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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 or contact him by e-mail at <kmcdowel@doe.state.in.us>.

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SCHOOL HEALTH SERVICES AND MEDICAL SERVICES: THE SUPREME COURT AND *GARRET F.*

The **Quarterly Reports** for July-September: 97, October-December: 97, and July-September: 98, reported on the growing dispute among the Circuit Courts of Appeal regarding the extent to which publicly funded schools would be required to provide supportive services to students with disabilities in order for the students to benefit from their public education. The courts were struggling with reconciling an earlier U.S. Supreme Court case that had not addressed the increasing presence in schools of students with more medical involvement than previously experienced. The earlier case in this area was Irving Independent School District v. Tatro, 468 U.S. 883, 104 S.Ct. 3371 (1984), discussed below, which found that the "clean intermittent catheterization" (CIC) of a student was a "related service" because it came within the ambit of "school health services," which can be "provided by a qualified school nurse or other qualified person."[1]

CIC is not a particularly involved process. Following Tatro, students with more involved medical conditions requiring ventilators, tracheostomy tubes, gastro-intestinal tubes, and the like have been able to attend school if the appropriate support services could be provided. The services required appeared to be medical in nature and, in some cases, were expensive. This resulted in the courts dividing into two camps: (1) those employing an "undue burden" cost analysis to find a service "medical in nature"; and (2) those employing a so-called "bright line" analysis, which determined a service to be "related" so long as it need not be provided by a physician or a hospital.

While "related services" are defined broadly under the Individuals with Disabilities Education Act (IDEA) at 20 U.S.C. §1401(22) and in the Indiana State Board of Education's rules at 511 IAC 7-3-44 and 511 IAC 7-13-5, this concept does not include "medical services" except when such services are necessary for diagnostic or evaluation purposes. Typically, a public school is not required to provide "medical services" under either IDEA or Sec. 504 of the Rehabilitation Act of 1973, except where such information is needed for diagnostic purposes. There is no statutory definition for "medical services," which resulted in numerous legal disputes involving the extent to which a public school district's school health services and ancillary personnel can accommodate a disabled student's needs before the student's medical involvement becomes such that the supportive services the student requires become more "medical" in nature than "related."[2]

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[1]I.C. 34-30-14 (Qualified Immunity of School Personnel Administering Medication to a Pupil) permits school nurses who are registered nurses to provide training to school personnel who would be responsible for injectable medications, such as insulin. "School health services" are defined in the Individuals with Disabilities Education Act (IDEA) as "services provided by a qualified school nurse or other qualified person." See 34 CFR §300.24(b)(12).

[2]The federal regulations in effect at that time, 34 CFR §300.16(a)(4), defined "medical services" as those "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." This same definition appears in the new regulations that became effective May 11, 1999. See 34 CFR §300.24(b)(4). See also 511 IAC 7-13-5(h).

On March 3, 1999, the U.S. Supreme Court issued its opinion in Cedar Rapids Community School District v. Garret F., 119 S.Ct. 992 (S. Ct. 1999), specifically rejecting the "undue burden" cost analysis in favor of a "bright line" application. Garret F. involved a student with quadriplegia resulting from a motorcycle accident that severed his spinal column when he was four years old. Although paralyzed from the neck down, he is academically capable. He can control his motorized wheelchair through the use of a "puff and suck straw" and can operate a computer with a device that responds to his head movements. He is ventilator-dependent, which requires a responsible individual to assist with certain physical needs while he is at school. When he first entered kindergarten and for several years thereafter, his family or a licensed practical nurse (LPN) retained using insurance proceeds attended to his needs while at school. When the family requested the school district to assume this cost, the school declined, asserting that it was not responsible for providing continuous nursing services to the student. The dispute was submitted to an Administrative Law Judge (ALJ) under IDEA due process procedures. The ALJ ruled in the student's favor, rejecting the school district's arguments that the continual aspects of the required care and attendant costs were relevant factors in determining the supportive services were medical as opposed to related services. The federal district court upheld the ALJ. See Cedar Rapids Comm. Sch. Dist. v. Garret F., 24 IDELR 648 (N.D. Ia. 1996), finding the services the student required (urinary bladder catheterization, suctioning of tracheostomy, ventilator setting checks, ambu bag administrations as a back-up to the ventilator, blood pressure monitoring, and observations to detect respiratory distress or autonomic hyperreflexia) were related services and had to be provided. The court applied the "bright line" analysis, where the question is whether the services need be provided by a licensed physician or a hospital. If not, then the services are related. The 8th Circuit upheld the district court's decision. See Cedar Rapids Comm. Sch. Dist. v. Garret F., 106 F.3d 822 (8th Cir. 1997). The U.S. Supreme Court granted certiorari, 118 S.Ct. 1793 (1998). The U.S. Department of Education sided with the student in the dispute before the Supreme Court.

In a 7-2 decision, the Supreme Court affirmed the 8th Circuit while reaffirming its own decision in Irving Ind. Sch. Dist. v. Tatro, 468 U.S. 883, 104 S.Ct. 3371 (1984), which involved an elementary school student with spina bifida who required clean intermittent catheterization (CIC) in order to attend school. The school in Tatro had refused CIC services, claiming these services were not related services under IDEA and Sec. 504, but a "medical service" that it did not have to provide except for diagnostic or evaluation purposes. The Supreme Court held that CIC is a "related service." The federal definition of "related services" includes "school health services," which are "provided by a qualified school nurse or other qualified person." "Medical services" are "provided by a licensed physician." CIC can be provided by a school nurse or a trained layperson. The Supreme Court in Garret F. noted that the U.S. Department of Education had issued opinions regarding Tatro, but did not issue regulations that altered the Supreme Court's distinction between "medical" and "related" services. Garret F., 119 S.Ct. at 998, footnote 6.[3]

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[3]See, for example, Letter to Greer, 19 IDELR 348 (OSEP 1992). The Office of Special Education Programs (OSEP) of the U.S. Department of Education reiterated the Tatro holding, applying its three-prong test in determining whether a service is related or medical: (1) Does the child have a disability requiring special education? (2) Is the service necessary to assist the child to benefit from special

The Supreme Court held that Tatro created a two-part test for analyzing whether a service is related or medical. First, are the services requested within the concept of "supportive services"? That is, does the student require the services in order to attend school? Second, are the services excluded as medical services? Garret F., at 996. There was no disagreement that the services the student required were "supportive services." At 997. However, the school district argued that the court should include within the concept of "medical services" those services that are intensive and costly. Specifically, the school district urged a four-part test: (1) Is the service continuous or intermittent? (2) Can existing school personnel provide the service? (3) What is the cost of the service? and (4) What are the potential consequences should the service not be properly performed? At 998.

In rejecting this multi-factored test, the Supreme Court noted there is no basis in statutory or regulatory schemes allowing for such exceptions that are, essentially, cost-based standards. The following are pertinent holdings.

- "In *Tatro* we concluded that the Secretary of Education had reasonably determined that the term 'medical services' referred only to services that must be performed by a physician, and not to school health services. [Citation omitted.] Accordingly, we held that a specific form of health care (clean intermittent catherization) that is often, though not always performed by a nurse, is not an excluded medical service." Garret F., at 997.

- "[M]ost of the requested services are already provided by the District to other students, and the in-school care necessitated by Garret's ventilator dependency does not demand the training, knowledge, and judgment of a licensed physician. [Citation omitted.] While more extensive, the in-school services Garret needs are no more 'medical' than was the care sought in *Tatro*." At 998.

- In explicitly adopting the "bright line" analysis, the Court stated: "Whatever its imperfections, a rule that limits the medical services exemption to physician services is unquestionably a reasonable and generally workable interpretation of the statute [IDEA]." Id.

- "[IDEA] does not employ cost in its definition of 'related services' or excluded 'medical services'...; [thus,] accepting the District's cost-based standard as the sole

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education? and (3) Can the service be provided by a nurse or other qualified professional? This would apply only where it is necessary to provide these services during school hours. Also see Letter to Johnson, 1 ECLPR ¶315 (OSEP 1993), applying the three-prong Tatro test in advising that training on reversing a child's pattern of aspirating during feeding could be a related service if it can be provided by a qualified professional other than a licensed physician.

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> test for determining the scope of the provision would require us to engage in judicial lawmaking without any guidance from Congress." At 999.

The court added that "IDEA requires schools to hire specially trained personnel to meet disabled student needs," noting further that the school district in this case already employed a one-on-one teacher associate (TA) to assist the student during the school day. At 999, notes 8, 9.

There have been no published opinions in Indiana on this matter, and only one dispute from Illinois reaching the 7th Circuit Court of Appeals prior to the Supreme Court's decision in Garret F.

Morton Community Unit Sch. Dist. No. 709 v. J.M., 986 F.Supp. 1112 (C.D. Ill. 1997) 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 earlier decision in Skelly v. Brookfield LaGrange Park Sch. Dist. 95, 968 F.Supp. 385 (N.D. Ill. 1997). However, unlike Skelly, the school district appealed to the 7th Circuit. In Morton Comm. Unit Sch. District No. 709 v. J.M., 152 F.3d 583 (7th Cir. 1998), the 7th Circuit upheld the federal district court. The court found that both the parents and the school maintained "extreme positions." The court rejected the parents' position that any service, no matter how expensive, is a related service under IDEA and must be provided so long as this does not require a physician.[4] The court noted that the advancement in medicine and technology has created "medically fragile" or "technology dependent" children who otherwise would not have survived. The "cost and character of services" can be relevant in determining whether a service is "related" or an excludable "medical" service. The 7th Circuit also rejected the school's "extreme position" that if school health services cannot provide the service, then it is an excludable medical service. This is a "non sequitur," the court wrote, which would make the student's right to attend school dependent upon a school district's administrative structure and the

[4]Although the Supreme Court adopted a "bright line" analysis in Garret F., rejecting the school district's cost-based, four-part test, the court did not rule that "other tests and criteria," possibly including "undue burden," are precluded from consideration. The court stated it would not address the issue in its Garret F. decision. See Garret F., 119 S.Ct. at 996, note 5.

number of students with disabilities. While the 7th Circuit noted that IDEA does not contain an "undue burden" defense, it is somewhat implicit in the limiting definition of "related services" and the minimal requirement that an education be "appropriate" rather than optimal.[5] The 7th Circuit decided to not take sides. While "undue burden" might be relevant in some cases, it would likewise be "arbitrary" to limit "medical services" to those services "rendered by a licensed physician." Because the school did not prove that one-to-one nursing care would be an "undue burden," the school had to provide the service. The 7th Circuit did observe at 588:

> At some point the efforts required to maintain a medically fragile, technology-dependent child in school may cross the blurry line that separates ancillary educational services from purely medical interventions.

The school district sought review by the U.S. Supreme Court. However, on March 8, 1999, the Supreme Court declined to review the 7th Circuit's decision. See Morton Comm. Unit Sch. Dist. No. 709 v. J.M., 119 S.Ct. 1140 (1999).

One of the problems in analyzing the various cases in this area has been the unreliable cost figures and degree of skill required. This was particularly true in both Garret F. and Morton, with published accounts by the parties at wide variance. One issue that is likely to arise as a result of the Garret F. case and the essentially hybrid approach by the 7th Circuit in Morton will involve the use of private and public insurance proceeds to assist in paying for such services.

Under IDEA, each State is required to have methods for ensuring that students eligible for special education and related services do, in fact, receive such services. There are a number of methods for ensuring such services, such as interagency agreements, legislation, court orders, executive orders, and agency regulations. The new IDEA federal regulations, effective May 11, 1999, also contain extensive directions for the use of private and public insurance as a means of ensuring the provision of such services. Under 34 CFR §300.142(e), a public school district could use Medicaid or other public insurance benefits for which an eligible student is entitled to provide or pay for services required by IDEA. However, a school may not require a parent to enroll in the public insurance program as a precondition to receiving services, and parents may not be required to incur out-of-pocket expenses (deductibles or co-pays). The student's public benefits cannot be used if to do so would: (1) decrease available lifetime coverage or affect other insured benefits; (2) require the parent to pay for services outside the time the student is in school as a result of the school's using the public insurance; (3) increase premiums or lead to discontinuance of insurance; or (4) risk the loss of eligibility for home and community-based waivers based on aggregate health-related

[5]The Supreme Court also warned against confusing the provision of an appropriate education with the provision of related services. "This case is about whether meaningful access to the public schools will be assured, not the level of education that a school must finance once access is attained." Garret F., at 1000.

expenditures. §300.142(e)(2). A school can use its IDEA funds to pay for deductibles and co-pays a parent would typically be responsible for. §300.142(g).[6]

The regulations also permit the public schools to employ private insurance proceeds applicable to the student but only where the parent has provided "informed consent." §300.142(f)(1).[7] Parental consent is to be obtained each time the school proposes to access the parent's private insurance proceeds, and parents have to be informed that they have the right to refuse to permit the school to gain such access. Such a refusal will not relieve the school of its responsibility to ensure that the services are provided at no cost to the parents. §300.142(f)(2). These provisions reflect a series of policy letters issued in the past by the Office of Special Education Programs (OSEP) and the Office of Special Education and Rehabilitative Services (OSERS) within the U.S. Department of Education. See, for example, Letter to Newby, 16 EHLR 549 (OSEP 1990), indicating that private insurance can be utilized so long as the insurance program is not jeopardized by the school's access and the parents do not realize a cost; Letter to Spinner, 18 IDELR 310 (OSERS 1991), advising that a school does not have a right to gain access to a parent's insurance program, but if a parent permits the use of such proceeds, explicit consent must be given and the parent cannot realize a cost for permitting the use of such proceeds; Letter to Rose, 18 IDELR 531 (OSERS 1991), advising that a school cannot make the provision of IDEA services contingent upon a parent applying for Medicaid; Letter to Spann, 20 IDELR 627 (OSEP 1993), reiterating that Medicaid can be used to pay for special education and related services so long as the parent consents and there is no realistic threat of a financial loss; and Letter to Frymoyer, 25 IDELR 830 (OSEP 1996), stating that parents cannot be required to apply for Medicaid.

There is not a little concern that disputes will arise between public schools and Medicaid providers regarding what services, if any, are covered by Medicaid. The USDOE included a number of these concerns when it published the new regulations. In the March 12, 1999, issue of the **Federal Register**, Vol. 64, No. 48, beginning on p. 12565, numerous comments indicated misgivings about schools using public and private insurance proceeds or making services contingent upon access to insurance programs, but most comments seem to be concerned that disagreements between schools and Medicaid may result in delays in providing services to eligible students.

The USDOE noted that Congress, when it reauthorized the IDEA, included a provision prohibiting a State from reducing medical and other assistance available to a student with disabilities or altering eligibility under such programs as Title V (Maternal and Child Health) (42 U.S.C. §701 *et seq.*) or

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[6]IDEA requires that each student who is entitled to a "free appropriate public education" (FAPE) receive such services "without charge." See 34 CFR §300.13(a) and 511 IAC 7-3-23(1). The intent of this section of the IDEA regulations is to ensure the services are provided "without charge" to the parents by permitting the school to use its IDEA funds to cover costs associated with the use of the public or private insurance program.

[7]"Informed consent" has been one of the ambiguities that arose from the reauthorization of IDEA by Congress in 1997. The new regulations have specific guidance as to what "consent" will mean. See 34 CFR §300.500(b)(1).

Title XIX (Medicaid) of the Social Security Act (42 U.S.C. §1396 *et seq.*), where such services the student is eligible to receive are also a part of the student's special education and related services. See 20 U.S.C. §1412(e), implemented by 34 CFR §300.601.

Notwithstanding the above, with the increased numbers of students reliant upon supportive services for medical conditions who are now able to attend school, disputes are likely to emerge between public schools providing such services and Medicaid providers who are also responsible for providing the same or similar services. The disputes may become exacerbated where the level of skill required to assist the student in the school environment are arguably beyond the expected skill level of nursing care provided through school health services. This will be the "blurry line" the 7th Circuit described, where "the efforts required to maintain a medically fragile, technology-dependent child in school" have crossed over from "ancillary educational services" to "purely medical interventions." Morton, *supra*, 153 F.3d at 588.

DRESS AND GROOMING CODES FOR TEACHERS

by Valerie Hall, Legal Counsel

A lot of attention has been given to dress and grooming restrictions of students, but little attention has been given to dress and grooming codes for teachers. Nevertheless, dress and grooming codes for teachers is an issue for teachers, teachers' unions, and school boards. School boards have imposed dress and grooming codes for teachers, while teacher unions have challenged such codes on various grounds. To the individual teacher the choice of what to wear, freedom to choose a hairstyle, or whether or not to sport a moustache is viewed as an element of personal liberty, privacy, or free expression. Courts have recognized that personal appearance involves constitutional issues,[8] but there has not been judicial consensus on whether particular dress or grooming restrictions violate the constitutional rights of teachers. The majority of courts have supported school officials' authority to impose dress and grooming restrictions on teachers. This article reviews Indiana statutory law and case law regarding dress and grooming codes for teachers.

Indiana Statutory Law

The governing bodies of school boards in Indiana have the authority to regulate dress and grooming for teachers who are employed within their school districts. Indiana Code 20-5-2-2 grants specific powers to the governing bodies of school corporations to regulate its employees and pupils. Indiana Code 20-5-2-2 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 specific powers: . . . .

[8] It is well-settled in American jurisprudence that neither students nor teachers shed their constitutional rights "at the schoolhouse gate." Hines v. Caston School Corp., 651 N.E.2d 330 (Ind. App. 1995); Tinker v. Des Moines Indep. Com. Sch. Dist., 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969).

> (17) To prepare, make, enforce, amend, or repeal rules, regulations, and procedures for the government and management of the schools, property, facilities, and activities of the school corporation, its agents, **employees**, and pupils and for the operation of its governing body, which rules, regulations, and procedures may be designated by any appropriate title such as **"policy handbook", "bylaws", or "rules and regulations"**. (Emphasis added.)

Indiana Code 20-8.1-5.1-7(a) requires the governing body of a school corporation to establish written discipline rules. Indiana Code 20-8-5.1-7(a) reads as follows:

> The governing body of a school corporation must do the following:
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> (1) Establish written discipline rules, which **may include appropriate dress codes**, for the school corporation. (Emphasis added.)

Although Indiana Code 20-8.1-5.1 addresses student discipline, the dress code language in Indiana Code 20-8.1-5.1-7(a) is not limited to students.

Schools may impose penalties against teachers who violate school policies. Indiana Code 20-6.1-4-10(a) permits the cancellation of a permanent teacher's contract on various grounds, including insubordination. Indiana Code 20-6.1-4-10(a) reads in part as follows:

> An indefinite contract with a permanent teacher may be canceled in the manner specified in section 11 of this chapter for only the following grounds:
> . . . .
> (2) insubordination, which means a willful refusal to obey the state school laws or reasonable rules prescribed for the government of the school corporation; . . . .

Indiana Code 20-6.1-4-10.5 permits the cancellation of a semipermanent teacher's contract on the same grounds. Failure to adhere to a dress and grooming code may be viewed as insubordination, and disciplinary action may range from a reprimand to the cancellation of a teacher's contract.

The Test for Whether a Dress or Grooming Code is Constitutional

The test for whether a dress or grooming code for a public employee is constitutional was set forth by the United States Supreme Court in Kelley v. Johnson, 425 U.S. 238, 247, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976). According to Kelley, the challenger of the dress code must demonstrate that there is no rational connection between the policy and accomplishment of a public purpose. In Kelley, the challengers sought to invalidate a county regulation in New York state which limited the length of a policemen's hair. The United States Supreme Court held that the regulation did not

violate any right guaranteed under the Fourteenth Amendment,[9] since, if it were assumed that all citizens had some sort of liberty interest within the Fourteenth Amendment with respect to personal appearance, the choice reflected in the regulation—that it was desirable for police officers to be similar in appearance, whether based on a desire to make police officers readily recognizable to the public or on a desire for *esprit de corps*—was rationally justified. Thus, the burden of proof was placed on the employee to demonstrate that there was no rational connection between the regulation and the accomplishment of a legitimate public purpose. The Kelley test has been followed by other courts in determining whether a dress or grooming code is unlawful or lawful.

Cases Where Dress or Grooming Code is Held Unlawful

In Pence v. Rosenquist, 573 F.2d 395 (7th Cir. 1978), a tenured high school teacher who was also a part-time school bus driver was suspended from employment as a bus driver (but not from his teaching position) because he refused to shave off his mustache. According to the affidavit of the superintendent of the school district, the decision to suspend the teacher was based upon the Illinois Office of Education's (IOE's) policy requiring a "neat and clean appearance" which was adopted in the school district's policy manual. Later clarification of the policy by the IOE indicated that it was intended as a general statement on grooming of school personnel and not a specific prohibition of beards and mustaches on school bus drivers. Pence sued the assistant superintendent, superintendent, and all the members of the school board for violation of his civil rights under the Civil Rights Act, 42 U.S.C. §1983[10] and violation of the equal protection guarantee of the Fourteenth Amendment of the United States Constitution. The Seventh Circuit rejected the school board's argument that in its capacity as a municipal corporation it was not subject to liability under 42 U.S.C. §1983. The court found that the school board's policy of not permitting a person with a mustache to drive a school bus lacked any rational relationship with a proper school purpose and concluded it was so irrational as to be arbitrary. The arbitrariness of the school board's policy was emphasized by the fact that the school board had no such policy with respect to teachers. Pence at 398.

In Pence, the Seventh Circuit relied on Kelley v. Johnson, 425 U.S. 238, 247, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976) for guidance on whether the existence of a policy regarding appearance deprived school bus drivers of their liberty interests without due process. The Seventh Circuit adopted the test set forth in Kelley. The Seventh Circuit also found that in viewing the claim as a denial of equal

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[9] Section 1 of the Fourteenth Amendment to the United States Constitution provides in part as follows: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." This section affords a procedural guarantee against the deprivation of "liberty" and protects substantive aspects of liberty against unconstitutional restrictions by the State.

[10] 42 U.S.C. §1983 is a federal statute that protects citizens from state action that infringes upon their constitutional rights. 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.

protection, i.e., classification of persons with mustaches as ineligible for employment, the test was the same. Pence at 399. The Seventh Circuit concluded that the choice of appearance is an element of liberty.[11] The Pence case demonstrates that a grooming code will not be held to be valid if it lacks a legitimate school purpose.

Cases Where Dress or Grooming Code is Held Lawful

In East Hartford Education Assoc. v. Board of Education of the Town of East Hartford, 562 F.2d 838 (2nd. Cir. 1977), a public high school teacher taught English and film-making. The evidence showed that it was his custom to wear a jacket and sport shirt, without a tie. His failure to wear a tie was in violation of the East Hartford Board of Education dress code, and he received a reprimand. He appealed to the school principal and was told that he was to wear a tie while teaching English, but that his informal attire was appropriate for his film-making classes. The teacher claimed that his refusal to wear a tie is "symbolic speech" protected against governmental interference by the First Amendment. The school argued that the tie code established "a professional image for teachers" that promotes "good grooming among students" and aids maintenance of "respect" and "decorum" in the classroom. On a petition for rehearing, the United States Court of Appeals, Second Circuit, upheld the dress code requirement and stated that "...the First Amendment claim...is so insubstantial as to border on the frivolous." East Hartford at 860. The teacher failed to carry the burden set out in Kelley of demonstrating that the dress code was so irrational that it may be considered arbitrary. East Hartford at 861. The Second Circuit stated that "We join the sound views of the First and Seventh Circuits, and follow Kelley by holding that a school board may, if it wishes, impose reasonable regulations governing the appearance of the teachers it employs." East Hartford at 863.

In McCutcheon v. Board of Education, 419 N.E.2d 451, 453 (Ill. App. 1981), the dismissal of an elementary school principal was upheld when the evidence showed that she was observed by employees of the board of education to be scantily and indecently attired in an elementary school. The Appellate Court of Illinois also found that there was no merit to the principal's contention that although fired as a principal she had a continuing right to employment as a teacher since the Illinois statute referred to the removal of a principal or teacher. McCutcheon at 455.

In Tardif v. Quinn, 545 F.2d 761 (5th Cir. 1976), a nontenured high school teacher alleged her constitutional rights were violated when she was terminated because of the length of her dress. The trial court found that the dress came "half-way down her thigh" and was "comparable in style to dresses worn by young, respectable professional women during the years when the plaintiff was teaching." She received a letter from the school which gave four reasons for her termination: lack of interest in professional growth; insufficient participation in school activities; unwillingness to work with students after school; and poor "image." At trial, the evidence showed that she had been

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[11] Cases in the Seventh Circuit have held that in a public school a student's right to control personal appearance is an ingredient of personal freedom protected by the Fourteenth Amendment. Hosapple v Woods, 500 F.2d 49 (7th Cir. 1974); Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1970); Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969).

a superior teacher and that her dresses "had no startling or adverse effect on her students or on her effectiveness as a teacher." On appeal the United States Court of Appeals, Fifth Circuit held that even assuming that she was terminated only because of the length of her dress and even assuming that the trial court's finding that the teacher's dress length was within reasonable limits was warranted, where the school's objections to the length of the teacher's dress were not irrational in the context of the school administration's concerns and did not demonstrate a lack of good faith, termination based on the length of a teacher's dress did not violate a teacher's constitutional rights under the Fourteenth Amendment. Tardif at 763.

In Morrison v. Hamilton County Board of Education, 494 S.W.2d 770 (Tenn. 1973), the Supreme Court of Tennessee affirmed the action of a board of education in dismissing a tenured teacher for insubordination when he refused to shave his beard. The Board of Education's rule applied to teachers and students, and read as follows:

> Students and teachers should use such taste in the selection and the wearing of their clothes, make up and hair styles and maintain such neatness, cleanliness, and self-respect so that the school is a desirable place in which to promote learning and character development. No apparel, dress, or grooming that is or may become potentially disruptive of the classroom atmosphere or educational process will be permitted.

The Board of Education felt that the teacher's full beard was disruptive or potentially disruptive of the educational process and in violation of the rules. The teacher contended: (1) that the Board deprived him of the right to teach as guaranteed by Tennessee's Teacher Tenure Act; (2) that the Board deprived him of liberty or property without due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States in that depriving him of the opportunity to earn a living by practicing his profession in the schools of the county solely because he wore a beard was arbitrary and unreasonable and without any direct and substantial relationship to the conduct of an efficient school system; (3) that the rule upon which the charge of insubordination was based was so vague and uncertain that to permit it to be used as the basis for the charge of insubordination amounted to a denial of due process of law under the Fourteenth Amendment; and (4) that the Fourteenth Amendment of the United States Constitution guaranteed him a "right to privacy" which he alleged was violated by the Board in discharging him from his teaching position because of his wearing a beard.

In Morrison, the Supreme Court of Tennessee held that the rule was not so vague and indefinite as to leave its interpretation to the whim of the Board and thereby amount to a denial of due process. The court stated that "disrupt" had "a definite, well-understood meaning which is capable of objective application." The court found that the teacher's claim that he had a constitutional right to wear a beard in the classroom as an alleged "right of privacy" guaranteed by the Fourteenth Amendment was without merit. The court also found that the Board's rule was within the bounds of reason and did not deny the teacher any right under the Teacher Tenure Act. The court held that the rule bore a reasonable relation to the proper management of the public schools and did not deny the teacher "due process of law" or "equal protection of the laws."

Validity of Statute or Regulation Relating to Religious Garb

In United States v. Board of Education for the School District of Philadelphia, 911 F.2d 882 (3rd Cir. 1990), a Muslim substitute teacher was informed by school principals that, pursuant to a Pennsylvania Garb Statute, enacted in 1895, she could not teach while dressed in religious clothing. She wore a head scarf that covered her head, neck, and bosom but left her face visible. She also wore a long, loose dress which covered her arms to her wrists. The teacher filed charges of discrimination with the district office of the Equal Employment Opportunity Commission (EEOC). The EEOC, after an investigation, turned the case over to the United States' Department of Justice. The Department of Justice filed a complaint in district court, naming the school board and the Commonwealth of Pennsylvania as defendants. The Third Circuit held that discharge of the teacher for continuing to wear Muslim garb did not violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*. because it would be an undue hardship[12] to require a school board to violate a Pennsylvania statute prohibiting public school teachers from wearing religious dress while teaching. Board of Education of School D. of Philadelphia at 891.

Title VII of the Civil Rights Act of 1964 protects employees from certain adverse employment actions, including on the basis of religion, and reads in part as follows:

> (a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals's...religion...

42 U.S.C. §2000e-2(a).

The term "religion" includes "all aspects of religious observance and practice, as well as belief, *unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.* 42 U.S.C. §2000e(j)." Board of Education of School D. of Philadelphia at 886.

In Cooper v. Eugene Sch. Dist. No. 4J, 723 P.2d 298 (Or. 1986), *appeal dismissed*, 480 U.S. 942, 107 S.Ct. 1597, 94 L.Ed.2d 784 (1987), a tenured teacher became a Sikh and wore white clothes and a white turban while teaching in a public school. She continued to wear her religious clothing after being warned that she would be suspended for violating an Oregon law against wearing "...any religious dress while engaged in the performance of duties as a teacher." The Oregon law expressed a legislative policy of maintaining the religious neutrality of the public schools. She was suspended

[12] For the school board to have accommodated the teacher, it would have exposed its administrators to a substantial risk of criminal prosecution, fines, and expulsion from the profession for violating the garb statute. This constituted an "undue hardship." Board of Education of School D. of Philadelphia at 891.

from teaching, and the Superintendent of Public Instruction revoked her teaching certificate for violating the religious dress statute. The Oregon Supreme Court upheld the constitutionality of the Oregon garb statute and concluded that the statute did not violate the federal First Amendment or Oregon's guarantee of religious freedom.[13] The Oregon garb statute would not be violated by occasional display of religious dress. However, regular or frequently repeated displays while teaching would be grounds for disqualification. Cooper at 313.

In Mississippi Employment Sec. Com. v. McGlothin, 556 So.2d 324 (Miss. 1990), a public school teacher was discharged for insubordination to her school principal for wearing a religious head wrap. The letter from the principal to the teacher indicated that the head wrap set a bad example for the children and would undermine the teacher's ability to teach health and hygiene. The school's governance committee, which was made up of school personnel and parents, had adopted a dress code that decreed that jeans and head wraps were inappropriate dress. Following the teacher's discharge she applied for unemployment benefits, but they were denied on the grounds of misconduct connected with her work. The Mississippi Supreme Court held that the teacher's wearing of a religious head wrap was a constitutionally protected religious and cultural expression protected by the First Amendment, and that the Employee Security Commission had no authority to deny her claim for unemployment compensation benefits. McGlothin at 331.

Absent Statute or Regulation Forbidding or Restricting Religious Garb

The compatibility of religious dress with the role of public school teachers is an issue that generally involved teaching by nuns while wearing the habits of their orders.[14] In Moore v. Board of Education, 212 N.E.2d 833 (Ohio Ct. of Common Pleas 1965), a taxpayer and parent brought an action seeking, *inter alia*, an injunction to enjoin a school board from allowing public school teachers to teach while wearing the garb of a religious order. Six of the elementary school teachers were members of a religious order within the Roman Catholic Church and accredited as teachers by the Ohio Department of Education. The court held that in the absence of a statute or regulation prohibiting religious garb, religious garb may be worn by teachers while teaching in public schools. Moore at 841.

In the Indiana case of State ex rel. Johnson v. Boyd, 28 N.E.2d 256 (Ind. 1940), the trustees of the City of Vincennes took over parochial school buildings and paid the salaries of Catholic teachers when these parochial schools lacked the funds to operate during the 1930's economic depression. As a result of this emergency, the trustees of the City of Vincennes had to provide school facilities for more than eight hundred (800) additional school children. The teachers employed by the school trustees were Catholic Sisters and Brothers and wore the dress of their religious orders. The Indiana Supreme Court held that the choice of teachers was within the discretion of the school trustees, and, unless such discretion was abused, the courts would not interfere. The fact that these Catholic teachers, while employed by the city school board, wore the robes of various orders to which they

[13] Oregon's Bill of Rights, Article I, sections 2, 3, 4, 5, 6 and 7.

[14] Cooper, 723 P.2d at 308.

belonged did not constitute sectarian teaching, nor did it make it illegal for public funds to be used to pay their salaries. Boyd, 28 N.E.2d at 265-266.

In Rawlings v. Butler, 290 S.W.2d 801 (Ky. 1956), the Court of Appeals of Kentucky reached a similar conclusion as the Indiana Supreme Court in Boyd. In Rawlings, a taxpayer questioned the constitutionality of spending public tax money to pay the salaries of nuns of the Roman Catholic Church who taught in public schools while wearing religious garb and religious symbols. The court held that the fact that members of a religious order wore religious garb and emblems while teaching in public schools did not violate the First Amendment constitutional guarantees of freedom of religion as they did not inject religion or the dogma of their church into what they taught. Preventing the nuns from teaching in public schools because of their religious beliefs would also have denied them equal protection of the law in violation of the Fourteenth Amendment of the Federal Constitution. Rawlings, 290 S.W.2d at 804.

METHODOLOGY: SCHOOL DISCRETION AND PARENTAL CHOICE

(Article by Dana L. Long, Legal Counsel)

The Indiana Board of Special Education Appeals (BSEA) recently affirmed an Independent Hearing Officer's decision upholding the school's choice of methodology for a three-year-old student with autism. A.S. and Richmond Community Schools, 30 IDELR 208, 4 ECLPR ¶ 76 (Article 7 Hearing No. 1055.98) (SEA IN 1999).[15] When the child was two years old, the child was provided with weekly sessions with a developmental therapist, speech therapy, physical therapy, and twice weekly sessions of occupational therapy pursuant to an Individualized Family Service Plan (IFSP) under the First Steps Program. The parents also implemented an Applied Behavioral Analysis (ABA) program that was not part of the IFSP. At a transition conference, the parents requested the school provide discrete trial training by funding a 30 hours per week home ABA program.[16] The school

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[15]The IHO's decision can be found at 29 IDELR 443 (SEA IN 1998). The parents sought judicial review of the BSEA's decision on April 5, 1999, in the federal district court, southern division, in Indianapolis.

[16]In a footnote, the BSEA noted:

> A "discrete trial format" or "discrete trial training" is a series of distinct, repeated lessons with clear beginnings and endings. Multiple trials are repeated over and over again until the child demonstrates mastery. The training usually occurs in a one-to-one setting with as little distraction as possible. Positive reinforcement is used to encourage compliance with any task. Tasks are broken down into small, learnable segments (task analysis). Data collection and record keeping are an integral part of this method. The data indicate when the child should move on to new tasks. This is a form of behavior modification. There are variations of this practice, such as "Compliance Training," "Clinical Prescriptive Method," "Applied Behavioral Analysis," "Functional Analysis of Behavior and Positive Behavior Supports," "Priming," and "Lovaas," the latter named for O. Ivar Lovaas, the best-known practitioner of this method. See "Discrete Trial Training: Finding the Balance" (Donnelly, 1997) and "Lovaas Revisited: Should We Have Ever

had a trained autism team, and the school's proposed program incorporated the use of ABA and other techniques. The hearing officer determined that as long as the school offers a free appropriate public education (FAPE), it can choose the methodologies that will be used.

The specific methodology employed by school districts or teachers has generally been left to the discretion of the schools and teachers providing instruction to students with special education needs. As early as 1984, the Office for Civil Rights (OCR) determined that the use of motivational techniques was within the educational discretion of all teachers and there is no requirement under Sec. 504[17] that they be specified in the student's I.E.P.[18] No violation of Sec. 504 would occur provided the teacher's methods did not materially interfere with a student's opportunity to meet program goals and objectives. Elgin (IL) Unit School District #46, EHLR 257:591 (OCR 1984). In 1988, the Seventh Circuit Court of Appeals had the opportunity to address the issue of methodology under the Education of All Handicapped Children Act (EAHCA).[19] Lachman v. Illinois State Board of Education, et al., 852 F.2d 290 (7th Cir. 1988), *cert. denied* 488 U.S. 925, 109 S.Ct. 308 (1988), involved a dispute concerning the methodology to be employed in the education of a hearing impaired child. The parents wanted their seven-year-old son to attend general education classes in a neighborhood school with a full-time cued speech instructor. The school district proposed placement in a Regional Hearing Impaired Program (RHIP) that utilized total communication and relied upon sign language. The student would attend general education classes for approximately half of the school day with the remaining time spent in a self-contained classroom. The Seventh Circuit Court determined:

> . . . Rowley[20] and its progeny leave no doubt that parents, no matter how well motivated, do not have the right under EAHCA to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child [citations omitted].

852 F.2d at 297.

Methodology issues have been the subject of numerous due process hearings and court decisions in the past few years. Although these various determinations do not hold that schools have absolute unilateral discretion to determine methodology, the Supreme Court's analysis in Rowley continues

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Left?" (Indiana Resource Center for Autism *Newsletter*, Vol. 8, No. 3, Summer 1995).

[17]Section 504 of the Rehabilitation Act of 1973, 29 USC §794, as implemented by 34 CFR Part 104.

[18]Individualized education program.

[19]The EAHCA was the predecessor to the Individuals with Disabilities Education Act (IDEA), 20 USC §1400 *et seq.*

[20]Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982), the seminal case on defining what constitutes FAPE.

to provide the general background for resolving such disputes. The Supreme Court established a two-part test in Rowley for courts to use when reviewing a school district's education plan for a student:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Rowley, 458 U.S. at 206, 102 S.Ct. at 3051.

The Minnesota Court of Appeals followed the Rowley rationale in declining to order the school district to provide a particular method of instruction for a student identified with an other health impairment (OHI). The court upheld the review officer's decision that concluded the school district provided the student with a free appropriate public education (FAPE) and refused to order the school to provide the Orton-Gillingham reading instruction requested by the parent. Glazier v. Independent School District No. 876, et al., 558 N.W.2d 763 (Minn.App. 1997).

In E.S. v. Independent School District No. 196, et al., 135 F.3d 566 (8th Cir. 1998), the circuit court cited Rowley in determining that as long as the student is benefitting from her education, it is up to the educators to determine the appropriate methodology. In this case, the student had dyslexia and her reading scores in four areas showed increases ranging from eight months to almost two years over a three-year period from fourth through seventh grades. The parents requested one-to-one tutoring and the use of Orton-Gillingham reading instruction during the school year. The school district had provided one-to-one tutoring during the summer using Orton-Gillingham and proposed pull-out classes of three to five students using a variety of instructional methods, including Orton-Gillingham. The court determined the record showed the student was making progress and the proposed I.E.P. would have provided educational benefit.

The parents of a nine-year-old student diagnosed with verbal apraxia challenged the new school district's proposed educational program. The I.E.P. from the previous school showed the student performed at grade level except for written language, in which he required adaptations and modifications for fine motor delays. The school provided Title I services, and the parents refused to attend several I.E.P. meetings. An independent educational evaluation indicated low reading scores and recommended the student be exposed to a variety of reading approaches as there was no particular approach recommended for all children with apraxia. The parents preferred the Orton-Gillingham method. Citing to Rowley, the court stated:

> It is well-settled that "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States." [Citations omitted].

Moubry v. Independent School District 696, 9 F.Supp.2d 1086, 1106 (D.Minn. 1998).

In Blackmon v. Springfield R-XII School District, 29 IDELR 855 (W.D.M.O. 1998), the district court used the two-part Rowley test in ruling in favor of the parents of a child with a brain injury, cerebral hypotonia, and autistic behavior. At fifteen months of age, the child was enrolled in a First Steps program and was provided with speech, physical therapy, and occupational therapy. After ten months in this program with no progress, the parents arranged for a program of therapy for twelve hours per day. The child made remarkable progress within six months. At an I.E.P. meeting with the school, the parents were read a lengthy evaluation report and I.E.P. and were merely asked to agree. The school's proposed program continued a program and therapies similar to the First Steps program. The court determined the parents were denied the opportunity to participate in the formulation of the I.E.P., and the proposed I.E.P. was not calculated to provide educational benefit because it employed the same therapies that had previously failed to provide benefit.

A fifth grade student with a learning disability was placed in a self-contained classroom for some academic subjects and mainstreamed for science, English, art, music, library, home room and physical education. Displeased that the school failed to use exclusively the Orton-Gillingham method of instruction, the parent unilaterally enrolled the student at a private school and sought reimbursement. The district court found the I.E.P. was reasonably calculated to - and was in fact - providing educational benefits. Although the instructional techniques may not have met the parent's exact desires, accommodating a parent's ideal educational program is beyond the scope of IDEA. Wall v. Mattituck-Cutchogue School, 945 F.Supp. 501 (E.D.N.Y. 1996).

A number of recent decisions concerning methodology issues have involved children with either a hearing impairment or with autism. Some of these cases may appear, at first blush, to erode earlier determinations that the choice of methodology is generally left to the discretion of the school. Hearing officers have recognized that a variety of factors can limit a school's unilateral discretion as to the choice of methodology. Violations of procedural requirements, failure to address the needs of the student, and the requirements of state law can sometimes change the nature of what initially appears as a dispute over methodology.

Hearing Impairment

In Logue v. Shawnee Mission Public School Unified School District No. 512, 3 ECLPR ¶31 (D.C. Kan. 1997),[21] the district court in Kansas addressed competing methodologies for a hearing impaired (H.I.) student. The court noted that the goal of "total communication" is to help students to achieve required academic levels by employing both speech and sign language. The court indicated the goal of "oral communication" is to help students to acquire intelligible speech. Oral communication forbids the use of sign language and insists that all communication be verbal. The student's I.E.P.s from the age of three had been based upon total communication. Subsequently, the parents took the student for testing at the Central Institute for the Deaf (CID), an institute that employed oral

[21]The district court's decision was upheld by the 10th Circuit Court of Appeals in an unpublished decision that is not binding precedent. See 28 IDELR 609 (10th Cir. 1998).

communication. After this evaluation, the parents preferred a program based upon oral communication. The school's proposed I.E.P. included placement in a self-contained H.I. classroom with mainstreaming for social studies, science, physical education, music, recess, lunch, kindergarten centers, and extended time for speech, language, and auditory training. The parents rejected the school's proposed placement and enrolled the student at the CID. The court indicated the issue was not whether CID is better, but whether the school district offered an appropriate education. The court relied on Lachman in determining the parents did not have the right to compel a specific program or methodology as the school's proposed placement was reasonably calculated to provide the student an educational benefit that would allow him to progress in school according to his abilities and capacities.

In Bonnie Ann F. v. Calallen Independent School District, 22 IDELR 615 (5th Cir. 1994),[22] the parents of a preschool student with a hearing impairment disputed the school's use of a total communication program for their daughter after she received a cochlear implant that had enabled her to learn to speak. The school had agreed to incorporate an aural/oral approach, but proposed to continue with the total communication program for a three-month transition period prior to discontinuing all use of sign language. The circuit court found the school's program had been appropriate and was reasonably calculated to provide the student with an educational benefit.

In Eureka Union Sch. Dist./Placer County Office of Educ., 28 IDELR 513 (SEA CA 1998), the parents of a three-year-old student with a hearing impairment unilaterally enrolled their child in an auditory/oral program designed to teach students with hearing impairments to listen and communicate orally. The school's proposed program relied upon total communication that combined sign language and oral communication. The student's aided hearing was almost on par with non-hearing impaired children. A hearing officer determined the school's proposed placement, which would provide the bulk of the student's education through sign language, could be detrimental to the student's education as it would possibly result in regression of the student's speaking and listening skills. The parents were awarded reimbursement for the costs of the private program for the 1997-1998 school year.

San Mateo-Foster City Sch. Dist., 28 IDELR 527 (SEA CA 1998) involved a dispute over placement and methodology for a three-year-old student with a hearing impairment. The hearing officer relied upon the provisions of IDEA, the holding in Rowley, and two provisions of California law in ruling in favor of the parents. California Education Code §56441.2 required the program to meet the needs of the child and her family, while California Education Code §56000(b)(2) provided that it was "essential that hard-of-hearing and deaf children, like all children, have an education in which their unique communication mode is respected, utilized, and developed to an appropriate level of efficiency." The child had been using the auditory-verbal mode since she was two months old. She had a seven-year-old brother who had a hearing impairment and also used the auditory-verbal mode. A five-year-old sister, without a hearing impairment, would be required to learn two different methods to communicate with her hearing-impaired siblings. The hearing officer concluded the

[22]Docket No. 93-7641. This decision was designated as not for publication by the Circuit Court.

student needed auditory-verbal training in a general education preschool setting. The school's proposed placement was not designed to meet the needs of the student or her family because it was not in a general education setting and it failed to take into account her chosen mode of communication. In addition, it did not respect her family's need for a cohesive method of communication.

Autism

A variety of procedural violations as well as a failure to offer an appropriate educational program led a hearing officer to order reimbursement to the parents of a preschool student with autism for the costs of the unilateral program the parents arranged for the student. Cobb County School System, 2 ECLPR ¶261 (SEA GA 1996). The parents first contacted the school on April 13, 1994, about three weeks prior to the student's third birthday. This resulted in a determination the student was eligible for speech services and a referral was made for cognitive testing. In July, the school sent a letter to the parents indicating that, due to numerous referrals, they would be unable to schedule timely screening appointments, and the student would not be considered officially referred until the parents completed and returned the packet of information included with the letter. The parents promptly completed and returned the packet and requested the school move forward promptly. The student entered school at the start of the 1994-1995 school year. An educational evaluation conducted on September 6, 1994, found delays in all five areas tested. At an I.E.P. meeting on September 20, 1994, an I.E.P. for speech was completed, although there was no teacher or administrator present at this meeting. On October 26, 1994, another I.E.P. meeting was held to write a comprehensive I.E.P., although there was no administrator or evaluator present. The school conducted a further evaluation in December, 1994 and January, 1995, determining the student was severely autistic. The written report from this evaluation was not provided to the special education department until June 5, 1995, and the autism eligibility report was not completed until June 26, 1995. Although the school verbally knew of the autism diagnosis in early 1995 and received the written report in June, 1995, no changes were made in the student's I.E.P. The I.E.P. was not reviewed until September 26, 1995, at an I.E.P. meeting that again failed to include an administrator or anyone knowledgeable about autism. The student had made minimal progress during the previous school year. The hearing officer determined the school had set inappropriately low goals and did not adequately consider or discuss extended school year services until it was too late to provide such services. While the school offered to lengthen the school day from 2¾ hours to 4¾ hours, it had no goals or plans on how to use this extra time. The parents ultimately removed the student from the school and arranged for a 40 hour per week Lovaas program in the home.

The hearing officer, applying the two-part test of Rowley, determined the school had failed to adhere to the procedural safeguards of IDEA and failed to design an I.E.P. that was reasonably calculated to provide educational benefit. The hearing officer recognized that a school system is not required to provide instruction in accordance with the parents' preferred methodology, and that the decision as to methodology is largely left to the discretion of public school educators. In this case, however, the hearing officer found that the issue was not choosing from two competing methodologies because when the school has failed to follow procedure and failed to provide an appropriate education, the parents were free to make a unilateral placement and to seek reimbursement.

Failure to follow procedural requirements and to timely offer an appropriate educational program resulted in a school being ordered to reimburse parents for their privately arranged Lovaas program and to provide an additional year of instruction in a Lovaas program for a preschool student with autism. Delaware County Intermediate Unit #25 v. Martin K., 831 F.Supp. 1206 (E.D.Pa. 1993). When the child was two years old, the parents enrolled him in a private center. A year later, the parents explored the Lovaas program as they felt the private center was not meeting their son's needs. After a multi-disciplinary team evaluation, the school proposed placing the child in the private center for nine hours per week. Disagreeing with the school's recommendation, the parents undertook a 40 hours per week Lovaas program with 1-1 behavior modification therapy and a mainstreaming component of 2½ hours per week at the private center. Although the child turned three years old in July, 1991, it was not until the following January, and after the parents requested a hearing, that the school issued its proposed IEP calling for 15 hours per week at the private center, including speech, group language therapy, and occupational therapy (OT). After a month of this program, the school's proposal included a change to a new program based on TEACCH[23] (in contrast to Lovaas, TEACCH stresses a cognitive rather than a behavioral approach) for ten hours per week in addition to the therapies. The district court found there was no appropriate educational program in place until January, 1992, and the I.E.P. proposed at that time was not reasonably calculated to provide an appropriate education for the child.

In Grapevine-Colleyville Indep. Sch. Dist., 28 IDELR 1276 (SEA TX 1998), a hearing officer ordered a change in methodologies for a student diagnosed with autism, mental retardation (MR), OHI and a speech impairment. The student had exhibited a lack of progress under previous I.E.P.s. The hearing officer found the current I.E.P. inappropriate due to a lack of intermittent steps or sequencing for goals and a lack of short-term objectives. While a list of methodologies was included, there was no indication of when or how the different methodologies would be employed. Also, the school failed to maintain records of discrete trials documenting student progress on any objectives. The hearing officer found the school has the right to choose the methodology as long as it is calculated to confer educational benefit but determined that where little or no educational progress has taken place and a change in methodology offers a chance of success, a change in approach is warranted.

The parents of a three-year-old student with autism requested reimbursement for an in-home discrete trial training program, speech therapy and a speech/language evaluation. The school offered placement in a preschool autism classroom with ten hours of in-home behavior intervention services per week. In finding in favor of the parents, the California hearing officer found that the school had only one preschool autism class at the time the placement was offered, which already contained the maximum number of students, all of whom were boys. Therefore, there was no program available. A second class would not be added until the start of the next semester. The classroom contained too many distractions for the student. None of the school's expert witnesses had met or observed the student or even spoken with anyone who had provided services to her. The school's program didn't

[23]"Treatment and Education of Autistic and related Communication, handicapped CHildren."

offer speech and language services. California law required that programs for preschool children must include specially designed services to meet the unique needs of preschool children and their families.[24] The school's proposed program had no provision for the participation of the parents. Redland Sands Unified Sch. Dist., 28 IDELR 1256 (SEA CA 1998).

The parents of a four-year-old student with autism implemented a 38-40 hours per week educational program of Applied Behavior Analysis (ABA) for their son that enabled him to make significant educational gains. The program was designed to provide the student with the skills and knowledge for a successful transition in the next several years to a general education program. Shortly after the implementation of this program, the school proposed placement in a cross-categorical classroom for 10 hours per week with additional time for various therapies. After the parents requested a hearing, the school proposed to double the total number of hours in the program. The school argued it met the standards set forth in Rowley, as it had followed proper procedures and developed an I.E.P. that was reasonably calculated to enable the child to receive educational benefit. The school also noted that under Lachman the school district had the primary responsibility for choosing the educational methods. The review officer determined that, for this student, educational benefit meant progress in the areas of his I.E.P. at a rate enabling him to make a successful transition to a general education classroom; and that for autistic children, the earlier a program begins and more intense that program, the smaller the eventual gap between that child's educational success and that of other children. The school failed to establish it offered an appropriate program as the student could not, at that time, benefit from a program in a cross-categorical classroom. Palatine Community Consolidated Sch. Dist. 15, 29 IDELR 258 (SEA IL 1998).

The Seventh Circuit Court of Appeals' ruling in Lachman continues to be followed, in conjunction with the Supreme Court's holding in Rowley, in resolving methodology disputes. As these cases indicate, however, additional factors have impacted the determination of whether the school's proposed program is reasonably calculated to enable the child to receive educational benefit. These factors, in addition to the two-part test of Rowley, have included the child's age and disability, provisions of state law, and competing instructional methodologies in the areas of autism and hearing impairment.

CONFEDERATE SYMBOLS AND SCHOOL POLICIES

(This article is part of a continuing series addressing various aspects of emergency preparedness and crisis intervention plans. School personnel, in attempting to create safe schools, will often confront the sometimes delicate balance between protectable free speech, including symbolic speech, and the compelling governmental need to address immediate emergencies.)

The Indianapolis News on March 18, 1999, carried a front-page article from the Associated Press on a dispute that has arisen in Randolph Southern School Corporation where, according to the newspaper account, the high school has had a longtime practice at its home basketball games of

[24]California Education Code §56441.2.

displaying a Confederate flag and dressing a student as Confederate General Robert E. Lee.[25] The school's athletic teams are known as "the Rebels." Several parents have objected to the use of the Confederate "flag and mock soldier," asserting they "are symbols of slavery and racism and should not be glorified."

The problem facing the Randolph Southern School Board is not a new one for a school nor will it be the last one. There are other Indiana schools that also employ the use of the Confederate flag and whose teams are known as "the Rebels."[26] This is not solely an Indiana concern, nor are the legal ramifications restricted to mascots, school monikers, or caricatures of Confederate soldiers. There may be First Amendment free speech issues as well.

Mascots and Collective Free Speech

Ironically, Randolph Southern School Corporation is located in Randolph County, Indiana, next door to Delaware County where the first reported dispute of this nature arose.

1. In Banks v. Muncie Community Schools, 433 F.2d 292 (7th Cir. 1970), plaintiffs challenged the use of Confederate symbols at Muncie Southside High School. Muncie Southside opened in 1962. The school board permitted the students to vote on the symbols to be adopted for their school. Because of the school name, the students pursued "a theme based on the old South. Accordingly, the school flag resembles the flag of the Confederacy, the name of the athletic teams is the 'Rebels,' the glee club is called the 'Southern Aires,' and the homecoming queen is called the 'Southern Belle.'" At 297. Plaintiffs alleged the use of Confederate symbols was offensive to minority students, prevented them from participating in extracurricular activities, and kept them out of the mainstream of school life. The school district asserted it was "pursuing a valid policy of allowing the pupils of all schools in the system to choose their symbols by a democratic process," and that there is "educational value in allowing student to make poor as well as good choices where it affects extracurricular activities." Id. There was no evidence minority students were being denied access to any school facilities or programs. As a result, the federal district court and the 7th Circuit Court of Appeals found the school board's "consistently applied policy" did not violate the plaintiffs' right to equal protection of the law. At 297-98. "[T]he adoption of symbols by the majority of the students is merely the exercise of their first amendment right of free speech...." At 298.

   Both the district court and the 7th Circuit, however, admonished the school board to be more sensitive. The 7th Circuit, at 297-98, quoted the following from the district court's opinion:

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[25]For a related topic, see "Mascots" in **QR** July-Sep't: 96, addressing objections to certain mascots as promoting satanism, witchcraft, or the occult.

[26]For non-Hoosier readers, Indiana remained with the Union during the Civil War. Indiana schools employing Confederate symbols typically have "South" somewhere in the school building or corporate name.

> This Court would recommend to the school authorities that they exercise their discretion to bring about the elimination of school symbols which are offensive to a racial minority. I think it is axiomatic that many symbols are inappropriate for use in public institutions in this country. For instance, some such symbols are the Nazi Swastika, the hammer and sickle, the hooded white-sheet of the Ku-Klux Klan, the clenched fist, etc.
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> Tyranny by the majority is as onerous as tyranny by a select minority. The student body's choice of symbols has been shown to be personally offensive to a significant number of students, no matter how innocuous the symbols may originally have seemed to the young, white students. An exercise in democracy which results in offense to a sizeable number of the participants should be seriously reconsidered by the student body.

The 7th Circuit also rejected plaintiffs' argument that Tinker v. Des Moines Ind. Comm. Sch. Dist., 393 U.S. 503, 89 S.Ct. 733 (1969) precluded a public school from compelling minority students to endure offensive symbols at public schools they are compelled to attend. At 298. "[A]lthough we agree that the symbols complained of are offensive and that good policy would dictate their removal, we find no evidence in the record before us that a constitutional violation has occurred." At 299.[27]

2. Fairfax High School in Fairfax, Virginia, had been known as "The Rebels." Its mascot was a cartoon symbol known as "Johnny Reb." Following complaints from black students and their parents, and at the suggestion of the school's Minority Achievement Task Free, the principal removed the "Johnny Reb" symbol but allowed the students to choose a new symbol, but it had to be unrelated to the Confederacy. Student protests and rallies—and a lawsuit—followed, challenging the principal's actions as violative of First Amendment free speech guarantees. In Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988), the 4th Circuit Court of Appeals affirmed the federal district court decision in favor of the principal. While acknowledging that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," Tinker v. Des Moines Ind. Comm. Sch. Dist. 393 U.S. 503, 506; 89 S.Ct. 733, 736 (1969), the court added that "school officials need not sponsor or promote all student speech." At 802. "There is a difference between tolerating student speech and affirmatively promoting it." Id.

> A school mascot or symbol bears the stamp of approval of the school itself. Therefore, school authorities are free to disassociate the school from such a

[27]Muncie Southside High School no longer has a mascot, nor does it employ any of the former Confederate symbols or references.

> symbol because of educational concerns. Here, Principal Holsinger received complaints that Johnny Reb offended blacks and limited their participation in school activities, so he eliminated the symbol based on legitimate concerns....

Id. "[S]chool officials have the right to disassociate the school from controversial speech even if it may limit student expression." At 802, citing to Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260; 108 S.Ct. 562, 569 (1988) and Bethel Sch. Dist. No. 403 v. Frazer, 478 U.S. 675, 681; 106 S.Ct. 3159, 3164 (1986).[28] Both Hazelwood and Bethel were decided after Banks, *supra*.

Individual Free Speech and Offensive Symbols

The courts recognize the historical significance of the Confederate Battle Flag, but where a school district has experienced increased racial tensions, and the presence of certain symbols have contributed to the deteriorating school climate, courts have supported school policies that restrict the wearing or possessing of such symbols where no educational purpose is implicated and there is a "reasonable forecast" of disturbances within the school context.[29] There has been a marked increase in such disputes recently. The following are representative.

1. Denno v. Sch. Bd. of Volusia County, 959 F.Supp. 1481 (M.D. Fla. 1997). A high school student was suspended for nine days after displaying to his friends a four-inch square Confederate battle flag during lunch period[30] in the high school courtyard. An administrator approached the student and demanded that he put the Confederate flag away. He also demanded the other students to remove Confederate symbols they were wearing. The student protested, explaining that the Confederate flag has "historical significance as a symbol of Southern heritage." At 1483. The administrator rejoined that he considered the flag to be a "racist symbol" and that the student "did not have a First Amendment right to wear or display the Confederate flag on school grounds." The school had no policy regarding the wearing or displaying of Confederate symbols, although this seems to be a prevalent practice at the school. There does not appear to be a history of disruption at the school resulting from students wearing Confederate symbols. The confrontation escalated, especially when the media reported the event and a demonstration by the Ku Klux Klan

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[28]For the purpose of deciding this case, the 4th Circuit assumed the protesting students "have a collective first amendment right in their school's symbol. That issue has not been decided authoritatively, and we do not reach it here." At 801, Note 1.

[29]On March 8, 1999, the Jasper, Texas, school board upheld the suspension of a 14-year-old middle school student who continued to wear a Confederate belt buckle despite being warned that this violated the school's dress code and could cause a disruption. Jasper is where James Byrd, Jr., was dragged to death by three white residents, one of whom—John William King—has been convicted and sentenced to death for the crime. See *School Law News* (March 19, 1999).

[30]The Confederate Battle Flag is the flag most people associate with the Confederacy during the Civil War. It is sometimes mistakenly referred to as "the Stars and Bars," but "the Stars and Bars" flag was the original, formal flag of the Confederacy and resembled the American flag.

followed. Id. The school moved for expulsion, charging the student with attempting to incite a riot, being insubordinate, and being generally disruptive. The school also filed a criminal complaint against the student, alleging he disturbed a school function. The student filed a civil rights lawsuit, alleging violation of his rights to free speech and peaceful assembly, as well as due process and equal protection rights.

The Florida federal district court acknowledged that U.S. Supreme Court decisions in Tinker, Bethel, and Hazelwood, *supra*, "struck a delicate balance between recognition of students' constitutional rights to freedom of speech or expression and deference to school officials' duty to enforce discipline." At 1484. The court denied part of the school's Motion to Dismiss, finding that the "unwritten ban" on Confederate symbols could be a governmental custom or policy leading to a deprivation of the student's First Amendment rights, such that trial on the issue was merited. At. 1485. However, the court did grant the school's Motion to Dismiss counts brought individually against the school administrator, finding they were entitled to "qualified immunity" because their conduct in banning Confederate symbols did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." At 1486. The court noted that two earlier decisions by other federal courts had found that the display of a Confederate flag was a focal point of racial irritation, offensive to a racial minority, and contributed to violence and disruption of the school. At 1487. See Augustus v. Sch. Bd. of Escambia County, Fla., 507 F.2d 152, 155 (5th Cir. 1975), affirming a federal district court's determination that the Confederate flag was racially irritating to many black students. Also see Melton v. Young 465 F.2d 1332, 1334 (6th Cir. 1972), *cert. den.*, 411 U.S. 951, 93 S.Ct. 1926 (1973), upholding a student's suspension for wearing a Confederate flag patch as a legitimate exercise of a school official's inherent authority to curtail disruption elicited by the wearing of the Confederate flag.

2. Phillips v. Anderson Co. Sch. Dist. Five, 987 F. Supp. 488 (D. S.C. 1997) presents different facts from Denno. In Phillips, the middle school served grades six through eight, was 27 percent minority students, and had a marked history of disruption from altercations between students wearing Confederate symbols and other students. The middle school instituted a dress code prohibiting student attire that interferes with classroom instruction. Offending students would be advised to correct their attire or their parents would be called to bring appropriate clothes or take home the offending students. At 490. The student at the heart of this dispute was aware of the school dress code and was particularly aware that wearing clothing with Confederate symbols violated the policy. His cousin had been involved in one of the earlier racial disturbances after wearing the Confederate Battle Flag on his school clothes. The student had once before been requested to turn inside-out clothing he was wearing bearing the Confederate Flag. He complied with the request at that time.

The student later wore a jacket to school bearing the Confederate Battle Flag. The assistant principal asked him to remove the jacket, which he refused to do. His mother and stepfather were called, but the stepfather told the student not to remove the jacket. The situation worsened when the stepfather contacted the media. Notwithstanding, the student received a three-day suspension. When he returned to school still wearing the jacket and his mother

would not require him to remove it, he received an additional five days of suspension. The lawsuit followed, asserting the student had a constitutional right to wear his Confederate flag jacket to the middle school. The court did not agree, and granted the school's Motion for Summary Judgment, finding the school had a reasonable basis for determining that the student's wearing of the Confederate Flag jacket would result in a substantial and material disruption of and interference with the educational process at the middle school. The following are pertinent determinations by the court.

- Although public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," Tinker, *supra*, neither are their First Amendment rights "automatically coextensive with the rights of adults in other settings." Bethel, 478 U.S. at 682, 106 S.Ct. 316-64.

- "It is generally held that the constitutional right to free speech of public secondary school students may be modified or curtailed by school regulations reasonably designed to adjust these rights to the needs of the school environment." At 492, citing Quarterman v. Byrd, 453 F.2d 54, 58 (4th Cir. 1971).

- Under Tinker, "students are entitled to freedom of expression of their views," but "they may not engage in a type of expression that materially and substantially interferes with schoolwork or discipline." Id. Tinker, 393 U.S. at 511, 89 S.Ct. at 739.

- "[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts class work or involves substantial disorder or invasion of the rights of others is...not immunized by the constitutional guarantee of freedom of speech." Id., Tinker, 393 U.S. at 513, 89 S.Ct. at 740.

- Students "cannot be punished merely for expressing their personal views on the school premises...unless school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students.'" Id., citing to Hazelwood, 484 U.S. at 266, 108 S.Ct. at 567.

- School officials are not required to wait until disorder or invasion occurs. If they have substantial facts that reasonably support a conclusion of likely disruption, the judgment of the school officials in restraining certain conduct will be sustained. Indeed, school officials "have a duty to *prevent* the occurrence of disturbances." Id., emphasis supplied by the court.

Thus, the court found the school district satisfied the "reasonable forecast" test. Based on the prior disturbances involving Confederate symbols, the school "had a reasonable basis for determining that [the student's] Confederate Flag jacket would likely result in another substantial disruption" at the middle school. At 493. The student's "right to wear the

Confederate Flag must yield to the school's interest in affording his classmates an educational environment conducive to learning and, as much as possible, free from disruptions and distractions."[31] Id.

3. West v. Derby Unified Sch. Dist. #260, 23 F.Supp.2d 1223 (D. Kan. 1998) differs from Denno in that it involves demonstrated incidents of racial disturbances involving certain symbols, including the Confederate Flag. It is similar to Phillips in that a school policy was implemented to address specifically some of the causes of the disturbances. However, the policy in West specifically mentions the Confederate Flag and metes out sanctions for its display within the district's various schools.

The school district began to experience a number of racial incidents in 1995, most at the high school, with some white students wearing shirts with Confederate battle flags while some black students wore shirts with an "X" in reference to Malcolm X. Tension increased, and was further exacerbated when recruiters from the "Aryan Nation" and the Ku Klux Klan used students to disseminate White Supremacist literature in the schools. Racially divisive graffiti began to appear. Racial incidents began to occur on the buses and at football games. School officials conducted a community meeting to discuss the problems. A "Racial and Social Equity Task Force" was established with broad community representation. The task force recommended the school board adopt a racial harassment policy similar to its policies on smoking and sexual harassment. In June of 1995, the school board adopted the following Racial Harassment or Intimidation Policy to be incorporated into all student handbooks and applied to all grades, K-12.

> RACIAL HARASSMENT OR INTIMIDATION
>
> Student(s) shall not racially harass or intimidate another student(s) by name calling, using racial or derogatory slurs, wearing or possessing items depicting or implying racial hatred or prejudice. Students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications or any item that denotes Ku Klux Klan, Aryan Nation—White Supremacy, Black Power, Confederate flags or articles, Neo-Nazi or any other "hate" group. This list is not intended to be all inclusive.)
>
> Violations of this policy shall result in disciplinary action by school authorities. There will be a three day out-of-school suspension for the first

[31]The court rejected the student's assertion the dress code was overbroad and vague. The student knew of the policy, as did his mother, and both were aware the policy was applied specifically to attire bearing Confederate symbols. The court also rejected the student's argument that the dress code was applied in an arbitrary, capricious, and discriminatory manner, by preventing the display of Confederate symbols but not preventing the wearing of swastikas, Black Power Flags, or shirts bearing the likeness of Martin Luther King, Jr. There was no evidence, the court noted, that these symbols ever caused a disruption at this middle school. There was evidence that Confederate symbols had resulted in disturbances. At. 493-94.

> offense with a required parent conference prior to readmittance. The second offense will result in a three to five day out-of-school suspension from school pending an expulsion hearing. The third offense will result in a suspension from school pending an expulsion hearing. Any student who believes he or she has been subjected to racial harassment should discuss the problem with his/her principal, or another certified staff member. Initiation of a racial harassment complaint will not cause any adverse reflection of the student. The initiation of a student's complaint shall not adversely affect the job security or status of any employee or student until a finding of fact determines that improper conduct occurred. Strict confidentiality shall be maintained throughout the complaint procedure. (Policy subject to change based upon change in district policy.)

The student in this case was a seventh grade student in the middle school with a history of inappropriate racial remarks dating from his elementary school days. Although the student was aware of the school's policy and had been warned by some of his classmates, in April of 1998, the student drew a picture of the Confederate Battle Flag during mathematics class. He received a three-day suspension. His father, after notifying the media, eventually filed suit on his son's behalf, alleging civil rights violations. Following trial, the court found the school did not violate the student's First Amendment rights. The court found the school had passed what the Phillips court referred to as the "reasonable forecast" test through its reliance on the increased racial tensions as a basis for developing and implementing its policy, which, the court found, did reduce friction and reports of such incidences. The following are relevant findings by the court.

- "The court concludes that...school officials in Derby had evidence from which they could reasonably conclude that possession and display of Confederate flag images, when unconnected with any legitimate educational purpose, would likely lead to a material and substantial disruption of school discipline."[32] At 1232.

- "The district had the power to act to prevent problems before they occurred; it was not limited to prohibiting and punishing conduct only after it caused a disturbance." At 1233.

- "Plaintiff correctly points out that [the Confederate] flag is vilified by some but honored by others. The court does not mean to suggest... that anyone who displays this flag is a racist or that they [sic] necessarily do so to express any particular

[32]The sanction portion of the policy was not found by the court to be overbroad or applied in an arbitrary manner, but this finding was made based upon a school administrator's testimony that the policy did not prohibit possession of history books or other library books or textbooks that include the Confederate Battle Flag. In fact, the school itself had hosted a national conference where they displayed the flags of the 50 states, two of which contain the Confederate Battle Flag (Georgia and Mississippi). At 1231, 1234. For an interesting case challenging, unsuccessfully, the display of Georgia's State Flag, see Coleman v. Miller, 117 F.3d 527 (11th Cir. 1997).

viewpoint on race.... But the court can and will say that in the context of this case, the school district had a reasonable basis for concluding that the Confederate flag is a symbol that 'is racially divisive or creates ill will or hatred'.... [I]t was reasonable for the district to consider this flag as a symbol whose display at school would likely lead to a disruption." Id.

- "'The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.' Part of a public school's essential mission must be to teach students of differing races, creeds and colors to engage each other in civil terms rather than in terms of debate highly offensive or highly threatening to others.'" Id., citing Bethel, 478 U.S. at 682-83, 106 S.Ct. 3159.

- "There is no evidence that the school district has attempted to suppress civil debate on racial matters, but the district has concluded that the display of certain symbols that have become associated with racial prejudice are so likely to provoke feelings of hatred and ill will in others that they are inappropriate in a school context." At 1234.

The court also rejected at 1236 the student's contention the Confederate Flag is being singled out. The school's policy prohibits a number of items that may lead to disturbances, including "Black Power" and "Neo-Nazi" symbols.

The court in West, at 1233, referred to an article by Edgar Dyer, M.B.A., J.D., "The Banning of Confederate Symbols in the Public Schools: Preventing Disruption or Avoiding Discomfort?" 125 Ed. Law. Rep. 1019 (1998). Dyer's article is critical of the use of possible disruption as a pretext for restricting student free speech. He described such practices by school officials as "patronizing and condescending." Students should not be protected "from controversial symbols displayed by others" because "[b]eyond the schoolhouse gates, racial controversy exists and the Confederate flag is waved for a variety of reasons." 125 Ed. Law Rep. at 1033. If students are not exposed to such controversial symbols, how else will they be able to learn tolerance of divergent views or the most effective methods for dealing with those who use such symbols to provoke. Id., 1033-34.

> School-sponsored dialogue would be the preferred pedagogical method to accomplish this. A forum on Confederate symbols could also produce much learning about constitutional rights, about the meaning of the symbols from the perspective of the wearer and the offended, about regional pride, about the differing versions of the history of the South, about the conflicts that took place in America between 1861 and 1877, along with tolerance, the sensitivities of fellow citizens, and appropriate and acceptable responses to provocative speech, expression, and actions.

> Open dialogue at a school-sponsored forum could initiate the attainment of these worthy educational goals. Such dialogue at a school-sponsored forum is much preferable to contentious and adversarial dialogue in a federal or state courtroom.

Dyer found the dissenting opinion by Judge William E. Miller in Melton v. Young, 465 F.2d 1332, 1335 (6th Cir. 1972) instructive. This decision, which upheld a student's suspension for wearing a Confederate flag patch on his jacket, was referenced above but not discussed. Judge Miller did not take issue with the fact the Chattanooga, Tennessee, high school had experienced racial tension over the use of Confederate symbols for the school, including the battle flag, calling the athletic teams "the Rebels," and employing "Dixie" as the pep band song. However, individual speech had never been implicated as a cause of the unrest. The judge felt the school policy barring "provocative symbols" was overbroad and unconstitutional in its application. See Dyer's discussion at 125 Ed. Law Rep. at 1027-28.[33]

(After this article was written but prior to its publication, *The Indianapolis Star* reported in its April 28, 1999, edition that two Eastbrook High School students from the Eastbrook Community School Corporation were suspended from school for participating in a demonstration displaying Confederate flags. According to the newspaper account, five vehicles drove into the School's parking lot in Marion, Indiana, on Monday, April 26, 1999, flying Confederate flags apparently in observation of the Confederate Memorial Day. The two students suspended were the only ones who refused to remove the flags.)

COURT JESTERS: THE INCOMMODIOUS COMMODE

Robert Frost wrote "Mending Wall" in 1914, a curious poem that is best remembered for the statement: "Good fences make good neighbors." The poem is a discourse between the narrator and his neighbor as they "walk the line" to inspect the wall between their properties and to repair the wall where weather or humans have caused stones to tumble. The narrator wonders why there is a wall at all. He has an apple orchard; his neighbor, pine trees.

> "My apple trees will never get across
> And eat the cones under his pines, I tell him.
> He only says, 'Good fences make good neighbors.'"

The narrator worries as to what he is "walling in or walling out" and "to whom I was like to give offence." But his neighbor always replies: "Good fences make good neighbors."

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[33]In Judge Leonard P. Moore's dissent in Augustus v. Sch. Bd. of Escambia Co., Fla., 507 F.2d 152, 159 (5th Cir. 1975), he bemoaned what he described as the emerging "tyranny of the courts," whereby a small minority, unsuccessful through the democratic process, obtains court injunctions to force the majority to bend to their demands. "Civil Rights should mean civil rights for all—not merely for a militant or threatening minority." As an example, he opined, "[W]hat of the right of some well intentioned Southerners to try to force the New York 'Yankees' to abandon their nickname?"

So what do *bad* fences make? Apparently, bad neighbors (or at least neighborhood ill will), according to Wernke v. Halas, 600 N.E.2d 117 (Ind. App. 1992).

Three neighbors whose properties abutted became embroiled in a disagreement "over the fate of a tree growing astride the common...boundary...." This grew into criticism of the "appearance and maintenance of each other's land." Wernke erected a privacy fence, which he "patched" using "some vinyl strips and a license plate," over which he ran "a section of orange plastic construction fencing." He placed support posts sunken in concrete at regular intervals along the fence line. However, while the concrete was wet, someone scrawled certain obscenities regarding Wernke's neighbors but not Wernke himself.[34]

Wernke erected the fence in apparent response to one of his neighbor's nailing a toilet seat to a tree facing Wernke's yard. Although the neighbor removed the indecorous ornament, "Wernke, in a display of equal taste, set up his own toilet seat, mounting the seat and its lid on a piece of plywood placed atop a post overlooking his neighbors' land. A brown spot alleged by the [neighbors] to represent human excrement, was painted on the plywood within the ring inscribed by the seat." At 119. The lawsuit followed, with the neighbors charging Wernke with creating a nuisance.

Although the trial court found the toilet, the graffiti, and the fence constituted a nuisance and awarded damages and attorney fees to the neighbors, the Court of Appeals reversed.

The Court recognized Wernke had erected a "spite fence," but its height and location did not violate the law. As to the toilet seat, the court acknowledged that "[a]esthetic values are inherently subjective." At 122.

> In the present case, the evidence concerning the toilet seat is undisputed. The seat and lid are affixed to a piece of blue plywood with a painted brown spot. The plywood is framed and attached to a pole roughly 10 feet tall facing out of Wernke's yard. Wernke claimed the entire contraption was a bird house, and indeed three small boxes with holes suitable for birds surround the frame. It may be the ugliest bird house in Indiana, or it may merely be a toilet seat on a post. The distinction is irrelevant, however; Wernke's tasteless decoration is merely an aesthetic annoyance, and we are not engaged in the incommodious task of judging aesthetics.

Although the Court of Appeals reversed the trial court, it had no illusions the parties would likely cease their bickering. As Judge John G. Baker wrote at 119:

> America's wise and thoughtful poet laureate, Robert Frost, once wrote that "good fences make good neighbors." Lamentably, not everyone has read Frost.

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[34]Wernke said "vandals" must have done this, but the trial court did not believe him. There was also another inscription in the wet concrete that arguably may have referred to Wernke. The Court of Appeals, 600 N.E.2d at 123, n.7 observed: "The record does not reveal the meaning of 'D. Head,' but the context of the phrase and the posture of the case leave little doubt it is not a complimentary phrase."

QUOTABLE...

"Tyranny by the majority is as onerous as tyranny by a select minority."

Chief Judge Luther M. Swygert, quoting the district court judge in Banks v. Muncie Community Schools, 433 F.2d 292, 297 (7th Cir. 1970), cautioning the school district to be more considerate of minority viewpoints when selecting school symbols. Quoted in Augustus v. Sch. Bd. of Escambia Co., Fla., 507 F.2d 152, 158, 159 (5th cir. 1975) by both the majority and dissent. The district court judge, who is not named in the 7th Circuit's opinion, may have been paraphrasing John Stuart Mill's essay "On Liberty," Chapter II: "If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."

UPDATES

Strip Searches

As noted in **QR** July-September, 1997 and Recent Decisions 1-12: 95, "strip searches" of students are meeting with increasing judicial disfavor to the extent that typical immunity defenses are being questioned. Indiana has definitive case law in this area, specifically the oft-cited Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), *reh. den.* 635 F.2d 582 (1980), *cert. den.* 451 U.S. 1022, 101 S.Ct. 3015 (1982). Such searches to pass constitutional muster, must involve a reasonable suspicion there may be a serious infraction by a specific individual that may pose a danger to someone. Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993). A strip search of missing money is excessively intrusive, unjustified, and inherently unreasonable, especially given the absence of any "threat of imminent harm." Oliver v. McClung, 919 F.Supp. 1206 (N.D. Ind. 1995). Only the 11th Circuit Court of Appeals has stated the law is so unsettled in this respect that school officials are not on notice that such searches would violate the Fourth Amendment where there is no threat of danger. Jenkins v. Talladega City Bd. of Ed., 115 F.3d 821 (11th Cir. 1997), *cert. den.*, 118 S.Ct. 412 (1997).

No other court has followed the line of reasoning in Jenkins. In Konop v. Northwestern Sch. Dist., 26 F.Supp.2d 1189 (D. S.D. 1998), the federal district court specifically rejected school officials' reliance on Jenkins in denying their motions for summary judgment on the students' civil rights

claim arising from a strip search for missing money. There was no individualized suspicion the affected 8th grade students had stolen the money. The resulting strip search was unreasonable, and school officials should have known that such strip searches under these circumstances would violate the plaintiffs' Constitutional rights. The court noted that school officials are generally immune from liability except where the action was either (1) untaken with the malicious intent to cause a deprivation of constitutional rights or other injury to the student; or (2) the school official knew or reasonably should have known that the action taken would violate the Constitutional rights of the student. At 1193. Jenkins notwithstanding, the court held that the law was clearly established at the time of the strip search of the 8th grade girls to put school officials on notice that such searches are unreasonable and violated the law. At 1194, 1196, 1204.

> It is undisputed that school officials were not searching for weapons or drugs or anything else posing even a possible threat to students or others. There was no imminent serious harm of any kind. There is no evidence of any thought given to consulting legal counsel, summoning law enforcement officials, or summoning parents.... As to the plaintiffs, the strip searches were made first, i.e., before any search of lockers or motor vehicles (which was done later). Any search of lockers or even vehicles would have been far less intrusive than a strip search.

At 1203. "Arguable reasonable suspicion to strip search was missing and qualified immunity is therefor inappropriate." At 1204. In this case, given the lack of individualized suspicion (including the lack of evidence that any money had actually been stolen), the strip searches were not justified at their inception. Even assuming the money had been stolen, the intrusiveness of the searches were not reasonably related in scope to the circumstances and were unjustified. At 1206. "Any reasonable school official should have known that strip searching students without a reasonable basis to believe they committed a crime violates their rights." At 1207.

Dress Codes: Earrings

In **QR** July-September, 1995, the Indiana case of Hines v. Caston Sch. Corp., 651 N.E.2d 330 (Ind. App. 1995) was analyzed in the context of dress codes in schools, student free speech, and community standards. Hines involved a male elementary school student who wanted to wear an earring to school, as does Jones v. W.T. Henning Elementary Sch., 721 So.2d 530 (La. App. 1998). In Jones, the student was in the second grade. His mother promised him she would get his ear pierced if his behavior improved. The school's principal informed the mother that school policy prohibited boys from wearing earrings. She ignored the principal and had her son's ear pierced. A tug-of-war began, with the mother sending the boy to school on numerous occasions only to have the principal send him back home. The student was eventually suspended for habitual violation of the school's dress code. The lawsuit followed. The court declined to enjoin the school, whereupon the parent appealed. The Louisiana Court of Appeals affirmed the trial court's denial of injunctive relief, noting that under the 14th Amendment, "equal protection does not mandate equal treatment." At 532, citations omitted. "To withstand scrutiny under the Equal Protection Clause, classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Id., citing Orr v. Orr, 440 U.S. 268, 269; 99 S.Ct. 1102, 1106

(1979). However, the school had articulated three legitimate objectives for the rule banning boys from wearing earrings: (1) to avoid disruption and distraction in the classroom; (2) to foster respect for authority and discipline; and (3) to conform to community standards. Id. The court noted that "[i]t is not a common occurrence for boys in elementary school grades to wear earrings, and the presence of one will surely cause a distraction in the classroom." Id. The appellate court determined the school's policy was reasonable and consistently applied. In a finding similar to the appellate court in Hines, the Jones court added: "Furthermore, we find that it is a valid educational objective to inspire discipline and form a positive learning environment, and that it is reasonable to allow a school to reflect the values of the community in which it is located through the use of a valid dress code." Id.

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