

**QUARTERLY REPORT**  
**April - June 1996**

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.

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## “PARENTAL RIGHTS” AND SCHOOL CHOICE

The issue of “Parental Rights” became a focal point during the 1996 General Assembly when language was introduced as a part of HB 1346 which would have created “fundamental right” of a parent “to direct the upbringing of the parent’s child” without interference from any governmental entity, except where serious health care matters were involved or there was abuse or neglect. A parent would have the right to initiate legal action against the government recoup “attorney fees and legal expenses.” This portion of the bill did not pass. Instead, HEA 1346 (P.L. 205-1996), Sec. 6, permitted the establishment of a legislative committee “to study matters related to parental rights.” This committee has been established. Similar language has been introduced in the U.S. Senate (S. 984) and the House of Representatives (H.R. 1946) as the “Parents’ Rights and Responsibilities Act of 1995.”

The ramifications of such a law, if passed, would be significant. Public education would be profoundly affected. The Indiana sponsor of the “Parental Rights” language singled out public education as a principal reason for his actions. In testimony before the Senate Judiciary Committee, the sponsor said he hoped the “Parental Rights” language would overturn existing law, Involved in Education, Inc. et al. v. Indiana Department of Education, et al. (the ISTEP+ lawsuit). Judge McCarty’s November 30, 1995, decision, at p. 28, noted:

...While parents have general rights, it does not follow that parents have a right to have the courts run the public schools to their satisfaction. Public schools must be conducted in the best interests of all school children.

There exists no Fourteenth Amendment fundamental right of parents to direct the secular education of their children. *People v. Bennett* (1992), Mich., 501 N.W.2 106; *Null v. Board of Education of the County of Jackson* (1993), S.D. W. Va., 815 F.Supp. 937.

Instead, the United State Supreme Court has recognized that [t]here is no doubt as to the power of a state, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.” *Wisconsin v. Yoder* (1972), 406 U.S. 205, 214.

“Parental Rights” involves a number of issues. Only one issue will be addressed in this **Quarterly Report**: school choice. A recent Congressional Research Service (CRS) report on the potential legal ramifications of “Parental Rights” language indicated that such a law would require public schools to provide alternate instruction acceptable to the parent even though courts have rejected the argument that the Constitution grants parents this right. The CRS wrote that the creation of such a right would legalize vouchers. Presently, vouchers and school choice have been the province of respective state legislatures and not the judicial system.

In Jenkins et al. v. Leininger et al., 659 N.E.2d 1366 (Ill. App. 1995), one hundred low-income parents of students in the Chicago school system claimed a deprivation of parental rights because they could not control and influence the education of their children due to their economic status and lack of political leverage. As a result, they were forced to send their children to substandard schools. The parents sought judicial intervention so that the per pupil expenditure by the State would be directed to the parents so that the parents could secure an education for their children in a public or private school of the parents' choosing.

The court recognized that although "parents have a primary role in the upbringing and education of their children," there was no showing they have been prevented by the State from doing so. There is no judicial authority to create a "voucher system."

The Jenkins court noted that the U.S. Supreme Court has found unconstitutional payments to low-income parents for reimbursement of private religious school tuition. Committee for Public Education v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955 (1973). The Jenkins court also referred to the continuing experimental voucher system in Milwaukee, Wisconsin. The Wisconsin Supreme Court upheld as Constitutional the legislatively created experimental voucher system for parents in Milwaukee choosing private, non-sectarian schools. Davis v. Glover, 480 N.W.2d 460 (Wisc. 1992), upholding the "Milwaukee Parental Choice Program." This program was amended in July of 1995 to include participation by religious-based, sectarian schools, but the implementation has been enjoined. Meanwhile, three of the private schools have gone out of business, owing the State nearly \$500,000. Because parental choice voucher systems have been discussed by Indiana's legislature and the Indiana State Board of Education, I asked Robert J. Paul, Chief Legal Counsel for the Wisconsin Department of Public Instruction, to detail some of the legal problems experienced in the implementation of the Milwaukee Parental Choice Program. The following is a condensed list of problems he detailed:

#### SCHOOL VOUCHER ISSUES: MILWAUKEE PARENTAL CHOICE PROGRAM

1. Participating School Requirements. (Also see section V.)
  - A. Must the eligible school have existed for a period of years before applying?
  - B. Required to be incorporated?
    1. Board of Directors?
    2. Articles of Incorporation?
    3. By Laws?
  - C. Must schools comply with open meetings and open records laws applicable to public schools?
    1. to private school board meetings?
    2. to private school financial records ?
    3. to private school fund raising or endowment records?



- D. Must the State require submission of a financial statement and plan approved by the private school's governing board assuring:
  - 1. solvency for one year of operation?
  - 2. a staff grievance procedure be in place?
  - 3. a parent complaint procedure be in place?
  
- E. Is a single-gender school eligible? Should such a school's Notice of Intent to Participate be accompanied by a "comparable" other-gender matching school or other evidence the school program will comply with Title IX and other equal protection laws?<sup>1</sup>
  
- F. Must eligible schools meet a participation standard and acquiesce in monitoring by the State for compliance?

## II. Pupil-Related Requirements

- A. List the federal statutory and applicable administrative rule requirements that will apply: FERPA, Sec. 504 of the Rehabilitation Act of 1973, Drug Free Schools and Communities Act of 1986 (20 USC 3171), ADA, ADEA. N.B.: The Wisconsin trial court held that all of these did apply in the Choice schools. It also held, however, that implementation of IDEA in the Choice schools remained the responsibility of the LEA. These rulings were not appealed.
  
- B. Must federal and state individual constitutional rights apply to pupils (all federal and state constitutional guarantees protecting the rights and liberties of individuals including freedom of religious expression, association, protection against unreasonable search and seizure)?
  - 1. In expulsion hearings, due process, equal protection?
  - 2. Student publications, free speech?
  - 3. Pupil searches, lockers, 4th Amendment?
  
- C. Does the state pupil non-discrimination law apply? (For Indiana, see I.C. 20-8.1-2.)

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<sup>1</sup>The U.S. Supreme Court in U.S. v. Commonwealth of Virginia et al., 64 L.W. 4638, decided June 26, 1996, and involving the Virginia Military Institute (VMI), held that "gender-based government action must demonstrate an exceedingly persuasive justification" (in this case, male-only higher education). The VMI case may prohibit consideration of single-sex private schools in voucher programs as violative of the Fourteenth Amendment's Equal Protection clause.

- D. Does participation prohibit the discipline (or suspension or expulsion) of pupils for reasons other than those applicable to public schools?
- E. Does participation require the same truancy enforcement as public schools?

### III. General Requirements

- A. Require tax dollars received by the schools be used for educational purposes?
  - 1. prohibited from use for capital expenditures, building projects?
  - 2. used only for instructionally related purposes?
- B. Limit maximum state aid to:
  - 1. private school tuition?
  - 2. “net cost per pupil” of operating the school but no more than the state aid the LEA would be entitled to? (Requires identification of costs that are “aidable” and those which are not.)
- C. Annual Financial Audit
  - 1. Mandate each school contract at its own expense with a private auditor to annually submit a report in accordance with state guidelines, or which meet “uniform financial accounting standards”?
  - 2. Should the state do the audit?
  - 3. Should the state educational agency do the audit?
  - 4. Will the audit include all sources of revenues and expenditures of the school or only those related to state dollars?
- D. Prohibit requiring parents or pupils from engaging in private school fund raising or paying tuition?
- E. Prohibit any school fees except those public schools are permitted to charge indigent pupils (Milwaukee’s program is a low income program by definition)?
- F. Provide for transportation as is provided currently by the LEA?

### IV. Assessment of Program

- A. Require pupils to take the same state-sponsored achievement tests as other public school pupils?
- B. Appropriate sufficient dollars for longitudinal study, specifying number of years with annual reports?
- C. Specify categories of study:
  - 1. achievement? daily attendance? percentage of drop outs? percentage suspended and expelled? parental involvement activities?
  - 2. parent satisfaction?
  - 3. require control group of anonymous public school pupils randomly selected by study group?

4. prohibit or require “survey” or annual interview type questions of parents?  
(See I.C. 20-10.1-4-15 for Indiana’s law in this respect.)
  5. prohibit or require private school comparisons with each other?  
(Wisconsin authorized a study of the private and public school pupils and parents as aggregate groups only.)
- D. Specify who does the Assessment?
1. be contracted by the SEA?
  2. be let out on competitive bid?
  3. be done by the state by designated department (SEA, state auditor, state board of accounts, public university, other public or private non-profit entity, in-state or out-of-state)?
- E. Require the state pupil confidentiality law apply to the study records, that pupil identities be encrypted and keyed, that the key is the sole property of the SEA, that the study be conducted in accordance with customary confidential and security standards of the profession? (Wisconsin developed model contract language to address some of these issues in the absence of specific statutory provisions.)
- F. Authorize or except from application the state open records law to the study data during the study. If the law applies, insure all reasonable and necessary costs of locating, reproducing and providing copies of data may be charged the requester, and that advance payment may be required. Insure the agents responding to the records requests have a reasonable time within which to comply and that interruption of the study shall not be required in order to reasonably comply.
- V. If a School Fails Mid-Term (In Wisconsin, public schools are paid in the current year on last year’s audited figures. Choice schools are paid on current year data. One school failed the first year and two the sixth.)
- A. How does SEA recoup aid overpayments if a school goes out of existence? Should participating schools be bonded in the amount of state aid to be paid in a semester?
  - B. If overpayment reduces pool of appropriated funds, is the shortfall prorated against the remaining Choice schools, against the LEA, or cut from the SEA’s operating budget? What if there’s a hold-harmless clause for both the Choice schools and the LEA?
  - C. Prohibit any state aid payments until pupil enrollments and eligibility are verified? How would this be accomplished if the first aid payment is in September?
  - D. School employee payroll: require quarterly evidence of compliance with federal and state income tax wage withholding? (IRS levied Wisconsin’s SEA on Choice

school's account but only after a full year's non-compliance.)

- E. Where shall confidential pupil records go?  
To SEA? To LEA? Maintained by the private school?
- F. Who shall respond to requests for transcripts or other data from educational records?

For Indiana purposes, it would have to be decided whether eligible private schools were accredited under I.C. 20-1-1.2 (Performance-Based Accreditation); "recognized" under I.C. 20-1-1-6.2; organized as a "Freeway School" under I.C. 20-5-62-13; or none of the above.

Other recent "Parental Rights" cases of interest:

1. Clay v. Fort Wayne Community Schools, 76 F.3d 873 (7th Cir. 1996). This case involved the school district's search for a new superintendent. The court held there is no Constitutional right to have a person of any particular race considered for the position of superintendent. While society has "a strong interest in thwarting discrimination...there is a difference between a political or social interest and a constitutional right. Appellants have no constitutional right we are aware of to have another African-American considered for the position of superintendent."
2. Battles v. Anne Arundel County Bd. of Ed., 904 F.Supp. 471 (D. Md. 1995). Battles home-schools her daughter. Maryland requires instruction in certain core subjects, and home-school providers are required to sign a consent form indicating they have read and understand this law. Battles has refused to do so, and has refused monitoring of compliance by the local school district. Battles claims that to sign the consent form would be an insult to her religious beliefs because she would be subjecting her child's education to oversight from agencies "charged by law with implementing atheistic, antichristian education" and with the promotion of a "Godless world view." The court dismissed the parent's civil rights claim, finding that the education of school-aged children is a "compelling governmental interest" and the state regulations for homeschooled students is the "least restrictive means of furthering that interest." Religious Freedom Restoration Act (RFRA), 42 U.S.C. §2000bb-1(b). Further, the court held that "...Maryland is not required to 'subsidize' Battles' particular religious beliefs by eliminating contrary viewpoints from the required curriculum" (at 477).

## ATTORNEY FEES: PARENT-ATTORNEY

The Indiana Supreme Court, reversing the Indiana Court of Appeals, has held that a parent-attorney of a student with disabilities is not entitled to recover attorney fees for representation of the attorney-parent's child. This dispute began as Article 7 Hearing No. 519-91. The student was represented by his father, who is an attorney.

In Miller v. West Lafayette School Corporation, 665 N.E.2d 905, 24 IDELR 174 (Ind. 1996), the Supreme Court agreed with the school district that the father was acting as a "*pro se* parent and a party" rather than as an attorney, and as "a *pro se* litigant [he]...is not entitled to [attorney] fees" which are available to parents who prevail through IDEA procedures. See 20 U.S.C. §1415(e)(4)(B); 34 C.F.R. §300.515; 511 IAC 7-15-6(q). The May 28, 1996, decision relies upon Rappaport v. Vance, 812 F.Supp. 609 (D. Md. 1993), appeal dismissed, 14 F.3d 596 (4th Cir. 1994), which found that a lawyer-parent representing his child in IDEA proceedings is a *pro se* litigant and thus not entitled to attorney fees under the IDEA. The Rappaport court relied upon an analogous U.S. Supreme Court decision in Kay v. Ehrler, 499 U.S. 432, 111 S.Ct. 1435 (1991), which held that attorneys who are *pro se* litigants are not entitled to attorney fees in civil rights actions because "the word 'attorney' assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under [42 U.S.C.] §1988." 111 S.Ct. at 1437-38.

The Indiana Supreme Court quoted extensively from Kay, 499 U.S. at 436-38, 111 S.Ct. at 1437-38:

Although [the fee-shifting section] was no doubt intended to encourage litigation protecting civil rights, it is also true that its more specific purpose was to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights.

In the end...the overriding statutory concern is the interest in obtaining independent counsel for victims of civil rights violations. We do not, however, rely primarily on the desirability of filtering out meritless claims. Rather, we think Congress was interested in ensuring the effective prosecution of meritorious claims.

Even a skilled lawyer who represents himself is at a disadvantage in contested litigation. Ethical considerations may make it inappropriate for him to appear as a witness. He is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom. The adage that "a lawyer who represents himself has a fool for a client" is the product of years of experience by seasoned litigators.

A rule that authorizes awards of counsel fees to pro se

litigants--even if limited to those who are members of the bar-- would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.

Miller, 665 N.E.2d at 906-7, 24 IDELR at 175.

For additional discussion of attorney fees in special education, see **Quarterly Report** Jan. - Mar. 95: **Quarterly Report** July - Sep't.: 95; **Quarterly Report** Jan. - Mar.: 96; Recent Decisions, 9-10:86; and Recent Decisions, 1-12: 92.

### TEXTBOOK FEES

During the 1996 General Assembly, there was much discussion involving the elimination of textbook fees, which school corporations can presently assess as "rental fees" under I.C. 20-10.1-10-2, as affected by the Financial Assistance for School Children provisions of I.C. 20-8.1-9 *et seq.* The General Assembly is expected to continue this discussion during the 1997 session, where legislation may be introduced eliminating these fees. Textbook and course fees have undergone judicial scrutiny in several states, usually involving a state constitutional challenge.

Randolph County Board of Education v. Adams, 467 S.E.2d 150 (West Va. 1995) is the most recent published opinion. This case is interesting because the West Virginia Constitution has a provision similar to Indiana's constitution, Art. 8, §1. West Virginia requires the establishment of "a thorough and efficient system of free schools" while Indiana must provide "a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all."

The dispute arose following an unsuccessful school levy. Faced with a financial shortfall, the school district established a textbook fee, and then sued 100 parents for nonpayment. (Indiana permits such actions for nonpayment of fees. A successful school district may also recover reasonable attorney fees and court costs. See I.C. 20-8.1-9-10.) The West Virginia Supreme Court found such fees unconstitutional in their state. Attendance at public schools is to be "cost free" and any expedient necessary to provide an education should be without charge. The court at 157 recognized that "free" is subject to various interpretations and, as a consequence, limits the "free schools" language to a publicly funded instruction related to the acquisition of general knowledge necessary to prepare one intellectually for a mature life or particular knowledge of certain skills inherent in a trade or profession (at 158). In short, the court found that "whatever items are deemed *necessary* to accomplish the goals of a school system and are in fact an integral fundamental part of the elementary and secondary education must be provided free of charge to all students in order to comply with the constitutional mandate of a 'free school' system." At 159. (Emphasis original. Some internal punctuation omitted.) Textbooks and school supplies are necessary and essential such that a fee cannot be assessed.

Indiana's textbook statutes have already withstood a constitutional challenge.

In Chandler v. South Bend Community School Corporation, 312 N.E.2d 915 (Ind. App. 1974), the plaintiff class challenged the constitutionality of the textbook rental statutes on the basis that Art. 8, §1 requires public schools to be without charge. (It should be noted that this case deals with previous statutory provisions and not the current ones. Nonetheless, Chandler supports the legislature's authority to create such fees.)

The trial court found that Indiana's constitution requires only that tuition be without charge, not textbooks or supplies. The Court of Appeals, in affirming the trial court, noted that "tuition" does not include "textbooks" within any given definition of that term (at 920).<sup>2</sup>

The following are related decisions of interest.

1. Complaint No. 1016-96. This special education compliance investigation under 511 IAC 7-15-4 involved the assessment of a textbook rental fee of a student with mild mental handicaps (MiMH). However, no instructional materials and inferior equipment were provided. The teacher had been without teacher editions for the adopted reading series for three years while other third grade teachers were provided such materials. This violated 511 IAC 7-6-5, which requires school districts to provide students with disabilities instructional materials--including textbooks and workbooks--which are comparable to those provided to nondisabled students.
2. Concerned Citizens et al. v. Caruthersville Sch. Dist., 548 S.W.2d 554 (Mo. 1977). The Missouri Supreme Court found unconstitutional the school district's assessment of registration and course fees for courses where academic credit is given. The Missouri constitution requires that "free public schools [be maintained] for the gratuitous instruction of all persons in this state within age not in excess of twenty-one years as prescribed by law."

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<sup>2</sup>In affirming the trial court, the Court of Appeals also upheld the determination that a child cannot be denied an education because he could not furnish his books or supplies. A school may charge a reasonable fee, but it cannot expel students for nonpayment, nor can it withhold grades, diplomas or transcripts if parents cannot pay. These prohibitions are now found in statute at I.C. 20-8.1-9-10. See Gohn v. Akron School, 562 N.E.2d 1291 (Ind. App. 1990).

3. Sneed v. Greensboro City Bd. of Education, 264 S.E.2d 106 (N.C. 1980). The North Carolina Supreme Court found that the assessing of incidental course and instructional fees does not violate the North Carolina constitution, which requires the establishment of a “general and uniform system of free public schools.” However, such fees cannot be assessed against students and parents who are financially unable to pay.

## COLLECTIVE BARGAINING AGREEMENTS

In Complaint No. 1022-96, a special education compliance investigation under 511 IAC 7-15-4, a school corporation and its special education cooperative were determined to have discriminated against preschool-aged students with disabilities. The school corporation and the cooperative had established early childhood classes for preschool-aged children with disabilities. The students were mainstreamed in kindergarten music, art and physical education classes. The students were accompanied by their licensed special education teacher and a paraprofessional. The local collective bargaining unit filed a grievance. In resolving the grievance, the school corporation entered into a “memorandum of understanding” with the bargaining unit which absolved any general education teacher from having to provide any instruction to a preschool student with disabilities.

The cooperative would not sign the “Memorandum of Understanding” but nevertheless acquiesced, advising its personnel that at all annual case reviews, preschool students would have “0% integration with general education [students].”

The “Memorandum of Understanding” and the cooperative's actions violated both State and Federal laws by discriminating against students with disabilities, and by denying the students a “free appropriate public education” (FAPE) in the “least restrictive environment.”

The school corporation was required to correct the “Memorandum of Understanding” while the cooperative had to withdraw its subsequent directive to staff to abide by the memorandum, and to reconvene the case conference committees of all affected students and individually determine placement.

Both Federal and State agencies have previously warned against collective bargaining agreements which discriminate against students with disabilities. The following are instructive.

1. Article 7 Hearing No. 678-93 (Board of Special Education Appeals 1993). The BSEA, under 511 IAC 7-15-6, reviewed the decision of an independent hearing officer. Compliance timelines were determined by the BSEA, but the school and parents could not agree upon a time to convene a case conference committee. The school insisted it could only meet during the contract hours established by the local collective bargaining agreement. The parents, who worked, wanted to meet before or after school. The BSEA advised the school that the terms of a collective bargaining agreement cannot interfere

with a federal and state obligation to meet with parents at a “mutually agreed upon date, time, and place.” See 511 IAC 7-12-1 (b), (c). See also Recent Decisions, 1-12:93.

2. Letter to Williams, 21 IDELR 73 (OSEP 1994). The provisions of a collective bargaining agreement cannot authorize a school district's failure to provide the rights and protections guaranteed under the Individuals with Disabilities Education Act (IDEA) and Sec. 504 of the Rehabilitation Act of 1973. A teacher cannot refuse to implement interventions in a general education classroom because of the terms of a union contract. See also Davila, 17 EHLR 391 (OSERS 1990), applying IDEA to reach the same conclusion.
3. Tamalpais (CA) Union High, EHLR 353:126 (OCR 1988). A school district violated Sec. 504 when it entered into collective bargaining agreement which restricted the number of students with disabilities who could be assigned to an academic class. The school district, in resolving the civil rights complaint, agreed not to abide by this provision.

### **CHORAL MUSIC AND THE ESTABLISHMENT CLAUSE**

While the recent focus on church-state issues in publicly funded schools has involved prayers at graduation ceremonies, there also have been challenges that certain choral selections are offensive to public school patrons and contravene the Establishment Clause of the First Amendment. The following are representative.

1. Doe v. Duncanville Ind. Sch. Dist., 70 F.3d 402 (5th Cir. 1995). Although this case involves school prayer and distribution of Bibles, it also addresses the inclusion of religious-based choral selections in the repertoire of school choirs. Plaintiff was a member of the choir, but objected to singing “The Lord Bless You and Keep You,” a popular choral piece based on Christian texts but performed by the choir at public performances and competitions. The choir had adopted this song as its “theme song” for the past twenty years. The court applied primarily the Establishment Clause “test” established by Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111-2112 (1971):

A government practice is constitutional if:

- (1) it has a secular purpose;
- (2) its primary effect neither advances nor inhibits religion; and
- (3) it does not excessively entangle government with religion.

The court, to a lesser extent, also referred to two other tests, but admitted that “Establishment Clause jurisprudence is rife with confusion” (at 405). The circuit court found that the singing of “The Lord Bless and Keep You” is useful to students in

teaching them to sight read and sing *a capella*, and it has not been sung by the choir as a religious exercise per se. In addition, 60-75 percent of serious choral music has religious themes. Repeated singing of one song does not amount to endorsement of religion (at 407). To forbid the use of religiously based choral music, which dominates this field, would be hostility towards religion, not neutrality (at 408).<sup>3</sup>

2. Doe v. Aldine Independent School District, 563 F. Supp. 883 (S.D. Tex. 1982). A school-composed prayer was set to music. The prayer called for God's blessings on the school, especially in athletic contests. It concluded with "In Jesus' name we pray, Amen." The band played the song at athletic contests, pep rallies, and graduation ceremonies. The words are posted near the gymnasium. The court found that these words constituted a prayer, and "[t]he singing of the prayer involves no constitutional distinction. "At 885, n.2. The court found that the singing of the prayer does not survive *Lemon* scrutiny, and is thus unconstitutional. The court noted at 885 that the posting of the prayer on the school wall by the gymnasium is also unconstitutional.
3. Bauchman v. West High School , 900 F. Supp. 248 (D. Utah 1995), involves a continuing dispute between a sophomore student member of the school's *a capella* choir and the public school. The student seeks to enjoin the singing of religious-based songs, particularly Christian-based songs, at a graduation ceremony. The two songs at issue were "May the Lord Bless You and Keep You" and "Friends." In denying injunctive relief, the court found that the songs were traditional and ceremonial, and expressive of friendship and camaraderie (at 251). The court also found that the use of the choral arrangements within the context of graduation ceremony did not fail the *Lemon* test. The singing of choral pieces is not an "explicit religious exercise." The court noted that *a capella* means "in the chapel" and has its origin from religious exercises. As a result, much of the music available for performance has religious themes. "Music has purpose in education beyond mere words or notes in conveying a feeling or mood, teaching a culture and history, and broadening understanding of art." (At 253.)

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<sup>3</sup>The parties were not in dispute that choirs could sing religious songs as a part of a secular music program. The U.S. Supreme Court in School District of Abington Township (PA) v. Schempp, 374 U.S. 203, 225, 83 S.Ct. 1560, 1573 (1963), while finding unconstitutional a Pennsylvania statute requiring the reading of ten biblical verses every day, warned that its decision does not create a "religion of secularism," and government may not oppose or show hostility to religion, thus "preferring those who believe in no religion over those who do believe."

4. Bauchman v. West High School, 900 F. Supp. 254 (D. Utah 1995), is the second reported case. The student sued the school for civil rights violations arising from the selection of certain choral pieces with Christian associations and the public performance of the choir at some churches. The court granted the school's Motion to Dismiss, noting that the school attempted to accommodate plaintiff's objections by excusing her from performances which were a part of the "Christmas Concerts" series without any grade penalty. A "Spring Tour" was canceled by the school because some of the performances would be in Christian churches. The 10th Circuit Court of Appeals reversed the district court (see above), enjoining the singing of the two religious-based songs at the graduation ceremony. However, after the choir had performed other selections at the graduation ceremony, a student led the choir in singing "Friends," one of the offending songs. School staff was unable to halt the enjoined performance. Many in the auditorium joined in singing the song. The court dismissed the civil rights claims, finding that the music teacher's selection of curriculum had primarily a secular purpose to teach musical appreciation, the principal effect of curriculum was not to advance or promote religion, and choice of religious-based curriculum did not constitute excessive entanglement. The court also found that the school sought to accommodate the student's religious beliefs, and thus there was no violation of the Religious Freedom Restoration Act.
5. Bauchman v. West High School, 906 F. Supp. 1483 (D. Utah 1995), is the third published opinion involving a student's objection to the use of religious-based choral pieces by the school's *a capella* choir. This action sought a civil contempt finding against the school and its officials for violation of the 10th Circuit Court of Appeals injunction when students sang one of the proscribed songs at the graduation ceremony. The student claimed that the singing of the song "Friends," and the joining in the song by the audience, caused her emotional distress. The court discussed the petition for contempt, finding that the school officials acted in good faith by attempting to halt the unauthorized singing of "Friends" but were overwhelmed by students and the audience who chose to interrupt the graduation ceremony by singing the song. The court also noted that emotional distress is not compensable in a civil contempt proceeding.
6. Malnak v. Yogi, 592 F.2d 197 (3rd Cir. 1979). Although this case is better known for defining as "religion" the Science of Creative Intelligence - Transcendental Meditation (SCI/TM) of Maharishi Mahesh Yogi, which a public school system implemented as an elective course, there is an interesting observation by Chief Judge Adams in his concurring opinion, questioning the use of "textual analysis" (comparing of words of alleged

prayers) by the majority in defining what will constitute a “religious practice” prohibited by the constitution.

... The actual wording of a school exercise, for example, may be far less important than its context or purpose. A textual analysis might well invalidate the pledge of allegiance, the singing of “America the Beautiful,” or the performance of certain works from Handel or Bach by a school glee club. Yet, such activities have not been held to violate the establishment clause, even though they include references to God or a Supreme Being, because they are undertaken for patriotic, cultural or other secular reasons, and neither have, nor are intended to have, a religious effect on those participating in or witnessing them....

Id., at 202, n.7 (Adams, Chief Judge, concurring.)

## COURT JESTERS

Ambrose Bierce, American journalist and short story writer, is best known for his caustic work The Devil's Dictionary (1906). One definition applies here.

**Court Fool**, n. The plaintiff.

In the case of Oreste Lodi, add “defendant” as well.

In Lodi v. Lodi, 219 Cal. Repr. 116 (Cal. App. 1985), Oreste Lodi, as plaintiff, sued himself, apparently attempting to invalidate his birth certificate, although the reason for suing himself was never clear to the Court. “Defendant” Lodi, although properly served with the complaint by “plaintiff” Lodi, failed to answer. “Plaintiff” Lodi sought a default judgment against himself. The court refused, choosing instead to dismiss the complaints *sua sponte*. In upholding the trial court’s dismissal of the complaint for failure to state any cognizable claim for relief, the appellate court observed that “In the arena of pleadings, the one at issue here is a slam-dunk frivolous complaint.”

The appellate court also noted:

In the circumstances, this result [upholding dismissal of the complaint] cannot be unfair to Mr. Lodi. Although it is true that, as plaintiff and appellant, he loses, it is equally true that, as defendant and respondent, he wins! It is hard to imagine a more even handed application of justice. Truly,

it would appear Oreste Lodi is that rare litigant who is assured of both victory and defeat regardless of which side triumphs.

We have considered whether respondent/defendant should be awarded his costs of suit on appeal, which he could thereafter recover from himself.

However, we believe the equities are better served by requiring each party to bear his own costs on appeal.

Bierce also provided other helpful definitions, such as:

**Litigation**, *n.* A machine which you go into as a pig and come out as a sausage.

### QUOTABLE

“Whatever theoretical merit there may be to the argument that there is a ‘right’ to rebellion against dictatorial government is without force where the existing structure of the government provides for peaceful and orderly change.”

Chief Justice Fred M. Vinson  
Dennis v. U.S., 341 U.S. 494,501  
71 S. Ct. 857, 863 (1951)

### UPDATES

1. Parochial School Students with Disabilities. From **Quarterly Report** Jan. - Mar.: 96, the updated citation is K.R. v. Anderson Community School Corporation, 81 F.3d 673 (7th Cir. 1996). The 7th Circuit reversed the district court, finding instead that the students with disabilities voluntarily attending private schools are entitled to equitable participation in special education services but are not entitled to services comparable to those provided in a public school.
2. Computers. In **Quarterly Report** Jan. - Mar.: 96, there was a discussion of a legal challenge in Ohio by some school districts against the establishment of a statewide computer information network by the Ohio State Board of Education (Educational Management Information System or EMIS). Although the court found in favor of the State Board, left unresolved was the extent to which such a system could compete with private providers. In Merslie, Inc. et al. v. Ohio Dep’t of Administrative Services and Ohio Dep’t of Education, 663 N.E.2d 1357 (Ohio App. 1995), career information software providers challenged the validity of

ODE's contracts for software and the authority of the State to administer a computerized career information system. At issue is the Ohio Career Information System (OCIS), which includes national, state and local occupational information, as well as information regarding armed services, vocational and postsecondary schools and financial aid. This information is made available for use by public entities, including school districts, for a licensing fee. Plaintiffs-Appellants are engaged in providing the same information but were unsuccessful in their attempts to be selected as a vendor for the OCIS program. The court upheld the contract and separate licensing fee arrangements even though there was no specific statutory authority to operate OCIS in this manner. The court found OCIS to be within the inherent statutory authority and responsibility of ODE.

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