

# 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](mailto:kmcdowel@doe.state.in.us).

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## THE INDIANA HIGH SCHOOL ATHLETIC ASSOCIATION:

### 'FAIR PLAY,' STUDENT ELIGIBILITY, AND THE CASE REVIEW PANEL

The Indiana High School Athletic Association (IHSAA) has been in existence since 1903, although it has been incorporated as a not-for-profit corporation only since 1976. During the past forty years, it has been involved in numerous lawsuits, both in state and federal courts, regarding its legal status, the enforcement of its by-laws against member schools and student-athletes, and the extent to which it is subject to judicial review. Only recently has the IHSAA come under any legislative scrutiny.<sup>1</sup> Although some members of the legislature originally became concerned with the IHSAA's activities when the single-class basketball tournament was ended, more recent legislative disaffection has centered on the perceived lack of meaningful review of student-athlete eligibility appeals. This resulted in the passage of P.L. 15-2000 (House Enrolled Act No. 1018-2000), creating a "Case Review Panel" of nine (9) members. The following is the pertinent language from the public law creating I.C. 20-5-63 (Interscholastic Athletic Associations):

- Sec. 7.** (a) The association must establish a case review panel that meets the following requirements:
- (1) The panel has nine (9) members.
  - (2) The state superintendent or the state superintendent's designee is a member of the panel.
  - (3) The state superintendent shall appoint as members of the panel persons having the following qualifications:
    - (A) Four (4) parents of high school students.
    - (B) Two (2) high school principals.
    - (C) Two (2) high school athletic directors.
  - (4) A member of the panel serves for a four (4) year term, subject to the following:
    - (A) An appointee who ceases to meet the member's qualification under subdivision (3) ceases to be a member of the panel.
    - (B) The state superintendent shall appoint fifty percent (50%) of the initial appointees under each clause in subdivision (3) for terms of two (2) years, so that terms of the panel are staggered.
  - (5) The panel must meet monthly, unless there are no cases before the panel. The panel may meet more frequently at the call of the chairperson. However,

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<sup>1</sup>See, for example, "Basketball in Indiana: Savin' the Republic and Slam Dunkin' the Opposition," **Quarterly Report** January-March 1997 and "Athletics: No Paean, No Gain," **Quarterly Report** April-June 1997.

the chairperson must call a meeting within five (5) business days after the panel receives a case in which time is a factor in relation to the scheduling of an athletic competition.

(6) A quorum of the panel is five (5) members. The affirmative vote of five (5) members of the panel is required for the panel to take action.

(b) A student's parent who disagrees with a decision of the association concerning the application or interpretation of a rule of the association to the student shall have the right to do one (1) of the following:

(1) Accept the decision.

(2) Take legal action without first referring the case to the panel.

(3) Refer the case to the panel.

(c) Upon receipt of a case, the panel must do the following:

(1) Collect testimony and information on the case, including testimony and information from both the association and the parent.

(2) Place the case on the panel's agenda and consider the case at a meeting of the panel.

(3) Make one (1) of the following decisions:

(A) Uphold the association's decision on the case.

(B) Modify the association's decision on the case.

(C) Nullify the association's decision on the case.

(d) The association must implement the decision of the panel on each case.

However, a decision of the panel:

(1) applies only to the case before the panel; and

(2) does not affect any rule of the association or decision under any rule concerning any student other than the student whose parent referred the case to the panel.

(e) The association shall pay all costs attributable to the operation of the panel, including travel and per diem for panel members.

There are questions to be resolved, such as:

1. If the IHSAA, a not-for-profit corporation, "establishes" and financially supports the Case Review Panel, but the appointments are made by the State Superintendent of Public Instruction, a statewide elected official and a constitutional office, what is the nature of the "Case Review Panel" with respect to Indiana's Open Door Law regarding public meetings (I.C. 5-14-1.5 *et seq.*) and the Access to Public Records Act (I.C. 5-14-3 *et seq.*)?
2. Because such proceedings may involve personally identifiable information regarding a student, are the proceedings of the Case Review Panel closed to the public except at the election of the student's parent or the student, if the student is over the age of eighteen years and does not have a guardian appointed?

3. To what extent will the Administrative Orders and Procedures Act (AOPA), I.C. 4-21.5-3 *et seq.*, apply to these proceedings?
4. Does the requirement that the IHSAA implement the decision of the Case Review Panel restrict the IHSAA's right to seek judicial review of the decision of the Case Review Panel or does this language merely require it to implement the decision while judicial review is sought?
5. Will there be different standards for judicial review depending upon whether the decision being appealed is from the IHSAA or from the Case Review Panel, given that a parent has an election?<sup>2</sup>

The first two questions will need to be answered shortly. The third will be likely determined through the procedures adopted and employed by the Case Review Panel itself. The fourth question will likely be determined through judicial avenues absent a legislative clarification. The fifth question can only be answered judicially.

More immediate and less esoteric concerns will involve the "mix" of the membership. The State Superintendent announced that the eight members to be appointed should be representative of the State in terms of gender, race, and geographic location.<sup>3</sup> She also indicated that at least one member would represent nonpublic schools. Although the Panel is to assume its responsibilities on July 1, 2000, there are logistical concerns that need to be addressed, such as: Just how many appeals could be expected? The number seems to vary. IHSAA Commissioner-elect W. Blake Ress was quoted in *The Indianapolis Star* that, as of April 12, 2000, the IHSAA had "2,587 transfers so far this academic year [school year 1999-2000] and just 24 students, or less than one percent, have been declared

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<sup>2</sup>The Indiana Supreme Court in *IHSAA v. Carlberg*, 694 N.E.2d 222, 231 (Ind. 1997), established, as a matter of Indiana common law, that state courts "have jurisdiction to review challenges to IHSAA rules and enforcement decisions applicable to a particular student, assuming those challenges are brought by non-IHSAA members with standing. Such rules and decisions will not be reviewed *de novo* but in a manner analogous to judicial review of government agency action, recognizing, however, that the IHSAA is not a government agency and the common law will have to accommodate the difference." As noted *infra*, the Case Review Panel is likely to be viewed as an agency of government created by the legislature exercising its constitutional prerogative. The standard of review (arbitrary and capricious) would likely remain the same, but a reviewing court will not have to "accommodate the difference" it would should it be reviewing a final decision emanating from the IHSAA itself and not the Case Review Panel. The difference would be subtle, but there could be some distinction made.

<sup>3</sup>"Overview panel still seeking applications," *The Indianapolis Star*, May 3, 2000.

ineligible.”<sup>4</sup> In a later newspaper article, it was reported that “[l]ast year, the IHSAA handed down rulings on 2,663 eligibility cases, with 2,350 students getting full eligibility, 275 getting limited eligibility<sup>5</sup> and 38 being declared ineligible.”<sup>6</sup> Ress, in the April 12, 2000, *Star* article, stated that he believes “the new appeals panel will rule the same way our executive committee has ruled in most cases, once it knows all the facts. I don’t think this is as big of a problem as people think it is.”<sup>7</sup> He added in the May 3, 2000 *Star* article that he does not perceive the Case Review Panel as a threat to the 97-year-old association. “At first, practically everyone we vote down will probably appeal,” he is quoted as saying. “I would imagine August and September will be very busy. I would hope if people watch what happens with the panel and see what’s going on, the precedent<sup>8</sup> will discourage people from taking frivolous cases to the appeals board.”

The IHSAA publishes annually its “By-Laws and Articles of Incorporation.”<sup>9</sup> Some of these by-laws or rules are preceded by philosophical statements explaining the basis for the enactments. There are also interpretative guidelines in a “question/answer” format. Although the IHSAA has specific titles for its enactments, the more controversial by-laws are better known in case law by such designations as the “Transfer Rule,” the “Eight-Semester Rule,” the “Hardship Rule,” and the “Restitution Rule.” The IHSAA itself has been—and continues to be—more controversial than any of its rules.

### *The IHSAA as a ‘State Actor’*

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<sup>4</sup> “Association’s new commissioner comments on issues facing group,” *The Indianapolis Star*, April 12, 2000.

<sup>5</sup> “Limited eligibility” means that the student-athlete can participate in athletic competition below the varsity interscholastic level.

<sup>6</sup> “Overview panel still seeking applications,” *The Indianapolis Star*, May 3, 2000.

<sup>7</sup> Courts have been critical of the IHSAA’s internal review system. Although a student may appeal an adverse decision by the Commissioner to the IHSAA’s Executive Committee, the Executive Committee rarely overturns such decisions. Any student appealing the Commissioner’s decision would find that “only about 5% of [the Commissioner’s] decisions are overturned.” *Crane v. IHSAA*, 975 F.2d 1315, 1324-25 (7<sup>th</sup> Cir. 1992).

<sup>8</sup> Actually, by law, the decisions of the Case Review Panel will not serve as precedent except with respect to the student-athlete who is the subject of the dispute being addressed. See P.L. 15-2000, creating I.C. 20-5-63-7(d)(1).

<sup>9</sup> Although the IHSAA recently adopted certain changes to its by-laws (see *The Indianapolis Star*, May 2, 2000), none of the changes affects this report. All references herein are to the by-laws as they appeared in the 1999-2000 edition.

State and federal courts have grappled with a legally precise definition for the IHSAA in order to determine its exact functions and the extent to which courts have jurisdiction to review final decisions of the IHSAA, especially as these relate to student-athletes as opposed to member schools, the vast majority of which are tax-supported public schools. The courts generally agree that high school students do not have a “constitutional right to participate in interscholastic athletics.” Hass v. South Bend Comm. Sch. Corp., 289 N.E.2d 495, 498 (Ind. 1972).<sup>10</sup> But this does not mean that constitutional issues might not arise from the manner that athletic programs are administered after being provided. Id. Also, IHSAA decisions “have long been held judicially reviewable even absent an expressed constitutional right.” IHSAA v. Wideman, 688 N.E.2d 413, 419 (Ind. App. 1997). Although the IHSAA does not receive any tax dollars directly and is a “voluntary association” because it does not exist by virtue of any statutory action by the General Assembly, “In the majority of the cases, the salaries of the respective principals and coaches are derived from tax funds. Equally true is the fact that most of the athletic contests are held in, or on, athletic facilities which have been constructed and maintained with tax funds. Regardless of how the IHSAA denominates itself as an organization, or how it characterizes its relationship with its member schools, it is abundantly clear that the association’s very existence is entirely dependent upon the absolute cooperation and support of the public school systems of the State of Indiana. The enforcement of the rules promulgated by the IHSAA and adopted by the member schools may have a substantial impact upon the rights of students enrolled in these tax-supported institutions, and we conclude, therefore, that the administration of interscholastic athletics by the IHSAA should be considered to be ‘state action’ within the meaning of the Fourteenth Amendment.” Haas, at 496-98.<sup>11</sup> In one case, the IHSAA stipulated that enforcement of the rules in question would constitute “state action.” IHSAA v. Raike, 329 N.E.2d 66, 69 (Ind. App. 1975).

The Indiana Supreme Court expanded upon the “state actor” role of the IHSAA in IHSAA v. Carlberg, 694 N.E.2d 222 (Ind. 1997), *reh. den.* (1998). Indiana’s constitution (Art. 8, §1) “specifically recognizes that ‘knowledge and learning’ are ‘essential to the preservation of a free

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<sup>10</sup>This has been reiterated in a number of state and federal decisions, including Jordan v. IHSAA, 813 F.Supp. 1372 (N.D. Ind. 1993). However, the Jordan court added at 1378, n. 8: “[T]he court would not find it entirely astonishing if, in the basketball-obsessed State of Indiana, a party would argue for recognition of a constitutionally protected fundamental right to play basketball.”

<sup>11</sup>Most federal constitutional challenges to IHSAA actions are concerned with the Equal Protection and Due Process Clauses of the Fourteenth Amendment, which read: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” State constitutional challenges usually involve Article I, §23, which reads: “**Privileges equal.** The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.”

government’ and so mandates a statewide system of free public education.... We believe athletics are an integral part of this constitutionally-mandated process of education.” Carlberg, 694 N.E.2d at 229. Justice Brent E. Dickson, in a separate opinion concurring and dissenting in Carlberg, 694 N.E.2d at 244, added that the “General Assembly has basically delegated the governance of the athletics component of education to the schools themselves. The schools have then sub-delegated that governance to the IHSAA. [The IHSAA] acknowledged that the IHSAA is supported by tax dollars and revenue from the participating schools. As recognized by the majority, we have long viewed IHSAA determinations as state action for the purpose of constitutional analysis.”<sup>12</sup> The Carlberg court, at 231, recognized that “[t]he analogy between IHSAA decisions and government agency action is not a perfect one, however, and courts must remember that the IHSAA is not a government agency. Administrative law, the body of law that governs government agency action, is largely of statutory creation and we do not suggest that the IHSAA must conform its procedures to those mandated by the Indiana Administrative Orders and Procedures Act, Ind. Code §4-21.5-1-1 *et seq.*, or other statutes.”<sup>13</sup>

The federal courts have likewise found that the IHSAA is a “state actor,” Jordan v. IHSAA, 813 F.Supp. 1373, 1376 (N.D. Ind. 1993), vacated and dismissed as moot, 16 F.3d 785 (7<sup>th</sup> Cir. 1994), and, as such, its decisions are judicially reviewable, Crane v. IHSAA, 975 F.2d 1315, 1317 (7<sup>th</sup> Cir. 1992). Also see Robbins v. IHSAA, 941 F.Supp. 786 (S.D. 1996).

Both state and federal courts have noted that the IHSAA is a frequent visitor. The Carlberg court observed at 694 N.E.2d at 228 that since 1959 the “IHSAA’s rules and its enforcement thereof [have been] the source of much litigation. And the number of cases cited in this and the Reyes opinion [companion opinion issued the same date] illustrate that a not insubstantial number of these cases result

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<sup>12</sup>Although the Supreme Court noted in Carlberg at 229 that the IHSAA’s continuing attempts to challenge its actions as “state actions” have resulted in over 25 years of decisions against it in this regard, apparently the IHSAA continued to raise this argument. Chief Justice Randall T. Shepard, in a concurring opinion to IHSAA v. Reyes, 694 N.E.2d 249, 258 (Ind. 1997), issued the same date as Carlberg, added that the IHSAA’s arguments that it is not subject to the jurisdiction of the courts “has been rejected by state and federal courts on prior occasions too numerous to mention. I see no reason why parties engaged in litigation with the IHSAA should have to pay their lawyers to respond to this contention. Thus, if we had been asked to do so, I would vote to order payment of attorney fees on this issue.”

<sup>13</sup>As noted above, there remains a question regarding the extent to which the AOPA will apply to the Case Review Panel. Under Carlberg, it would appear the Supreme Court would view the Case Review Panel as a government agency created by the General Assembly in the exercise of its constitutional prerogative. However, it seems unlikely the AOPA would apply strictly given the somewhat expedited process intended by the legislature. The AOPA would likely provide helpful guidelines to be employed but would not require other procedural elements, such as mandatory pre-hearing conferences and pre-hearing orders.

in published opinions in the federal and state reporters.” The 7<sup>th</sup> Circuit, in Crane v. IHSAA, 975 F.2d at 1317, n. 2, commented on the IHSAA’s trend to remove cases to the federal courts from state courts: “One would think that the IHSAA would prefer to have this case heard in Indiana state courts; however, it is apparent why the IHSAA chose the federal forum. IHSAA rules limiting the right of high school students to participate in athletics have not fared well in Indiana state courts.”

The IHSAA has been the subject of much criticism from state and federal courts regarding its methods of enforcing its rules and, lately, for its tactics. Justice Dickson, in the dissenting portion of his opinion in Carlberg, 694 N.E.2d at 247, n. 5, proved prophetic: “Because of the past willingness of Indiana courts to meaningfully review the actions and decisions of the IHSAA, the General Assembly may have heretofore found it unnecessary to exercise its constitutional authority to provide guidance and limits upon IHSAA action, and specific remedies for conflict resolution. With its decision today [in Carlberg and Reyes], the majority [of the Supreme Court] effectively withdraws this assurance of substantial judicial oversight and thereby invites legislative review and regulation.” Justice Dickson’s dissent was written in 1997. The legislature acted in 2000. As the law was about to pass, the majority and the dissent in IHSAA v. Vasario, 726 N.E.2d 325, 333, 336, n. 6 (Ind. App. 2000) commented favorably on the intervention of the legislature to create a review system that would be more fair to student-athletes by curtailing the IHSAA’s “virtually unreviewable discretion” in determining when and how it will enforce its rules. The following are some of the issues and controversies involving the IHSAA. The two main issues have been the Transfer Rule and the Restitution Rule, although the Eight Semester Rule, the Hardship Rule, the Foreign Exchange Student Rule, the Age Rule and the Credit Rule also appear as related issues.

### ***The Transfer Rule***

The federal district court in Anderson v. IHSAA, 699 F.Supp. 719 (S.D. Ind. 1988), commenting on the Transfer Rule especially, lamented that the “rules of the IHSAA, in essence, create an irrebuttable conclusion of law that other transferees have been the victims of unscrupulous practices” even though there is no evidence that transfers were primarily for athletic reasons or the result of undue influence. “The [Transfer] rule is unfair, lacks sensitivity and penalizes a student that it was never intended to cover and shouldn’t. The rule lacks provision for the application of common sense and reasonableness. Its rigid enforcement fails to cure or address the abuse for which it was intended. Pure and simple, it’s an overkill, which the Court hopes is rectified in the immediate future.... While academics are certainly important, competitive sports reveal and demonstrate a separate dimension of character.” At 731. The Court rejected the IHSAA’s argument that judging individual cases will be too time-consuming. “The Court says, yes, it will be more trouble and require more time, but it’s worth it when it means some young person may not get to participate in athletics for one (1) year.” Id. The Transfer Rule has numerous subsections, some of which have been the subjects of particular case law.

### ***Primarily for Athletic Reasons***

A student who transfers to an IHSAA member school “primarily for athletic reasons” will not be eligible

to participate in interscholastic sports for 365 days from the date of the transfer.<sup>14</sup> The stated purpose for such a rule is “to preserve the integrity of interschool athletics and to prevent or minimize recruiting, proselytizing and school ‘jumping’ for athletic reasons...” (Rule 19-4).

Sometimes the reason for the transfer is presumed from the circumstances. Most often, this presumption arises where the student transfers schools but there is not a corresponding “bona fide change of residence” by the student’s parent or guardian.<sup>15</sup> There are thirteen (13) exceptions to this general rule, including circumstances where the student becomes a “ward of the court,”<sup>16</sup> moves between divorced parents (with some limitations on multiple moves), the closing of the student’s former school, lack of accreditation status by the former school (all member schools are required to be state-accredited), redistricting, emancipation, lack of previous athletic participation, or the student is a “qualified foreign exchange student under Rule 19-7.” The IHSAA also has a “Hardship Rule” (Rule 17-8) that permits the IHSAA, in its discretion, to set aside the effect of any Rule where (1) strict enforcement of the Rule in a particular case will not serve the purpose of the Rule; (2) the spirit of the Rule has not been violated; and (3) circumstances dictate that enforcement of the Rule would create an “undue hardship.”

The IHSAA may also decide that a student’s transfer was not “primarily for athletic reasons,” but without a corresponding change of residence, the student will still be ineligible for varsity competition but will have “limited eligibility,” which would allow the student to participate on junior varsity or freshman teams, as appropriate.

### ***Bona Fide Change of Residence***

In IHSAA v. Wideman, 688 N.E.2d 413 (Ind App. 1997), Wideman spent the first two years of high school playing basketball and volleyball for one public school district. She was expected to be a mainstay of the local athletic teams her junior year. Her parents commuted daily to nearby Warsaw for

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<sup>14</sup>A “transfer primarily for athletic reasons” is defined generally by the IHSAA to include transfers to obtain an athletic advantage at either a superior or inferior athletic team; to avoid philosophical conflicts with administrators, teachers, or coaches regarding athletics; or to avoid or nullify punitive action.

<sup>15</sup>The IHSAA defines a “bona fide” change of residence to require the actual abandonment of the previous residence through sale, lease, or similar disposition, or be in the process of doing so, with no immediate family member utilizing the premises as a residence. In addition, “the student’s entire immediate family must make the change and take with them the household goods and furniture appropriate to the circumstances. For eligibility purposes, a single family unit may not maintain two or more residences.” (Rule 19–Definitions)

<sup>16</sup>Because Indiana does not define this term, “ward of the court” is often used interchangeably with “ward of the state.” In some circumstances, the distinction is important, but for the purpose of the IHSAA rules, wardship refers to both court and state.

work. Wideman's father contracted multiple sclerosis and her mother's parents, who lived in Warsaw, were infirmed and required increasing support and assistance from Wideman's mother. The family sold its residence and bought land in Warsaw, intending to build a house. During this time, they lived with the maternal grandfather (the grandmother having passed away). She enrolled in the Warsaw schools, but the IHSAA found her ineligible, claiming the transfer was primarily for athletic reasons. The trial court enjoined the IHSAA, and the Court of Appeals upheld the injunction, finding the IHSAA's determination was arbitrary and capricious. The "uncontroverted evidence" supported that the change of residence was "bona fide" as defined by the IHSAA rules. The Widemans had sold their house for its full list price and moved to Warsaw.

### ***Limited Eligibility***

The parents of the student in Crane v. IHSAA, 975 F.2d 1315 (7<sup>th</sup> Cir. 1992) were divorced, with custody eventually granted to the mother, with whom he lived for the next ten years. During his freshman year, he was a member of the junior varsity golf team. However, he was also becoming a disciplinary problem for his mother and his grades were falling. The mother and father decided to let him complete his freshman year, after which he would live with the father in a rural district 150 miles away. The student enrolled in the rural district and was a member of the varsity golf team, notably because the school was so small it did not have a junior varsity team. Although the principals of the two high school involved in the transfer certified to the IHSAA the transfer was not "primarily for athletic reasons," the IHSAA found him nonetheless ineligible for varsity sports because his parents did not change residence. It granted him "limited eligibility," which, because his school had no junior varsity team, meant the student could not participate at all. The federal district court enjoined the IHSAA from enforcing its Transfer Rule against the student, and the 7<sup>th</sup> Circuit upheld the injunction. There was no question the move was not "primarily for athletic reasons" and was not the result of "undue influence." The IHSAA rules contain exceptions to the "change of residence" requirement where the move is between divorced or separated parents and the "reasons for the move are outside the control of the parents and student and are significant, substantial and/or compelling."<sup>17</sup> Additionally, eligibility will be

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<sup>17</sup>The 7<sup>th</sup> Circuit later criticized the IHSAA for its poorly drafted rules, which are part of the reason for the inconsistent applications of such rules. The current language of many of the IHSAA's rules contains the curious construction "and/or" that, in and of itself, creates the type of ambiguity the 7<sup>th</sup> Circuit criticized. Are conditions satisfied through a three-part application or satisfied so long as the reason for the move was "significant, substantial, *or* compelling"? Other courts have criticized the use of such an indefinite construction. "The presiding judge murdered the King's, the Queen's, and everybody's English by using the monstrous linguistic abomination 'and/or' in this portion of the order." Brown v. Guaranty Estates Corp., 80 S.E.2d 645, 653 (N.C. 1954). Also see Employers' Mutual Life Ins. Co. v. Tollefsen, 219 Wisc. 434, 437 (Wisc. 1935), criticizing the use of "and/or" as "that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did

granted where the transfer is due to “reasons outside the control of the student.” (Rule 19-6(b),(c).) However, the IHSAA rules do not define critical terms. At 1321-22. The fact that the IHSAA granted the student “limited eligibility” is a tacit finding that the transfer was not primarily for athletic reasons or the result of undue influence. At 1322. “The IHSAA’s problem starts with a poorly drafted rule.” Although some key terms are defined, other important terms are not. “This omission would not be fatal if the IHSAA used the common meaning of these terms or interpreted the terms consistently. But it does not. As [the Commissioner’s] testimony demonstrates, the IHSAA has no consistent idea what these words mean.” At 1325. Such an “*ad hoc* interpretation and application of [the Transfer Rule] in this case was arbitrary and capricious in violation of Indiana law.”<sup>18</sup> At 1326.

IHSAA v. Carlberg, 694 N.E.2d 222 (Ind. 1997), *reh. den.* (Ind. 1998) also involved “limited eligibility” for a student who started his academic career at a parochial school but transferred to a public school for his sophomore year due to academic difficulties. There was no corresponding change of residence by his parents. As a consequence, he was found ineligible for varsity sports for 365 days, but was granted “limited eligibility.” The trial court enjoined the IHSAA, and the Court of Appeals upheld the injunction. However, the Supreme Court reversed. Applying a more consistent “arbitrary and capricious” standard for judicial review of IHSAA decisions affecting student-athletes, the majority found that the IHSAA had established “objective standards for eligibility” (i.e., change of residence), and that such a rule “acts as a deterrent to athletically motivated transfers. The absence of such a rule might reasonably ‘invite strategically motivated transfers thinly disguised as transfers in the best (nonathletic) interest of the student.’” At 233, citing Crane v. IHSAA, 975 F.2d 1315, 1328 (7<sup>th</sup> Cir. 1992), Judge Richard A. Posner, dissenting. Applying the arbitrary and capricious standard, the majority did not “find the IHSAA decision that Carlberg was ineligible for varsity athletics for 365 days following his transfer to be willful and unreasonable, without consideration and in disregard of the facts or circumstances in the case, or without some basis which would lead a reasonable and honest person to the same conclusion.” At 233 (citation omitted). The dissent would have found otherwise. “[T]he arbitrariness of the IHSAA’s application of its [Transfer] rule becomes apparent in the present case: A rule purporting to limit athletically-motivated transfers and promote education as the primary value of school in fact punishes a student whom the IHSAA found did *not* transfer for an athletic reason and where the uncontradicted evidence points only to academic reasons for transfer. Common sense

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mean...”

<sup>18</sup>The 7<sup>th</sup> Circuit observed at 1325 that the “IHSAA’s inconsistency is aggravated by the fact that it does not publish any type of written opinion or reasoning for its eligibility decisions to member schools. Thus, there is no guidance for high schools, students or parents.... Once the IHSAA decides on one interpretation, it should publicize that interpretation and apply it consistently.” Although the Case Review Panel created by P.L. 15-2000 will issue opinions that affect only the case at hand and will not serve as “precedent” or otherwise affect the IHSAA’s rules, the Case Review Panel should nevertheless reduce its decisions to writing (which is not actually required by the law) and provide some means of public access to redacted decisions.

instructs that application of the Transfer Rule to limit Jason's opportunities for participation would be blatantly arbitrary and capricious." (At 245, J. Dickson, dissenting).

### ***Guardianships***

Although the IHSAA's rules recognize the role of guardians, it will not recognize "[a] guardian appointed for the purpose of making a student eligible..." Rule 19-6.1(c)(2). In Kriss v. Brown, 390 N.E.2d 193 (Ind. App. 1979), the IHSAA would not recognize the guardianship established for Kriss when he moved from his mother's house to live with a family in another school district that was better known for its basketball prowess. The IHSAA noted that the student's mother did not change her residence, the guardianship was established in order to render the student eligible to play basketball, and the move was motivated by "undue influence" from a former coach. Kriss sought to enjoin the IHSAA's enforcement of its rule, but the trial court denied the relief. The Court of Appeals upheld the trial court, noting the IHSAA was not challenging the legality of the guardianship when it determined Kriss was ineligible to play because the transfer was primarily for athletic reasons. Although the IHSAA's Rule 20 is concerned entirely with what constitutes "undue influence," the appellate court found that "undue influence" does not lend itself to an exact definition, "since to define it by fixed principles would be to point out the highway of evasion to those who are desirous of circumventing it." At 201. "Undue influence" is a question of fact, the court stated at 196. "It is usually proved by circumstantial evidence since it involves an operation of the mind. Direct evidence is required only to establish facts from which the trier of fact can make a proper inference of the presence of undue influence." The Rule, the court concluded, provides enough specifics that "we cannot agree [with the student] that 'undue influence' amounts to anything the Commissioner wants to so label." At 201.

In Sturup v. Mahan, 305 N.E.2d 877 (Ind. 1974), the student moved to Indiana from Florida, where he had been living with his parents and ten sisters in a two-bedroom house, to live with an older brother. The Florida neighborhood and his high school were described as providing "demoralizing and detrimental conditions." The brother established a guardianship through the county circuit court. The IHSAA did not contest Sturup's move was primarily for athletic reasons. However, because his parents did not change their residence, the IHSAA determined he was ineligible under the Transfer Rule. Sturup sought to enjoin the IHSAA, but the trial court denied the relief. The Court of Appeals reversed. The Supreme Court upheld the appellate court. Although the IHSAA's Transfer Rule is reasonably related to the goal of preserving the integrity of interscholastic athletics by minimizing recruitment and "school jumping," the rule is unreasonable, the court held at 881, where it sweeps too broadly in its proscription by creating an irrebuttable conclusion of law that all transferees (other than those whose parents move with them or those who move due to "unavoidable circumstances") have been the victims of unscrupulous practices. This creates an "over-inclusive class" of those who move from one school to another for reasons wholly unrelated to athletics being grouped with those who have been recruited or who have "jumped" for athletic reasons. The rule penalizes a student-athlete who wishes to transfer for academic or religious reasons or for any number of other legitimate reasons. Denying eligibility to such students does not further the IHSAA's objectives. Id. The Supreme Court

added at 882 that the IHSAA's rules specifically recognize the establishment of legal guardianships, including the doctrine of *in loco parentis*. There is no rational reason for distinguishing between natural parents and legal guardians with respect to transferee eligibility.<sup>19</sup>

### ***Students with Disabilities***

Although the case involves the IHSAA's "Eight Semester Rule," the decision in Washington v. IHSAA, 181 F.3d 840 (7<sup>th</sup> Cir. 1999) is helpful in applying the requirements of federal disability laws to what are essentially school-sponsored events, albeit sanctioned and controlled by the IHSAA.<sup>20</sup> Washington had an undiagnosed learning disability. Despite his inability to demonstrate academic proficiency, he was passed from grade to grade, although he was retained in the eighth grade. He continued to experience academic failure but was promoted to high school, where he proceeded to fail both his freshman and sophomore years. At the beginning of his junior year, a school counselor suggested that he drop out of school, which he did. The following summer, while participating in a local basketball tournament, he met the basketball coach for a parochial school. He enrolled at the parochial school the next fall and began playing basketball. He was also referred for an educational evaluation to determine whether he had a learning disability. He had been referred for such an evaluation earlier in his academic career, but was determined not eligible for special education and related services at that time. This time, however, he was found to have a learning disability. The IHSAA has an "Eight Semester Rule" that limits eligibility to eight semesters calculated from the student's first entrance into high school. Based on this, the IHSAA found Washington ineligible for athletic competition beginning the second semester of his junior year. The school sought a waiver from the rule, arguing that the two semesters he was not enrolled in school should not count against him, but the IHSAA was not persuaded. Washington sought declaratory and injunctive relief. The federal district court enjoined the IHSAA, finding that Washington had a disability and waiver of the rule would constitute a "reasonable modification" under Title II of the Americans with Disabilities Act (ADA). The 7<sup>th</sup> Circuit Court of Appeals affirmed, noting that neither the ADA nor Sec. 504 of the Rehabilitation Act of 1973 requires any type of intent before discrimination occurs but can arise from the refusal to provide a reasonable modification of a rule or where a rule disproportionately impacts people with disabilities. In order to decline to provide a reasonable modification, the IHSAA would have to show such accommodation

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<sup>19</sup> The Supreme Court in IHSAA v. Carlberg, 694 N.E.2d 222, 233, n. 15, abandoned the so-called "overbreadth" analysis from Sturup but only for Equal Protection analysis. The court stated the "overbreadth" analysis is still helpful in assessing whether or not IHSAA decisions are arbitrary and capricious.

<sup>20</sup> The Washington case involves Title II of the Americans with Disabilities Act of 1990. It does not implicate the pre-eminent federal disability law for public secondary schools, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, as implemented through 34 CFR Part 300, although he was found eligible for services under IDEA.

would be unreasonable and would constitute a fundamental change in the rule itself. In this case, the Eight Semester Rule is designed primarily to discourage redshirting and promote academics over athletics. The 7<sup>th</sup> Circuit found that the factors behind the creation of the Rule were not jeopardized in this situation through a waiver for Washington.<sup>21</sup>

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<sup>21</sup> Washington did not challenge the IHSAA's "Age Rule," which would have rendered him ineligible due to his age for his senior year at the parochial school or at any other member school.

It is also noteworthy that the 7<sup>th</sup> Circuit would not treat IHSAA decisions with the same deference State courts would have to under the Supreme Court's IHSAA v. Carlberg case. In this situation, the IHSAA found that Washington's learning disability did not cause him to drop out of school. Federal courts, the 7<sup>th</sup> Circuit stated at 849, n. 12, are not obliged to give deference to determinations by the IHSAA. "[W]e can discern no basis in Title II of the ADA for treating the IHSAA's findings deferentially." The 7<sup>th</sup> Circuit also rejected the IHSAA's argument that the waiver would create an "undue administrative burden" upon it, especially with the individualized approach to analyzing ADA claims. "The record indicates that Mr. Washington is the only student athlete to seek a waiver because of a learning disability in more than a decade. The few case-by-case analyses that the IHSAA would need to conduct hardly can be described as an excessive burden. The IHSAA already conducts individualized inquiries into whether student athletes with physical impairments should receive a waiver; requiring such an analysis in disability cases will not be a significant additional burden." At 852.<sup>22</sup>

The IHSAA in Washington argued that, should the court not uphold its Rule, it would be inundated with requests from other student-athletes alleging the presence of a disability. The 7<sup>th</sup> Circuit did not find this persuasive, noting that there are markedly few such cases from students with disabilities. There are two of note. In Thomas v. Greencastle Community School Corp., 603 N.E.2d 190 (Ind. App. 1992), Thomas, the star running back on the school's football team, would become ineligible for his senior year because of his age. He had been retained in the second grade due to a learning disability, resulting in his advanced age by his senior year. The IHSAA's decision was upheld by the Indiana Court of Appeals. The "Age Rule" bears a rational relationship to legitimate interests of the IHSAA: (1) to protect the health and safety of younger student-athletes; (2) to foster competition; and (3) to eliminate "redshirting." At 193. The appellate court also found that the Age Rule did not violate equal protection by not applying to the same extent to baseball. The age differential remains basically the same, the court found, because the younger students would be proportionally older since baseball is a spring and not a fall sport. "There will always be people who fall minutes, even seconds, outside of the established [time] line." At 194.

IHSAA v. Schafer, 598 N.E.2d 540 (Ind. App. 1992), *trans. den.* involved both the Eight Semester Rule and the Credit Rule of the IHSAA. Schafer was a member of a parochial school's basketball team. During his junior year, his academic and athletic skills noticeably deteriorated due to a

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<sup>22</sup> This statement is also an important distinction between federal analysis and state analysis. In IHSAA v. Carlberg, 694 N.E.2d 222, 233 (Ind. 1997), the Indiana Supreme Court accepted the IHSAA's argument that it could not conduct "regular detailed investigations" because these would be "cost prohibitive, could not be staffed by the current IHSAA personnel, and would have limited success in identifying those athletic transfers thinly disguised as nonathletic transfers." The Supreme Court found that any seeming inequities resulting from the strict application of the IHSAA's rules (in that case, the Transfer Rule) were balanced by creating the thirteen special criteria for immediate eligibility, the use of the Hardship Rule, or the permitting of "limited eligibility."

debilitating illness. He withdrew from school just before sectional play began. His coursework at the school had been college preparatory and year-long in its design. As a consequence, the high school permitted him to repeat his junior year the following school year. Schafer sought to have his junior year not count towards the “Eight Semester Rule.” The IHSAA denied his request, noting that he had participated in basketball well into the second semester. When the decision was appealed to the IHSAA’s executive committee, not only was the original decision upheld but an additional reason was found to declare him ineligible for the first semester of the new school year: He had not earned any credit in the previous semester. When the student filed suit to enjoin the IHSAA, the IHSAA added a third reason for denying him eligibility for the second semester of the new school year: He was not academically eligible at the end of the second semester due to his withdrawing from school. This would wipe out any remaining eligibility for the student. The trial court enjoined the IHSAA, and the Court of Appeals substantially affirmed the trial court’s decision. Although the Eight Semester Rule and the Credit Rule serve a legitimate, even laudable, interest, the proscriptions sweep too broadly, utilizing the rationale in Sturup v. Mahan that was later refined by the Carlberg court. However, the legitimate interests (prohibit redshirting, ensuring the primacy of academics over athletics) are not present in this case. Schafer was repeating his junior year due to illness and not due to any of the feared activities sought to be prohibited. Application of the rules in this case was arbitrary and capricious. At 554.

### ***Foreign Exchange Students***

Although IHSAA v. Vasario, 726 N.E.2d 325 (Ind. App. 2000) was referenced *supra* as the decision where both the majority and dissent included commentaries about the legislative action creating the Case Review Panel under P.L. 15-2000, the reason for doing so seems to be centered on the restricted standard of review created by Carlberg and the seeming belief that, had the Case Review Panel been in place and reviewed this case, there likely would have been a different outcome.

Vasario, an Italian national, applied for and was accepted into a foreign exchange program. The IHSAA permits athletic eligibility for foreign exchange students if, in part, the program is approved by the Council of Standards for International Education Travel (CSIET) and the IHSAA. A part of these requirements is that the exchange program “be under the auspices of an established national corporation, a not-for-profit corporation or organization or a national civic organization...” (Rule 19-7.1 under the Transfer Rule.) That is, the exchange program must have direct control over the placement and supervision of the students it places. The program that accepted Vasario originally met this criteria, but by the time he was placed in Crown Point, Indiana, it no longer met the criteria, a fact unknown to Vasario. The IHSAA found him ineligible for varsity competition, granting him instead “limited eligibility.” Vasario sought admittance to an acceptable foreign exchange program, but when this proved unsuccessful, he petitioned the IHSAA under the “Hardship Rule.” This was also denied. Vasario sought injunctive relief, but by the time the court granted the relief, it was too late for him to participate in the swimming sectionals. As a result, he sought to dismiss voluntarily his lawsuit, which the court granted. However, the IHSAA appealed the dismissal because it wanted to litigate the matter and obtain attorney fees as a result of what it perceived as “wrongful enjoinder.” Significant legal

maneuvering ensued, including appeals to the Court of Appeals and a separate action in the federal district court, which was decided in the IHSAA's favor. Eventually, a trial was conducted on the IHSAA's request for attorney fees. The trial court found the IHSAA's foreign exchange program requirements do not bear a rational relationship to the stated purpose of the Transfer Rule (to prevent recruitment and school jumping). Further, the application to Vasario was arbitrary and capricious. Additionally, the circumstances warranted an application of the "Hardship Rule." The trial court denied attorney fees to the IHSAA, but the Court of Appeals reversed, but not without reservation and a sharply worded dissent. Although the trial court found Vasario's failure to meet the technical requirements for eligibility was beyond his control, this is not the standard to employ. The standard, as set forth in Carlberg, is one of arbitrariness and capriciousness. To meet this standard, Vasario would have to show that the IHSAA acted "willfully and unreasonably and did not apply the standards listed in the [Transfer] rule. However, the criteria listed for the IHSAA to approve foreign exchange programs attempt to insure that a foreign exchange program does not have the opportunity to influence an assignment of a student for athletic purposes." The CSEIT's standards require that such placing programs maintain direct control over placements. The IHSAA's reliance on these standards is not arbitrary or capricious. "It is reasonable to require the program to have complete control over its placements to prevent others from exerting influence." At 332. Despite this, the majority opinion added that it shared the trial court's "disapproval of the failure of the IHSAA to grant Vasario a hardship exception. Vasario's situation seems to epitomize the reason the hardship exception was created..." At 333. The majority also criticized the IHSAA's actions in this case as being essentially motivated by a desire to intimidate students and parents. "We...fear that the IHSAA might wish to send a message to parents and student-athletes in Indiana about the great risk and expense involved in challenging a ruling [of the IHSAA] and thus discourage them from appealing a denial of eligibility." At 335.

The dissent believes that the narrow construction given the Carlberg "arbitrary and capricious" standard of review by the majority renders IHSAA decisions virtually unreviewable. "In deciding whether the IHSAA's decision was arbitrary and capricious, I would observe that if any conceivable problem qualifies for a hardship exception, the problems encountered by Vasario do: they were beyond the control of his school, his family, and himself. None argue in this case that Vasario even understood that his program had been disqualified from any list deemed important by the IHSAA before he was already attending school in Crown Point." At 336. "...To my mind, this ultimately means that the refusal to grant a hardship exception in this case was arbitrary and capricious as that standard is defined." Id.<sup>23</sup>

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<sup>23</sup>Although not raised in Vasario, there is a statutory provision that permits foreign students to attend tuition free the public school corporation where the host family resides so long as the student is in Indiana "under any student exchange program approved by the Indiana state board of education and is considered a resident student with legal settlement in the school corporation where the foreign exchange student resides." I.C. 20-8.1-6.1-6(b). If Vasario were here under a program that meets the statutory requirements, then he had "legal settlement" (see I.C. 20-8.1-6.1-1) and would have been

### ***Athletic Scholarship***

The Indiana Court of Appeals, in Kriss v. Brown, 390 N.E.2d 193, 198 (Ind. App. 1979) addressed whether the potential for a college athletic scholarship should be a consideration when deciding the applicability of the IHSAA rules to a student-athlete. The court stated: “Considering the rising cost of a college education, certainly a majority of young people could claim that an athletic scholarship would enhance their opportunity to gain a college education. That is not a satisfactory reason, *per se*, for permitting Kriss or any other senior in high school to disregard the [IHSAA’s] rules.”

This may not be an across-the-board proscription. The 7<sup>th</sup> Circuit Court of Appeals, in Washington v. IHSAA, 181 F.3d 840, 853 (7<sup>th</sup> Cir. 1999) upheld the district court’s finding that Washington would be irreparably harmed if he did not obtain an injunction against the IHSAA “because if he were not allowed to play, he would lose out on the chance to obtain a college scholarship and he would have a diminished academic motivation.” The IHSAA argued that the loss of a potential college scholarship is too speculative to constitute irreparable harm. “However, Purdue University basketball coach Gene Keady testified at the preliminary injunction hearing that Mr. Washington would be harmed by an inability to play basketball in his high school games because basketball scouts would not have an opportunity to view him playing.... The district court’s finding is therefore not clear error.”

### ***The Restitution Rule***

The “Restitution Rule” has become the more controversial of the IHSAA’s rules. Found at Rule 17-6, it reads as follows:

If a student is ineligible according to Association Rules but is permitted to participate in interschool competition contrary to Association Rules, but in accordance with the terms of a court restraining order or injunction against the student’s school and/or the Association and the injunction is subsequently voluntarily vacated, stayed, reversed or it is finally determined by the courts that injunctive relief is not or was not justified, any one or more of the following action(s) against such school in the interest of restitution and fairness to competing schools shall be taken:

- a. require individual or team records and performances achieved during participation by such ineligible student be vacated or stricken;
- b. require team victories be forfeited to opponents;
- c. require team or individual awards earned be returned to the Association; and/or
- d. if the school has received or would receive any funds from an Association tournament series in which the ineligible individual has participated, require the school forfeit its

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eligible for participation in any extracurricular activity for which he was otherwise qualified, IHSAA by-laws notwithstanding.

share of net receipts from such competition, and if said receipts have not been distributed, authorize the withholding of such receipts by the Association.<sup>24</sup>

In IHSAA v. Avant, 650 N.E.2d 1164 (Ind. App. 1995), *trans. den.*, a student transferred to a public school from a parochial school during the summer after his junior year. The ostensible reason for the transfer was financial hardship of the family, but it appears that athletics was at least a motivating factor. Although he transferred, his parents did not change their residence. As a result, the IHSAA denied him eligibility under its Transfer Rule and did accord him “limited eligibility,” which would be useless since he would be a senior and the school he attended did not permit seniors to play on the junior varsity basketball team. Avant obtained an injunction against the IHSAA, which allowed him to play basketball. The Court of Appeals found that the Transfer Rule would apply to Avant, but agreed with the trial court that the Restitution Rule should be enjoined. The rule punishes student-athletes and their respective schools when an injunction is either voluntarily vacated, stayed, reversed, or finally determined to have been unjustified. Under such circumstances, the IHSAA would require the student and the school to forfeit any awards, funds, and games that were the result of participation by the student-athlete. “It would be illogical and manifestly unreasonable to exact penalties upon individuals and schools as punishment or retribution for their actions in compliance with a court order.” At 1171. Also see IHSAA v. Wideman, 688 N.E.2d 413, 419 (Ind. App. 1997).

The Indiana Supreme Court reversed this trend in IHSAA v. Reyes, 694 N.E.2d 249 (Ind. 1997). By the time this case reached the Supreme Court, Reyes had graduated and the matter was moot as to him. But because he had played under a court order that was later reversed by the Court of Appeals, the school sought transfer to the Supreme Court because it feared retaliation from the IHSAA under its Restitution Rule. The Supreme Court noted that Indiana courts have historically given heightened scrutiny to IHSAA decisions, but this is primarily where a non-member student-athlete is involved. “The rule in Indiana is that courts exercise limited interference with the internal affairs and rules of a voluntary membership association... Absent fraud, other illegality, or abuse of civil or property rights having their origin elsewhere, Indiana courts will not interfere in the internal affairs of [a] voluntary membership association. This means, *inter alia*<sup>2</sup> that Indiana courts will neither enforce an association’s internal rules [citation omitted] nor second guess an association’s interpretation or application of its rules [citation omitted].” At 256. Although the court would apply the Carlberg “arbitrary and capricious” standard of review to IHSAA decisions affecting students, “we see little justification for it when it comes to the IHSAA’s member schools. As to its member schools, the IHSAA is a voluntary membership association. Judicial review of its decisions with respect to those schools should be limited to those circumstances under which courts review the decisions of voluntary membership associations—fraud, other illegality, or abuse of civil or property rights having their origins elsewhere.” At 257. Because the public school in Reyes is not alleging fraud, other illegality, or abuse

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<sup>24</sup>The Restitution Rule employs two “and/or” constructions, creating unfortunate ambiguities. See footnote 17, *supra*.

of civil or property rights having their origins elsewhere, the Supreme Court said it would not interfere in the school's dispute with the voluntary association of which it is a member. Id.

Although the IHSAA's Restitution Rule does place member schools in a difficult dilemma with respect to obeying or defying a court order, the Supreme Court rejected the argument that such a rule, in its application, "shows disrespect for the institution of the judiciary." Id. "Contracts frequently allocate risks of unfavorable litigation results... If a school wants to enjoy the benefits of membership in the IHSAA, the school agrees to be subject to [a] rule that permits the IHSAA to require the school to forfeit victories, trophies, titles, and earnings if a trial court improperly grants an injunction or restraining order prohibiting enforcement of IHSAA eligibility rules. Such an agreement shows no disrespect to the institution of the judiciary." Id. The court allowed that the rule "imposes a hardship on a school" that does comply with a court order. "The Restitution Rule may not be the best method to deal with such situations. However, it is the method which the member schools have adopted. And in any event, its enforcement by the IHSAA does not impinge upon the judiciary's function." At 258.

Justice Dickson, dissenting in both Carlberg and Reyes (both decisions were issued the same date), wrote that "[t]o describe the IHSAA as a voluntary association apart from its integral relation to public schools contradicts reality. The IHSAA is the only governing body for high school athletics in the state of Indiana. Every public high school and approximately thirty private schools are members of the IHSAA. In effect, if a school wants to offer any kind of interscholastic athletic program, it has only two choices: the IHSAA and its rules or nothing. I cannot agree that that IHSAA should be considered a 'voluntary' association not subject to meaningful judicial review in its disputes with 'member' schools." Carlberg, 694 N.E.2d at 244-45. The dissent added at 245 that the Restitution Rule fails to protect the interests of an "innocent set of actors: those teammates with whom the student participated and the schools they represented." In other words, when the IHSAA employs its Restitution Rule, it injures more than the targeted student-athlete and the school; it also attacks the other teammates who were without question eligible for participation but now must relinquish any awards, trophies, records, and so forth. "The IHSAA should not be allowed to impose such a manifestly arbitrary and capricious rule without demonstrating the practical inability to make a provision for the other team members who were eligible to play." At 245-46. "Furthermore," the dissent added, "our system of justice has always favored compliance with injunctions and court orders, even ones which are eventually found to be erroneous. Had the school disregarded the trial court's order, even if the injunction or order was later found erroneous for non-jurisdictional reasons, a contempt citation could have issued. [Citation omitted.] To punish a school or the ineligible player's teammates for complying with a court order is wrong." At 246.

The Supreme Court may revisit the Restitution Rule relatively soon. On May 15, 2000, the Indiana Court of Appeals entertained oral arguments in IHSAA v. Martin, a dispute exacerbated by the IHSAA's threat to employ the Restitution Rule against the school. Martin enrolled in a parochial school after moving to escape a dysfunctional family situation. The IHSAA denied her request for eligibility, but the trial court found the IHSAA's decision to be arbitrary and capricious and ruled in

Martin's favor. However, the threat of the Restitution Rule resulted in the parochial school not permitting Martin to play basketball. The trial court imposed a fine of \$500 a day on the IHSAA for each day Martin did not play. The amount of the fine is now over \$30,000, according to an article in *The Indianapolis Star* for May 16, 2000. Martin never played basketball, even though the trial court ruled in her favor.<sup>25</sup>

The federal courts have found that the Restitution Rule constitutes an "actual controversy" conferring continuing jurisdiction even where a case has become moot as to the student. Washington v. IHSAA, 181 F.3d 840, 844-45 (7<sup>th</sup> Cir. 1999). See also Crane v. IHSAA, 975 F.2d 1315, 1318-19 (7<sup>th</sup> Cir. 1992). The 7<sup>th</sup> Circuit's decision in Washington departs somewhat from its decision in Jordan v. IHSAA, 16 F.3d 785, 787-78 (7<sup>th</sup> Cir. 1994), where it found the case moot because the student had graduated and the IHSAA could no longer subject him to its rules, including the Restitution Rule. In Jordan, the federal court seemed less concerned with any punitive action that could be taken against the school. The Washington court seemed more concerned. In any case, the federal courts have not adopted the "voluntary association" standard of review the Reyes court has.

### ***The Future***

With a myriad of rules, a plethora of state and federal case law, and all of this seemingly at odds with one another, the Case Review Panel will be thrust into a difficult situation. The Case Review Panel will not be limited by standards of review created by and for the courts, but will review each case on its own merits without any requirement to be deferential to the decision reached by the IHSAA itself. The Case Review Panel, itself a creature of statute, will have to be more cognizant of overlap between IHSAA by-laws and state and federal laws affecting public schools in such areas as legal settlement, guardianships, foreign exchange students, and students with disabilities. Although the mechanics of the Case Review Panel have yet to be worked out, it is apparent that the courts are expecting less rigidity from the panel than it has experienced with the IHSAA. This may be summed up best by the dissenting opinion of Judge John G. Baker in IHSAA v. Vasario, 726 N.E.2d 325 (Ind. App. 2000):

To me, this case concerns notions of fundamental fairness and fair play. I would note that the IHSAA is not a voluntary organization for students subject to its decisions. Rather, students who have no voice in the IHSAA must abide by its rules or be deprived of the right to enter into sports activities at the level which their skills merit. The importance of this case, for me, lies in the fact that students learn at the hands of the IHSAA some of their early lessons about what constitutes fair play in decision-making. Unfortunately, students acquainted with the IHSAA's conduct in this case

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<sup>25</sup>On June 14, 2000, the Indiana Court of Appeals unanimously affirmed the trial court's issuance of an injunction against the IHSAA, finding there was substantial evidence before the trial court to justify the injunction. See IHSAA v. Martin, \_N.E.2d\_ (Ind. App. 2000).

might reasonably conclude that winning at all costs is more important than fair play.

At 335-36. “I would note,” Judge Baker added at 336, n.7, “that public consensus over the issue of fair play has recently led to a legislative bill, passed by both houses of our legislature, which would guarantee a new review system for appealing IHSAA decisions.”

A need for “fair play” seems to underscore both the judicial trends in this area—even in opinions ultimately favorable to the IHSAA—and the express legislative language of P.L. 15-2000. The call for “Fair Play” will need to precede the exhortation to “Play ball!” As the incoming IHSAA Commissioner noted in the May 3, 2000, issue of *The Indianapolis Star*: “I imagine August and September will be very busy.”

### TEACHER COMPETENCY ASSESSMENT AND TEACHER PREPARATION: DISPARITY ANALYSES AND QUALITY CONTROL

“[I]f you improve a teacher, you improve a school.”  
Ass’n of Mexican-American Educators v. California, 937 F.Supp. 1397, 1403 (N.D. Cal. 1996), quoting a 1971 Tax Court decision in Willie v. Commissioner

Consider the following mathematical problem:

How many students at a school can be served a half-pint of milk from five (5) gallons of milk?

- (A) 80?      (B) 60?      (C) 40?      (D) 20?      (E) 10?<sup>26</sup>

Other than one’s natural inclination to solve such a mathematical problem, is successful computation of this problem a bona fide, job-related function for a kindergarten teacher? Any teacher? Will such a problem have a disparate impact on certain identifiable groupings of prospective or current teachers? Will such a problem result in disparate treatment? Will such a question tend to violate civil rights laws?

These are some of the questions chief policy makers in each state must address as the use of teacher competency tests—either as a pre-condition for admittance to teacher-training programs, as exit criteria for such programs, or as a state licensing requirement—expands dramatically, in many cases as part of

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<sup>26</sup>The correct answer is A. There are two (2) half-pints to a pint; there are two (2) pints to a quart; there are four (4) quarts to a gallon; and there are five (5) gallons. Thus,  $2 \times 2 \times 4 \times 5 = 80$ .

overall public school reform efforts. According to a recent survey by the Center for Education Information, virtually all teacher-preparation schools are now requiring the passage of a content area test for completion of teacher preparation programs. This reflects the use by states of such tests for determining certification or licensure of prospective teacher candidates. “This is a dramatic change from 15 years ago when only five percent of [Institutions of Higher Education, or IHE’s] surveyed...indicated that they required passage of a content area test for completion of their teacher education programs.”<sup>27</sup> The widespread use of such assessments has not been without controversy or legal scrutiny.<sup>28</sup>

Most challenges to such competency tests are based upon Title VI of the Civil Rights Act of 1964 (forbidding the use of federal funds to subsidize racial discrimination on the basis of race, color, or national origin) and Title VII of the same Act (forbidding discrimination in employment practices based on race, color, religion, sex, or national origin). 42 U.S.C. §2000d, 42 U.S.C. §2000e. Statistical analysis is generally employed to demonstrate “disparate impact” although disparate impact does not dictate a legal conclusion that discrimination has occurred. Oftentimes, parties will refer to the “Four Fifths Rule,” which is derived from the federal Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607.4(D). See *Fields, infra*.

Disputes often involve questions of bias, validity, job-relatedness, business necessity, and educational justification. Evidence and testimony are generally offered to demonstrate “disparate impact” or “disparate treatment.” It is not unusual for courts to discuss the so-called “Four Fifths Rule,” although this rule seems to be acknowledged more than applied.

### ***Disparate Impact and Disparate Treatment***

“Disparate impact” or “adverse impact” simply means that one group scored differently from another group on a test. See, for example, *Allen v. Alabama State Bd. of Education*, 976 F.Supp. 1410, 1420 (M.D. Ala. 1997). Under a “disparate impact” theory, a facially neutral activity, such as a teacher

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<sup>27</sup>“The Making of a Teacher: A Report on Teacher Preparation in the U.S.” (Feistritzer, 1999).

<sup>28</sup>Indiana does require that applicants for teacher licenses demonstrate proficiency in basic reading, writing, and mathematics through the Pre-Professional Skills Test (PPST or Praxis I) of the Educational Testing Service; pedagogy; and knowledge of the areas in which the individual is required to have a license to teach. An applicant who does not successfully complete the required examination may receive a one-year renewable limited license. Also, an applicant may repeat any section of an examination for which the applicant does not receive a minimum score. P.L. 156-1997, adding I.C. 20-6.1-3-10.1 and certain non-code provisions regarding proficiency examinations for applicants for Indiana teacher licenses. The Indiana Professional Standards Board recently reviewed and reset “cut scores” for certain teaching areas, as well as established “cut scores” depending upon whether the applicant used a computer-based or written test. See the proposed amendments to 515 IAC 1-4-1, 1-4-2 as published in the June 1, 2000, *Indiana Register*.

competency test, can violate the civil rights law even if there is no evidence of the State's subjective intent to discriminate. See Frazier v. Garrison Int. Sch. Dist., 980 F.2d 1514, 1523 (5<sup>th</sup> Cir. 1993). Although "disparate impact" can be established through statistics, a court's inquiry will shift to the state to demonstrate some educational justification (often referred to as "business necessity"). The State usually has to demonstrate the lack of availability of alternative practices that could achieve the same end but with less impact on a protected group. Frazier, 980 F.2d at 1525-26. Groves v. Alabama State Bd. of Education, 776 F.Supp. 1518, 1523 (M.D. Ala. 1991).

Where "disparate impact" is applied directly to a licensing examination, after the adverse impact has been established, the burden shifts to the State to demonstrate the test was validated to be job-related and consistent with "business necessity." Ass'n of Mexican-American Educators v. California, 183 F.3d 1055, 1072 (9<sup>th</sup> Cir. 1999), *opinion amended*, 195 F.3d 465, 468 (9<sup>th</sup> Cir. 1999).

"Disparate Treatment," however, is intentional, unfair treatment of federally protected classes of persons otherwise qualified for employment positions. There are generally four elements necessary to prove "disparate treatment": (1) one is a member of a protected group; (2) he is qualified for the job he held; (3) he was discharged from this position; and (4) after discharge, his position was filled with a person not from a protected group. Frazier, 980 F.2d at 1526.

### ***The EEOC's "Four Fifths Rule"***

The Equal Employment Opportunities Commission (EEOC) established in 1978 uniform guidelines on employment selection procedures to provide a set of principles for employers as a means of complying with Title VII. One of the more important guidelines is found at 29 C.F.R. §1607.4(D) and is known as the "Four Fifths Rule." This rule specifies that an "adverse impact" occurs where the selection rate for members of a particular race, sex, or ethnic group is less than four-fifths of the rate for the group with the highest rate. These uniform guidelines are not legally binding. Although entitled to great deference by the courts, they do not have the force of law. See, for example, Ass'n of Mexican-American Educators v. California, 183 F.3d 1055, 1073 (9<sup>th</sup> Cir. 1999), *opinion amended*, 195 F.3d 465, 487 (9<sup>th</sup> Cir. 1999); Fields v. Texas Education Agency, 754 F.Supp. 530, 532 (E.D. Tex. 1989), affirmed, 906 F.2d 1017 (5<sup>th</sup> Cir. 1990), *cert. den.* 111 S.Ct. 676 (1991); and Groves, *supra*, 776 F.Supp. at 1527-28 (acknowledging criticism of the EEOC rule as little more than a "rule of thumb for the courts" and "entitled to deference, not obedience.")

## *Teacher Competency Tests: Legal Stories From Three States*

### *Texas*

Fields v. Texas Education Agency, 754 F.Supp. 530 (E.D. Tex. 1989), affirmed 906 F.2d 1017 (5<sup>th</sup> Cir. 1990), *cert. den.* 111 S.Ct. 676 (1991) grew out of a legislative statewide school reform package that required teachers to pass the Texas Examination for Current Administrators and Educators (TECAT), a basic reading and writing test, in order to obtain recertification. The plaintiffs were minority teachers who did not pass the TECAT. They alleged the TECAT had an impermissible adverse impact upon minority teachers. Perusing the EEOC's "Four Fifths Rule," the court noted the pass rates between white teachers and minority teachers was within 80 percent. The court found "no statistical disparities that suggest the equivalent of intentional discrimination in the facially neutral TECAT, nor any proof of its discriminatory impact on the employer's work force." 754 F.Supp. at 532. The court refused to further break pass rates into age categories, finding that such an argument ran "counter to the stated [EEOC] guidelines, statistical reasoning, and ...the law." At 533. The plaintiffs did not challenge the "job-relatedness" of the TECAT because "reading and writing skills bear [relevancy] to public school teaching." *Id.* Because the TECAT was facially neutral and job-related, a showing of disparate impact did not constitute *per se* discrimination.

Frazier v. Garrison Int. Sch. Dist., 980 F.2d 1514 (5<sup>th</sup> Cir. 1993) also involved challenges to the constitutionality of the TECAT. Plaintiffs were minority teachers who failed the TECAT. They claimed, in part, that the test violated Title VI and Title VII of the Civil Rights Act of 1964.<sup>29</sup> The court noted that TECAT is a requirement for all teachers and not just minority teachers or older teachers. Although there might be a "disparate impact" for certain groups, "we cannot infer discrimination from statistics that by and large are neutral." At 1526.

It is self-evident that any examination that purports to test competence will have an adverse effect on the test takers who do not pass because some of the test takers can be expected to fail. By itself, this is not evidence of intent to discriminate particularly in this instance where all teachers are required to take the test, and there is little statistical discrepancy in the minority pass rates.

At 1526-27. As to "disparate treatment," the teachers "have not presented any direct evidence of intent to discriminate." At 1527.<sup>30</sup>

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<sup>29</sup>There is also a claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 *et seq.* Such claims are generally added where the plaintiff is over forty (40) years of age.

<sup>30</sup>The plaintiffs also raised due process issues. While the court acknowledged a public school teacher has a constitutionally protected property interest in continued employment, he has to

## *Alabama*

Allen v. Alabama State Board of Education, 976 F.Supp. 1410 (M.D. Ala. 1997) was authored by the same judge who decided Groves, infra, a case involving teacher-preparation courses that is also a succinct but well written decision involving statistical analysis for determining adverse or disparate impact and the function of validating tests for their intended purposes. In this case, the plaintiff class has been engaged in a prolonged challenge to Alabama's teacher certification test. In 1987, the State Board, to resolve the initial suit, entered into a consent decree whereby it would no longer use the then-existing teacher certification test, which the court found lacking in content validity. However, the State Board was unable to develop a new test, largely due to its own actions. A number of national testing companies declined to bid on the project.

In 1995, the Alabama legislature passed a law requiring teacher candidates to pass an examination as a condition for graduation. The State Board, in an attempt to avoid the requirements of the consent decree, argued to the court that the 1987 consent decree was based on "unsound psychometric principles" that would effectively prevent the State Board from developing a teacher competency test that did not have an inherent "disparate impact." The court did not agree, finding that "disparate impact" is not the same as "bias," the latter defined as "any quality of the test item, or the test, that offends or unnecessarily penalizes the examinees on the basis of personal characteristics, such as gender, ethnicity, and so on." At 1420. As an example, the court stated that a math question involving football scores might be biased against women. "But the existence of the disparate impact does not necessarily indicate bias." The adverse impact may be due to legitimate differences in skills and knowledge. *Id.* What is more important, the court added, is that the test be a valid test of "the full range of skills and knowledge required of a teacher." *Id.* "[L]egal considerations dictate that validity trump the need to reduce disparate impact." At 1421. See also Richardson v. Lamar Co. (Ala.) Bd. of Education, 729 F.Supp. 806 (M.D. Ala. 1989). The court found the State Board could develop a teacher competency test that is psychometrically sound and has content validity. No modification of the 1987 consent decree was warranted. The 11<sup>th</sup> Circuit Court of Appeals affirmed the district court's opinion. See Allen v. Alabama State Board of Education, 164 F.3d 1347 (11<sup>th</sup> Cir. 1999).

The parties eventually negotiated a settlement whereby the State would employ a "basic skills competency test" for prospective teachers as an alternative to the procedures in the 1987 consent decree. The test would assess skills in reading, writing, and mathematics. A prospective teacher's score will be related to the prospective teacher's grade point average in the undergraduate core curriculum. If an applicant does not make the required cut score on the test, the applicant's grade point

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demonstrate a reasonable expectation of continued employment. A teacher whose license was revoked because of failure to pass the TECAT does have available a process to challenge the revocation. At 1529-30. Multiple opportunities were provided to pass the test. This satisfies Fourteenth Amendment requirements.

average will count 50 percent and his test score 50 percent to determine certification, provided the applicant has a minimum grade point of average of 2.5 on a 4.0 scale. For applicants who meet the 2.5 grade point average but do not pass the test, they may attend a remedial course. If they pass the course and the exit assessment, they will be certified to teach. Allen v. Alabama State Board of Education, 190 F.R.D. 602 (M.D. Ala. 2000).

### ***California***

Ass'n of Mexican-American Educators (AMAE) v. California, 183 F.3d 1055 (9<sup>th</sup> Cir. 1999), *opinion amended* 195 F.3d 465 (9<sup>th</sup> Cir. 1999) is a class action lawsuit challenging the constitutionality of the California Basic Educational Skills Test (CBEST), a minimum competency test a public school teacher has to pass to be certified as a teacher. The plaintiffs assert CBEST has a disproportionate disparate impact on racial minorities and was not properly validated.<sup>31</sup> They also assert that there is available an equally effective screening procedure that would not have such an adverse impact. The Circuit Court found that Title VI does not apply because no federal funds are involved in the development and administration of CBEST. The court rejected the argument that Title VI should apply because other educational agencies (State Board and Department of Education) received federal funds. At 1067-69. The Circuit Court also declined to apply Title VII because the affected teachers were not potential employees of the State, and the CBEST is not an employment examination. Although the limitation of the exam to public school teachers “raises a question as to whether it [CBEST] is a true licensing exam,” at 1071, the State is nevertheless exercising “its police powers,” and a state “will not be liable under Title VII for ‘interference’ with an employment relationship if the alleged interference is an exercise of its regulatory responsibilities.” *Id.* This conclusion is bolstered by the fact the CBEST was mandated by the legislature and not by an administrative entity or person responsible for overseeing the affected employees. At 1072.

The CBEST, the Circuit Court determined, “is a valid licensing exam, and therefore exempt from liability under Title VII.” *Id.* “Discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are evaluated.” *Id.*, citation omitted. In this situation, notwithstanding a “disparate impact,” the State demonstrated the CBEST was properly “validated” to be “job related for the position in question and consistent with business necessity.” *Id.*, citations omitted. The decision addresses content validity studies, criterion-

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<sup>31</sup>The CBEST is a mixed-format examination with a multiple choice part for reading comprehension and mathematics along with a writing test. It is given six (6) times a year and can be repeated as often as necessary. State data reveal significant differences among first-time examinees. According to *Education Daily* (April 6, 2000), “...the most recent state figures show that the passing rate for whites was 80 percent, but 60 percent for Asians, 47 percent for Hispanics and 37 percent for blacks.”

related validity studies, and construct validation studies, as well as how these relate to the EEOC's Uniform Guidelines. California employed content validation studies to establish CBEST's relationship to "job relatedness," including "job-specific validation" and an actual measurement of job skills. The cutoff score was likewise validated, and reflected reasonable judgments about the minimum level of basic skills' competence that should be required of teachers.<sup>32</sup> At 1078. The three-judge panel later amended its published opinion but did not alter its substantive findings. See Ass'n of Mexican-American Educators v. California, 195 F.3d 465 (9<sup>th</sup> Cir. 1999). On March 27, 2000, the 9<sup>th</sup> Circuit set aside the decision of the panel and agreed to review the matter before the full court.

### ***Teacher-Preparation Programs***

Improving the quality of teachers has been a part of a number of public school reform packages. Some states have used competency tests as part of the criteria for admittance to or completion of teacher preparation courses. In U.S. v. Lulac, 793 F.2d 636 (5<sup>th</sup> Cir. 1986), Texas instituted a program that required college students to pass a Pre-Professional Skills Test (PPST) (see Jacobsen, *infra*) before scheduling more than six hours of professional education courses at any state college or university. Passing the PPST and successful completion of professional education courses were prerequisites for licensure. The passing rate for minority students was lower than for white students. Plaintiffs argued this discrepancy impeded minority students from becoming teachers. Although the federal district court agreed with plaintiffs, the 5<sup>th</sup> Circuit Court of Appeals reversed. The Circuit Court found the PPST—a test of basic reading, writing, and mathematical skills—was validated for the purpose for which it was being employed. The validation process was detailed and included review of the test by a representative sample of public school and university teachers, with a significant percentage (95 percent) indicating that the information needed to complete the PPST was taught in the Texas school system, and that the information needed was "relevant to successful performance as a teacher." At 640. Unfortunately, the pass rates for minority students were significantly lower than their white counterparts. The test had a disparate impact on minority college students, but the U.S. Constitution guarantees "equal laws, not equal results." State action does not violate the equal protection clause of the Fourteenth Amendment, despite disparate impact, as long as the State employs "permissible racially neutral selection criteria and procedures [that] have produced the monochromatic result" of the test's avowed nondiscriminatory purpose. At 646. The State's interest in ensuring teacher competency "is a goal of unquestioned legitimacy and importance." At 647. Plaintiff college students would have to prove that the State's motivating factor in establishing the test was to discriminate. At 646.

Groves v. Alabama State Bd. of Education, 776 F.Supp. 1518 (M.D. Ala. 1991) contrasts sharply

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<sup>32</sup>Incidentally, the math question posed at the outset of this dissertation was, in fact, considered "job related" to the essential teaching function. It was the hardest math question on the August 1995 CBEST (judged the most difficult because most examinees answered it incorrectly). Ass'n of Mexican-Americans Educators v. California, 937 F.Supp. 1397, 1403 (N.D. Cal. 1996).

with other reported cases, especially with respect to the validation of an “off the shelf” test for the intended purpose of establishing minimum standards for admission to teacher training programs. The Alabama State Board of Education, in response to a widespread belief that public school teachers were incompetent, decided to use the American College Testing Programs’ ACT exam as a means for ensuring certain minimum standards for prospective teachers. The ACT is primarily an exam for college-bound high school juniors as a means of predicting first-year collegiate academic success. It was not designed to be used as an “absolute criterion” for selecting students for undergraduate courses, “let alone to gauge whether a student possesses the skills necessary to become a competent teacher.” At 1520. No validation studies were conducted, and the “cut-off score” (the minimum score a student would have to attain on the ACT in order to be eligible for teacher-education courses) was determined based on political concerns with no debate. No effort was made to correlate any particular score or range of scores with the competence to teach. At 1521, 1522. The court, in finding for the plaintiff class of minority students, found that the use of the ACT without validation and with the use of an arbitrary cut-off score had a “disparate impact” upon the plaintiff class without any legitimate showing of educational justification by the State, such that the use of the ACT for its intended purpose was discriminatory. The court’s decision also contains a discussion of the use of statistics to demonstrate adverse impact and how this relates to the “Four Fifths Rule” when determining statistical proof of adverse impact in employment testing by comparing pass-fail rates. At 1526-28. The court also expressed judicial caution regarding the use of statistics and the expert testimony of assessment or testing experts: “While courts should draw upon the findings of experts in the field of testing, they should not hesitate to subject these findings to the *scrutiny of reason*.” At 1529, emphasis original by the court (internal punctuation and citation omitted).

### ***Accommodations for Disabilities***

Minnesota legislation attempts to ensure that teacher licenses are issued to persons who are deemed qualified and competent. Qualifications and competency are based in part upon successful completion of an examination involving reading, writing, and mathematics. The Minnesota State Board of Teaching (MBOT) adopted the Pre-Professional Skills Test (PPST) developed by the Educational Testing Service (ETS) as an objective means to assess such competencies. Jacobsen possessed several degrees and was able to teach under a state provisional licensure mechanism. However, she had a learning disability manifested by her inability to easily read words and letters (dyslexia) and an impairment in her ability to do mathematical problems (dyscalculia). The MBOT set the passing score at 169. Unfortunately, Jacobsen took and failed the math portion of the PPST fourteen times, with an average score of 163. She had been provided every form of accommodation permitted, including twice the time to finish the test, being provided a “reader,” being permitted to use scratch paper, and being permitted to mark her answers on the examination book itself rather than the answer sheet. In the resulting Jacobsen v. Tillman, 17 F.Supp. 2d 1018 (D. Minn. 1998), she sought injunctive relief under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, to have the MBOT issue her a teacher license by either recognizing her “self-determined competence” or by using another standard to assess her teaching qualifications. To establish a violation under the ADA, a plaintiff must demonstrate that she (1) is a qualified individual with a disability; (2) was excluded from participation in

or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the entity; and (3) suffered exclusion, denial of services, or other discrimination by reason of her disability. Jacobsen argued the PPST's math skill test did not accurately measure her ability in this area, bore no relationship to the essential functions of an elementary school teacher, and was employed as a single or sole criterion for licensure. The court did not agree. The following are relevant findings:

- “The objective ability to perform and demonstrate math skills is an inherent part of a teacher’s duties. The State, which publicly validates the competence of a teacher by issuing a license, is entitled to demand and receive an objective demonstration of competence.” At 1025.
- Because the PPST is a valid measure of math teaching competency—and Jacobsen was provided an array of reasonable accommodations but still could not pass the math skills test—she is not otherwise a “qualified” individual with a disability, so as to apply ADA provisions. Plaintiff’s position is no different from a law school or medical school graduate who cannot pass the bar examination or medical boards. Although such professional school graduates may be able to perform the respective professional tasks, the State still has the right “to receive an objective demonstration of competence in the particular field of endeavor.” *Id.*
- “The State is not obligated to certify teachers who cannot pass fair and valid tests of basic skills.” At 1025-26.
- Under the ADA, a public entity is not required to modify its policies where to do so would “fundamentally alter the nature of the service.” 28 C.F.R. §35.130(b)(7). Jacobsen’s request that the math skills test be waived is “an unreasonable modification that would fundamentally alter the nature” of Minnesota’s licensing requirements.<sup>33</sup> At 1026.

## ***Conclusions***

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<sup>33</sup>Jacobsen analogized her situation with the legal dispute involving professional golfer Casey Martin who, under the ADA, was finally permitted to use a golf cart while on the PGA tour. See Martin v. PGA Tour, Inc., 994 F.Supp. 1242 (D. Or. 1998). Jacobsen’s judge, however, was not persuaded. “Martin did not ask to be relieved of the need to demonstrate an ability to execute his middle iron prowess, or to be relieved of the need to putt... [Jacobsen] is asking to be relieved of the need to demonstrate an essential and inherent element of competence in the field for which she seeks to practice.” At 1025.

In implementing any one of the three types of teacher competency tests (admittance to teacher-training programs, exit criteria, or state licensing), states should ensure that any such test is properly validated for its intended purpose, with a cut-off score that can be defended as relevant to the competency to teach. “Disparate impact” is not necessarily the same as “disparate treatment” or bias. In fact, “disparate impact” may reveal inconsistent or inadequate practices that are limiting opportunities for prospective teachers from protected classes. Hence, such a test should be developed with significant input from teachers, who are in the best position to detail what knowledge and skills are related to the teaching profession. No only should such tests be relevant to the teaching profession with a cut-off score rationally related to ensuring a degree of minimum competency, prospective candidates should have adequate notice of the test requirement; be provided multiple opportunities to pass the test; and, where the test is a licensing requirement, provide provisional or emergency licensure for candidates who have satisfied all other requirements except passing the test. The test should also be presented in a format that permits a candidate to demonstrate the extent of the candidate’s ability rather than a degree of disability. Hence, for candidates with disabilities, reasonable accommodations may be necessary.

### **VISITOR POLICIES: ACCESS TO SCHOOLS**

(This is part of the continuing series on school safety policies and crisis intervention plans as these relate to the implementation of emergency preparedness plans by schools. The Indiana General Assembly, through P.L. 37-2000, amended the Access to Public Records Act and the Open Door Act to authorize the governing bodies of local public school districts to discuss in executive session the “assessment, design and implementation of school safety and security measures, plans, and systems,” and protect from public disclosure such school security plans and systems, “including emergency preparedness plans developed under 511 IAC 6.1-2-2.5.”)

Although there is no explicit requirement that Indiana schools establish policies and procedures to restrict access by non-school personnel to school facilities during the school day, school districts and private schools have found it necessary to do so. The requirement “to protect the safety and well-being of staff, students, and the public...” under 511 IAC 6.1-2-2.5(a)(7) may encompass such policies and procedures. Indiana has been fortunate that no violence has occurred from unauthorized entry into school buildings during the school day; however, the incidence of such intrusions has increased significantly. Usually such intrusions involve deteriorated relationships between parents or guardians and school staff such that it has been necessary to enjoin the parent or guardian from entry or the parent or guardian has been removed from school grounds by the police. Although public schools are not usually liable when they fail to act in the absence of any clear legal directive to do so, increased public awareness and concern about school security, especially with respect to intruders, may have altered the legal maxim. A public school that fails to have policies and procedures regarding visitors or intruders, even without a clear legal directive to do so, will likely expose itself to liability. Indiana governmental entities, including its public schools, are not liable under the Indiana Tort Claims Act for losses that result from, among other things, “the performance of a discretionary function...” I.C. 34-13-3-1(6). Establishing negligence requires a showing of:

1. A duty of care;
2. A breach of that duty through a negligent act or omission;
3. An injury; and
4. A proximate, causal nexus between the breach of the duty and the resulting injury.

A “duty” arises from a ministerial requirement and not generally from performance of a discretionary function. Could a school safety issue become of such paramount importance that circumstances dictate a public school must establish certain procedures even absent a legislative requirement to do so? This has been a central question in a series of legal maneuverings involving the Spring Lake Park School District No. 16 and a Minnesota Tort Claims Act similar to Indiana’s Act.

S.W. v. Spring Lake Park School District No. 16, 566 N.W.2d 366 (Minn. App. 1997). A student sued her school district following her rape in the girls’ locker room at the high school. The student alleged the school district failed to provide adequate supervision, protection, and security, as well as failed to enact and enforce appropriate security policies. These failures, the student alleged, resulted in her being the victim of a brutal sexual assault in the girls’ locker room. Three different employees saw the perpetrator prior to the attack. The attacker was neatly dressed and was carrying what appeared to be a box of flowers. He appeared to be a delivery person. A school employee saw the attacker and asked if she could help him. He mumbled a reply that she could not understand. She later saw him talking to a student, but she did not approach him a second time. The high school water safety instructor also saw him, this time near the girls’ locker room. The custodian saw him earlier as he left the girls’ locker room, but he did not inquire of the individual the nature of his business at the school nor did he report the incident. All employees at the school wear photo I.D. badges. The rapist did not have one, which the custodian noticed. During the custodian’s orientation, he was provided a copy of the Teachers’ Manual, which included the school’s visitor policies. However, the custodian never read the manual. The appellate court affirmed the trial court’s imposition of liability on the school and denial of the school’s Motion for Summary Judgment based upon statutory immunity. Although the appellate court noted the school did not have a security policy, the court declined to grant immunity. “[S]tatutory immunity was not designed to protect [that] decision...” At 373. The court reasoned that “imposing liability on these individuals would encourage them to exercise care when seeing strangers in school” in the future. Id.

In S.W. v. Spring Lake Park School Dist. No. 16, 580 N.W.2d 19, (Minn. 1998), the Minnesota Supreme Court affirmed in part and reversed in part. The court refused to grant the school district immunity for its inaction because the “conduct challenged...was at an operational level and not of a public policy-making nature.” However, the court also concluded that it was unclear whether there was a specific duty giving rise to the cause of action. Accordingly, the matter was remanded to the trial court for a determination. The court found the school did not meet its burden of establishing that the conduct challenged by the student was “of a public policy-making nature involving social, political, or economical considerations.” Although there was no security policy, it “is not clear from the record...whether the school district consciously decided not to have a security policy or whether the

school district simply never considered the issue.” At 22. The court rejected the school’s argument that “the act of not putting a security policy in place is a decision entitled to statutory immunity.” The court observed: “Were we to hold that the simple absence of a policy or a decision not to have a policy entitles government entities to immunity under the statute, we would be providing government decision-makers an incentive to avoid making the difficult decisions which the statute was designed to protect.” At 23.

On remand to the trial court, the court again denied the school district’s Motion for Summary Judgment, and the school again appealed this denial. In S.W. v. Spring Lake Park Dist. No. 16, 592 S.W.2d 870 (Minn. App. 1999), the appellate court affirmed the trial court, finding that there is a common law duty in Minnesota to protect school children.

While school districts may not be liable for sudden, unanticipated misconduct, they are nevertheless liable for sudden conduct that was foreseeable and that probably could have been prevented by the exercise of ordinary care.

At 874 (citation omitted). “Foreseeability” creates the duty of ordinary care. “Foreseeability requires actual, not constructive, knowledge of a dangerous condition.” Id. (Citation omitted.) The realization of such knowledge imposes “a special duty to do something about that condition. Such foreseeability does not require the notice of danger.” At 874-75 (citations omitted).

The appellate court again rejected the school’s arguments that the failure to have a visitor policy was a discretionary act entitled to immunity. “A ministerial act,” the court wrote at 876, “is either the implementation or exercise of established public policy.” At 876.

While a discretionary act reflects professional goals and factors of a situation, a ministerial duty is one in which nothing is left to discretion; it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts.

Id. Although the court did find the employees were entitled to official immunity because the school assigned no specific “visitor” reporting responsibilities to them, this immunity would not extend to the school.

To hold otherwise would be to reward the school district for its failure to develop and implement a basic security policy that would have applied in these circumstances.

At 877.

As noted above, most visitor access disputes involve parents or guardians. In Ryans v. Gresham, 6 F.Supp.2d 595 (E.D. Tex. 1998), a fifth grade student reported to his parents that he feared going to

school because he was being mistreated by his teachers and was disliked by his classmates because of his race (African-American). He was also failing Gresham's class. The Ryans sought a conference with Gresham, but she refused to speak with them. The Ryans did meet with the local superintendent, who referred them to the school's principal, also an African-American. Instead of meeting with the school's principal, the Ryans asked for a hearing before the local governing body, which rejected their requests. They then filed complaints with state and federal agencies. The school principal attempted to accommodate the Ryans. He monitored the child's classes and gave the mother permission to observe the classes. On one day, the mother arrived but indicated she could stay only for an hour. She expressed displeasure at not having her seat assigned closer to her son's seat, and shortly after class began, asked Gresham to step out in the hall so they could discuss some of the mother's concerns. Gresham declined to do so. After an hour had elapsed, the mother refused to leave the classroom. Eventually, she agreed to meet with the school counselor, but later indicated she was going to return to Gresham's class and left the office. The mother returned to Gresham's class and sat next to her son to comfort him. She also told him "he had to stand up and be a man." Gresham ordered the mother back to her seat and she complied. The school counselor arrived and asked the mother to leave the classroom. Local law enforcement had also been contacted and an officer dispatched to the school. A police officer met with the mother and the school counselor after Gresham's class ended. The mother asserted she had a right to be present at school and refused repeated requests to leave. The police officer eventually arrested her for trespassing, although the charges were later dismissed. The Ryans filed suit, claiming a host of constitutional violations.

The court was not persuaded. It found no First Amendment right "to voice...complaints about the way their child was being treated" nor were the mother's Free Speech rights abridged when school officials did not accede to her position she had a right to remain in the school. At 601-02. Furthermore, a parent's constitutional right to direct the education of the parent's child does not "even remotely [suggest] that this guarantee includes a right to access the classes in which one's child participates." At 602. "The interference with the Ryans' effort to monitor [their son's] classes represents no violation of the constitutional right of parents to direct the education of their children." At 603.

Johnson v. New York City Board of Education, 676 N.Y.S.2d 444 (N.Y.Sup. 1998). Johnson, an "interim acting assistant principal" was physically assaulted by a parent during parent-teacher conferences being conducted at the school. She filed a criminal complaint against the parent and obtained a protective order against him. Nevertheless, the parent came to the school some time later to pick up his child, who had been injured in a physical education class. Three days later, Johnson learned that the parent had been in the school. This reportedly resulted in her suffering post-traumatic stress syndrome such that she was granted accidental disability retirement. She sued the school district, alleging negligence for failure to properly implement and enforce school security and visitor screening procedures, as well as negligence for permitting the parent to come into the school despite being aware of the protective order. The court granted the school district's Motion for Summary Judgment, finding the school district did not have a "special relationship" with Johnson such that the school district would not be immune from negligence claims arising from performance of its governmental functions. In order

for a “special relationship” to exist, the claimant needs to show: (1) the governmental entity assumed, through promises or actions, an affirmative duty to act on behalf of the claimant; (2) the governmental entity had knowledge that inaction could lead to harm to claimant; (3) there was some form of direct contact between the governmental entity and the claimant; and (4) the claimant justifiably relied upon the affirmative undertaking by the governmental entity. The court noted that security policies of the school, including the assignment of security guards and the equipping of administrators with walkie-talkies, were not implemented solely for the benefit and protection of Johnson, but were, by their very language, designed for all students and school staff. This decision was affirmed in Johnson v. New York City Bd. of Education, 704 N.Y.S.2d 281 (A.D. 2 Dep’t. 2000). Although the provision of security to public school teachers against criminal acts by third parties is a governmental function, and a school may not be held liable for negligence in the absence of a “special duty,” the school owed no special duty to the administrator and did not assume such a special duty. The fact that she was among staff members issued walkie-talkies and required to respond to emergency calls under the school’s security plan, there was no duty owed to her that was different from the general duty owed to persons in the school system and members of the general public.

Lake Bluff School Dist. 65, 29 IDLER 915 (OCR 1998) involved an allegation that a public school district discriminated on the basis of disability when it refused a parent of a child with a disability the opportunity to visit the child’s classroom. The district had a written policy that requires all parents wishing to observe a classroom to give advance notice to the school (School Policy 745), a policy the parent acknowledges receiving. The Office for Civil Rights (OCR) of the U.S. Department of Education investigated the complaint but did not find any discriminatory practices. “The District’s visitation policy clearly states that visitors and guests should provide advance notice of their intention to visit the school. The policy applies to parents as well as other types of visitors. The policy also gives three reasons why advance notice is required. The policy and reasons for advance notice are also clearly stated in the school 1997/98 Calendar.” The disagreement began when the mother arrived during the student’s lunch hour and insisted on visiting him at that time. The school provided four reasons why this would not be advisable: (1) the student has autism and he is just getting acquainted with other students; (2) the room where the student and two other students, along with an aide, were eating lunch is very small and crowded; (3) this was not a classroom setting but a transition period; and (4) the parent and the school district had earlier agreed that, to maximize success for the student, there should be no surprises. OCR noted that the parent had the same right to observe the student’s classes on the same basis as other parents but must follow the school’s visitation policy, which she had never done.

Kent (WA) School Dist. No. 415, 29 IDELR 914 (OCR 1998) involved similar allegations of discrimination, although in this circumstance, the parent alleged the discriminatory acts were retaliation for exercising rights on behalf of her son. See 34 CFR §100.7 of Title VI for the non-retaliation provision. In this case, the parent’s son attended the elementary school in a self-contained classroom for only six days, after which the mother withdrew him and had him transferred to a different district school. However, during those six days, the parent raised complaints on two occasions with the

principal regarding the classroom and the teachers, and contacted the local superintendent and local director of special education. Although her son was transferred, her daughter remained enrolled in the elementary school. Several months later, the principal issued a memorandum to the parent prohibiting her from driving onto the school's premises and from entering the campus except under certain circumstances related to her daughter's education and health. The district defended its actions and claimed the restrictions were based on safety concerns related to the parent's unsafe driving on school grounds, which had been observed on several occasions by school personnel. The district also stated the parent's conduct in the school was disruptive and threatening to her child's teachers, and that these incidents occurred often while class was in session. The parent also failed to follow required school procedures of signing in at the office and obtaining a visitor's badge when visiting the school. OCR found the district had "provided a non-retaliatory justification for restricting the parent's access" to the school and its premises. Hence, OCR did not find the school's actions were discriminatory or in retaliation against someone who exercised protected rights on behalf of another.

In Hancock v. Bryan County Board of Education, 522 S.E.2d 661 (Ga. App. 1999), a student was suspended from the bus for abusive behavior. The next morning, his grandmother boarded the bus at one of its regularly scheduled stops and attempted to engage the bus driver regarding the suspension. However, the bus driver informed her that school policy prohibits parents and other adults (except teachers) from boarding the bus while it is en route. The grandmother, while disembarking, fell and allegedly injured her back. She sued for damages, but a jury returned a verdict against her, which the appellate court affirmed. The testimony and documentary evidence at trial established the existence of the school policy and that the bus driver was acting in accordance with that policy. This, in turn, established that the school neither owed nor assumed any special duty towards the grandmother upon which negligence could be based.

In State of Washington v. Allen, 955 P.2d 403 (Wash. App. 1998), the court upheld Allen's conviction for second-degree burglary. Allen entered the school building and was discovered in a fifth-grade classroom by a teacher. The school had a policy that all visitors had to report to the administrative office upon arriving at school. The court found the school's policy is related to the duty owed to children required to attend school by law that such schools be safe and provide for their care and protection. Although such schools are "public" in the sense they are supported by public funds, public schools are not open to the public in the sense that one has freedom of movement. "We reason Mr. Allen's freedom of movement in a public place, like a school, may be reasonably limited through school policies when necessary for the protection of children just as the movement of children in public surroundings may be regulated for their own protection."

### **COURT JESTER: PSALT 'N' PEPPER**

The words of Henry David Thoreau exalting individualism are well known: "If a man does not keep pace with his companions, perhaps it is because he hears a different drummer. Let him step to the

music which he hears, however measured or far away.’<sup>34</sup>

All well and good, but what if he doesn’t hear a drummer at all? Should he be allowed to “step to the music he hears” in such a fashion that everyone else has to hear it too? A church congregation in North Carolina didn’t think so. Such was the problem faced by the North Carolina Supreme Court in State v. Linkhaw, 69 N.C. 214 (N.C. 1873).

William Linkhaw was a “member of the Methodist Church...a strict member of the church, and a man of exemplary deportment.” Unfortunately, he could not carry a note in a bucket, although he saw “as a part of his worship it was his duty to sing” and so he “conscientiously [took] part in the religious services” of his church. His singing became so bad that he was charged with a misdemeanor offense for disturbing a religious congregation and found guilty by a jury.

The evidence is interesting:

[H]e sings in such a way as to disturb the congregation; at the end of each verse, his voice is heard after all the other singers have ceased. One of the witnesses being asked to describe defendant’s singing, imitated it by singing a verse in the voice and manner of defendant, which “produced a burst of prolonged and irresistible laughter, convulsing alike the spectators, the Bar, the jury, and the Court.”

At 215. The “disturbance occasioned by defendant’s singing was decided and serious; the effect of it was to make one part of the congregation laugh and the other mad; that the irreligious and frivolous enjoyed it as fun, while the serious and devout were indignant.” Id. This had an effect on the religious services as well.

[T]he congregation had been so much disturbed by it that the preacher had declined to sing the hymn, and shut up the book without singing it; that the presiding elder had refused to preach in the church on account of the disturbance occasioned by it [Linkhaw’s singing]; and that on one occasion a leading member of the church, appreciating that there was a feeling of solemnity pervading the congregation in consequence of the sermon just delivered, and fearing that it would be turned into ridicule, went to the defendant and asked him not to sing, and that on that occasion he did not sing.

Id. The court added that “on many occasions the church members and authorities expostulated with

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<sup>34</sup>This well known quotation is from Thoreau’s 1854 work *Walden*, which is a collection of his essays, observations, and musings from the two years, two months, and two days he spent living simply at Walden Pond near Concord, Massachusetts, from 1845-1847.

the defendant about his singing and the disturbance growing out of it. To all of which he replied: “That he would worship his God, and that as part of his worship, it was his duty to sing.” Id.

Although the jury found him guilty, the North Carolina Supreme Court reversed. The court acknowledged that Linkhaw’s singing “is described to be so peculiar as to excite mirth in one portion of the congregation and indignation in the other.” However, he was “conscientiously taking part in the religious services” and not trying to disrupt or otherwise disturb the worship services.<sup>35</sup> “It would seem,” the court wrote, that the defendant is a proper subject for the discipline of his church, but not for the discipline of the Courts.”

Too bad. Maybe he could have been sentenced to Sing-Sing.

### QUOTABLE...

“Opening a can of worms is a worthy endeavor if it means doing what is right.”

Chief Judge Gene E. Brooks in Anderson v. Indiana High School Athletic Association, 699 F.Supp. 719, 731 (S.D. Ind. 1988), encouraging the IHSAA to reopen and review its athletic eligibility rules to remove the apparent “irrebutable conclusion of law” inherent in such rules that every school transfer is the result of “unscrupulous practices.”

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<sup>35</sup>Disruption of a church service would require an intent to do so. By way of example, the mother of American humorist and artist James Thurber, who was more eccentric than her famous son, engaged in numerous pranks that have become part of the folklore in Columbus, Ohio, where the Thurbers lived. “One of her finer moments in prankishness came when she borrowed a wheelchair at a faith-healing meeting, rolled down the aisle, suddenly stood up, and proclaimed that she could walk. With hallelujahs sounding about her, she fled on foot as the owner of the wheelchair recognized his property.” Thurber, Burton Bernstein, Dodd, Mead & Co., N.Y. (1975).

Date: \_\_\_\_\_

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