a win over any submissions by the “Tards,” whose votes should be fragmented by the other 29 submissions. The scheme failed. The teacher in charge of the vote tabulation declared the contest too close to call. There was a run-off election with three choices, one of them Brandt’s opus. A design by a “Tard” was selected. *Id.* at 462-63.

The Gifties were indignant. When the teacher would not explain her runoff system to the satisfaction of the Gifties, they produced Brandt’s T-shirt design and wore it as a form of protest rather than the T-Shirt design that won.²⁹ The principal tried to dissuade the Gifties from their reckless course of action. The assistant principal warned them that they were likely violating the school district’s Uniform Discipline Code (since changed) that prohibited students from wearing clothing with “inappropriate words or slogans.” *Id.* at 463.

Undeterred, the Gifties continued their protest. This resulted in their being confined to their homeroom for nine days, resulting in their missing gym, science lab, computer lab, and after-school activities. A “Crisis Intervention Team” arrived and decided Brandt’s T-Shirt did not pose a safety problem, so the Gifties were permitted to wear their preferred T-Shirt. *Id.*

It did not stop there. Brandt’s mother is an attorney. She sued the school board on behalf of 24 of the Gifties, seeking equitable relief and damages, as well as injunctive relief to prevent enforcement of the Uniform Discipline Code provision regarding “inappropriate words or slogans.” They also sought an order requiring the school to expunge any disciplinary record regarding this incident. *Id.* at 463-64.

As it turned out, the school had no records of the disciplinary action taken against the Gifties, which mooted the claim to have the records expunged. The Gifties then sought a court order to prevent school officials from *telling* anyone that the Gifties had been punished for wearing Brandt’s T-Shirt design. “There is a touch of irony in the claim,” the court noted, “since by filing this suit the plaintiffs have spread far and wide the information concerning their conduct and the school’s response to it; the suit has attracted a fair amount of publicity.” *Id.* at 464, adding that the court had “googled” the dispute just to be sure.

The 7th Circuit did not believe the plaintiffs had suffered anything more than minuscule damages. Missing nine days of specials out of a full school year did not amount to much. *Id.* at 465. Even though the court agreed nominal damages can be awarded for a constitutional violation, “such an award presupposes a violation of sufficient gravity to merit a judgment, even if significant

²⁹The 7th Circuit reproduced Brandt’s T-Shirt. It is included in this **Quarterly Report** on page _____. As one wag put it, the Gifties should have hired an Artie.

damages cannot be proved; and this is not such a case. In any event there has been no constitutional violation.” *Id.*

The T-Shirt itself would not be protected speech. “Although freedom of speech and of the press—the relevant terms in the First Amendment—are often loosely paraphrased as ‘freedom of expression,’ and clothes are certainly a way in which people express themselves, clothing as such is not—not normally at any rate—constitutionally protected expression.” *Id.*, citing *Tinker*, 393 U.S. at 507-08.

Self-expression is not to be equated to the expression of ideas or opinions and thus to participation in the intellectual marketplace. Nor is the kind of “message” that clothing normally sends—“I am rich,” “I am sexy,” “I have good taste,” and so forth—intended to contribute to competition in that marketplace.

Id. The court acknowledged that protected speech can be printed on clothing, and that “[m]erely wearing clothes inappropriate to a particular occasion could be a political statement.” But in this case, the T-Shirt design and words “are no more expressive of an idea or opinion than the First Amendment might be thought to protect than a young child’s talentless, infantile drawing, which Brandt’s design successfully mimics.”³⁰ *Id.* at 465-66. If free-speech protections were afforded to every T-Shirt with whatever design or words may be emblazoned thereon, “schools could not impose dress codes or require uniforms without violating the free speech of the students[.]” *Id.* at 466.

The 7th Circuit panel did agree that there was some merit to the plaintiffs’ argument that the wearing of the T-shirt as a protest made the contents of the apparel protected expression. Context is important, the court agreed, but in this case, the protesters are school children who are insisting that “unless their T-shirt is adopted by the entire eighth grade, they will as it were secede, and flaunt their own T-shirt. They do not recognize the principal’s authority or the legitimacy of the school’s procedures for determining the winner of contests.” *Id.*

The court expressed doubts “whether the constitutional privilege to engage in protest demonstrations in the name of free speech extends to eighth graders,” but added that this would not mean that such students did not have any First Amendment rights. The only right the eighth grade students were seeking to vindicate was a right to an explanation as to the voting procedures.

We do not think eighth graders have such a right. For the school to hold an election for class T-shirt and rig the results, as the plaintiffs suspect happened, is

³⁰Judge Posner is giving Brandt credit he likely does not deserve. Later in the opinion, the judge is not so generous. In response to the school’s argument that the drawing ridicules students with disabilities, the court observed that “[i]t is more likely that Brandt simply can’t draw very well.” *Id.* at 468.

probably not a recommended educational practice, but it is not an infringement of any legal right.

Id. The court also noted that the Gifties were not prevented from protesting the results—they were forbidden from engaging in “a particular means of protest.” The students did petition the principal and made a presentation to the Local School Council (at the principal’s urging) and were not punished for doing so. Their parents also expressed their dissatisfaction with the process. “With many routes of communication open to the gifties, the closing of the T-shirt route inflicted the most minimal of possible injuries, if injury at all (as we doubt), to the First Amendment.” *Id.* at 466-67. “[A] school need not tolerate student speech that is inconsistent with its basic educational mission.” *Id.* at 467, quoting and citing *Hazelwood*, 484 U.S. at 266.

In this case, the principal acted within the authority of the school board. Although the Crisis Intervention Team later determined the wearing of the T-Shirt posed no safety risk, the Crisis Intervention Team had the advantage of hindsight. When the Gifties defied the principal’s orders, he had to decide whether the imposition of mild discipline was warranted in order “to affirm his authority and maintain order.” Even if it should be later shown that the principal was wrong, “the existence of discretion implies a license to make mistakes.” Before a court would reverse any decisions of the principal, he would have had to have abused his discretion, “implying conduct not merely mistaken in retrospect but unreasonable.” Here, the principal “did not abuse his discretion.” *Id.* at 467-68.

The T-shirt is not protected speech, and we are doubtful that it became so by being a vehicle for eighth graders to protest the outcome of a T-shirt contest. If protected at all, it was not immune from reasonable regulation by the school authorities.

Id. at 468. Summary judgment for the school board was affirmed. In addition, the Gifties had to pay the school board’s costs. “They have made the defendants jump through a number of costly hoops in this protracted litigation and must bear the usual consequences of failed litigation.” *Id.*

The 7th Circuit declined to rehear the matter. The U.S. Supreme Court has denied a writ of certiorari. See *Brandt v. Chicago Board of Education*, 128 S. Ct. 441 (2007).

PLEDGE OF ALLEGIANCE

The U.S. Supreme Court’s decision in *Elk Grove Unified School District, et al. v. Newdow*, 542 U.S. 1, 124 S. Ct. 2301 (2004) did not answer the question whether the 1954 insertion of “under God” into the Pledge of Allegiance by Congress violated the Establishment Clause of the First

Amendment.³¹ Rather, the Supreme Court found that Michael Newdow did not have standing to prosecute his Establishment Clause claim on behalf of his minor daughter.³²

While Newdow's grievance with the "under God" language stems from his atheism, there are also those who oppose the insertion based on their religious beliefs. One such person is Edward R. Myers, who earlier sued the Loudoun (Virginia) County School Board to prevent the daily recitation of the Pledge of Allegiance. He was motivated by his faith tradition that required his allegiance only to "Christ's kingdom, [and] not the state or society." He failed in this attempt, notably because the recitation of the Pledge is voluntary under Virginia legislation.³³ See *Myers v. Loudoun County Public Schools, et al.*, 418 F.3d 395 (4th Cir. 2005).

Myers has returned. He has sued the school board anew, on behalf of his children and their friends, challenging the school's purported "patriotic curriculum" as violating the Establishment Clause. He has also continued his protests of the voluntary recitation of the Pledge of Allegiance by handing out flyers and attempting to place advertisements in school publications. *Myers v. Loudoun County School Board, et al.*, 500 F.Supp.2d 539 (E.D. Va. 2007).

One advertisement he attempted to put in the elementary school yearbook read:

Tired of civil religion exercises in public schools? Try this pledge alternative: I pledge hell's legions to the rag of the united states of hysteria, and screw the public, make them stand, one nation, dumber than cod, so liberty and justice fall.

500 F.Supp. 2d at 542. The advertisement was rejected based on its inappropriateness and the untimeliness of its submission for consideration. *Id.* Myers also handed out leaflets on the sidewalk adjacent to the high school, resulting in numerous complaints from students and parents. A security guard informed Myers he could not hand out his leaflets on the sidewalk, which resulted in a flurry of e-mails from Myers to school officials. School officials relented and allowed him to resume his distribution of leaflets. *Id.* Myers also attempted to purchase an advertisement in a high school athletic program, which contained a web address of "www.CivilReligionSucks.com," offering for sale "flag desecration products." The advertisement was deemed inappropriate because of the word "sucks." Myers changed this to "sux," but the school still considered the advertisement to be inappropriate and refused to include it in the publication. *Id.*

Lastly, Myers also attempted to distribute a flyer to every student at the elementary school through the "Thursday Folders," a mechanism established by the school to send home

³¹"Congress shall make no law respecting an establishment of religion."

³²Please consult the Cumulative Index of the **Quarterly Report** to locate previous articles on this topic.

³³Congress codified the Pledge of Allegiance at 4 U.S.C. § 4.

information concerning school activities and other school-related materials. He also attempted to distribute flyers at the middle and high school during Constitution Week. The school declined his requests, noting that Constitution Week did not create a forum for distribution of such literature in the homerooms at the middle and high schools, and the Thursday Folders were used only by school employees and school-related entities. *Id.* at 542-43.

Myers, acting *pro se*, filed suit, claiming these various actions by the school district violated his fundamental right to direct the upbringing of his children, violated his First Amendment right to free speech, and violated his right to petition the government.³⁴ *Id.* at 543.

His attempts to represent the interests of his children and their friends were dismissed. Only Myers' own claims were addressed. *Id.* at 544.

Fundamental Right to Raise Children

The court acknowledged that Myers has a fundamental right to raise his children as he sees fit, but noted that such a fundamental right is not without boundaries.

There is no dispute that Plaintiff has a liberty interest in directing the upbringing of his children, and the idiosyncrasy of his individual beliefs does not eliminate that right. But such an interest does not vest Plaintiff with the authority to intervene and modify school curriculum. [Citations omitted.] That is precisely what Plaintiff asks this Court to do. Misguided by the assumption that his unique set of beliefs entitles his children to a public education tailored to suit those beliefs, Plaintiff asks this Court to mandate system-wide curricular changes to [the school district]. Plaintiff requests a redesign of the school system's patriotic curriculum by, *inter alia* prefacing the Pledge with a disclaimer, removing the words "all stand," or conducting the Pledge in an auditorium rather than homeroom. Such a remedy is beyond the purview of this Court, and outside the scope of constitutional protections.... [Citations omitted.] Furthermore, the record presented to the Court suggests that the Pledge is currently administered in a constitutionally permissible manner, and objecting students are allowed to remain quietly seated.

Id. at 545. The fact that Myers directs his children to stand during this time negates his claims of coercion. *Id.* "While Plaintiff retains the right to remove his children from public schools and place them in private institutions, he does not have the right to dictate school curriculum to suit his own religious point of view." *Id.*

³⁴The latter claim is related to the understandable disinclination of school officials to engage in communications, email and otherwise, with Myers. This claim was without merit. *Id.* at 546-67.

Free Speech Rights

The court denied his request for injunctive relief based on his claim that his free-speech rights were violated when the security guard prohibited him from distributing leaflets on the sidewalk by the high school. Myers did have a right to distribute the leaflets on the sidewalk. The single incident occasioned by the security guard was corrected by school personnel. He has not been prevented from doing so since this incident. *Id.* at 547-48.

Myers was unable to persuade the court that a limited public forum existed at either the middle or high school, or that the elementary school's "Thursday Folder" likewise created a forum for the distribution of his flyer. "The record clearly establishes that no forum existed in Middle School and High School homerooms for the distribution of flyers." *Id.* at 549. The "Thursday Folder" did not "open a forum for expressive activity by the general public." *Id.* The mission of the Thursday Folder was "to serve as a means to send information concerning school and school-related activities home to parents. It is certainly not intended to serve as a medium for political discussion or religious debate." *Id.* Although some non-school related entities did have their flyers sent home in the Thursday Folder, these flyers were provided through school personnel and requested to be included. No non-school related entity had free access to the Thursday Folder. "Thus, the record is equally clear that individuals and non-school related entities are not permitted free access to these folders, but rather that school officials maintain complete discretion over the materials and subject matters distributed." *Id.* at 549-50.

Access to individuals and parents for the purpose of distributing religious or political propaganda would run the risk of abuse, appearance of favoritism, and the risk of imposing on a captive audience. It would also likely open the Thursday Folders to all expressions of personal beliefs, which is simply not the purpose. Finally, the fact that all political and religious messages are excluded from the Thursday Folders shows viewpoint neutrality.

Id. at 551. Myers' message is purely religious or political, despite his attempts to disguise it otherwise.

While Plaintiff cleverly attempts to disguise his political message as an advertisement for the sale of numerous propaganda items, any commercial value of the flyer is an afterthought to its expressive message. The flyer consists of four whole paragraphs dedicated to the advocacy of Meyers's [sic] own religious and political world view and his distaste for the Pledge of Allegiance, followed by a brief mention of "flag desecration products" for sale.

Id. Viewed in its totality, the flyer is expressive, not commercial speech. No forum existed for distribution of materials such as Myers' flyers. *Id.* at 551-52.

Advertisements

The court noted that a public forum is not created in a school-sponsored publication where the school board retains editorial control and responsibility for the publication.

Educators are entitled to exercise control over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear “the imprimatur of the school.” *Hazelwood*, 484 U.S. at 271, 108 S. Ct. 562.... Under this standard, educators are permitted to regulate or exclude speech for a variety of reasons, including bias, prejudice, or vulgarity, so that “the views of the individual speaker are not erroneously attributed to the school.” *Hazelwood*, 484 U.S. at 271-72, 108 S. Ct. 562.

Id. at 552. Under *Hazelwood*, “educators do not violate the First Amendment by exercising editorial control over the style and content of speech so long as the regulation is ‘reasonably related to legitimate pedagogical concerns.’” *Id.*, citing *Hazelwood*, 484 U.S. at 272-73. Advertising space in the school publications was reserved for businesses or individuals offering to sell goods and service that students might be interested in purchasing. “It is clearly not intended to act as a forum for the advocacy of controversial political views.” *Id.*

The proposed advertisement is the antithesis of neutrality on a controversial issue, and the school is under no constitutional obligation to publish it. Additionally, the school maintains authority to disassociate itself from speech inconsistent with its educational mission. *Hazelwood*, 484 U.S. at 266-67. Plaintiff’s proposed advertisement is directly contrary to the school’s patriotic curriculum. In conclusion, the Court finds that denial of Plaintiff’s access to advertising space was constitutionally permissible, and resulted in no First Amendment violation.

Id. at 553. With respect to the athletic program and the offensive web site, “schools may refrain from publishing speech that is ‘ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.’” *Id.*, citing *Hazelwood*, 484 U.S. at 271. The word “sucks” can “reasonably be considered offensive in the school context.” *Id.* “Given a school’s right under *Hazelwood* to regulate offensive speech in its publications, the exclusion of the advertisement for using the word ‘sucks’ is constitutionally permissible.” *Id.* at 554. It does not matter that Myers offered to insert “sux.” “[A] phonetic variation of the word...may also reasonably be considered offensive.” *Id.*

The school district’s Motion for Summary Judgment was granted on all of Myers’ claims. *Id.* at 556.

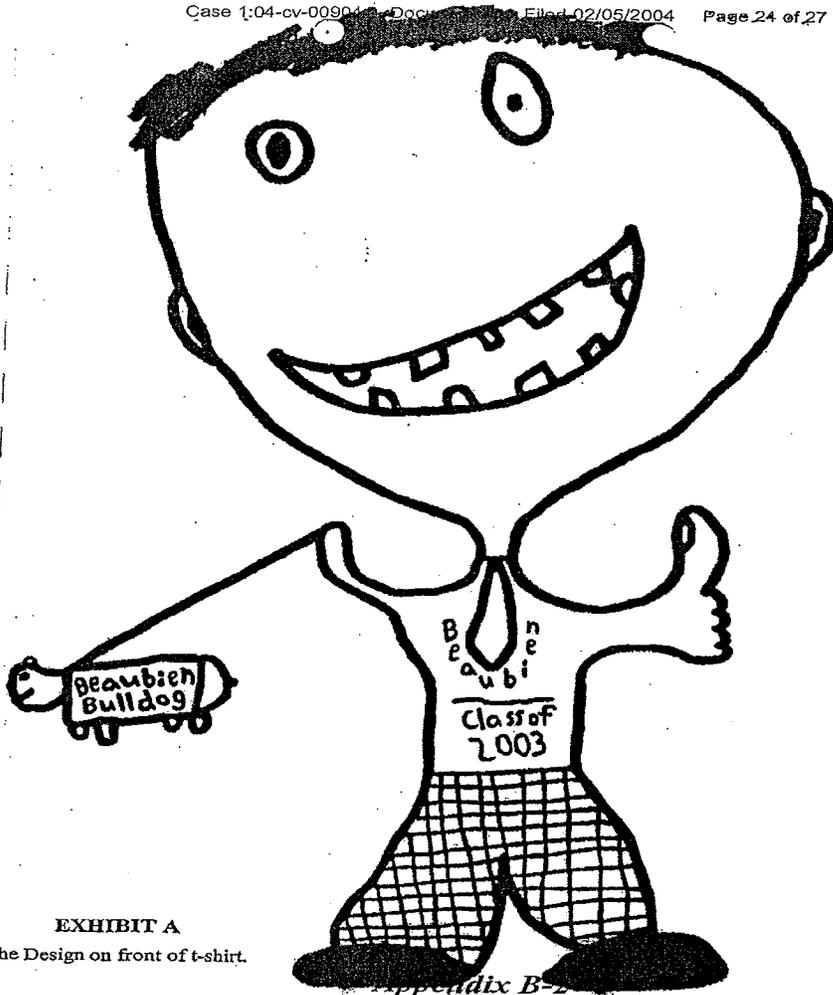
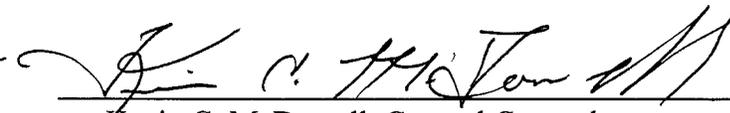


EXHIBIT A
The Design on front of t-shirt.

Date: April 22, 2008 
 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.in.gov/legal.

Policy Notification Statement

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

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

Index for Quarterly Report Through July – September 2007

Legend

J-M (January-March)
A-J (April-June)

J-S (July-September)
O-D (October-December)

Access to Public Records and Statewide Assessment	(A-J: 98, J-S: 98)
Administrative Procedures: Extensions of Time	(J-S: 96)
Age Discrimination, School Bus Drivers	(O-D: 98)
Anti-Homosexual Bullying and Student-on-Student Sexual Harassment Based on Male Stereotypes	(A-J: 07)
Athletic Competition, Students with Disabilities, and the “Scholarship Rule”	(A-J: 04)
Athletic Conferences, Constitutional Rights, and Undue Influence	(A-J: 01, O-D: 01)
Athletics: No Paeon, No Gain	(A-J: 97, J-S: 97)
Athletic Schedules and Gender Equity: Disparity Analysis and Equal Athletic Opportunity	(J-S: 04, J-S: 06)
Attorney Fees: Athletics	(A-J: 01)
Attorney Fees and “Catalyst Theory”	(J-S: 03, O-D: 03)
Attorney Fees by Degrees: When Does One “Prevail”?	(O-D: 04)
Attorney Fees: Special Education	(J-M: 95, J-S: 95, O-D: 95, J-M: 96)
Attorney Fees: Parent-Attorneys	(A-J: 96, J-S: 96)
Attorneys, Out-of-State	(J-S: 04, J-M: 07)
Basketball in Indiana: Savin’ the Republic and Slam Dunkin’ the Opposition	(J-M: 97)
Being Prepared: the Boy Scouts and Litigation	(O-D: 02)
Bibles, Distribution	(J-M: 95, J-S: 95, A-J: 98, O-D: 98, A-J: 07)
Board of Special Education Appeals	(J-S: 95)
Boy Scouts and Litigation	(O-D: 02, J-M: 03, A-J: 03, J-M: 05, O-D: 06)
Breach of Contract	(A-J: 01)
Bricks and Tiles: Fund-raising and the First Amendment	(J-S: 04)
Bricks and Tiles: Wall of Separation	(J-S: 03)
Bullying, Student-on-Student Sexual Harassment	(A-J: 07)
Bus Drivers and Age Discrimination	(O-D: 98)
Bus Drivers and Reasonable Accommodations	(A-J: 95)
Bus Drivers, Performance Standards and Measurement for School	(J-S, 00)
Canine “Sniffs” and the Fourth Amendment: Implications for School-Based Searches	(O-D: 06)
Causal Relationship/Manifestation Determinations	(O-D: 97)
“Catalyst Theory” and Attorney Fees	(J-S: 03)
Censorship	(O-D: 96)
Charter Schools	(O-D: 98, A-J: 99, J-M: 01, A-J: 01)
Chartering a New Course in Indiana: Emergence of Charter Schools in Indiana	(J-M: 01)
Cheerleading Safety: Chants of Lifetime	(J-S: 05, O-D: 05)
Child Abuse Registries	(J-S: 96)
Child Abuse: Reporting Requirement	(O-D: 95, J-S: 96)
Child Abuse: Repressed Memory	(J-M: 95, A-J: 95)
Child Obesity and the “Cola Wars”	(O-D: 03, J-M: 04)
Childhood Obesity and the “Cola Wars”: The Battle of the Bulge Continues	(J-M: 04)
Choral Music and the Establishment Clause	(A-J: 96, J-M: 98)
Class Rank	(J-M: 96, J-M: 04)
“Cola Wars” and Child Obesity	(O-D: 03, J-M: 04)
Collective Bargaining	(O-D: 95, J-S: 97)
Collective Bargaining Agreements and Discrimination	(A-J: 96)
Collective Bargaining: Fair Share	(J-M: 97, J-S: 97, O-D: 99)
Commercial Free Speech, Public Schools and Advertising	(O-D: 99)
Community Service	(O-D: 95, J-M: 96, J-S: 96)
Computers	(J-M: 96, A-J: 96)
Computers and Online Activity: Student Free Speech and “Substantial Disruption”	(O-D: 06, A-J: 07)
Confederate Symbols and School Policies	(J-M: 99, J-S: 99)
Confidentiality of Drug Test Results	(A-J: 99)
Consensus at Case Conference Committees	(J-S: 96)
Consultation Process: Determining Services for Private School Students under the <i>IDEA</i> , The	(A-J: 07)
Contracting for Educational Services	(A-J: 97, J-M: 98, O-D: 98)
Court Jesters:	
Bard of Education, The	(A-J: 97)
Barking Mad	(A-J: 07)

Brewing Controversy	(J-S: 01)
Brush with the Law, A	(J-S: 99)
Bull-Dozing	(A-J: 99)
Burning the Candor at Both Ends	(A-J: 00)
Butterflies Are Free	(O-D: 02)
Case of the <i>Sham Rock</i> , The	(J-S: 02)
Cat with the Chat, The	(A-J: 02, A-J: 04)
Caustic Acrostic	(J-S: 96)
Court Fool: <u>Lodi v. Lodi</u>	(A-J: 96)
Disorderly Conduct	(O-D: 05)
<i>Dramatis Personae Non Grata</i>	(A-J: 06)
Education of H̄i Ēi R̄i S̄i K̄i Ōi W̄i Īi T̄i Z, The	(J-M: 01)
End Zone: <u>Laxey v. La. Bd. of Trustees</u>	(J-M: 95)
Girth Mirth	(A-J: 98)
<i>Grinch</i> and Bear It	(J-S: 00)
Horse ¢ent\$	(J-M: 03)
Horse Feathers!	(J-M: 04)
Hound and The Furry, The	(O-D: 00)
Hound from Yale, The	(J-M: 06)
Humble π	(O-D: 97)
Incommodious Commode, The	(J-M: 99)
Junk Male	(A-J: 03)
<u>Kent © Norman</u>	(J-M: 96)
Little Piggy Goes to Court	(O-D: 98)
Missing Link, The	(O-D: 03)
Name-Calling	(O-D: 04)
Omissis Jocis	(O-D: 96)
One Ring to Rue Them All	(J-S: 07)
Psittacine Bane	(A-J: 04)
Poe Folks	(J-M: 98)
Poetic Justice	(J-M: 05)
Pork-Noy's Complaint	(J-M: 02)
Pot Luck	(J-M: 07)
Proof Is in the Pudd'nhead	(O-D: 06)
Psalt 'N' Pepper	(J-M: 00)
Re: Joyce	(J-M: 97)
Satan and his Staff	(J-S: 95)
Seventh-Inning Kvetch	(J-S: 05)
Smoke and Ire	(A-J: 01)
Snicker Poodle	(J-S: 06)
Spell Checkmate	(J-S: 04)
Spirit of the Law, The	(J-S: 97, O-D: 98)
Subordinate Claus	(J-S: 03)
Things That Go Bump	(J-S: 98)
Tripping the Light Fandango	(A-J: 95)
Waxing Poetic	(O-D: 95)
Well Versed in the Law	(O-D: 99)
What A Croc!	(O-D: 01)
"Creationism," Evolution vs.	(O-D: 96, O-D: 97, O-D: 99)
Crisis Intervention, Emergency Preparedness	(O-D: 98)
Crisis Intervention Plans, Suicide Threats and	(O-D: 99)
"Current Educational Placement": the "Stay Put" Rule and Special Education	(J-S: 97)
Curriculum, Challenges to	(J-S: 96)
Curriculum and Religious Beliefs	(J-M: 96, A-J: 98, J-S: 98, J-S: 06)
Decalogue: Epilogue	(O-D: 00, A-J: 01, O-D: 01, A-J: 03)
Decalogue: Thou Shalt and Thou Shalt Not, The	(A-J: 00)
Decalogue Wars Continue; Holy Moses, Roy's Rock, and the Frieze: The	(A-J: 03)
Desegregation and Unitary Status	(A-J: 95)
Distribution of Religious Materials in Elementary Schools	(J-M: 97)
"Do Not Resuscitate" Orders and Public Schools	(J-S: 99)
Dress Codes	(J-S: 95, O-D: 95, J-S: 96, J-M: 99)
Dress Codes: Free Speech and Standing	(A-J: 02, J-S: 05)
Dress and Grooming Codes for Teachers	(J-M: 99)
Driving Privileges, Drug Testing	(A-J: 99)
Driving Privileges, Suspension and Expulsion	(J-M: 04)
Drug Testing	(J-M: 95, A-J: 95)

Drug Testing Beyond <i>Vernonia</i>	(J-M: 98)
Drug Testing and School Privileges	(A-J: 99)
Drug Testing of Students: Judicial Retrenching	(A-J: 00)
Dual-Enrollment and the “Indirect Benefit” Analysis in Indiana	(O-D: 03)
Due Process, ‘Zero Tolerance’ Policies	(J-S: 00)
Educational Malpractice: Emerging Theories of Liability	(A-J: 01)
Educational Malpractice Generally	(A-J: 01, A-J: 03, A-J: 04)
Educational Malpractice In Indiana	(A-J: 01, A-J: 03)
Educational Records: Civil Rights And Privacy Rights	(A-J: 02)
Educational Records and FERPA	(A-J: 99)
Emergency Preparedness and Crisis Intervention	(O-D: 98)
Empirical Data and Drug Tests	(A-J: 99)
Equal Access, Religious Clubs	(J-S: 96, A-J: 97)
Er the Gobble-Uns ‘ll Git You	(J-S: 96)
Ethical Testing Procedures: Reliability, Validity, and Sanctions	(J-M: 05)
Evacuation Procedures	(O-D: 98, J-M: 04)
Evolution vs. “Creationism”	(O-D: 96, O-D: 97, O-D: 99)
Evolution of “Theories,” The	(O-D: 01, J-M: 05, J-S: 05, A-J: 06)
Exit Examinations	(J-M: 96, O-D: 96, J-M: 97, A-J: 98, J-S: 98, O-D: 98)
Expert Fees Not Recoverable as “Costs” under <i>IDEA</i>	(A-J: 06)
Extensions of Time	(J-S: 96)
Facilitated Communication	(O-D: 95)
“Fair Share” and Collective Bargaining Agreements	(J-M: 97, J-S: 97, O-D: 99)
Fees and “Tuition”	(J-M: 06)
FERPA, Educational Records	(A-J: 99)
First Friday: Public Accommodation of Religious Observances	(J-S: 98, O-D: 99)
Foreign Exchange Students: Federal Government Seeks to Eliminate Sexual Abuse and Exploitation	(J-M: 06)
Free Speech, Grades	(J-M: 96)
Free Speech, Graduations	(J-M: 04)
Free Speech, Teachers	(J-M: 97, A-J: 97)
Free Speech Rights, Teacher	(J-S: 07)
Free Speech, T-Shirts	(J-S: 05, A-J: 06)
Gangs and Gang-Related Activities	(A-J: 99, J-S: 99)
Gangs: Dress Codes	(O-D: 95)
Gender Equity and Athletic Programs	(J-M: 95)
Golf Wars: Tee Time at the Supreme Court, The	(O-D: 00)
Grades	(J-M: 96)
Graduation Ceremonies and Free Speech	(J-M: 04)
Graduation Ceremonies, School Prayer	(A-J: 97, J-M: 98, O-D: 98)
Grooming Codes for Teachers, Dress and	(J-M: 99)
Growing Controversy over the Use of Native American Symbols as Mascots, Logos, and Nicknames, The	(J-M: 01)
Habitual Truancy	(J-M: 97)
Halloween	(J-S: 96)
Hardship Rule	(A-J: 01)
Harry Potter in the Public Schools	(J-M: 03)
Health Services and Medical Services: The Supreme Court and <i>Garret F</i>	(J-M: 99)
High Stakes Assessment, Educational Standards, and Equity	(A-J: 98)
Holy Moses, Roy’s Rock, and the Frieze: The Decalogue Wars Continue	(A-J: 03)
IHSAA: ‘Fair Play,’ Student Eligibility, and the Case Review Panel	(J-M: 00)
Indiana Board of Special Education Appeals	(J-S: 95)
“Intelligent Design”: Court Finds Origin Specious	(O-D: 05)
Interstate Transfers, Legal Settlement	(A-J: 99)
Islam, The Study of	(J-S: 06)
Juvenile Courts & Public Schools: Reconciling Protective Orders & Expulsion Proceedings	(J-M: 98)
Latch-Key Programs	(O-D: 95)
Legal Settlement and Interstate Transfers	(A-J: 99)
Library Censorship	(O-D: 96)
Limited English Proficiency: Civil Rights Implications	(J-S: 97)
Logos	(J-M: 01)
Loyalty Oaths	(J-M: 96)
Mascots	(J-S: 96, J-M: 99, J-M: 01, J-S: 03)
Medical Services, Related Services, and the Role of School Health Services	(J-S: 97, O-D: 97, J-S: 98)
Meditation/Quiet Time	(A-J: 97)
Metal Detectors and Fourth Amendment	(J-S: 96, O-D: 96, J-M: 97, J-S: 97)
Methodology: School Discretion and Parental Choice	(J-M: 99)
Moment of Silence	(J-S: 01)

Military Recruiters and Educational Records	(J-M: 02, J-M: 04)
<i>Miranda</i> Warnings and School Security	(J-S: 99, J-M: 02)
National Motto, The	(O-D: 01, J-M: 03)
Native American Symbols	(J-M: 01, A-J: 02, J-S: 03)
Negligent Hiring	(O-D: 96, J-M: 97)
Negligent Misrepresentation	(A-J: 01)
The Open Door Law: When Does a “Meeting” Occur?	(J-M: 06)
Opt-Out of Curriculum and Religious Beliefs	(J-M: 96)
Orders and Public Schools: “Do Not Resuscitate”	(J-S: 99)
Out-of-State Attorneys	(J-S: 04, J-M: 07)
“Parent” in the Unconventional Family, The	(O-D: 04)
“Parent” Trap, The	(O-D: 01)
<i>Parent Trap</i> : Variations on a Theme, The	(J-S: 02)
The “Parent” in the Unconventional Family:	(O-D: 04, O-D: 05)
Parental Rights and School Choice	(A-J: 96)
Parental Choice, Methodology: School Discretion	(J-M: 99)
Parochial School Students with Disabilities	(J-S: 95, O-D: 95, J-M: 96, A-J: 96, A-J: 97, J-S: 97)
Parochial School Vouchers	(A-J: 98)
Participation Rule: Student-Athletes and Out-of-Season Sports, The	(J-M: 02)
Peer Sexual Harassment	(O-D: 97)
Peer Sexual Harassment: Kindergarten Students	(J-S: 02)
Peer Sexual Harassment Revisited	(J-S: 98, A-J: 99)
Peer Sexual Orientation Harassment	(J-M: 03)
Performance Standards and Measurements for School Bus Drivers	(J-S: 00)
Pledge of Allegiance, The	(J-S: 01, J-S: 02, O-D: 02, J-M: 03, A-J: 03, O-D: 03, J-S: 04, J-S: 05, J-S: 07)
Pledge of Allegiance, The: “One Nation, under Advisement”	(A-J: 04)
Prayer and Public Meetings	(J-M: 97, J-M: 98, O-D: 98, A-J: 99, J-S: 02)
Prayer and Schools	(A-J: 97, O-D: 98)
Prayer, Voluntary Student	(A-J: 97)
Pregnancy, Student, and the Fourth Amendment	(J-M: 07)
Privileged Communications	(A-J: 97)
Proselytizing by Teachers	(O-D: 96)
<i>Pro Se</i> Parents and the Federal Courts: Representing a Child’s Interests Under The <i>IDEA</i>	(O-D: 06)
Protection of Pupil Rights Act, The	(O-D: 02)
Public Records, Access to	(A-J: 98, J-S: 98)
“Qualified Interpreters” for Students with Hearing Impairments	(J-M: 98)
Quiet Time/Meditation	(A-J: 97)
Racial Imbalance in Special Programs	(J-M: 95)
Real Estate Sales and School Accountability Laws	(O-D: 03, J-S: 04)
“Release Time” and the Establishment Clause	(O-D: 04)
Religion: Distribution of Bibles	(J-M: 95)
Religion and Curriculum: The Study of Islam	(J-S: 06)
Religious Clubs	(J-S: 96, A-J: 97)
Religious Expression by Teachers in the Classroom	(J-S: 00)
Religious Observances, First Friday: Public Accommodations	(J-S: 98)
Religious Symbolism	(J-S: 98)
Repressed Memory, Child Abuse:	(J-M: 95, A-J: 95)
Residential Placement: Judicial Authority	(J-S: 95)
Restitution Rule and Student-Athletes, The	(A-J: 01)
Resuscitate” Orders and Public Schools, “Do Not	(J-S: 99)
School Accountability	(A-J: 01)
School Accountability: “Negligent Accreditation”	(A-J: 01)
School Accountability and Real Estate Sales	(O-D: 03)
School Accountability: Standardized Assessment	(A-J: 01)
School Construction	(J-S: 95)
School Discretion and Parental Choice, Methodology:	(J-M: 99)
School Health Services	(J-S: 97)
School Health Services and Medical Services: The Supreme Court and <i>Garret F.</i>	(J-M: 99)
School Policies, Confederate Symbols and,	(J-M: 99)
School Prayer	(A-J: 97, O-D: 98)
School Privileges, Drug Testing	(A-J: 99)
Security, <i>Miranda</i> Warnings and School	(J-S: 99)
Service Dogs	(O-D: 96)
Sexual Orientation, the Equal Access Act, and the Equal Protection Clause	(J-S: 02, J-M: 03, J-S: 03, J-S: 04)
Single-sex Classes and Public Schools, Separate but Comparable	(J-S: 06)
Standardized Assessment and the Accountability Movement: The Ethical Dilemmas of Over Reliance	(J-S: 01)

“State Action,” U.S. Supreme Court	(A-J: 01)
Statewide Assessments, Public Access to	(A-J: 98, J-S: 98)
Statute of Limitations	(J-S: 03)
“Stay Put” and “Current Educational Placement”	(J-S: 97)
Strip Search	(J-S: 97, J-M: 99, A-J: 06)
Strip Searches of Students	(A-J: 00)
Student–Athletes & School Transfers: Restitution, Hardship, Contempt of Court, & Attorney Fees	(A-J: 01, J-M: 02)
Student Pregnancy and the Fourth Amendment	(J-M: 07)
Suicide: School Liability	(J-S: 96, J-S: 02)
Suicide Threats and Crisis Intervention Plans	(O-D: 99)
Surveys and Privacy Rights: Analysis of State and Federal Laws	(O-D: 05, J-M: 07)
Symbolism, Religious	(J-S: 98)
Symbols and School Policy, Confederate	(J-M: 99, J-S: 99)
Symbols and Native Americans	(J-M: 01)
Tape Recordings and Wiretapping	(O-D: 02)
Teacher Competency Assessment & Teacher Preparation: Disparity Analyses & Quality Control	(J-M: 00)
Teacher Free Speech	(J-M: 97, A-J: 97)
Teacher Free Speech Rights	(J-S: 07)
Teacher License Suspension/Revocation	(J-S: 95)
Teacher-Student Sexual Activity	(J-M: 07)
Ten Commandments (see “Decalogue”)	(A-J: 00, O-D: 00)
Ten Commandments: The Supreme Court Hands Down a Split Decision, The	(A-J: 06)
Ten Commandments: The Supreme Court’s Split Decisions as Applied, The	(J-S: 06)
Terroristic Threats	(O-D: 99)
Textbook Fees	(A-J: 96, O-D: 96)
Theory of Evolution (also see Evolution)	(O-D: 01, J-M: 05, J-S: 05, A-J: 06, J-S: 06)
Time-Out Rooms	(O-D: 96)
Time-Out Rooms Revisited	(J-S: 02)
Title I and Parochial Schools	(A-J: 95, O-D: 96, A-J: 97)
Triennial Evaluations	(J-S: 96)
Truancy, Habitual	(J-M: 97)
T-Shirts: Free-Speech Rights Vs. Substantial Disruption	(J-S: 05, A-J: 06, J-S: 07)
“Tuition” and Fees: the Supreme Court Creates an Analytical Model	(J-M: 06)
“Undue Influence” and the IHSAA	(A-J: 01)
Uniform Policies and Constitutional Challenges	(O-D: 00)
Uniform Policies and Procedures: Constitutional Rights, Student Safety, and School Climate	(J-S: 07)
Valedictorian	(J-M: 96, J-M: 04)
Valedictorians: Saying “Farewell” to an Honorary Position?	(J-M: 04, A-J: 04)
Video Games, Popular Culture and School Violence	(J-M: 02)
Video Replay: Popular Culture and School Violence	(A-J: 02)
Visitor Access to Public Schools: Constitutional Rights and Retaliation	(J-M: 05)
Visitor Policies: Access to Schools	(J-M: 00, O-D: 06)
Voluntary School Prayer	(A-J: 97)
Volunteers In Public Schools	(O-D: 97, J-S: 99)
Vouchers and the Establishment Clause: The “Indirect Benefit” Analysis	(J-M: 03)
Vouchers and Parochial Schools	(A-J: 98)
Wiretapping, Tape Recordings, and Evidentiary Concerns	(O-D: 02)
‘Zero Tolerance’ Policies and Due Process	(J-S: 00)