

# Indiana Department of Education



Room 229, State House - Indianapolis, IN 46204-2798  
Telephone: 317/232-6676

## QUARTERLY REPORT

January - March 1995

The **Quarterly Report** provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676.

In this Report:

<u>Drug Testing</u> .....	2
<u>Racial Imbalance in Special Programs</u> .....	3
<u>Gender Equity and Athletic Programs</u> .....	4
<u>Child Abuse: Repressed Memory</u> .....	5
<u>Attorney Fees: Special Education</u> .....	6
<u>Religion: Distribution of Bibles</u> .....	7
<u>Court Jesters</u> .....	8
<u>Quotable</u> .....	9

## Drug Testing

The U.S. Supreme Court has granted certiorari and will review the decision in Acton v. Veronia School District, 23 F.3d 1514 (9th Cir. 1994). The 9th Circuit in Acton determined that random drug testing through urinalysis of students wishing to participate in school-sponsored activities constituted an unreasonable intrusion upon the students' right to privacy so as to violate the prohibition against unreasonable searches under the Fourth Amendment. The court noted the school's desire to address deteriorating discipline in the district, which teachers reported as improved once the random drug testing by urinalyses was instituted for athletes. But, the court noted, there was no showing that the discipline problem was related to athletic participation. The randomness of the searches as established with a corresponding lack of individualized reasonable suspicion that a student was violating a law or school rule exceeded the standards for student searches in New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733 (1985). Citing to Tinker v. Des Moines Indep. Comm. Sch. District, 393 U.S. 503, 89 S. Ct. 733 (1969) for support that students do not "shed their constitutional rights...at the school house gate," the court found that students have a "right to privacy in their excretory functions" (at 1525). There would have to be a compelling governmental interest to support random urinalysis programs such that this interest would outweigh or diminish one's expectations of privacy. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 109 S. Ct. 1402 (1989). The "compelling government interest" in Skinner was public safety. Substantial personal loss and property damage issues--including 25 fatalities--were related to drug and alcohol use by railroad employees such that random urinalysis testing was necessary. As a consequence, employees had a diminished expectation of privacy.

The Acton decision is directly contrary to an earlier decision by the 7th Circuit deciding a similar matter in favor of an Indiana school corporation. See Shail v. Tippecanoe County Sch. Corp., 864 F.2d 1309 (7th Cir. 1988). The 9th Circuit noted it was reaching a different conclusion based on substantially similar facts from that reached by the 7th Circuit in Shail. See Acton, Id., at 1527. The U.S. Supreme Court has already entertained oral arguments on Acton. The Schail decision, it should be noted, was reached prior to any decision by the U.S. Supreme Court regarding urinalysis. For related areas, see:

1. Moulé v. Paradise Valley Unified School District No. 69, 863 F.Supp. 1098 (D. Ariz. 1994), following Acton and finding the random drug testing through urinalysis for student athletes was unconstitutional.
2. University of Colorado v. Derdeyn, 863 P.2d 929 (Colo. 1993). The Colorado Supreme Court found that, in the absence of voluntary consent, the university's policy of conducting random, suspicionless urinalysis drug testing of student athletes was an unconstitutional search (with two dissenting opinions).
3. Hill v. N.C.A.A., 865 P.2d 633 (Cal. 1994), found that government did not have to have a *compelling* interest before instituting a drug testing policy involving urinalysis for athletes (with concurring and dissenting opinions).

4. Atkins v. Indianapolis Public Schools, 830 F.Supp. 1169 (S.D. Ind. 1993), is an example of a compelling government interest. The school district fired the school bus driver when he refused to submit to a drug test. The court, in upholding the termination, cited to Skinner, noting that "the testing of school bus drivers for drugs, even without suspicion, is not subject to constitutional attack" (at 1176).

#### Racial Imbalance In Special Programs (Title VI)

In 1990 Michael Williams, then Assistant Secretary for Civil Rights within USDOE, said that the Office for Civil Rights (OCR) would place greater emphasis on investigating whether academic tracking and ability grouping policies of public schools were resulting in discrimination against minorities. Williams said at the time: "There's a growing belief that minority students are being labeled as learning disabled or retarded and are being shipped off to special education classes." He added that OCR would be developing a "national enforcement strategy" which would devote more time and resources to ensure that schools are not channeling minorities into low-track or special education classes in violation of Title VI or Sec. 504. A Rand Corp. study issued shortly before Williams' remarks supported his claim of substantially disproportionate representation in remedial and special education classes. The Rand study also showed "patterns of unequal opportunities" for African-American and Hispanic children placed in low-ability math and science courses. OCR acknowledged at the time that it had been quite some time since it had conducted a major compliance review on ability grouping (School Law News, October 25, 1990). OCR began limited compliance reviews last year.

In MSD of Warren Township (IN), #15-93-5005 (OCR, 1994), OCR chose the school district for a compliance review because statistical data seem to indicate an over-representation of African-American students identified as having a Mild Mental Handicap (MiMH). OCR reviewed the school's policies, practices and procedures, and applied a "disparate impact analysis": (1) Is there a statistically significant, racially disproportionate effect? (2) If so, is there a legitimate educational justification? (3) If educational justification is demonstrated, is this a pretext for discrimination especially where there are equally effective but less discriminatory practices available which would achieve the same educational goals? African-American students comprised about 23 percent of the school's population but 54 percent of its special education students, most of these in MiMH and Learning Disabilities (LD) programs. One out of three referrals for an educational evaluation was an African-American student.

However, OCR noted that the numbers and percentage share of African-American students referred for special education evaluations dropped significantly following implementation by the school of the General Education Intervention (GEI) procedures under 511 IAC 7-10-2. The school had also prepared and implemented policies based on the State Board's revised rules for evaluation and eligibility. OCR found these policies and procedures race-neutral and compliant with federal requirements. OCR also found that placements for MiMH students were determined individually, with significant levels of participation in general education classes.

While OCR studied Warren Township's overall programs, it analyzed more closely the GEI procedures and referral rates and reasons in Alton Community Unit School District #11 (IL),

#05-93-5005 (OCR, 1994). OCR compared ten elementary schools in the school district. The Illinois State Board of Education has a regulation similar to the Indiana State Board of Education's GEI procedures under 511 IAC 7-10-2. The school district had no policies for implementing GEI. Each school, through Child Study Teams (CST), developed its own procedures. The OCR report is a fascinating study. One school embraced GEI, developed before-school and after-school tutoring/homework sessions, coordinated special and general education classes, involved all constituencies in its CSTs and, as a consequence, had zero referrals for special education in the school year studied.. At the other end of the study, teachers and administrators did not work together, did not develop any alternative or support programs, and saw special education as the only place where a student could get special help. This school referred 23 percent of its African-American students for special education evaluations. OCR found many of these referrals inappropriate. The school district agreed to implement system-wide policies and procedures for developing and implementing GEI procedures through the CSTs.

### Gender Equity and Athletic Programs

There have been a number of recent state and federal court cases (as well as OCR investigations) involving gender equity issues and athletic programs. The issues have not involved the right to participate on or the availability of athletic teams but the qualifications of coaches, the availability of adequate practice facilities and time, the scheduling of games, and the pay of coaches.

In Tipton Community School Corporation (OCR, 1995) No. 05-95-1002, OCR conducted an investigation of alleged discrimination on the basis of sex in the girls' basketball program. It had been alleged that the girls' coaches were less qualified than the boys' coaches, the locker room facilities were inequitably allocated, and the girls' teams had to schedule practice in the main gym around other teams' activities but the boys' team did not have to. The school corporation entered into a settlement agreement, agreeing to:

- \* Evaluate the training, experience and other professional qualifications of the boys' and girls' coaches in an attempt to provide more qualified coaches for the girls' teams from the sixth grade through varsity levels.
- \* Ensure more equitable allocations of locker room space.
- \* Ensure equitable access by the girls' teams to the basketball facilities for practices and games on the same basis as the boys' teams.

In related cases of interest:

1. State Ex Rel. Lambert v. West Virginia Board of Education. 447 S.E.2d 901 (W.Va. 1994). Although this case is better known for the requirement that the school district provide a signer for a deaf student in order that she could participate on the basketball team, it is also noteworthy for the disparity between girls' and boys' basketball teams in that state. Girls had two weeks of organized practice while the boys had four weeks of organized practice prior to regular season play. The girls' basketball season was scheduled between September and November, a time generally considered off season for

this sport. The State Board of Education urged the state athletic association to move the girls' season to the wintertime to coincide with the boys' season, but the association refused. The court ordered the girls' basketball season to be moved to the traditional time for such a sport, finding that the refusal to do so denied equal protection under West Virginia's constitution.

2. Stanley v. University of Southern California, 13 F.3d 1313 (9th Cir. 1994). Former head coach of the women's basketball team was not entitled to the same pay as the men's head coach because (1) there were differences in the relative responsibilities, qualifications and experiences of the coaches; and (2) relative amounts of revenue generated can be considered in this analysis, particularly where the men's coach had substantial public relations and other promotional activities related to revenue generation.

### Child Abuse: Repressed Memory

In Ernstes v. Warner, 860 F. Supp. 1338 (S.D. Ind. 1994), the court dismissed plaintiff's suit against his former junior high school science teacher brought nearly twenty years after the alleged repeated molestations were said to have occurred. The plaintiff stated the memories of the alleged abuse had been repressed until a chance encounter with his former teacher followed by counseling for depression and anxiety. Citing to a recent Indiana Supreme Court case, the federal court noted that repressed memory is not considered in Indiana as a disability which would toll the statute of limitations for bringing civil cases. Fager v. Hundt, 610 N.E.2d 246 (Ind. 1993) (incest action was commenced 22 years after alleged occurrence). Although neither the state nor the federal court doubted that one could suffer repressed memories, the federal court was disinclined to believe the plaintiff in this case. The plaintiff either knew or had reason to know of his injury long before the suit was filed.

For a related case, see:

1. Tyson v. Tyson, 727 P. 2d 727 P.2d 226 (Wash. 1986), finding that alleged repressed memory can create a "gulf" between "historical truth and psychoanalytic 'truth,'" such that transformation may result in an inaccurate account of the individual's past. Psychoanalysis addresses contemporary treatment and care of a patient and is not designed to determine historical facts. A significant passage of time eliminates objective means of determining injury. The court's majority opinion is based principally upon Wesson, Historical Truth, Narrative Truth, and Expert Testimony, 60 Wash. Law Rev. 331 (1985).

### Attorney Fees: Special Education

The Handicapped Children's Protection Act (HCPA) of 1986 amended the Individuals with Disabilities Education Act (IDEA) at 20 U.S.C. Sec. 1415 to permit a parent or a guardian to recover reasonable attorney fees in "any action or proceeding" brought under IDEA due process,

if the parent or guardian is the "prevailing" party. What constitutes "reasonable," "attorney fees," an "action or proceeding," and "prevailing" have all spawned litigation.

Currently, the Indiana Department of Education is involved in such a dispute. In Powers v. The Indiana Department of Education, Cause No. IP93-1541-C (S.D. Ind. 1994), the parent and the IDOE disagreed as to the residential placement for the parent's child. The parent retained the services of an attorney from another state who was not licensed to practice in Indiana. The attorney requested a due process hearing under 511 IAC 7-12-5 and 7-15-5, and also requested mediation under 511 IAC 7-15-3.

The parties reached agreement through mediation and the parent withdrew the hearing request. The parent's attorney requested attorney fees of nearly \$5,000.00. IDOE refused to consider the request because mediation is not an "action or proceeding" under IDEA. The parent did not file this action for attorney fees until eight months after IDOE rejected the request for attorney fees.

The federal district court granted IDOE's Motion for Summary Judgment, finding that the parent did not file the action within thirty calendar days from the denial by IDOE of her request, applying I.C. 4-21.5-5-5 and Elizabeth K. v. Warrick County School Corp. 795 F.Supp. 881 (S.D. Ind. 1992). The parent has sought review by the 7th Circuit. Oral arguments have been entertained and we await the decision.

During the period between the district court's decision and the plaintiff's appeal to the 7th Circuit, the 7th Circuit decided several similar cases arising from Illinois. The 7th Circuit found that the Illinois counterpart to our statutory timeline for seeking review of administrative decisions would apply to attorney fee requests under IDEA. See Dell v. Board of Education, 32 F.3d 1053 (7th Cir. 1994) and Reed v. Mokena School Dist. No. 159, Will County, Ill. 41 F.3d 1153 (7th Cir. 1994). The Illinois timeline is 120 days in contrast to Indiana's 30 days. IDEA contains very few definitive timelines or standards, generally deferring to the states to create timelines and standards for implementing IDEA. This is an example of how two different timelines for the same matter can exist within the same circuit.

[Note: Just prior to the printing of this report, I received a copy of Uhl v. Harrison County Special Educaiton Cooperative et al., Cause No. NA-93-0153-C (S.D. Ind. 1995), decided April 5, 1995, applying Dell and Reed in denying the parents' request for attorney fees for failure to bring the claim to court within thirty (30) days from the written decision of the Indiana Board of Special Education Appeals.]

Although the summary judgment in Powers leaves unresolved whether mediation is an "action or proceeding" under IDEA and whether an attorney not licensed in Indiana is an "attorney" for IDEA fee requests, one recent court has determined that mediation is an "action or proceeding" under IDEA.

In E.M. v. Millville Bd. of Ed., 849 F. Supp. 312 (D. N.J. 1994), the court acknowledged that mediation is not a part of IDEA but it is encouraged. Drawing an analogy between settlement

agreements and mediation agreements, the court awarded the parent nearly \$1,500.00 in attorney fees for the mediation. Only one other court has made such a finding. See Masotti v. Tustin Unified Sch. Dist., 806 F.Supp. 221 (C.D. Cal. 1992).

It is hoped that other courts will not follow the New Jersey and California courts. Mediation is a voluntary process which enables the parties to make their own decisions rather than have decisions imposed upon them. If attorney fees are awarded for mediations, public agencies may be less willing to mediate disputes. For a party to be a "prevailing party," there should be some enforceable judgment or comparable relief through a settlement agreement or consent decree. Mediation agreements are not enforceable. See Farrar v. Hobby, \_\_ U.S. \_\_, 113 S. Ct. 566 (1992).

### Religion: Distribution of Bibles

Establishment Clause cases continue to reveal widespread uncertainty among the courts.

In Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160 (7th Cir. 1993), cert. den., 113 S. Ct. 2344 (1993), the court found constitutional fault with the distribution of Gideon bibles in the public school to fifth grade students by the Gideon International organization. However, in Schanou v. Lancaster County School Dist. No. 160, 863 F.Supp. 1048 (D. Neb. 1994), the court found no constitutional infirmity with distribution of Gideon bibles by Gideon International to fifth grade pupils where the distribution occurred after school hours and outside the school building, students were not required to take a bible, and the Gideons did not proselytize. The court found that the school's policy and procedure passed the so-called *Lemon* test: (1) Policy permitting wide varieties of uses of school facilities and property by school district patrons after school hours had a secular purpose; (2) the policy does not have a principal or primary effect of advancing or inhibiting religion; and (3) the policy does not foster an excessive entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105. The court referred to the *Lemon* test as "much maligned but still viable" (at 1050). The court understated the extent to which the three-part *Lemon* test has been "maligned." Justice Scalia recently described the *Lemon* test "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried. *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys..." Lamb's Chapel v. Center Moriches Union Free Sch. Dist., \_\_ U.S. \_\_, 113 S.Ct. 2141, 2149-50 (1993).

Other related cases of interest:

1. Hedges v. Wauconda Comm. Unit Sch. Dist. No. 118, 9 F.3d 1295 (7th Cir. 1993). A school policy forbidding the distribution by students of religious literature violated the First Amendment. A subsequent policy limiting distribution to literature the students wrote themselves was also found to violate the First Amendment: However, the school could restrict location and times for distribution so long as such restrictions applied to all literature.

2. Johnson-Loehner v. O'Brien, 859 F.Supp. 575 (M.D. Fla. 1994). School policy requiring prior approval of the superintendent before any materials (religious or nonreligious) could be distributed constituted content-based prior restriction on student speech in violation of the First Amendment where there was no showing that student speech would materially and substantially interfere with school operations or the rights of other students (material in question were invitations to a Halloween party at a church).
3. Clark v. Dallas Ind. Sch. Dist., 806 F.Supp. 116 (N.D. Tex. 1992). First Amendment protects religious speech. School district cannot suppress students' expressions of religious views and even proselytizing on campus, except where such speech constituted material and substantial disruption of the operation of the school. (Some students were merely handing out tracts and conducting group prayers. Other students were allegedly using bullhorns and would continue to speak after the school bell rang indicating the resumption of classes.)

### Court Jesters

Judges are human. When a patently frivolous case comes before them, and there is nothing to bar the exercise of a little judicial discretion (kicking sand in the face of bullies), tongue-in-cheek constructions follow. Such was the situation in Laxey v. Louisiana Bd. of Trustees, 22 F.3d 621 (5th Cir. 1994), a case involving a university football player who was dismissed from the football team and had his scholarship revoked upon his arrest for cocaine distribution. The court was unimpressed with his claim that his civil rights were violated--so unimpressed that the decision is written entirely in football jargon. The district court "made the right call" in dismissing the suit. Laxey had been "blitzed" by undercover agents. The football coach "sacked" him from the team but "dropped the ball" by revoking his scholarship without a hearing. The student disciplinary committee "scrambled" to hold a hearing, which resulted in upholding the suspension. A review of this decision resulted in a finding that "the call would stand." Laxey claimed that his "interception" for cocaine distribution resulted in a host of constitutional deprivations. Laxey claimed "there was a flag on the play" in the district court's dismissal of his claim. The court decided to "tackle the issue" *de novo*. The party seeking summary judgment "has the ball" and must show that the non-moving party's "game plan" lacks evidence to support its position. The court decided to "referee this contest on a level playing field." If the non-movant sets forth sufficient facts to support his allegations, then "the game continues." This continues on and on, and includes references to "punting" by the district court on certain issues, Laxey's attempt at "an end run around" immunity issues, and Laxey's "illegal procedure" to be a "fumble" because 11th Amendment immunity "plainly blocks his suit." The court compared the 11th Amendment to a "defensive lineman" and noted that certain state employees are members of the "team" protected from such suits. Finally, the court concluded: "Although this suit was terminated in the first quarter, we agree with the district court that it did not deserve to go the distance. To prevent unnecessary overtime, we therefore AFFIRM the district court's grant of summary judgment."

### Quotable...

"[T]he best way to get rid of a bad law is to rigidly enforce it." Ralph B. Guy, Jr., Senior Circuit Judge, 6th Circuit Court of Appeals, in a concurring/dissenting opinion in Washegesic v. Bloomington Public Schools, 33 F.3d 679, 684 (6th Cir. 1994). Judge Guy was paraphrasing from President Ulysses S. Grant's inaugural address on March 4, 1869: " I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution."

---

Date

---

Kevin C. McDowell, General Counsel  
Indiana Department of Education