

QUARTERLY REPORT

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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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PEER SEXUAL HARASSMENT
(Article by Dana L. Long, Legal Counsel)

Sexual harassment of students by other students is a growing concern within school districts across the country. Just as the “good ol’ boy” attitude in the business or corporate world (which tolerated persons who made sexual advances, *quid pro quo* harassment, or an otherwise sexually hostile environment) is no longer tolerated or legally permitted, a “boys will be boys” (or “girls will be girls”) attitude by school districts when confronted with student complaints of peer sexual harassment can be costly for schools. Litigation in recent years has been growing at an alarming rate as students seek to have schools held responsible for sexual harassment inflicted by other students. Most of the reported cases concern alleged violations of Title IX of the Education Amendments of 1972 (Title IX),¹ although claims of violations of the Equal Protection or the Due Process Clauses² or negligence are often included.

Title VII of the Civil Rights Act of 1964 (Title VII)³ prohibited gender discrimination in employment while Title VI of the Civil Rights Act of 1964 (Title VI)⁴ prohibited racial discrimination by all recipients of federal funding. As enacted, Title VI applied to educational institutions but did not prohibit gender discrimination, while Title VII prohibited gender discrimination but was not applicable to educational institutions. To fill this gap, Congress enacted Title IX of the Education Amendments of 1972 to ban gender discrimination in educational institutions. Under Title IX, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .” School districts are required to adopt and publish grievance procedures for the resolution of student and employee complaints, and to designate at least one employee to coordinate the district’s efforts to receive and investigate complaints. 34 CFR §106.8. Each district is further required to implement steps to notify students, parents, employees and others that it does not discriminate on the basis of sex and that Title IX and its regulations prohibit such discrimination. The notice must also indicate the employee designated pursuant to §106.8 to receive complaints or answer questions. 34 CFR §106.9.

In the past several years federal courts have issued a number of decisions concerning the issue of whether Title IX provides a cause of action for student-to-student sexual harassment and hostile environment discrimination. The federal courts that have addressed these issues have reviewed the legislative history of Title IX and analyzed the case law interpreting Title IX, Title VI and

¹20 USC §1681.

²United States Constitution, Amendment 14.

³42 USC §2000e-2.

⁴42 USC §2000d.

Title VII. The issue of student-to-student sexual harassment has not yet been addressed by the United States Supreme Court, leaving the district and circuit courts more freedom in interpreting Title IX to either grant or deny relief to students complaining of harassment by other students. As is to be expected, the decisions rendered by the courts are anything but consistent as the courts vary in their determinations as to whether Title VI or Title VII principles should apply to Title IX.

A number of federal district courts have considered student-to-student sexual harassment under Title IX. In Doe v. Petaluma City Sch. Dist., 830 F.Supp. 1560 (N.D.Cal. 1993), *on reconsideration*, 949 F.Supp. 1415 (N.D.Cal. 1996), the plaintiff filed a complaint alleging that the defendants failed to stop the sexual harassment inflicted on her by her peers. In Petaluma I (830 F.Supp. 1560), the court determined that Title IX prohibits hostile environment sexual harassment but that money damages are available in a private action to enforce Title IX only upon proof of intentional discrimination on the basis of sex by an employee of the educational institution. The federal district court granted the plaintiff's motion for reconsideration in light of the developing case authority in this area of law. The court determined that the availability of the remedy of monetary damages for a violation of Title IX is based upon the Supreme Court's ruling in Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 112 S.Ct. 1028 (1992).⁵ While the Supreme Court did not define "intentional discrimination," and refused to consider whether the standards applicable to Title VII claims applied to Title IX claims, it did characterize the plaintiff's claim as one for "intentional discrimination" and then cited Meritor Savings Bank, FSB v. Vinson, 479 U.S. 57, 106 S.Ct. 2399 (1986), which was a hostile environment case arising under Title VII. 503 U.S. at 75, 112 S.Ct. at 1037-38. Determining that the Franklin Court's opinion lacked clarity as to whether Title VII standards applied to Title IX claims, the federal district court examined other court decisions issued since its ruling in Petaluma I.

The approach taken by the district court in Bosley v. Kearney R-1 School District, 904 F.Supp. 1006 (W.D.Mo. 1995) was found to be the most similar to that taken in Petaluma I. The Bosley court also found intentional discrimination to be a required element of a claim for damages under Title IX. Analogizing to Title VII standards, the Bosley court determined the standard for intentional discrimination under Title IX to be that the school district "knew of the harassment and intentionally failed to take proper remedial action." Id. at 1023. The Bosley court further specified that intent could be inferred if it were determined that the school district knew of the harassment and failed to take appropriate remedial action. Id. at 1025. The district court in Petaluma II (949 F.Supp. 1415) also relied upon the reasoning of the Eleventh Circuit in Davis v. Monroe County Board of Education, 74 F.3d 1186 (11th Cir. 1996), which found Title VII standards to be appropriate in Title IX cases. The Davis decision, however, was vacated *en banc*, 91 F.3d 1418 (11th Cir. 1996) and the full Eleventh Circuit reached a contrary result. 120 F.3d

⁵The Franklin case involved teacher-student sexual harassment rather than student-to-student sexual harassment. The Court reasoned that, just as an employer may be liable when a supervisor sexually harasses an employee under Title VII, a cause of action under Title IX may lie against a school district when a teacher sexually harasses a student. 503 U.S. at 75, 112 S.Ct. at 1037.

1390 (11th Cir. 1997)⁶. At the time of the district court’s ruling in Petaluma II, the only circuit court decision concerning Title IX liability for student-to-student sexual harassment determined that not only must discriminatory intent on the part of the school be specifically shown, but the only way to show this was to prove that the school responded to sexual harassment claims differently based on sex. Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1016 (5th Cir. 1996). The Petaluma II court rejected the approach taken in Rowinsky and determined:

. . . if a school district fails to develop and implement policies reasonably designed to bring incidents of severe or pervasive harassment to the attention of appropriate officials, it must be inferred that the district intended the inevitable result of that failure, that is, a hostile environment. Thus the Title VII standard for intentional discrimination, which imposes liability where the entity knows or should have known of the hostile environment and fails to take remedial action, is the appropriate standard.

949 F.Supp. at 1426.

The federal district court in New Hampshire conducted a similar analysis of case law to determine that in order for a plaintiff to prevail on a Title IX claim against a school district, the plaintiff must show: (1) the plaintiff was a student in an educational program or activity receiving federal financial assistance within the coverage of Title IX; (2) the plaintiff was subjected to unwelcome sexual harassment while a participant in the program; (3) the harassment was sufficiently severe or pervasive that it altered the conditions of the plaintiff’s education and created a hostile or abusive educational environment; and (4) the school district knew of the harassment and intentionally failed to take proper remedial action. Doe v. Londonderry Sch. Dist., 970 F.Supp. 64, 74 (D.N.H. 1997). In reaching its decision, the district court found the Office for Civil Rights’ (OCR) interpretation of Title IX to be relevant. OCR has determined that peer sexual harassment violates Title IX and that a school district can violate Title IX by failing to take reasonable steps to curtail peer sexual harassment. “Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,” 62 Fed.Reg. 12,034 (1997)(Final Policy Guidance). “[A] school will be liable under Title IX if its students sexually harass other students if (i) a hostile environment exists in the school’s programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action.” Id. at 12039.

In Collier v. William Penn Sch. Dist., 956 F.Supp. 1209 (E.D.Pa. 1997), a student brought claims against the school district for its alleged failure to take remedial action to prevent her sexual harassment by other students. The plaintiff claimed violations of Title IX and the Due Process

⁶The Davis case has been appealed to the U.S. Supreme Court (Case No. 97-843). Although the Supreme Court has not yet decided whether or not to hear the case, it did ask the U.S. Department of Justice on January 26, 1998, to brief the court on the Clinton Administration’s view of school district liability for peer sexual harassment (*Education Week*, Feb. 4, 1998, p. 30).

Clause as well as negligence on the part of the school district. The court determined that “Title VII imposes liability on employers for their failure to prevent or eradicate a sexually hostile environment created by employees as that environment discriminates and limits employment opportunities based on sex. See, e.g., Landgraf v. US1 Film Prods., 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). Similarly, Title IX should impose liability on a school district for its failure to prevent or eradicate a sexually hostile environment created by students as that environment discriminates and limits educational opportunities based on sex.” 965 F.Supp. at 1213. The court rejected the Due Process and negligence claims, determining that “a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause (citation omitted),” and the defendants were protected by governmental immunity for the claims of negligence. Id. at 1214-15.

While the majority of federal district courts which have considered peer sexual harassment claims have held that Title IX allows a student to sue a school district for failing to prevent hostile environment sexual harassment by another student,⁷ the circuit courts which have addressed the issue have not been in agreement. The recent decision by the Eleventh Circuit Court of Appeals in Davis, supra, determined that Title IX did not provide a cause of action for students complaining of student-to-student sexual harassment. In Davis, a student brought an action alleging that the indifference of the defendants to unwelcome sexual advances made to the student created an intimidating, hostile, offensive and abusive school environment in violation of Title IX. After noting that neither the Supreme Court nor the Eleventh Circuit had previously addressed the issue, the court examined the legislative history of Title IX, noting that the discussions held during the enactment of Title IX concerned three types of discrimination that this law was intended to address: (1) discrimination in the admission to an educational institution; (2) discrimination in available services once admitted to an educational institution; and (3) employment within an educational institution. Id., 120 F.3d at 1397. The court determined that Title IX was enacted under the Spending Clause of Article I,⁸ and was therefore similar to Title VI, which prohibits racial discrimination by all recipients of federal funding. In reviewing Title VI and relevant case law, the court determined that Title VI conditions the receipt of federal funds on the recipient’s agreement not to discriminate on the basis of race, and that this agreement is contractual, not regulatory. As Congress did not unambiguously notify educational institutions, through either the language of Title IX or the legislative history, that sexual discrimination by third parties was

⁷See, e.g.: Nicole M. v. Martinez Unified Sch. Dist., 964 F.Supp. 1369 (N.D.Cal. 1997); Bruneau By and Through Schofield v. South Kortright Cent. Sch. Dist., 935 F.Supp. 162 (N.D.N.Y. 1996); Burrow v. Postville Community Sch. Dist., 929 F.Supp. 1193 (N.D.Iowa 1996); Wright v. Mason City Community Sch. Dist., 940 F.Supp. 1412 (N.D.Iowa 1996); Patricia H. v. Berkeley Unified Sch. Dist., 830 F.Supp. 1288 (N.D.Cal. 1993); and Oona R.-S. v. Santa Rosa City Schs., 890 F.Supp. 1288 (N.D.Cal. 1993). But see, Garza v. Galena Park Indep. Sch. Dist., 914 F.Supp. 1437 (S.D.Tex. 1994) which found that a student could not bring a claim under Title IX for a hostile environment claim.

⁸United States Constitution, Art. I, §8, cl. 1.

prohibited as a condition for the receipt of federal funding, Title IX could not be used to hold school districts responsible for the action of other students. *Id.* at 1398-99.

The Fifth Circuit Court of Appeals, in 1996, also determined that Title IX does not impose liability on a school district for peer sexual harassment, absent allegations that the school district itself directly discriminated on the basis of sex, such as treating complaints of peer sexual harassment from boys differently from complaints from girls. *Rowinsky, supra*. The Fifth Circuit inferred that, since Title IX was enacted pursuant to Congress' spending power, it only prohibited discriminatory acts by grant recipients as opposed to acts of third parties. The court determined that imposing liability for the actions of third parties would not be compatible with the purpose of a spending condition, as the recipient would have little control over a multitude of third parties who could violate Title IX. Secondly, the court found that the legislative history of the statute supports limiting the recipient's liability, as Title IX is modeled after Title VI. Finally, the Court relied on an earlier Office for Civil Rights (OCR) Policy Memorandum⁹ indicating that the harassment must be by an employee or agent of the recipient to be considered sexual harassment under Title IX. This policy memorandum left unresolved the issue of peer sexual harassment. The Fifth Circuit, while indicating that OCR's policy memorandum deserved due deference, also stated that Letters of Finding issued by OCR which did address peer sexual harassment would be accorded little weight. *Id.*, 80 F.3d at 1015.

Other circuit courts which have issued decisions in cases involving Title IX claims have not directly addressed the issue of whether and to what extent educational institutions can be held liable for peer sexual harassment. In *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996), the Tenth Circuit determined that the plaintiff failed to state a claim for student-to-student sexual harassment because he failed to allege that the harassment in question was because of his sex or that the harassment was sexual in nature. The Second Circuit indicated that even if Title IX created a private cause of action for sexual harassment by a non-employee of the school, the plaintiff failed to allege that school officials knew or should have known of the harassment. *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243 (2nd Cir. 1995). While *Petaluma I, supra*, did involve a Title IX claim, the appeal to the Ninth Circuit did not involve the Title IX issue. The student's claims in *Petaluma I* included a §1983¹⁰ claim against a school counselor for allegedly failing to take appropriate action to prevent the sexual harassment of the student, in

⁹OCR's Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981). "Sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of the recipient, that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under title IX." 80 F.3d at 1015.

¹⁰42 U.S.C. §1983 imposes liability on state actors for the deprivation of rights secured by the Constitution and federal laws. In this case, the student's claim against the counselor was brought pursuant to §1983 alleging that the counselor violated the student's rights under Title IX.

violation of Title IX. The counselor claimed qualified immunity, which was rejected by the district court. The Ninth Circuit Court found that the school counselor was entitled to qualified immunity against a claim that he failed to respond to known sexual harassment of the plaintiff by other students. The Court recognized an employer's duty under Title VII to prevent employee-employee harassment but distinguished Title VII from Title IX because at the time of the alleged harassment in 1990, courts had not yet treated them as analogous for purposes of sexual harassment claims. The Ninth Circuit was not called upon to address other issues of the Title IX complaint, which left undisturbed the district court's determination that Title IX did provide a cause of action for peer sexual harassment. Doe v. Petaluma City Sch. Dist., 54 F.3d 1447 (9th Cir. 1995)

The Ninth Circuit Court of Appeals had the opportunity to revisit the issue of a school official's claim of qualified immunity in Oona, R.-S.-By Kate S. v. McCaffrey, 112 F.3d 1207 (9th Cir. 1997). Having previously granted such immunity in Petaluma, *supra*, because the law was not yet determined, in 1997 the Ninth Circuit determined that the United States Supreme Court did analogize the duties of a school district to prevent sexual harassment under Title IX to the Title VII duties of an employer in Franklin, *supra*. The Ninth Circuit determined that other circuit courts had also considered a school district's duties under Title IX to be the same as an employer's duties under Title VII.¹¹ The Ninth Circuit disagreed with the interpretation in Rowinsky, *supra*. The Court determined that after Franklin, a school official in a supervisory position can no longer claim immunity for the failure to respond to complaints of sexual harassment and discrimination and held that the duty to take reasonable steps to respond to such complaints is now clearly established. Oona, 112 F.3d at 1210-11.

As these cases indicate, the case law interpreting Title IX and peer sexual harassment is rapidly evolving in somewhat contradictory ways. This can be expected to continue until further guidance is provided to the courts by the Supreme Court or by Congress. Even though two circuit courts have determined that school districts are not liable for peer sexual harassment, OCR, which is responsible for enforcing Title IX, has unequivocally indicated that schools which fail to have grievance procedures and fail to take reasonable steps to prevent peer sexual harassment violate Title IX. (OCR Final Policy Guidance. See also, e.g., Letter of Findings by John E. Palomino, Regional Civil Rights Director, Region IX (May 5, 1989), Docket Number 09-89-1050 (Kenilworth) and Letter of Findings by Kenneth A. Mines, Regional Director, Region V (April 27, 1993), Docket No. 05-92-1174 (Illinois)). Having a grievance procedure, investigating all complaints and taking steps to prevent harassment, as required by OCR, were instrumental in shielding the South Kortright School District from liability. "School Law News," Vol. 24, No. 24, November 29, 1996, reported that having such policies, and following them, led to a jury refusing to hold the school liable for sixth grade boys tormenting a girl. Bruneau v. South Kortright School District (94-CV-0864). The federal district court had earlier ruled that Title IX does cover student-to-student harassment. Bruneau By and Through Schofield v. South

¹¹Kinman v. Omaha Pub. Schools, 94 F.3d 463 (8th Cir. 1996) and Doe v. Claiborne County, 103 F.3d 495 (6th Cir. 1996). Both of these cases involved teacher-student harassment.

Kortright Cent. Sch. Dist., 935 F.Supp. 162 (N.D.N.Y. 1996).

While the Seventh Circuit Court of Appeals has not yet addressed a complaint of peer sexual harassment under Title IX, three recent cases are instructive. The Seventh Circuit just recently addressed a claim of teacher-student sexual harassment under Title IX. In Smith v. M.S.D. Perry Township, 128 F.3d 1014 (7th Cir. 1997), the student brought claims alleging sex discrimination in violation of Title IX, constitutional violations and violations under state law against the teacher, school district, school board and school officials. The district court denied the defendants' motions for summary judgment on the Title IX claim and state law negligence claim, and the defendants filed an interlocutory appeal. The Seventh Circuit first addressed the issue of the proper defendants under Title IX and determined that a Title IX action can only be brought against a grant recipient and not an individual or against a school official in his official capacity. Id., at 1019-21. The Court then engaged in a lengthy review and analysis of existing case law in determining the standard for institutional liability and concluded:

Agency principles, either pure or the agency-like principles of Title VII, cannot impute discriminatory conduct of an employee to the "program or activity" because Title IX contains no language indicating that Congress intended agency principles to apply. Rather, "a school district can be liable for teacher-student sexual harassment under Title IX only if a school official who had actual knowledge of the abuse was invested by the school board with the duty to supervise the employee and the power to take action that would end such abuse and failed to do so." [Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 660 (5th Cir. 1997)]. Here there is no evidence that anyone had actual knowledge of the alleged relationship between Smith and Rager. On the contrary, it appears that Rager and Smith successfully hid their conduct. Therefore, the School Board and School District were entitled to summary judgment.

Id., at 1034. No opinion was expressed as to the plaintiff's other claims and the matter was remanded to the district court with instructions to enter summary judgment in favor of the defendants on the Title IX claim.

The Seventh Circuit issued an opinion in a case alleging equal protection and due process violations stemming from school officials' alleged failure to protect a student from harassment and harm by other students due to the student's sexual orientation. In Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996), the student claimed repeated abuse and harassment over several years from seventh through the eleventh grade, at which time the student withdrew from school. The principal's alleged response to the student's complaints was that "boys will be boys" and that if the student was going to be so openly gay, he should expect such behavior. Id. at 450. Due to the harassment, the student twice attempted suicide. In the eleventh grade, the student was severely beaten by other students. School officials persuaded the student not to file charges. Two weeks later he collapsed and was hospitalized due to internal bleeding caused by the beating. The Seventh Circuit noted that Wisconsin, by statute, prohibits discrimination based on sex or

sexual orientation and that the school had a similar policy as well as a policy and practice of punishing the perpetrators of battery and harassment. The Court noted that it is well-settled law that departures from established practice may be evidence of discriminatory intent. Id. at 455. The school district and individual defendants claimed qualified immunity. The Court found that the school district was not entitled to qualified immunity, citing Owen v. City of Independence, Mo., 445 U.S. 622, 650-53, 100 S.Ct. 1398, 1415-16 (1980) (denying to municipalities qualified immunity based on good faith constitutional violations). In addressing the individual defendants, the Court noted that officials who perform discretionary functions are generally shielded from liability insofar as their conduct does not violate clearly established statutory or constitutional rights. (Citation omitted.) Nabozny, at 455. However, in 1971, the Supreme Court interpreted the Equal Protection Clause to prevent arbitrary gender-based discrimination. Reed v. Reed, 404 U.S. 71, 76, 92 S.Ct. 251, 254 (1971). The Seventh Circuit determined that “[i]t is now well-settled that to survive constitutional scrutiny, gender based discrimination must be substantially related to an important governmental objective. (Citation omitted.) Nabozny, at 456. Citing J.O. v. Alton Community Unit School Dist. 11, 909 F.2d 267 (7th Cir. 1990), the Court found that local school administrators have no affirmative substantive due process duty to protect students. Nabozny, at 459.

In a December 16, 1997 decision, the Seventh Circuit again determined that a school’s failure to protect a student from harassment inflicted by other students did not constitute a violation of the Due Process Clause. In Stevens v. Umsted, 131 F.3d 697 (7th Cir. 1997), the student was repeatedly sexually assaulted by other students while he was attending the Illinois School for the Visually Impaired. The student claimed a violation of his due process rights, claiming that the superintendent took no action to protect him even after the superintendent was made aware of the assaults. The Seventh Circuit again cited J.O. v. Alton, *supra*, and DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989) to determine that the Fourteenth Amendment does not require the government to prevent private citizens from harming each other. The two areas of exception to this general rule include: (1) when a state takes a person into custody, confining him against his will; and (2) when a state creates the danger or renders a person more vulnerable to an existing danger. Id. at 198-201. In Stevens, the student was not in state custody but had been voluntarily placed in the school with the consent of his parents, who could remove him at any time. Because the student was not confined against his will, the superintendent’s alleged failure to protect him was not a violation of the Due Process Clause.

CAUSAL RELATIONSHIP OR MANIFESTATION DETERMINATIONS

Although the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, 34 CFR Part 300, historically did not specifically address “causal relationship” or “manifestation determination,” during the 1980s, the concept became an integral part of due process proceedings involving students with disabilities. In essence, the student’s case conference committee (the team responsible for developing and implementing the student’s individualized education program or IEP) is to meet prior to the imposition of a disciplinary sanction to assess the student’s behavior in light of the student’s disability or the student’s placement. If there is “causality” or the behavior is a manifestation of the student’s disability or placement, the sanction would not be imposed. Although this type of analysis is somewhat related to the “mitigating circumstances” analysis in criminal law, causal relationship or manifestation determinations have been less than effective for the following reasons:

1. Analysis of the behavior as related to disability or placement usually occurs prior to the legal establishment that any school rule or law has been broken. This can, and does, have a prejudicial effect upon the school-based disciplinary process.
2. Causal relationship or manifestation determinations are not conducted with any degree of uniformity. Some case conference committees approach this analysis as a part of “due process” while others view it as an evaluative process. The former tends to be more procedurally oriented while the latter tends to be more analytical in explaining the behavior (although the complained-of behavior is still theoretical in nature at this juncture).
3. There has been no federal guidance in this respect. Most states implemented this process as a result of state-specific case law or determinations by the Office for Civil Rights (OCR) of the U.S. Department of Education.¹²
4. Causal relationship or manifestation determinations tend to be “either-or” without consideration for gradations of culpability.

The 1997 amendments to IDEA, P.L. 105-17, provide specific federal legislative guidance for the first time. At 20 U.S.C. §1415(k)(4), Congress established a procedure that requires a

¹²In Doe v. Koger, 480 F.Supp. 225, 228-29, (N.D. Ind. 1979), the federal district court determined that an Indiana public school district did not comply with federal special education law and procedure, now found in IDEA, when it expelled a student with disabilities without first determining whether the disruptive behavior was caused by the student’s disability or placement. If the student’s “propensity to disrupt” is related to the student’s disability or placement, the student cannot be expelled. The school must “transfer the disruptive student to an appropriate, more restrictive, environment.” Id., at 228.

“manifestation determination review” where actual or constructive expulsion¹³ is contemplated for a student with disabilities. Within specified timelines, a review is to be conducted by a case conference committee “and other qualified personnel.” The following is the actual language with respect to the conduct of the review.

(C) Conduct of review

In carrying out a review described in subparagraph (A), the IEP Team may determine that the behavior of the child was not a manifestation of such child’s disability only if the IEP Team—

(i) first considers, in terms of the behavior subject to disciplinary action, all relevant information, including—

(I) evaluation and diagnostic results, including such results or other relevant information supplied by the parents of the child;

(II) observations of the child; and

(III) the child’s IEP and placement; and

(ii) then determines that—

(I) in relationship to the behavior subject to disciplinary action, the child’s IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child’s IEP and placement;

(II) the child’s disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(III) the child’s disability did not impair the ability of the child to control the behavior subject to disciplinary action.

If the determination is that the behavior is not a manifestation of the student’s disability, school-based disciplinary actions which apply to all students can be applied to the student with disabilities, except that educational services may not cease during periods of expulsion. 20 U.S.C. §§1412(a)(1); 1415(k)(5)(A). A parent may challenge this determination through IDEA due process. 20 U.S.C. §1415(k)(6).¹⁴

Although there have been no reported court cases addressing the new requirements for causal relationship or manifestation determinations, there has been one complaint investigation report conducted under 511 IAC 7-15-4.

¹³A constructive expulsion would be any suspension beyond ten (10) instructional days in a school year. The ten instructional day limitation appears in current State Board regulations at 511 IAC 7-15-1(b)(2) and was derived from OCR investigations and *Doe v. Koger*, *supra*, 480 F.Supp. at 228: “The prohibition of the [IDEA] includes not only formal expulsions, but informal expulsions like [the student’s] indefinite suspension pending formal expulsion.”

¹⁴The proposed federal regulations at 34 CFR §§300.523-300.525 mirror the statutory requirements. These have not been included herein because the rules are not final.

In Complaint No. 1207-97 (December 22, 1997), a 16-year-old sophomore with a learning disability brought a “stun device” to school in his bookbag and showed it to another student, who subsequently reported him to the assistant principal.¹⁵ A case conference committee was convened immediately to conduct a causal relationship or manifestation review. The complete review notes indicated:

[Student] brought a stun gun to school. [Student] understands rules and regulations. His learning disability does not interfere with his ability to understand choices and consequences. [Student] will be suspended from school for ten days, pending expulsion for the school year....

Finding of Fact No. 4. The parent was not provided with a written notice of parental rights. Although the special education teacher/department chair reviewed prior to the conference the student’s most recent educational evaluation (dated March 21, 1996), the evaluation report was not shared with any other participant. Based upon the fact the student was learning disabled and had no prior behavioral problems, the case conference committee determined there was no “causal relationship.”¹⁶ Finding of Fact No. 5.

In finding the school district violated IDEA, the complaint investigator noted that the parent was not provided information regarding the parent’s right to request a due process hearing to challenge the determination, as required by 20 U.S.C. §1415(k)(6)(A) and 511 IAC 7-15-2(l).

The complaint investigator detailed the requirements for conducting a causal relationship or manifestation determination under 20 U.S.C. §1415(k)(4)(C), as provided *supra*, which the public school had not followed. There was also a significant delay between the suspension and the provision of continuing educational services (three weeks), although the school indicated compensatory educational services would be provided. The orders issued required, in part, that school personnel receive training in the federal and state requirements for the conduct of case conference committees where causal relationship or manifestation reviews are to be conducted and what the proper membership should be. In addition, the student’s case conference committee was to reconvene to consider compensatory education services, including, if necessary, opportunities for independent study, tutoring, summer school “or other means as the case conference determines appropriate.”

¹⁵Under I.C. 20-8.1-5.1-10(e), a student may be expelled from school for up to one (1) year for possessing a “deadly weapon” on school property. A “deadly weapon” specifically includes an “electronic stun weapon.” See I.C. 35-41-1-8(2).

¹⁶Indiana defines “causal relationship” as meaning “a process whereby a determination is made by a case conference committee, following review of all relevant data including the student’s placement and pertinent educational records, whether a student’s behavior is caused by, or is a manifestation of, the student’s disability.” 511 IAC 7-3-9.

The complaint investigation report did not cite all violations which occurred and was somewhat muted in citing the school district for not complying with the recent federal legislation, which is understandable. However, Findings of Fact Nos. 4 and 5 indicate the school district did not follow current Indiana requirements for conducting causal relationship or manifestation determinations, which underscores the four criticisms of current practice listed at the beginning of this article.

Although IDEA now addresses manifestation determinations, the origin of this essentially evaluative concept is from Sec. 504 of the Rehabilitation Act of 1973, a federal law which prohibits discrimination on the basis of disability by recipients of federal financial assistance. This would include Indiana public school districts. OCR is the federal agency responsible for ensuring compliance with Sec. 504 by educational entities who receive federal financial assistance. At 34 CFR §104.35(a), Sec. 504 requires any “recipient that operates a public elementary or secondary education program” to conduct evaluations prior to an educational placement “and any subsequent significant change in placement.” It is from this requirement that manifestation determinations, by whatever name, became requirements as a means of evaluating a student prior to a “significant change in placement.” Expulsion would be a “significant change in placement.” See, for example, Seattle (WA) School Dist. No. 1, Education of the Handicapped Law Report (EHLR) 257:203 (OCR 1980), where the district was found to violate Sec. 504 with respect to 323 students with disabilities by not evaluating properly disruptive behavior in light of the students’ respective disabilities and placements; by not implementing recommended placements; and by not advising parents of their due process recourse to challenge proposed disciplinary actions by the school. Though disciplinary cases draw the most attention, OCR has applied such evaluative measures to other “significant changes in placement” where a sanction of some sort is proposed or possible.

Grade Point Averages and Extracurricular Activities

1. Winston County (AL) School District, EHLR 352:66 (OCR 1985) addressed a host of issues, including comparable facilities, disciplinary sanctions, retaliation, and exclusion from extracurricular activities, including sports. OCR found that the high school (grades 7-12) did not exclude students with disabilities from such extracurricular activities as 4-H Club, Science Club, F.F.A., Band, and sports. The school had implemented the Alabama Athletic Association’s (AAA) policy which provided that a student must pass three academic subjects for a given year to participate in interscholastic sports the following year. OCR found the policy was uniformly applied, and that only one student with a disability had been affected by the AAA policy. Although OCR did not find a violation, it did add:

While we are not finding a violation, the District should modify its policy on academic requirements for student participation in sports (and other extracurricular activities, if applicable) when it is applied to handicapped children. Teachers and administrators familiar with

the student should determine, prior to any decision to exclude a child from participation, whether the child's inability to attain the passing grades was because of the individual handicap or was for reasons totally unrelated to the student's handicapping condition. A student should not be excluded from participation in sports if it is determined that he/she could not attain the passing grades because of his or her individual handicap.

2. In Claremont (CA) Unified School District, EHLR 257:667 (OCR 1985), the school district established "Scholastic Eligibility Criteria," which required of all students in the district to attain a 2.0 average to participate in extracurricular activities. If a student does not attain a 2.0 average, the student may appeal for an exemption based upon extenuating circumstances. However, the policy was not widely disseminated and tended to exclude students with disabilities from participation. The district revised its policy. OCR, in accepting the revised policy, noted:

The new extracurricular participation policy implemented by the District provides for an automatic review by the District of all special education students who have been found ineligible for participation because their grade point average falls below 2.0. In this review, the District is to determine if the student's grade point average is 2.0 or below for reasons related to the individual's handicapping condition. If so, the student is not excluded from participation from extracurricular activities.

Athletic Participation

1. Alpena (AR) Public School District, EHLR 257:565 (OCR 1984) involved an eighth grade student with epilepsy who tried out for the basketball team. The student met all requirements to be on the team. Under the coach's "point rating" system for assessing basketball skills, the student performed better than four students who made the team. However, he was not selected. The coach admitted he cut the student from the team because of the student's epilepsy. Occasionally, the student did experience mild seizures of a few seconds duration during which his right arm would go limp and he would stagger. The coach offered the student a manager's position instead. School officials acknowledged they were aware of the student's epilepsy and that he had played basketball in the past without incident. Medical statements cleared him to play basketball. OCR found the district discriminated against the student by not providing him an equal opportunity to participate in sports. Although the student had participated without incident on the 6th grade and 7th grade basketball teams, "no effort was made to determine the extent of [the student's] ability to participate in the District's basketball program based upon his individual needs and capabilities."

2. In contrast with Alpena, OCR found no violations of Sec. 504 in Beaufort County (SC) School District, 26 Individuals with Disabilities Education Law Report (IDELR) 1154 (OCR 1997), when the school district refused to permit an 11th grade student with a learning disability, asthma, and hay fever from playing baseball. The student had excessive absences from school. Although the student asserted the absences were medically related to asthmatic bronchitis, the school district determined his excessive absences were unrelated to the student's disability. The student also failed to apply himself academically and "skipped classes," which were also determined to be unrelated to his disability. As a result, the student failed to meet the minimum state eligibility requirements to play baseball. The student's poor academic performance, attendance, and behavior occurred the previous year as well. The school instituted a number of interventions in an attempt to assist him. Because the school considered the student's disability and placement in relation to his absences and misbehavior, the school did not discriminate against the student when it determined him ineligible for participation on the baseball team.

Chronic Illness

Sec. 504 does not contain disability categories. Whether or not one is considered to have a disability is a matter of perception on one hand and a matter of degree on the other. Perception relates to whether others view one as disabled; degree refers to whether a condition substantially limits a major life activity, such as living, eating, breathing, learning, and so on. See 34 CFR §104.3(j). Under Sec. 504, one could come under the purview of its protections even if the disabling condition is a temporary one.

In Yuma (AZ) Union High School District, 17 EHLR 7 (OCR 1990), OCR investigated two complaints that the district discriminated against two students by denying them credit for classes they missed through absences due to chronic illnesses. The district did have a policy for accommodating students with temporary disabilities who miss more than five (5) days of school. If a student were absent due to acute and chronic illness, certification by a physician is required. One student provided the medical certification for her chronic illness as a temporary disability and received homebound instruction and course credit for the course work she missed through her absences. The other student, however, did not provide the medical certification. In fact, the physician stated there was no medical reason for him to be absent from school. OCR found the first student "qualified for an exception to the five-day attendance rule, received homebound instruction from the District, and was awarded credit for course work she missed through absence." OCR, however, found the second student, even though he had had nose surgery, was not considered disabled under Sec. 504 and, as a consequence, not entitled to its protections.

VOLUNTEERS IN PUBLIC SCHOOLS

(Article by Valerie Hall, Legal Counsel)

Public school districts across the country are finding it increasingly necessary to employ the services of volunteers in support of curricular and extracurricular endeavors. These volunteers range from assisting on the playground and on field trips; providing instructional support in classrooms and libraries, including tutoring; serving as quasi-attendance officers who escort children to schools in dangerous neighborhoods; working as attendants in “latch key” and other similar child care programs; and serving as coaches and assistant coaches.¹⁷ The status of the “volunteers” as “employees” for liability analysis is often unclear. Although there is a dearth of case law directly on point, there are sufficient published opinions which provide insight and guidance. This article reviews Indiana statutory law and reported cases regarding the liability of public schools for the acts or omissions of the volunteers they utilize in curricular and extracurricular activities. These cases emphasize the need for thorough background checks on all prospective volunteers a school wishes to engage.

Indiana Statutory Law

The Indiana Tort Claims Act, I.C. 34-4-16.5 *et seq.*, provides protection from liability to “employees” of “governmental entities.” These terms are defined by the Indiana Tort Claims Act (ITCA) at I.C. 34-4-16.5-2. “Employee” and “public employee” are defined as “a person presently or formerly acting on behalf of a governmental entity whether temporarily or permanently or with or without compensation. . .” “Without compensation” may include a volunteer who performs duties without compensation. I.C. 34-4-16.5 also specifically states that the term “employee” and “public employee” does not include an independent contractor.¹⁸ “Governmental entity” is defined as “the state or a political subdivision of the state.” “Political subdivision” includes a school corporation. A vocational school established pursuant to a statute allowing two or more school corporations to cooperate for vocational education has been held to

¹⁷ The Indiana High School Athletic Association (IHSAA), the sanctioning body for secondary interscholastic athletic competition, recognizes that there are no longer sufficient numbers of licensed teachers to serve as coaches. The IHSAA will consider and approve non-teachers who wish to coach. However, “[a]pproval cannot be given for head football or boys’ head basketball coach.” IHSAA By-Laws, “Rule 7 - Coaches,” Note 2. Indiana law provides school districts some flexibility, especially where there is a dearth of available licensed teachers who wish to be coaches. See I.C. 20-5-2-2(7), which authorizes school corporations “To employ, contract for, and discharge...athletic coaches (whether or not they are otherwise employed by the school corporation and whether or not they are licensed...[teachers])...”

¹⁸ “Employee” and “public employee” include attorneys employed as employees or as independent contractors.

be a political subdivision of the state, and a “governmental entity” for the purposes of the Tort Claims Act. Yerkes v. Heartland Career Center, 661 N.E.2d 558 (Ind. Ct. App. 1995).

The ITCA protects governmental entities from liability under certain circumstances. These circumstances are listed in the ITCA at I.C. 34-4-16.5-3(1) through (19). For example, “[a] governmental entity or an employee acting within the scope of the employee’s employment is not liable if a loss results from: . . .(6) the performance of a discretionary function; . . .” Whether an act is discretionary, and thus entitled to immunity, depends on the meaning of “discretionary function.” Case law has addressed the meaning of “discretionary function,” and will be discussed in this memorandum.

According to the ITCA at I.C. 34-4-16.5-3(13), a governmental entity or an employee acting within the scope of the employee’s employment is not liable if a loss results from “misrepresentation *if unintentional*.” Another example of immunity from liability is set forth at I.C. 34-4-16.5-3(19), where a governmental entity or an employee acting within the scope of the employee’s employment is not liable if a loss results from “injury to a student or a student’s property by an employee of a school corporation *if the employee is acting reasonably under a discipline policy adopted under I.C. 20-8.1-5.1-7(b)*.” (Emphasis added.)

I.C. 20-8.1-5.1-7(b) reads as follows:

The superintendent of a school corporation and the principals of each school in a school corporation may adopt regulations establishing lines of responsibility and related guidelines in compliance with the discipline policies of the governing body.

According to the ITCA at I.C. 34-4-16.5-5, “a judgment rendered with respect to or a settlement made by a governmental entity bars an action by the claimant against an employee whose conduct gave rise to the claim.” Furthermore, a lawsuit alleging that an employee acted *within* the scope of the employee’s employment “must be exclusive to the complaint and bars an action by the claimant against the employee personally.” However, if the governmental entity asserts “the employee acted outside the scope of the employee’s employment,” the plaintiff may amend the complaint and sue the employee personally. I.C. 34-4-16.5-5(b) reads as follows:

A lawsuit filed against an employee personally must allege that an act or omission of the employee that causes a loss is:

- (1) Criminal;
- (2) Clearly outside the scope of the employee’s employment;
 - (3) Malicious;
 - (4) Willful and wanton; or
 - (5) Calculated to benefit the employee personally.

The complaint must contain a reasonable factual basis supporting the allegations.

The ITCA requires a governmental entity, such as a school corporation, to provide and pay for legal counsel in defense of a claim for losses occurring because of acts or omissions within the scope of employment. I.C. 34-4-16.5-5(d) reads as follows:

The governmental entity shall provide counsel for and pay all costs and fees incurred by or on behalf of an employee in defense of a claim or suit for a loss occurring because of acts or omissions within the scope of his employment, **regardless** of whether the employee can or cannot be held personally liable for the loss. (Emphasis added.)

Also see I.C. 20-5-2-2 which reads, in part, as follows:

In carrying out the school purposes of each school corporation, its governing body acting on its behalf shall have the following specific powers:

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(16) To defend any member of the governing body or any employee of the school corporation in any suit arising out of the performance of his duties for or employment with, the school corporation, provided the governing body by resolution determined that such action was taken in good faith. To save any such member or employee harmless from any liability, cost, or damage in connection therewith, including but not limited to the payment of any legal fees, except where such liability, cost, or damage is predicated on or arises out of the bad faith of such member or employee, or is a claim or judgment based on his malfeasance in office or employment.

Indiana has a statute which gives specific immunity for volunteers involved in sports or leisure activities. I.C. 34-4-11.8 *et seq.* A volunteer is defined as “an individual who, without compensation, engages in or provides other personal services for a sports or leisure activity such as baseball, basketball, football, soccer, hockey, volleyball, cheerleading, or other similar sports or leisure activities involving children who are less than sixteen (16) years of age.” I.C. 34-4-11.8-3. Specific immunity for volunteers is codified at I.C. 34-4-11.8-6, which reads as follows:

A volunteer is not liable for civil damages that are proximately caused by a negligent act or omission in the personal services provided by:

- (1) the volunteer; or
- (2) another person selected, trained, supervised, or otherwise under the control of the volunteer;

in the course of a sports or leisure activity.

This statute does not grant immunity from liability to those who engage in intentional, willful, wanton, or reckless behavior.

Indiana provides immunity from civil damages for volunteers at Special Olympics events where the negligent act or omission arises out of the volunteer's performance in this function. I.C. 34-4-11.6-4. This does not apply to the operation of a motor vehicle nor does it affect the "vicarious civil liability of the entity that the individual serves." I.C. 34-4-11.6-3.

Indiana also has a statute, I.C. 20-5-2-7, which requires a school corporation to adopt a policy concerning criminal history information for noncertificated employees and entities with which a school corporation contracts for services "if the individuals are likely to have direct, ongoing contact with children within the scope of the individuals' employment." Such policies may require limited criminal history information concerning each applicant from a local or state law enforcement agency and submission of the individual's fingerprints to the Indiana central repository for criminal history information. A school corporation may use information obtained under I.C. 20-5-2-7 concerning an individual's conviction for certain offenses as grounds to not employ or contract with the individual.¹⁹

School corporations are also adopting "behavioral expectation policies" for volunteers. Bremen Public Schools require volunteers who work with students to sign an agreement concerning behavioral expectations. The agreement has seven sections, including the responsibility to represent the Bremen Public Schools with dignity and pride by being a positive role model for youth. Another section states that failure to comply with equal opportunity and anti-discrimination laws or committing criminal acts may be grounds for termination as a volunteer. Warsaw Community Schools also require faculty, staff, and volunteers who work with students to sign an agreement regarding behavioral expectations.

Indiana Case Law

In Drake v. Mitchell Community Schools, 628 N.E.2d 1231 (Ind. Ct. App. 1994), *rev'd on other grounds*, 649 N.E.2d 1027 (Ind. 1995), a student volunteer contracted histoplasmosis from pigeon droppings after cleaning a grain elevator and participating in a Halloween activity co-sponsored by the school and co-defendant Kiwanis International. The student council and the Kiwanis agreed to split the profits from this fund raising event. The student's participation in the student council was an extracurricular activity. A teacher and advisor to the student council knew that the elevator was potentially unsafe and could pose a health danger. The teacher advised the

¹⁹ See I.C. 20-5-2-8(b) for the offenses. These offenses include, among others, murder; causing suicide; assisting suicide; voluntary manslaughter; reckless homicide; battery; aggravated battery; kidnapping; criminal confinement; sex offense; carjacking; arson; incest; neglect of a dependent; child selling; contributing to the delinquency of a minor; offenses involving a weapon; controlled substances; distribution of obscene material or a performance that is harmful to minors unless ten (10) years have elapsed from the date the individual was discharged from probation, imprisonment, or parole; and operating a motor vehicle while intoxicated unless five (5) years have elapsed from the date the individual was discharged from probation, imprisonment, or parole, whichever is later.

Kiwanis to clean the elevator before anyone entered it. The student volunteered to make decorations for the haunted house and entered the elevator before the Kiwanis had cleaned the building. A Kiwanis volunteer arrived to clean the building while the students were making the decorations, but the elevator was still very dusty when the actual event was held.

The school was immune from liability under the ITCA for damages arising from any duty it may have to inspect the grain elevator. I.C. 34-4-16.5-3 reads in part as follows:

A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from:

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(11) failure to make an inspection, or making an inadequate or negligent inspection, of any property, other than the property of a governmental entity, to determine whether the property . . . contains a hazard to health and safety.

Although a school is immune from liability under the ITCA for damages arising from its duty to make an inspection, the Indiana Court of Appeals found that the school had knowledge of a specific danger, and had a duty to exercise reasonable care to protect its students from this danger. This duty to exercise reasonable care was independent of any duty the school had to inspect the grain elevator. The court, therefore, reversed the summary judgment in favor of the school and remanded the case for trial because "a reasonable jury could find the school breached its duty to exercise reasonable care to warn the students and/or protect them from a known danger, exposure to histoplasmosis."

The ITCA provides that "[a] governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from the performance of a discretionary function," I.C. 34-4-16.5-3(6). The Indiana Court of Appeals addressed the meaning of "discretionary function" in the case of Borne v. Northwest Allen County School Corp., 532 N.E.2d 1196, 1200-1201 (Ind. Ct. App. 1989). Although the Borne case does not involve a volunteer, it has some relevancy if a volunteer is defined as an employee acting on behalf of a governmental entity without compensation. The Borne case concerns a teacher's professional judgment. In Borne, a teacher gave permission for an eleven-year-old special education student to go unsupervised to the bathroom with her three male classmates at a nature center unsupervised. The court found that the teacher's decision was a professional judgment, not a "policy decision." The school could, therefore, be found liable for failing to protect the student from sexual abuse at the hands of her three male classmates. The Indiana Court of Appeals relied on the Indiana Supreme Court case of Peavler v. Board of Commissioners, 528 N.E.2d 40 (Ind. 1988), which held that professional judgments will no longer be immune from legal challenge under I.C. 34-4-16.5-3(6). In Peavler, the Indiana Supreme Court pointed out that the discretionary function exception insulates only those *significant policy* and *political decisions* which cannot be assessed by customary tort standards. Discretionary refers to "the exercise of political power which is held accountable only to the Constitution or the political process."

Peavler, 528 N.E.2d at 45.

Cases from Other Jurisdictions

In C.P. v. Piscataway Tp. Bd. of Educ., 681 A.2d 105 (N.J. Super. A.D. 1996), an eight-year-old student was sexually molested in a swimming pool by a volunteer instructor during a school board-sponsored swimming program. A doctor's diagnosis revealed that the student had an acute post-traumatic stress disorder. The instructor pled guilty to the sexual assault. The student brought an action against the board of education under the New Jersey Tort Claims Act and under 42 U.S.C. §1983.

Under the New Jersey Tort Claims Act, "no damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury" except in cases of "permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of \$1,000.00. . . ." In Piscataway, the student failed to establish that she sustained a permanent loss of bodily function; consequently, the court found she could not establish a claim against the board under the Tort Claims Act.

The student also brought an action under 42 U.S.C. §1983, alleging that her constitutional right to personal bodily integrity was violated. An individual may file suit against any person who, "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia," has deprived that individual of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. §1983.

The court adopted the "deliberate indifference" standard to evaluate the action of the school board and the swimming program coordinator to screen volunteers. At a minimum, "deliberate indifference" encompasses "knowledge of a risk, recognition of the harm posed by the risk, and a conscious decision to take no action or manifestly inadequate action to avoid the risk." The swimming program was under the direction of a physical education teacher employed by the school board. When a volunteer from the general public expressed an interest in participating in the swimming program, the physical education teacher would try to speak to someone who knew the candidate. If the volunteer was a high school student or a parent of a student, she would contact someone at the high school who was familiar with the student or the parent before inviting the volunteer to participate in the program. Prior to November 1990, no background checks of a volunteer's history of criminal behavior, psychiatric problems or substance abuse were made, but after the sexual assault, the school board developed an official policy regarding the screening of volunteers. The court found that the facts did not establish "deliberate indifference."²⁰

In Swearingen v. Fall River Joint Unified School Dist., 212 Cal. Rptr. 400 (Cal. Ct. App. 1985), a student who volunteered to be a scorekeeper for a basketball tournament was injured when an automobile driven by another student volunteer overturned while the student was being

²⁰ In QR Oct.-Dec. 1996 and Jan.-Mar. 1997, "Negligent Hiring" was discussed, including Indiana's application of "deliberate indifference."

transported to overnight lodgings provided by the driver's host family. The host families were selected by Fall River faculty, the host school. The injured student and her parents filed a personal injury action naming the host school district, visiting school district (Princeton School District) and others as defendants. The appeal presented two issues of liability of school districts for injuries to students that occur off school grounds: 1) the reach of immunity for "field trips or excursions" provided in California Education Code section 35330; and 2) *respondeat superior*²¹ liability for the negligence of volunteers who provide services to a school district. The Court of Appeals held that the trial court erred in: 1) ruling, as a matter of law, that the student driver was not an employee for the purposes of *respondeat superior* liability; 2) granting summary judgment for the host school district on the ground that it was immune from potential liability for negligent selection of the volunteer hosts; and 3) granting the visiting school district's summary judgment against the negligent selection theory as "liability might be predicated on its failure to inquire concerning Fall River's criteria for selection, i.e., Princeton's employees' negligence in blindly entrusting this task to Fall River."

California's Government Code section 895.2 imposes joint and several liability on school districts for injuries arising out of a lawful multiple entity venture. Swearinger at 409. The significance of joint and several liability "is that the injured claimant may pursue his remedy against any one of the entities without tracing employment relations under *respondeat superior*." The California Court of Appeals concluded that if the host employees of the host school district is negligent in selecting the host family, the visiting school district is derivatively liable.

In a related case, Travelers Indem. Co. v. Swearinger, 214 Cal. Rptr. 383 (Cal. Ct. App. 1985), a liability insurer sought a declaration that its policy did not apply to the automobile accident in which the student was driving her parents' automobile to transport the visiting student in connection with the school basketball tournament. The California Court of Appeals held that a school district "borrows" an automobile when the student is using it to transport a guest student; therefore, the student could be an "insured" under the school district's liability policy.

In Glankler v. Rapides Parish School Bd., 610 So.2d 1020 (La. Ct. App. 1992), a kindergarten student on a school field trip was injured when she was struck by a heavy metal swing. One of the issues was whether or not the school board provided adequate supervision of seventy-eight (78) kindergarten students in a one and a half (1½) acre park which contained one hundred (100) pieces of playground equipment, including forty-seven (47) adult swings. There were three (3) teachers and approximately eleven (11) parent volunteers in the park when the student was

²¹ This means that a "master" is liable in certain cases for the wrongful acts of his "servant," and a principal for those of his agent. Black's Law Dictionary 1179 (5th ed. 1979).

injured. The trial court did not include the parent volunteers as supervisors, finding that the parents were not sufficiently instructed to qualify as supervisors.

The Court of Appeals found that the record showed that the parents were supervising the children and should have been included in determining whether the students were properly supervised. Though the record showed that not all of the parents were given safety instructions, the Court of Appeals stated that “the parenting skills each adult brought, together with the guidance of the teachers as they walked around Parents’ Park, augmented the degree of supervision offered and was reasonable. Therefore, the parents should have been included as supervisors.”

In Carol WW v. Stala, 627 N.Y.S.2d 136, 137 (N.Y. App. Div. 1995), a mother of two sons sued the president of a student association and the president of the student volunteer service at the State University of New York for damages resulting from the alleged sexual abuse of her children by a student participant in the “Big Buddy” program. The New York Supreme Court, Appellate Division held that even if the defendant presidents owed a duty of care to the children who were matched with a student through the buddy program, that duty did not extend to children who might happen to come in contact with the student through one of his “matches.” A duty of care extended only to those individuals who are within “the orbit of the danger as disclosed to the eye of reasonable vigilance.”

Yates v. Children’s Workshop, 555 So.2d 503 (La. Ct. App. 1989), involved a four-year-old child who was injured when she fell from a slide in the backyard of a day-care center while supervised by a seventeen-year-old paid assistant who had no formal training in child care or supervision and was not licensed in child care. Plaintiff’s claim against the day-care center was based on a failure to supervise. In school-related accident cases, the rule is that supervising teachers must follow “a reasonable standard of care commensurate with the age of the children under the attendant circumstances, and liability is imposed only where there is a causal connection between the lack of supervision and the accident that could have been avoided by the required degree of supervision.” Yates at 505. The court found that the trial court’s finding that the day-care center was liable for the child’s injuries due to lack of supervision was supported by the evidence, but reduced the award for future medical expenses. Although the Yates case does not involve a volunteer, it has some relevancy because a volunteer may have some of the characteristics of the assistant who lacked formal training in child care or supervision.

In Doe by and through Knackert v. Estes, 926 F. Supp. 979 (D. Nev. 1996), a student was allegedly sexually abused by a teacher while the student was in his first year of elementary school. The student’s action under 42 U.S.C. §1983 alleged that the school district was liable for the violation of his federal constitutional right to be free from “grievous physical, emotional and psychological injury.” Schools may be liable under §1983 if their *failure* adequately to guard against such injuries through training and supervision rises to the level of “deliberate indifference.” Estes at 987. The defendant school district filed a motion for summary judgment²² which was

²² The purpose of a summary judgment is to avoid unnecessary trials when there is no dispute as to the facts. Estes at 983.

denied. The United States District Court found that the student presented sufficient evidence to justify the imposition of supervisory liability under §1983. The school district had until the arrest of the teacher no policy regarding the reporting of suspected incidents of sexual abuse of students, had never instructed its employees in the techniques of recognizing the warning signs of suspected sexual abuse of students, and had never provided its staff with guidelines for dealing with such suspicions.

The student also brought a state law battery claim against the school district. Under the Nevada state statute, state agencies and political subdivisions of the state are granted immunity from liability for torts committed by employees acting **outside** the scope of the employee's duties. The school's claim of statutory immunity failed, and its motion for summary judgment was denied. The District Court discounted the school's argument that the teacher was not acting within the scope of his employment when he abused his authority as a school teacher to molest the student on school property.

In Randi v. High Ridge YMCA, 524 N.E.2d 966 (Ill. App. 1988), a three-year-old child was allegedly beaten and sexually assaulted by a teacher's aide at a day care center operated by the YMCA. Under the doctrine of *respondeat superior*, an employer may be liable for the negligent, wilful, malicious or even criminal acts of its employees when such acts are committed in the course of employment and in furtherance of the business of the employer; however, the employer is not liable where the acts are committed solely for the benefit of the employee. Randi at 968. The court found that the assault and sexual molestation of the child by the teacher's aide was a deviation from the scope of employment with no relation to the business of the day care center. The Illinois Appellate Court agreed with the trial court's ruling, that as a matter of law, the teacher's aide was not acting within the scope of her employment but "solely for her own benefit when she assaulted and sexually molested plaintiffs' daughter."

No Comparative Fault

Indiana's comparative fault legislation was not intended to be applied to any tort claims against a governmental entity. Governmental Interinsurance Exchange v. Khayyata, 526 N.E.2d 745 (Ind. Ct. App. 1988). Indiana is a "comparative fault" state. I.C. 34-4-33 et seq. Under I.C. 34-4-33-3, any contributory negligence chargeable to a claimant reduces the amount awarded as compensatory damages for an injury. Under this statute, if the claimant's fault is greater than the other party, the claimant is barred from recovery altogether.

Under I.C. 34-4-33-8, comparative fault "does not apply in any manner to tort claims against governmental entities or public employees under the I.C. 34-4-16.5." I.C. 34-4-16.5 et seq. is the ITCA. As mentioned above in the discussion of the ITCA, a volunteer in an Indiana public school could be included as a "public employee" under the ITCA as an employee who performs duties without compensation. Comparative fault would, therefore, not apply to cases involving volunteers in Indiana public schools.

COURT JESTERS: HUMBLE Π

[**Ed. Note:** Although this section is reserved for unusual court decisions, the books on 1997 cannot be closed without recognizing the 100th anniversary of one of the more curious bills ever to be entertained by Indiana’s General Assembly.]

As every schoolboy and schoolgirl knows (except those who haven’t passed the Graduation Qualifying Examination), “pi” (or π) represents the ratio of the circumference of any circle to its diameter. This ratio is usually expressed as 3.14+ or 3.14159+, but it is, in any case, an irrational number. In 1873, English mathematician William Shanks calculated “pi” to 707 places and took 15 years to do so. In 1949, one of the first generation of electronic computers calculated “pi” to 2,035 places. It took the computer three days to do so, and it also found that Dr. Shanks made a mistake in the last 100 or so calculations.

All of this could have been avoided had the 1897 session of the Indiana General Assembly enacted House Bill No. 246, which would have introduced “a new mathematical truth” and was “offered as a contribution to education to be used only by the State of Indiana free of cost by paying any royalties whatever on the same, provided it is accepted and adopted by the official action of the Legislature of 1897.”

This “new mathematical truth” would have established the value of “pi” as 3.2, and given a citizen of Indiana a monopoly on this concept.

The bill was sponsored by Rep. Taylor I. Record of Posey County at the instigation of Edwin J. Goodwin, M.D., who lived in the village of Solitude, Indiana, in Posey County. Posey County is in the extreme southwest part of the state, which is often referred to as “the Pocket.” (Evansville, the principal city in the region, is referred to as the “Pocket City.”) The bill was introduced on January 18, 1897, and assigned to the House Committee on Canals, which apparently was also known as the Committee on Swamp Lands. The bill was then referred to the Committee on Education. Dr. Goodwin also had the support of the then State Superintendent of Public Instruction, whose name will not be revealed in the body of this article.²³

The bill’s sponsor did not profess to understand the contents of his proposed legislation. Indeed, the language does not come right out and state that “pi” is 3.2; but if one is willing to wade through Dr. Goodwin’s formula for “squaring a circle,” the result is that “pi” is 3.2. Oddly enough, this bill passed the Indiana House unanimously. While the bill was passing from the House to the Senate for its consideration, actual mathematicians waded into the fracas. Prof. C.A. Waldo from the Indiana Academy of Science was shown a copy of the bill, but he declined to meet Dr. Goodwin as he was already “acquainted with as many crazy people as he cared to know.” Prof. Waldo and others explained to the Senate the many flaws in Dr. Goodwin’s bill.

When the bill did reach the Senate, it was assigned to the Committee on Temperance, which may

²³David M. Geeting served as State Superintendent from 1895-1899. His picture can be seen in Room 229 of the State House.

be an indication of what the Senators thought the state of mind of the Representatives must have been when passing this bill.²⁴ According to newspaper accounts, Senators treated the bill as an occasion for frivolity, making numerous jokes and puns at the bill's expense. Consideration of the bill was indefinitely postponed. It survives today only as a part of what has become known as "urban folklore."²⁵

Although Dr. Goodwin would live out his days unsuccessfully attempting to promote his "mathematical truth," which he copyrighted, he never came as close to legitimacy as he did in the 1897 Indiana General Assembly. Prof. Waldo is quoted as saying, thus ends "the epoch-making discovery of the Wise Man from the Pocket."²⁶

²⁴There may be some historical context for the "state of mind" explanation. As one court noted:

The ancient Germans, from whom the Anglo-Saxon race sprung, used to propose their laws in their legislature while drunk and consider their passage while sober. And it is suspected by some that their descendants propose laws in Legislatures of the present day while in the same condition, though their enactment may not be considered while sober, as by their ancestors.

Texarkana & Ft. S. Railway Co. v. Frugia, 95 S.W.563, 565 (Tex. App. 1906).

²⁵See "The Case of Indiana vs. Pi," by Mark Brader, msb@sq.com., for an amusing dissection of Dr. Goodwin's formula, which would have established the value of pi at 3.2.

²⁶Dana L. Long, Legal Counsel for the Indiana Department of Education, notes that the value of pi has baffled mathematicians and engineers for many more years and by far more notable people. Dana originally intended to become a mathematics teacher, but turned to the dark side and became an attorney. Nevertheless, in a memorandum dated October 31, 1997, she advised me of an interesting passage in Hebrew Scripture:

As you are well aware, the circumference of a circle is determined by the formula:

$$C=2\pi r$$

C= circumference; r=radius

Another way to express the circumference would be to multiply the diameter by pi.

A literal reading of the Bible would indicate that pi is equal to three (3.0). King Solomon recruited Hiram from Tyre, an artisan skilled in working bronze, to construct furnishings for his temple. Hiram made the *molten sea*. [Apparently, this was a 5.5 gallon bath supported on a pedestal.] The "sea" was round, with a diameter of ten (10) cubits and a circumference of thirty (30) cubits. [See I Kings 7:23.]

Dr. Goodwin could not have his cake and eat it too. Apparently, though, he could have his π .

QUOTABLE...

Some of the [school] defendants argue that this ruling will stifle all prayer in schools, but the court feels confident that as long as there are tests in schools there will be prayers there also.

District Judge Neal B. Biggers, Jr. in Herdahl v. Pontotoc County School District, 933 F.Supp. 582, 599 (N.D. Miss. 1996), invalidating a school's organized prayer activities and Bible study class. See **QR** April-June 1997. (This saying has been around far longer than Judge Biggers has been on the bench. Although lawyers and judges are fond of using this statement, this is the only published reference.)

UPDATES

Medical Services, Related Services, and School Health Services

QR July-September 1997 contained a report on the continuing difficulty in determining whether a particular service for a student with disabilities is a "related service" designed to support the educational program or a "medical service," which a school is not required to provide. Courts are divided between an "undue burden" test and a "bright-line" analysis. An "undue burden" would render a service medical in nature if the service is medical in nature, requires skilled care beyond school health services, and is costly. A "bright-line" analysis looks simply to see whether the service has to be provided by a physician. If not, the service is a "related service" and has to be provided. The courts' differing interpretations are all related to the U.S. Supreme Court's decision in Irving Ind. Sch. Dist. v. Tatro, 468 U.S. 883, 104 S.Ct. 3371 (1984), which doesn't apply either analysis. With the courts divided—but most favoring the "undue burden" test—the Supreme Court will have to address the dispute. The Supreme Court has granted a writ of certiorari in Cedar Comm. Sch. Dist. v. Garret F., 106 F.3d 822 (8th Cir. 1997), a "bright line" case reported in **QR** July-Sep't: 97. The following cases have been reported since the last **QR**.

Related Services versus Medical Services

1. Kevin G. v. Cranston School Committee, 130 F.3d 481 (1st Cir. 1997). The circuit court upheld the federal district court in Rhode Island, which found appropriate a public school district's proposed placement for a student who had a tracheal tube but whose medical condition occasionally required emergency assistance from a "qualified nurse." The proposed placement was not at the student's "home school" but at another school where a full-time nurse was assigned. Because the proposed placement could meet the student's

academic and medical needs, coupled with the fact IDEA does not mandate the assignment of a full-time nurse to the neighborhood school, the placement was calculated to provide the student a “free appropriate public education” (FAPE).

2. Morton Community Unit Sch. Dist. No. 709 v. J.M., 27 IDELR 11, 1997 WL 731814 (C.D. Ill. 1997). This case involved a 14-year-old student with Noonan’s Syndrome, chronic fibrotic lung disease, and cystic hygroma. He has a tracheostomy and a gastrostomy, and requires a nurse or trained individual to monitor his life support equipment, suction his airways, and apply his hourly eye medication during the school day. Although the school district the student initially attended hired a nurse to monitor the student during the school day and during transportation, when the student moved to his present school, the new school declined to do so, asserting the services were medical in nature. Through IDEA due process procedures, both a hearing and review officer found the services to be related in nature and not medical such that the school had to provide the services. The court agreed. After analyzing the issue under both “bright line” and “undue burden” analyses, the court applied a modified “bright line” test, noting that “medical services” under IDEA are provided by a physician, 34 CFR §300.16(b)(4), while §300.16(b)(11) defines “school health services” as those services provided by a “qualified school nurse or other qualified person.” “School health services” are included within the definition of “related services” at §300.16(a). Since a skilled pediatric nurse is an “other qualified person” and not a “physician,” the services required by the student are “related services” and not “medical services.” This decision follows the decision in Skelly v. Brookfield LaGrange Park Sch. Dist. 95, 968 F.Supp. 385 (N.D. Ill. 1997) reported in **QR** July-Sep’t: 97. There is no 7th Circuit opinion addressing this issue.

Student Medications

In Lubbock (Tex.) Independent School District, 27 IDELR 509 (OCR 1997), the Office for Civil Rights found that the school district’s procedures and policies for administering medications did not discriminate against a student with multiple disabilities. School policy required signed parental consent; the provision of medication in the original, labeled container; and, for any changes in dosages, a written order from a physician to the school nurse. The school’s individual medication log indicated medication was dispensed to the student when he was in school and that a current, signed consent form was on file. The school nurse and the classroom teacher sent home a letter to the parent requesting clarification regarding a dosage increase. Thereafter, the school nurse contacted the student’s physician and pharmacy, and obtained a faxed order from the physician regarding dosage and administration of medication for the student. There was no interruption of service.

Liability

The 8th Circuit Court of Appeals in Davis v. Francis Howell Sch. Dist., 104 F.3d 204 (8th Cir. 1997) upheld a Missouri school district’s policy of not administering dosages of medication beyond the recommendations in the *Physician’s Desk Reference* (PDR). The court has once again upheld a Missouri school district’s policy of not administering dosages not recommended in

the PDR. In DeBord v. Bd. of Education of the Ferguson-Florissant Sch. Dist., 126 F.3d 1102 (8th Cir. 1997), the school district's nurse refused to administer an afternoon dosage of Ritalin to an eight-year-old student identified as having Attention Deficit Hyperactivity Disorder (ADHD) because the student's daily intake of Ritalin exceeded by 60 mg the recommended dosage in the PDR. The school declined to accept a waiver of liability from the parents. The court found the school's policy regarding dosages to be neutral and nondiscriminatory. The court also found that the waiver of liability would "impose an undue administrative burden on the school district to verify the safety of an excess dosage in each individual case... At this time, no one knows what the long-term effects of high doses of Ritalin might be. A waiver of liability might not be effective, and statutory immunity might not apply." The school did offer to alter the student's class schedule so the parents could administer the medication.

Evolution v. "Creationism"

QR Oct.-Dec.: 1996 discussed the continuing friction between the teaching of the theory of evolution and the proponents of "creationism," a religious belief in the literal Biblical account of creation. The U.S. Supreme Court has had occasion to visit this controversy. One such case was Edwards v. Aguillard, 482 U.S. 578, 107 S.Ct. 2573 (1987), which found unconstitutional Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act." This legislative enactment forbade the teaching of the theory of evolution in public schools unless accompanied by instruction in "creation science" (also known as "creationism"). The court found that "creationism" is a religious belief, and that the legislature's attempt "to discredit evolution by counterbalancing its teaching at every turn with the teaching of creationism" does not serve a secular purpose but is designed to advance a religious belief.

This violated the Establishment Clause of the First Amendment. However, the Court added at 482 U.S. at 595, 107 S.Ct. at 2583:

[T]eaching a variety of scientific theories about the origins of humankind to school children might be validly done with the clear secular intent of enhancing the effectiveness of science instruction.

1. Although Louisiana's statute was found unconstitutional, the issue has not been considered resolved at the local school district level. In Freiler v. Tangipahoa Parish Board of Education, 975 F.Supp. 819 (E.D. La. 1997), the federal district court found unconstitutional the school board's resolution requiring teachers to read a disclaimer prior to teaching the theory of evolution to students. The disclaimer, although ostensibly promoting "critical thinking," was actually promoting "creationism." The resolution read, in pertinent part:

It is hereby recognized by the Tangipahoa Board of Education, that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not

intended to influence or dissuade the Biblical version of Creation or any other concept.

The resolution concluded with an exhortation of students “to exercise critical thinking” in forming an opinion regarding “the origin of life and matter.” The school board had been experiencing some internal discord over attempts to address constitutional accommodation of religion at graduation ceremonies and in the distribution of religiously oriented materials. The resolution itself passed only by a 5-4 count. All testimony and discussion at the school board meeting indicated the intent of the resolution was to promote the teaching of creationism but not any other explanation of the origin of life. The school board member who sponsored the resolution stated the theory of evolution is antithetical to his religious beliefs, which include a belief in the literal creation account in the Bible. The theory of evolution, he believes, undermines his religious belief by representing creation as an “accident.” The court, relying upon Edwards and the avowed religious purpose for the resolution, found no secular purpose for the disclaimer. Edwards holdings cannot be avoided by the school board’s belief that “the theory of evolution is essentially a religious teaching” necessitating a “disclaimer” which “officially denies approving of such spiritual doctrine” while promoting another religious doctrine. The resolution, as the statute in Edwards, violated the Establishment Clause of the First Amendment.

2. Indiana also must contend with the friction between the theory of evolution and creationism. On May 19, 1997, Kevin Beardmore, Science Coordinator for the Indiana Department of Education (IDOE), disseminated a memorandum for general circulation to address “The Teaching of Evolution and Creationism” following inquiries and complaints regarding the draft of the Indiana Science Proficiency Guide. Mr. Beardmore acknowledged the proficiency guide does have content involving evolution, but the IDOE does not identify content which should **not** be taught. “Curriculum directors in Indiana schools may choose to supplement their local curriculum as they respond to the desires of the community, which is appropriate. However, content taught in the area of science

must be consistent with the method of scientific inquiry....” He explained this last statement as follows:

This means that the explanations for how the world works must be based upon physical evidence. If better explanations for the physical evidence arise, older explanations are left behind, which is the belief system upon which science is founded. This does not mean that belief systems based upon sacred texts or traditions are to be discounted, for they are not lesser or greater than a “scientific” viewpoint. Understanding the difference is the key, and it is something of which students should be made aware.

Mindful of the Supreme Court’s suggestions on Edwards, the memorandum concluded:

If a community would decide that it was in the best interests of their students to teach students to recognize the differences between various belief systems, they may do so. However, teaching a specific doctrine that originated in one specific sacred text without recognizing that other sacred texts and traditions exist could be construed as espousing one particular religious faith over another, which is inappropriate in a public school setting.

Date

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