

# Indiana Department of Education



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## QUARTERLY REPORT

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The **Quarterly Report** provides information 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).

### In this report:

<b>“Tuition” and Fees: The Supreme Court Creates an Analytical Model</b> .....	2
• Background .....	3
• Analytical Framework .....	6
<b>The Open Door Law: When Does a “Meeting” Occur?</b> .....	7
• Telephone Conference Calls .....	9
• E-mail Communication .....	11
• Serial Communications .....	14
• Member Retreats .....	17
• Attorney Fees .....	18
• Ombudsman .....	18
<b>Foreign Exchange Students: Federal Government Seeks to Eliminate Sexual Abuse and Exploitation</b> .....	19
• Tragedy In Wisconsin .....	20
• In Indiana .....	22
<b>Court Jesters: The Hound from Yale</b> .....	23
<b>Quotable</b> .....	25
<b>Cumulative Index</b> .....	26

## “TUITION” AND FEES: THE SUPREME COURT CREATES AN ANALYTICAL MODEL

“If we go to the dictionaries, the last resort of the baffled judge,” the late Supreme Court Justice Robert H. Jackson wrote, “we learn little except that the expression is redundant[.]”<sup>1</sup>

Resort to the dictionaries was necessary for the Indiana Supreme Court to decide Nagy, et al. v. Evansville-Vanderburgh School Corporation, 844 N.E.2d 481 (Ind. 2006), a baffling case revolving around the meaning of the term “tuition” as employed—but never defined—in the Indiana Constitution. The 4-1 decision did not result in a bright-line analysis but has created an analytical framework that likely will result in considerable legislative action.

In 1851, when the Indiana voters approved the current Constitution, Article 8, Sec. 1 provided (and still does) as follows:

Knowledge and learning generally diffused throughout a community, being essential to the preservation of a free government, it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide by law for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

No one defined what was meant by “tuition” in 1851, the meaning of which has undergone a curious transformation over the ensuing 155 years. Although modern usage would view “tuition” as “money paid for instruction,” in 1851, this concept was tertiary in the lexicons of the day. 844 N.E.2d 481, 490, *n.* 9. The primary and secondary usages in 1851 (guardianship, instruction) are rarely, if ever, employed today.

However, the Common Schools do exist today, in a form that the constitutional delegates (and subsequent voters) could not have contemplated. Does one view the language of the 1851 Constitution through the eyes of Hoosiers then existing, or should one recognize an evolution of sorts in the concept of a “Common School”?

An obvious answer would be to recognize an evolution of sorts in attitudes, understandings, and applications. If not, there would be considerable discriminatory activities enjoying constitutional *imprimatur* in every facet of our lives and livelihoods.

Such was the dilemma facing the Indiana Supreme Court when it agreed to grant transfer and review of the decision of the Indiana Court of Appeals in Nagy, et al. v. Evansville-Vanderburgh School Corporation, 808 N.E.2d 1221 (Ind. App. 2004), a 2-1 decision.

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<sup>1</sup>Jordan v. De George, 341 U.S. 223, 234, 71 S. Ct. 703 (1951).

## Background

The dispute began when the Evansville-Vanderburgh School Corporation (EVSC), faced with a \$2.3 million shortfall in its budget, instituted a \$20 “student services fee” and imposed it upon the parents of all of its 23,000 students, without regard to financial need. The fee was designed to offset costs for programs required by either statute or, through extension of statutory delegation, by rules of the Indiana State Board of Education.<sup>2</sup> EVSC was aggressive in collecting the fee, threatening legal action and attorney fees of up to \$100 should this be necessary to collect the fee.<sup>3</sup> *Id.* at 482-83. Parents sued EVSC, arguing in part that the fee violated Art. 8, Sec. 1.<sup>4</sup>

The trial court found substantially in favor of EVSC, but the Indiana Court of Appeals reversed. While doing so, the appellate court also questioned the constitutional sufficiency of the textbook rental fee, which had withstood a challenge to its constitutionality in 1974, albeit by a different panel of the Indiana Court of Appeals.<sup>5</sup> *Id.* at 483.

The Supreme Court agreed with the Court of Appeals that the fee violated Article 8, Sec. 1, but for slightly different reasons, choosing instead to defer to legislative prerogative to define the contours of “a general and uniform system of Common Schools” rather than adopt a narrow definition of “tuition.”

Although case law is abundant on judicially crafted rules for statutory construction, the rules for construction of constitutional provisions is a bit more complicated, especially where there has been a considerable passage of time. The Supreme Court provided an abbreviated history of the creation of “Common Schools” in Indiana, beginning with the original 1816 Constitution, which coincided with Indiana becoming a State. The original constitution had lofty goals but limiting language regarding a system of publicly funded schools “wherein tuition will be gratis” (“as soon as circumstances will permit”). As the population grew, so did widespread illiteracy. The well-to-do could afford privately obtained education for their children. The same was not true for many other Hoosiers. The legislature began to debate whether a system of tax-supported schools should be created. Debate was often acrimonious. The matter was eventually put to the

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<sup>2</sup>The State Board’s rules are found at Title 511 of the Indiana Administrative Code (IAC).

<sup>3</sup>Indiana statute, as the Supreme Court’s opinion noted, requires school districts to collect a “textbook rental fee.” I.C. 20-26-12-1, I.C. 20-26-12-2. Textbook rental fees cannot be charged to certain parents because of income level. However, for parents required to pay such fees, statute does permit school districts to initiate court action to recover the fees (and court costs and attorney fees as well). See I.C. 20-33-5-11(b).

<sup>4</sup>There was also a Fourteenth Amendment issue raised by a parent whose income level precluded charging for textbook rental fee (and initiation of lawsuits mentioned in Footnote 3, *supra*). This claim was not implicated on appeal.

<sup>5</sup>Chandler v. South Bend Community School Corporation, 312 N.E.2d 915 (1974).

voters, who approved the concept with a 56 percent favorable vote. A Constitutional Convention followed, during which there were some editing difficulties (*e.g.*, accidentally left in the qualifying language “as soon as circumstances will permit”), changed “gratis” to “shall be without charge,” but did not use the word “free” or define “tuition.” *Id.* at 485-89. Although a number of states do employ “free” to describe their publicly funded school systems,<sup>6</sup> the Indiana framers’ use of “without charge” as opposed to “free” creates “a subtle distinction, but a significant one that we believe the framers made intentionally.”<sup>7</sup> *Id.* at 485.

The overall intent of the framers was not to establish “*free* schools” but to create “a uniform statewide system of public schools that would be supported by taxation.” Under all accepted definitions and applications of the concept of “common schools” as employed at the time by various states, a “common school” has never meant a “free” school but one that is “in opposition to a private school.” Originally, parents in common schools paid a type of tuition (“rate bills”), which was abolished in 1852. *Id.* at 489-90. (emphasis original).

EVSC argued that “tuition” should apply only to instruction that is legislatively mandated, with all other expenses (including physical plant expenses and salaries for non-instructional personnel) assessed against parents and students as fees as opposed to “tuition.” The Supreme Court acknowledged EVSC had an interesting argument, but the argument cannot prevail when one views the system of common schools in its historical context. In 1851, public education expenses “were modest by today’s standards,” and may have covered the essential areas identified by EVSC. However, “to suppose that all remaining educational expense would be placed on the shoulders of parents whose children were attending public schools loses sight of the entire free school movement debate—a central and key element of which was that public schools would be operated largely at public expense.” *Id.* at 490-91.

It is of course true that what constitutes a public education has dramatically expanded over these several decades. We doubt for example that the framers could have had in their contemplation such cost items as computer labs, athletic departments, and media specialists. But it is equally true that determining the components of a public education is left within the authority of the legislative branch of government. Article 8, Section 1 imperatively places upon the legislature, “by all suitable means...to provide by law, for a general and uniform system of Commons Schools.” But this imperative leaves to that branch considerable discretion in determining what will and what will not come within the meaning of a public education system. “The duty rests on the legislature to adopt the best [school] system that can be framed; but they, and not the courts, are to judge what is the best system. There is this limitation on the legislative power: the system must be ‘a general and uniform one,’ and tuition must be free and open

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<sup>6</sup>See *Id.* at 484-85, *n.* 4 for collected State constitutional provisions.

<sup>7</sup>The Supreme Court realized it needed to be more precise in its terminology, especially as its precedence indicates Indiana’s Constitution “mandates a statewide system of free public education.” *IHSAA v. Carlberg*, 694 N.E.2d 222, 229 (Ind. 1997). See *Id.* at 485, *n.* 5.

to all; but the extent of this limitation is this, and nothing more.” Robinson v. Schenck, 1 N.E. 698, 705 (Ind. 1885).

Id. at 491. Not only has the General Assembly enacted a considerable body of law directed at the creation and support of the public schools, including special programs and projects, it has delegated to the Indiana State Board of Education the authority to adopt rules governing a host of public school-related areas that are a part of its charge to establish the educational goals of the state.<sup>8</sup> Id. at 491-92.

Where the legislature—or through delegation of its authority the State Board—has identified programs, activities, projects, services or curricula that it either mandates or permits school corporations to undertake, the legislature has made a policy decision regarding exactly what qualifies as a part of a uniform system of public education commanded by Article 8, Section 1 and thus what qualifies for funding at public expense. And of course the legislature has the authority to place appropriate conditions or limitations on any such funding. However, *absent specific statutory authority*, fees or charges for what are otherwise public education cost items cannot be levied directly or indirectly against students or their parents. Only programs, activities, projects, services or curricula that are outside of or expanded upon those identified by the legislature—what we understand to be “extracurricular”—may be assessed, but only against those students who participate in or take advantage of them.

Id. at 492 (emphasis added). The services for which EVSC had assessed a fee—student services, nurses, media specialists, alternative education, elementary school counselors, drama and music programs, speech and debate programs, academic academies, athletic programs, and a police liaison program—were determined to be “part and parcel of a public school education” by either the legislature or the State Board, and, by extension, qualify for public funding.<sup>9</sup> Id. at 492-93.

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<sup>8</sup>Although the Supreme Court’s decision addresses only the State Board’s rules, this is not the only state agency with delegated rule-making authority that would affect publicly funded schools, such that the attendant costs for complying with these rules would likewise be within the operational definition of “tuition.” Notably, this would include applicable rules of the Indiana State Department of Health, the State Board of Accounts, the State Fire Marshal, the Professional Standards Advisory Board, and the Department of Education. With regard to this issue, the Indiana Attorney General had issued Official Opinion 2001-4 (June 15, 2001) finding that a “health service fee” charged by an Indiana school corporation to offset costs for school health services violated Article 8, Sec. 1. The Attorney General agreed with an earlier position by the Department of Education (April 11, 2000) that the “health service fee” was unconstitutional because the fee was intended to “pay[] for salaries and services provided for by the General Assembly and funded through tax levies...”

<sup>9</sup>The Supreme Court in an earlier decision had determined that “athletics are an integral part of this constitutionally mandated process of education.” See Carlberg, *supra*, 694 N.E.2d at 229.

In essence, the very programs, services, and activities for which EVSC charges a fee already are a part of a publicly funded education in the state of Indiana. However, this does not preclude EVSC from offering programs, services or activities that are outside of or expand upon those deemed by the legislature or State Board as part of a public education. The Indiana Constitution does not prohibit EVSC from charging individual students for their participation in such extracurriculars or for their consumption of such services.

Id. at 493. The mandatory fee charged by EVSC and imposed on all students—whether the students participated or not—“becomes a charge for attending a public school and obtaining a public education. Such a charge contravenes the ‘Common Schools’ mandate as the term is used in Article 8, Section 1 and is therefore unconstitutional.” Id.

### **Analytical Framework**

The Supreme Court did not provide a bright-line definition for “tuition,” but it did fashion an analytical framework for reviewing existing state law to determine where fees are authorized and where such charges are not.

1. Is the program, activity, project, service or curricula mandated by the legislature or permitted by the legislature? If so, then “the legislature has made a policy decision regarding exactly what qualifies for funding at public expense.” Id. at 492.
2. Although the legislature has the authority to place appropriate conditions or limitations on funding for such programs, “absent statutory authority, fees or charges for what are otherwise public education cost items cannot be levied directly or indirectly against students or their parents.” Id.

Of course, “this does not preclude [a public school] from offering programs, services or activities that are outside of or expand upon those deemed by the legislature or State Board as part of a public education.” Id. at 493.

Even though this analytical framework can be applied to most programs, activities, projects, services, or curricula, it lacks preciseness for all such endeavors. One such “endeavor” is “full day kindergarten.” The legislature requires all public schools to make kindergarten available to eligible students (I.C. § 20-26-5-1(a)(1); I.C. § 20-33-2-7), but it has never defined what the instructional day would be nor has it delegated authority to any state agency to determine the instructional day. The kindergarten instructional day has been traditionally one-half an instructional day for elementary grades, and state tuition support has been one-half Average Daily Membership (ADM). I.C. § 21-3-1.6-1.1(d).<sup>10</sup>

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<sup>10</sup>Actually, the legislature did reference an instructional day for kindergarten at I.C. § 20-23-3-8, where it directed that schools reorganizing as a School Township must “include a kindergarten program that is *at least* a half-day program.” (Emphasis added.)

A number of public schools have implemented full-day kindergartens but have been charging tuition to parents for the educational services provided past the traditional half-day classes. There is no question that kindergarten is a part of the system of common schools, but is full-day kindergarten an expansion “upon those [programs] deemed by the legislature or State Board as part of a public education”? The legislature will likely address this in its next session, by either defining an instructional day or supplying funding for full-day kindergarten. Should it define kindergarten as a one-half day program, then anything beyond that would be an expansion, which under the Supreme Court’s analytical model would permit the assessment of fees to participating parents.<sup>11</sup>

The General Assembly will likely review its current requirements for public schools to determine which programs should be eliminated. Some programs, like driver’s education, were initiated in order to comply with federal laws that no longer require this method of instruction.

### **THE OPEN DOOR LAW: WHEN DOES A “MEETING” OCCUR? By Nicole R. Confer, Legal Intern<sup>12</sup>**

In January of 2006, the Indiana Court of Appeals decided Marion-Adams School Corporation v. Boone, 840 N.E.2d 462 (Ind. App. 2006). The case involved alleged violations of Indiana’s Open Door Law (ODL) by a school board. A patron of the Marion-Adams School Corporation asserted that on three different occasions the school board met in executive session to discuss budgetary issues, including the closing of a district elementary school. The notice for each of the meetings in question stated the reason for the executive session was to discuss issues related to collective bargaining. Although collective bargaining is a valid justification for an executive session under Indiana law, I.C. § 5-14-1.5-6.1(b)(2)(A), discussion of budgetary issues is not. The trial court found that the subject matter of the meetings was, in fact, regarding the budget and the closing of the elementary school. Id. at 463. Prior to this case, two local newspapers filed formal complaints with Indiana’s Public Access Counselor (PAC)<sup>13</sup>, who found that the board was in violation of the ODL for meeting and discussing an issue of public concern in an inappropriately noticed executive session. *Advisory Opinions 05-FC-105 and 05-FC-106*.<sup>14</sup> Following the PAC’s advisory opinion, the patron of the school corporation filed this lawsuit. She sought to enjoin the school board from committing further violations of the ODL and also

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<sup>11</sup>Such a legislative move could potentially raise other constitutional questions not addressed in Nagy, such as whether such fees prohibit some children from participating, creating questions whether the programs are “equally open to all.”

<sup>12</sup> Nicole R. Confer is a third-year law student at the Indiana University School of Law—Indianapolis. She served as Legal Intern during the first semester of 2006 with the Legal Section of the Indiana Department of Education through the Law School’s Program on Law and State Government.

<sup>13</sup> The Indiana Public Access Counselor is responsible for answering citizen complaints and issuing advisory opinions providing clarity on issues relating to Indiana’s Public Access Law and Open Door Law. See I.C. § 5-14-4 *et seq.* and I.C. § 5-14-5 *et seq.*

<sup>14</sup>The PAC’s formal responses to complaints can be found at <http://www.in.gov/pac/advisory/>.

sought an injunction against the decisions made (and formalized during a public meeting), specifically regarding the closing of the elementary school. After finding that the board had violated the ODL, the trial court awarded the plaintiff attorney fees and issued an injunction, ordering the Board to reconsider the budget decisions, including the school closing. The school appealed the trial court's decision. On appeal, the Court of Appeals affirmed the trial court's decision, finding that "although the vote to pass the budget cuts occurred at the public meeting of May 27, 2004, ...the Board did not cure the violation of the Open Door Law merely by taking final action at the public board meeting." *Id.* at 466. The court additionally upheld the award of attorney fees. *Id.* at 469.

Marion-Adams is the latest decision in a growing number of cases involving open-meeting laws exacerbated in some cases by advancements in communication technology. All fifty states have a law granting the public the right to attend governmental meetings.<sup>15</sup> Indiana's Open Door Law was passed in 1977 by the General Assembly and states in its introduction:

[T]he general assembly finds and declares that this state and its political subdivisions exist only to aid in the conduct of the business of the people of this state. It is the intent of this chapter that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. The purposes of this chapter are remedial, and its provisions are to be liberally construed with the view of carrying out its policy.

#### I.C. § 5-14-1.5-1

Like any statute, open-meeting laws are subject to interpretation, analysis, application, and disagreement. Recent open-meeting law litigation often implicates evolving means of communication through advanced technology. Disputes include the use of telephone conference calls, electronic mail (e-mail), instant messaging, the use of chat rooms, and most recently, the use of cell phone text messaging, and whether the communication exchanged in these interchanges constituted a "meeting" that would be subject to the open door laws.<sup>16</sup> Additionally, serial communications (meetings between members of governing bodies fewer than would constitute a quorum) give rise to concern whether such maneuvering circumvents the open-meeting laws. Finally, a number of cases have arisen concerning official member retreats or seminars, held for the purpose of improving communication and effectiveness among public officials but which otherwise exclude the public. Although there are common threads among the states, state legislatures and state courts answer issues as they arise in a variety of ways. These

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<sup>15</sup> In 1950 Alabama was the only state with an open meeting statute. By the late 1970's, however, after heavy pressure and assertion by the media of their right to attend public meetings and access public records, all fifty states had established statutes allowing the public to attend governmental meetings.

<sup>16</sup> A "meeting" is defined by Indiana statute as "a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business." I.C. 5-14-1.5-2(c). A "meeting" does not include any social or chance gathering not intended to avoid this chapter, any on-site inspection of any project or program, traveling to and attending meetings of organizations devoted to betterment of government, or a caucus.

issues are relevant to all meetings of public concern; school board meetings are no exception. School boards must carefully consider their actions in carrying out the business of public school governance.

### **Telephone Conference Calls**

Before issues arose concerning use of the internet and instant communication, legislatures and courts had to first address the increasing use of telephones in conducting meetings. Telephone conferences are frequently used by private businesses and government entities alike. Although Indiana's ODL lacks a specific provision regarding telephone conference calls, it provides a back-door answer to the question of whether a telephone conference call will trigger the requirements of the Act. I.C. § 5-14-1.5-3(c) states "a meeting conducted in compliance with I.C. § 5-1.5-2-2.5 does not violate" the ODL. This section refers to meetings of the Indiana Bond Bank and states in part:

A member of the board may participate in a meeting of the board by using a means of communication that permits: (1) All other members participating in the meeting; and (2) All members of the public physically present at the place where the meeting is conducted; to simultaneously communicate with each other during the meeting.

I.C. § 5-1.5-2-2.5(b).

Furthermore, "a member who participates in a meeting under subsection (b) is considered to be present at the meeting." I.C. § 5-1.5-2-2.5(e).

In 2002, the Indiana PAC issued an advisory opinion in response to allegations that a Town Council Board, made up of three (3) members, had violated the ODL. The Clerk-Treasurer of the Town and a private citizen filed individual formal complaints with the PAC, alleging discussions of official town business outside the town meeting. The complainants asserted that prior to the town meeting, two of the three members had discussed the content of the meeting together on the telephone. The two council members failed to file a response with the PAC; therefore, all allegations about their conduct were accepted as factual. The PAC stated that in accordance with Indiana law, because a majority of the board had discussed issues of town business, outside a regularly conducted meeting, the board had violated the ODL. *Advisory Opinion 02-FC-10*.

Courts in other states have addressed the issue of telephone communication in triggering open-meeting laws. One early case, decided in Virginia, involved the selection of a new superintendent by a community school board. Roanoke City School Board v. Times-World Corporation, 307 S.E. 2d 256 (Va. 1983). After the superintendent was informed by the Assistant City Attorney that a teleconference among all members of the school board would not violate Virginia's open-meeting statute, the Freedom of Information Act (FOIA), the superintendent called all seven members of the board. During the private telephone conference call, the school board made an official decision regarding the eligibility of one candidate. An area newspaper alleged this teleconference constituted a meeting subject to the FOIA and, because the public was not permitted to be in attendance during the teleconference, the board's actions violated the Act. The Virginia Supreme Court disagreed with the newspaper and held

that the meeting was not subject to FOIA requirements. The court stated that a public agency could “meet” through a telephone conference so long as the relevant statute did not contain a provision to the contrary. Because the FOIA did not contain such a provision, the court held that the board’s telephone conference call did not constitute a “meeting” under the statute and, therefore, the Board had not violated the Act. The court additionally noted, “[W]e are not persuaded that the omission in the Act of any reference to a telephone conference call was inadvertent. Such calls have been in common use for any years. The General Assembly has expressly approved meetings of corporate boards of directors by conference calls.” *Id.* at 259.

Following a factually similar case, the Kansas legislature modified its own open-meeting statute to address the use of telephone conference calls by government bodies. The Kansas open meeting statute was modified after the Kansas Supreme Court decided State ex rel. Stephan v. Board of County Commissioners, 866 P.2d 1024 (Kan. 1994). After three public officers discussed official county business over the telephone, the Kansas Attorney General argued that the telephone conversation constituted a public meeting under the Kansas Open Meetings Act. Because the statute did not specifically address the use of a telephone for meetings, the court considered the ordinary meaning of the words “gathering” and “assembly,” both found in the statutory definition of “meeting,” and limited the Act to physical gatherings and held that telephone conversations did not violate the Kansas law as it was written. Subsequently, the Kansas legislature amended the definition of “meeting” to include telephone calls. Now codified at K.S.A.75-4317a, this section reads:

As used in this act, “meeting” means any gathering, assembly, telephone call or any other means of interactive communication by a majority of a quorum of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or agency.

An important factor in considering whether a phone conversation triggers an open meeting law is the number of members involved in the conversation. Most state statutes specify that in order for a meeting to be subject to the open-meetings law, a majority, or a quorum, of the members must be present. The Minnesota Supreme Court addressed this issue in Moberg v. Independent School District No. 281, 336 N.W.2d 510 (Minn. 1983). In that case, taxpayers brought suit against a local school board for allegedly violating Minnesota’s Open Meeting Law (OML). Over a ten-year period, Independent School District No. 281 saw a drop in student enrollment from 28,000 students to about 16,000 students. As a result, the District closed seven elementary schools and one junior high school. The District also began to close one of the district’s three high schools as well. After intense debate and disagreement about which of the three schools was appropriate to close, a panel was appointed to investigate the issue and make a recommendation to the board. The trial court found that throughout this process, individual board members gathered in private at least seventeen (17) times to discuss the school-closing issue. In addition to these meetings, the board members communicated regularly through telephone calls regarding the school closing. In reviewing the case, the Supreme Court specified that the phone conversations were not violations of the OML because “telephone conversations between fewer than a quorum” would not be subject to Minnesota’s OML. *Id.* at 518. However, the court held “serial meetings in groups of less than a quorum for the purposes of avoiding public hearings or fashioning agreement on an issue may also be found to be a violation of the statute depending upon the facts of the individual case.” *Id.*

Reaching a similar conclusion, the court in Freedom Oil Company v. The Illinois Pollution Control Board, 655 N.E.2d 1184 (Ill. App. 1995), determined that a meeting of a state pollution control board via a telephone conference did not violate Illinois' Open Meetings Act. Only two members of a six-member board were physically present at the meeting site; four other members were connected to the proceedings by telephone. Basing its opinion on an Illinois Attorney General's opinion, the court held that because "nothing within the Open Meetings Act . . . specifically prohibits conducting a meeting by telephone conference or requires members of a public body to be in each other's physical presence to establish a quorum," the Open Meetings Act was not violated when the Board met via a telephone conference. Id. at 1189. Unlike the Roanoke decision, where the court determined an absence of mention in the statute meant telephone conference calls were not to be included in the FOIA, the court in Freedom specified that "[a]lthough the rules do not contain any reference to . . . meetings by telephone, the absence of a rule does not render the Board's authority to conduct meetings by telephone conference invalid." Id. at 1191.

Based upon the statutory and judicial law available, governing bodies would be wise to review available statutory and judicial law and always err on the side of making the meeting accessible to the public if a quorum is going to be involved in official action, whether by telephone or in person.

### **E-mail Communication**

E-mail communication is an additional means of communication that may trigger the requirements of the open-meeting laws. Similar to e-mail, the increasing use of instant messaging communication (including the use of chat rooms) and phone text messaging may give rise to new uncertainties regarding open-meeting laws. The use of e-mail among board members in preparation for upcoming board meetings presents an interesting issue, which is further complicated when conversations among a small number of members are copied and forwarded to the entire board.

The Open Door Law for Indiana does not specify whether an exchange of e-mail communication among members of a governing body will trigger the statute's requirements. Although the notice provision of the Act specifies that notice of a meeting given via electronic mail or facsimile transmission is sufficient, the statute fails to provide guidance or detail whether a meeting can occur through an exchange of e-mail. I.C. § 5-14-1.5-5. Although Indiana courts have not yet addressed whether the use of e-mails would constitute a "meeting" subject to public attendance and recording, Indiana's PAC has issued advisory opinions regarding e-mail communication as related to the ODL. In response to a June 2005 formal complaint, the PAC wrote on July 6, 2005:

While some states have specifically addressed forms of communication other than personal assemblage, Indiana has not. Therefore, I find that it is wholly consistent with the ODL to interpret the term "gathering" to require some amount of simultaneous discussion. The determination of whether electronic communication would constitute a meeting for purposes of the ODL would be dependent upon the circumstances of the e-mail communication and should include consideration of the timing of the communications.

In this formal complaint, a police department employee received a five-day suspension after being charged with a violation of department rules and regulations. The employee asserted that formal action occurred prior to the public meeting, where the suspension was officially decided. The Board of Public Works and Safety responded that although members had reviewed the information regarding the suspension independently, they had not violated the ODL. The members admitted that following the independent review of the material, they communicated via e-mail and agreed that the suspension was an appropriate course of action. Citing Beck v. Shelton, 593 S.E.2d 195 (Va. 2004), a case discussed *infra*, the PAC considered the definitions of “meeting” and “gathering” and determined that she was unable to make a determination about whether the e-mail exchange constituted a violation of the ODL because the e-mails were no longer available for inspection.<sup>17</sup> She noted that “if intent to avoid the ODL were evidenced in e-mail communication, [she] would find it difficult to determine that no violation of the ODL had occurred.” *Id.*

Later in 2005, the PAC had an opportunity to consider relevant factors in a similar case and determine that e-mail communication might have been a violation of the ODL. This allegation arose due to a complaint filed about a meeting of a Library Board, made up of seven (7) voting members. The formal complaint alleged that over a two-day time period, board members communicated with the library director via e-mail about a letter responding to complaints made by a citizen coalition. On at least one occasion, three or four of the members responded to an e-mail sent by the director, approving of changes to the letter she had made. The board officially accepted the response, as amended and corrected, at a public meeting soon thereafter. The PAC wrote:

Static, or single, e-mail communications directly to an individual who is not a member of the governing body does not constitute a gathering of a majority of the Board. However, this situation involves more than just a static e-mail to or from each Board member to the Library Director. In my opinion, e-mail communications that are accomplished through a third person rather than directly among members of the a governing body, if otherwise deemed to be a “gathering,” would be in violation of the ODL, despite the communication not being carried out directly between a majority of the members of the governing body.

A number of other state legislatures and courts have addressed the use of e-mail communication in their statutory and judicial determinations. The seminal case on the effect of e-mail communication as it relates to open-meeting laws arose in Washington in Wood v. Battle Ground School District, 27 P.3d 1208 (Wash. App. 2001). In Wood, the court addressed whether an exchange of e-mail messages among a majority of a five-member school board was a “meeting” under Washington’s Open Public Meetings Act (OPMA). The alleged violations occurred when three members-elect met with a current board member at the member’s home to discuss the possibility of firing two district employees. Wood was one of these employees. The

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<sup>17</sup> “Gathering” is not defined in Indiana’s ODL.

in-home meeting was followed by an exchange of e-mail communications among the three members-elect and current member. Once the members-elect were sworn in on the school board, the board addressed the personnel issues in adequately noticed executive session. Although Wood received competent to excellent performance evaluations, her contract was not renewed by the board the following year. In considering whether the e-mail exchange constituted a violation of the OPMA, the court stated that “. . . under some circumstances electronic mail communications can constitute a ‘meeting.’” *Id.* at 1217. The court further acknowledged the changing scheme of communication and held that the purpose of the statute would be defeated if members of governing bodies were able to avoid the requirements of the statute by employing small technicalities like avoiding face-to-face communication. The court laid out three factors that would be required to trigger the OPMA by way of e-mail communication: First, a majority of the governing body would have to be involved in the exchange of communication. Second, the participants had to intend to transact official business. Finally, members had to take some form of “action” as defined by the Act. *Id.* The court remanded the case for further fact-finding to determine whether the exchange of e-mail communication regarding employee Wood constituted a meeting under the OPMA. *Id.* at 1219.

In 2004 the Supreme Court of Virginia considered whether the exchange of e-mail communication among members of a public body triggered the requirements of Virginia’s Freedom of Information Act (FOIA). In *Beck v. Shelton*, 593 S.E.2d 195 (Va. 2004), the court reviewed a determination by a trial court that communication via e-mail between more than three members (a quorum) of a City Council in which official public business was discussed constituted a violation of the FOIA. Three citizens filed the suit against the council, asserting members deliberately e-mailed each other in a knowing, willful and deliberate attempt to hold secret meetings, avoid public scrutiny, discuss City business, and decide City issues without the input of all the council members and the public. *Id.* at 196. The court focused its attention on the simultaneous nature of the communication between members of the governing body and ultimately likened the e-mail exchange to communication via traditional writing, such as letters and facsimile, noting that the briefest period of time passing between two senders was four hours and the longest was well over two days. *Id.* at 199. The court noted that had the communication been more spontaneous – such as in instant messaging or in chat room-like conversations – the meeting would have triggered the FOIA. *Id.*

A recent case from Georgia dealt with both telephone and e-mail communication. In *Claxton Enterprise v. Evans County Board of Commissioners*, 549 S.E.2d 830 (Ga. App. 2001), the court held that the alleged meetings did not violate the Georgia open-meeting statute because the meetings did not occur at a “designated time or place” as required by the relevant statute. However, the court did hold that it was possible for telephone meetings to violate the statute under certain circumstances:

Although a meeting is required to be open only when a quorum of a governing body or its agents have gathered at a designated time and place to take official action, such a gathering can be realized through virtual as well as actual means. The quorum does not have to be gathered in a physical space. In this digital age, we recognize that meetings may be held in ways that were not contemplated when the Act was initially drafted . . . Thus, a “meeting,” within the definition of the Act, may be conducted by written, telephonic, electronic, wireless, or other virtual means. A designated place may be a

postal, Internet, or telephonic address. A designated time may be the date upon which requested responses are due.

Id. at 835 (citations omitted).

Following the advisory opinions from Indiana's PAC and cases from other states, where courts conclude that communication via e-mail may constitute a violation of open-meeting laws, it is possible for instant communication, via e-mail and possibly text-messaging, to be subject to open-meeting requirements. Consideration of intent, nature, and timing of the communication seems to be key in determining whether such communication may invoke requirements of the open-meeting laws.

### **Serial Communications**

An additional subset for open-meeting consideration is the serial communication strategy whereby a series of meetings are conducted with governing body members but a quorum of the governing body is never present at any one of these meetings. Current Indiana law does not address this ostensible means of avoiding compliance with the Open Door Law.

The best-known dispute involving serial communication involves the Indiana University Board of Trustees and Indiana University's former basketball coach. Robert M. (Bobby) Knight won three collegiate national basketball championships at Indiana University (IU) (1976, 1981, and 1987). His 1976 team was the last team to go undefeated.

Despite his success on the court, his relationship with the IU President, Myles Brand, deteriorated. On May 14, 2000, IU's Trustees and Brand held an executive session to discuss Knight's continued employment. Sanctions and possible termination were also discussed.

In September of 2000, Knight had an angry exchange with an IU student during which time he allegedly grabbed the student. IU initiated an investigation. On September 9, 2000, Brand invited the nine-member Board of Trustees to his home. He met with four of them to discuss the investigation, while the other four (one was out of the country) stayed in another room of his house. After his discussion with the first four members, he then spoke with the remaining four Trustees. Brand acknowledged he deliberately met with fewer than a quorum so as "to exclude any impropriety with respect to the Open Door Act." The following day, Brand fired Knight.

Shortly thereafter, Knight supporters filed an action in the Monroe County Circuit Court, claiming the Trustees violated Indiana's Open Door Law and seeking to void the decision to terminate Knight's employment. Both sides moved for summary judgment. The trial court granted partial summary judgment to the Trustees on the issue of the authority of Brand to fire Knight.

Thereafter, the Trustees moved for summary judgment on the Open Door Law complaint, asserting that their serial meetings at Brand's home did not violate that law. The trial court granted the motion in May of 2005. Complainants appealed these decisions.

The Indiana Court of Appeals affirmed the trial court's decisions on June 2, 2006, in James R. Dillman, et al. v. Trustees of Indiana University, 848 N.E.2d 348 (Ind. App. 2006). The appellate court noted the purpose of the Open Door Law (ODL) is to ensure that governmental business be conducted openly so that the general public may be informed. Except for "executive sessions," the use of which is strictly defined, "all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them."<sup>18</sup> I.C. § 5-14-1.5-3(a). "Meeting" is defined as "a gathering of a majority of the governing body...for the purpose of taking official action on public business." I.C. § 5-14-1.5-2(c). Id. at 351.

The plaintiffs argued the serial communications at Brand's house should be considered a "meeting" for the purpose of providing notice and permitting the public to observe and record the proceedings. They were under the same roof even if they were not in the same room simultaneously. The appellate court disagreed, noting that "meeting" has a precise statutory definition, and that a majority of the Trustees were not present at the same time. "Thus, without a majority present, no meeting occurs for the purposes of the Open Door Law." Id. In addition, the Trustees could not take official action because a quorum was not present. The court rejected the argument that back-to-back briefings should constitute a "constructive quorum." Id. at 351-52, citing Dewey v. Redevelopment Agency of City of Reno, 64 P.3d 1070, 1078 (Nev. 2003).

The conduct of the I.U. Trustees was in direct contravention to the public policy behind the Open Door Law. While a more open process in matters of governance such as this might be preferable, the legislative branch of our state government has spoken. The law does not prohibit this conduct. Moreover and importantly, we know this because the General Assembly has repeatedly considered and declined to amend the Open Door Law to change the definition of a meeting to include a "series of at least two [] gatherings of members of the governing body...attended by at least two [] members but less than a quorum...[where] [t]he sum of the number of different members of the governing body attending any of the series of gatherings at least equals a quorum of the governing body."

Id. at 352.<sup>19</sup> "This repeated refusal to amend the definition makes clear the legislature's intent to preserve the meaning of the term 'meeting' as it is written." Id.

As the Indiana Court of Appeals noted in Dillman, supra, the Indiana General Assembly has since 1996 attempted to address, in part, the use of serial communications as a means of avoiding the requirements of the ODL. The most recent effort occurred during the 2006 session.

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<sup>18</sup>Indiana law does not permit one to "speak" at such meetings. The right accorded by law is to be present, to observe, and to record the proceedings. Whether one has a right to speak at such meetings is within the discretion of the governing body. I.C. § 5-14-1.5-3(a).

<sup>19</sup>As the court noted, the General Assembly has attempted unsuccessfully to amend the Open Door Law to address serial communications in its 1996, 1997, 1999, 2001, 2004, 2005, and 2006 sessions. Id. at 352.

During the 2006 regular session of the Indiana state legislature, the Senate acted on a proposed bill, Senate Bill No. 89, that would have amended Indiana's ODL. The most notable inclusion was a definition for "serial meetings" and electronic communication. Believing that the ODL was being purposefully avoided through serial meetings and electronic communication, including e-mail and text messaging, the Senate bill proposed that governing body members must be physically present at a meeting to be able to participate in final decisions of the governing body. Section 2 (a) of Senate Bill No. 89 would have added the following to the ODL:

- (a) A governing body of a public agency violates this chapter [ODL] if members of the governing body participate in a series of at least two (2) gatherings of members of the governing body that meets all the following criteria:**
- (1) Each gathering attended by at least two (2) members but less than a quorum of the members of the governing body.**
  - (2) The sum of the number of different members of the governing body attending any of the series of gatherings at least equals a quorum of the governing body.**
  - (3) All the gatherings concern the same subject matter and are held within a period of not more than seven (7) days.**
  - (4) The gatherings are held to take official action on public business.**
- For purposes of this subsection, a member of a governing body attends a gathering if the member is present at the gathering in person or if the member participates in the gathering by telephone or other electronic means, excluding electronic mail.**

Although the Bill passed the Senate by a 48-2 vote, it did not pass in the House of Representatives.<sup>20</sup> The relationship between "gatherings" and "meetings" remains unresolved.

The attempt to clarify Indiana's ODL is not an isolated endeavor. Several states explicitly detail whether serial communication among members fewer than a quorum constitutes a "meeting" subject to the open-meeting laws. An example of such a statute is Nevada's open-meeting statute, which states that a "series of gatherings will be subject to open meeting laws." Nev. Rev. Stat. 241.015(2)(a) (2002). Other states, lacking statutory guidance on this issue of serial communication, have case law on point. One such case is Blackford v. School Board of Orange County, 375 So.2d 578 (Fla. App. 1979). In Blackford a school board, working through a redistricting plan that affected approximately 6,000 students and a possible school closing, attempted to avoid a meeting that would be open to the public as required by Florida's Sunshine Law by devising a plan by which the superintendent conducted one-on-one meetings in a rapid-fire succession with each board member to discuss re-districting options. The superintendent was candid in admitting that it was his intention to have a crystallized plan ready when the issue was presented to members of the public. Believing they would be exempt from the Act's requirements, Board members met individually and privately with the superintendent in meetings spaced two hours apart over a period of three days. The members based their belief upon case law that a meeting of a board member and a staff member did not constitute a "meeting" under the statute. The Florida Court of Appeals held that the serial meetings violated

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<sup>20</sup> The full text of Senate Bill No. 89 can be read and downloaded at <http://www.in.gov/legislative/bills/2006/PDF/SB/SB0089.1.pdf>.

the Sunshine Law, adding: “[W]e are convinced that the scheduling of six sessions of secret discussions, repetitive in content, in rapid-fire seriatim and of such obvious official portent, resulted in six de facto meetings by two or more members of the board at which official action was taken.” Id. at 580. The court further specified that:

Outcries by adversely affected special interest groups are commonplace whenever any form of legislation is proposed. There is no reason why school boards should be excluded simply because secrecy was necessary to avoid, in the words of the superintendent, “dysfunctional or disruptive . . . stress or distress in the community.”

Id. at 581.

In Cortese v. School Board of Palm Beach County, 425 So.2d 554 (Fla. App. 1982), the court reached a different conclusion regarding a series of meetings among school board members to discuss the closing of a district elementary school. The district elementary school at issue was the smallest elementary school and one of the oldest schools in the district. The closing of the school would send its students to a neighboring elementary school. The court found that members of the board on a number of occasions met with concerned parents, school principals, and at the school site to discuss issues concerning the closing of the school. Ultimately the board voted 6-1 at a public meeting to close the elementary school. Although the ultimate decision followed these collective meetings, the court stated, “There is nothing in the record to show that the decision-making was clandestine or sinister, or that the public meetings were merely shells in which non-public decisions were poured, or that the ultimate decision was anything other than the result of bona fide ‘town meetings.’” Id. at 557. The court distinguished this case from Blackford on the basis that the meetings in Blackford were held to make official determinations intentionally outside of the public realm. Id.

In a case similar to the Bobby Knight case, actions by the Board of Regents for the University of Michigan were held to be obvious, direct violations of Michigan’s Open Meeting Act (OMA). Booth Newspapers, Inc. v. University of Michigan Board of Regents, 507 N.W.2d 422 (Mich. 1993). Following an announcement by the then-President of the University of Michigan, the Regents, in selecting a replacement, purposefully avoided conducting meetings with a majority of the Regents so as to avoid triggering the OMA. Id. at 425. After narrowing the number of candidates from 250 to two (2), all via sub-quorum meetings and by private telephone calls, the Regents met in homes with the candidates. One Regent conceded that such meetings were, like any interview, intended to assess and possibly recruit candidates. Id. The Michigan Supreme Court reasoned that because it was the board’s intention to avoid the OMA, the board had violated the Act by deciding official business via individualized and serial telephone communications. Id. at 425.

## **Member Retreats**

A final area of continuing concern for school board governance relates to board retreats. This issue was implicated in Kansas City Star Company v. Fulson, 859 S.W.2d 934 (Mo. App. 1993). In this case, school board members so violently disagreed and feuded with one another that it was arranged for the board members to attend a workshop where the members could be trained in skills aimed at enhancing cooperation and effectiveness. After being denied the right to attend

the workshop, a local newspaper alleged that the workshop constituted a public meeting and the denial of access constituted a violation of Kansas' open-meeting law. The court rejected this argument and held no violation of the law occurred. The court specified further that the workshop was intended only to indirectly affect public business, that public business would not actually be discussed at the training, and that the training was not a social gathering. The workshop was, therefore, not subject to the open-meeting statute's requirements. *Id.* at 942.

Unlike its omission in regards to the use of telephone and e-mail communication and serial meetings, Indiana's ODL does provide a statutory exception in regards to improvement workshops and social gatherings. The statute provides an executive session exception "[t]o train school board members with an outside consultant about the performance of the role of the members as public officials." I.C. 5-14-1.5-6.1(b)(11). Additionally, Indiana's ODL speaks directly to chance social gatherings. The law states, "'Meeting' does not include . . . any social or chance gathering not intended to avoid this chapter." I.C. 5-14-1.5-2(c)(1). Indiana's position is common among jurisdictions that have either dealt with board member improvement trainings or retreats.

### **Attorney Fees**

Although there is some uncertainty about what activities may trigger open-meeting laws, the cost for being wrong can be certain. Making mistakes about what meetings should be open to members of the public can result in heavy costs and fines. Indiana, like many states, permits an award of attorney fees to the complainant if a governing body is found to be in violation of the ODL. For example, in Gary/Chicago Airport Board of Authority v. Maclin, 772 N.E.2d 463 (Ind. App. 2002), the court awarded attorney's fees after it was determined the Airport Authority had violated the requirements of the ODL by posting an inadequate notice, one that lacked statutory reference to justification for an executive session, for an otherwise public meeting. After granting summary judgment, the court additionally found the Airport Authority was liable for a total award of \$16,472.50 in attorney fees for 88.5 hours of work by the plaintiff's counsel. *Id.* at 473, *n.* 8.

### **Ombudsman**

In response to continuing issues associated with open-meeting laws, states have explored the use of an ombudsman to address complaints from the public regarding potential ODL violations by public agencies as well as to provide guidance through official or advisory opinions.<sup>21</sup> In Indiana the Public Access Counselor (PAC) provides this guidance and assistance. The PAC was originally established by then-Governor Frank O'Bannon's Executive Order 98-24. The Indiana General Assembly later codified the position and detailed the PAC's duties at I.C. § 5-14-4 *et seq.* and I.C. § 5-14-5 *et seq.*<sup>22</sup> The PAC's powers and duties include training public officials and educating the public on rights of the public and responsibility of public agencies under the public access laws; conducting research; preparing interpretative and educational materials and

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<sup>21</sup> An ombudsman is defined by Black's Law Dictionary as "an official appointed to receive, investigate, and report on private citizens' complaints about the government."

<sup>22</sup> See P.L. 70-1999, Sec. 4 and P.L. 191-1999, Sec. 4.

programs in cooperation with the office of the Attorney General; distributing the public access laws to newly elected or appointed public officials; responding to informal inquiries made by the public and public agencies; issuing advisory opinions to interpret the public laws upon the request of a person or public agency; and making recommendations to the General Assembly concerning ways to improve public access.

In 2005, the PAC addressed six (6) formal complaints regarding alleged ODL violations by public school districts. The six complaints all related in some form to the use of the executive session. In three (3) of the cases, the PAC found that boards had inadequately posted or inadequately used the executive session exception. In the other three complaints, she found the boards had not violated the ODL. These cases illustrate just one of many additional concerns about the ODL and its provisions. School Boards, along with all government bodies, should be scrupulous in complying with open-meeting laws by posting adequate notices of meetings, keeping discussion of official business within the context of official meetings, and avoiding attempts to circumvent statutory requirements through various subterfuges.

### **FOREIGN EXCHANGE STUDENTS: FEDERAL GOVERNMENT SEEKS TO ELIMINATE SEXUAL ABUSE AND EXPLOITATION**

Since the Mutual Educational and Cultural Exchange Act of 1961, the U.S. Department of State has been active in promoting educational and cultural exchanges, especially at the high school level where some 1,450 program sponsors facilitate the entry of more than 275,000 foreign exchange students each year. The students are secondary level students. Most of the students are 17 or 18 years of age, but some participants are as young as 15 years of age and often are away from home for the first time.

The Department of State has amended 22 C.F.R. § 62.25, effective May 4, 2006, in an attempt to provide greater security for foreign exchange students.<sup>23</sup> For Program Sponsors, their personnel must be “adequately trained and supervised” and that any person who has “direct personal contact with exchange students” must be “vetted through a criminal background check.” Program Sponsors also cannot make student placements “beyond 120 miles of the home of a local organizational representative authorized to act on the sponsor’s behalf in both routine and emergency matters...” An “organizational representative” cannot serve as “both host family and area supervisor for any exchange student participant.” In addition, there must be, at a minimum, monthly schedules of personal contact with the student and the host family. The school must have contact information for the local organizational representative. § 62.25(d).

Prospective foreign exchange students must be secondary students in their home country and not have completed more than eleven (11) years of primary and secondary study (kindergarten excluded), or be at least 15 years of age but not older than 18 years and six months of age as of the program start date. § 66.25(e).

The Sponsor must “secure prior written acceptance for the enrollment of any exchange student participant in a United States public or private secondary school.” § 66.25(f)(1). In addition, the

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<sup>23</sup>See *Federal Register*, Vol. 71, No. 64, pp. 16696-16699 (April 4, 2006).

Sponsor “must provide the school with a translated ‘written English language summary’ of the exchange student’s complete academic course work prior to commencement of school, in addition to any additional documents the school may require. Sponsors must inform the prospective host school of any student who has completed secondary school in his/her country.” § 66.25(f)(4). Also, Sponsors “may not facilitate the enrollment of more than five exchange students in one school unless the school itself has requested, in writing, the placement of more than five students.” § 66.25(f)(5).

Sponsors are also required to better prepare exchange students, especially “how to identify and report sexual abuse or exploitation.” The exchange student will also receive a “detailed profile of the host family” as well as a “detailed profile of the school and community” where the student will participate. The exchange student will be issued an identification card, with contact numbers should there be an emergency. § 66.25(g).

Host families must be screened, which must include “an in-person interview with all family members residing in the home.” A host family must have a good reputation and character. This must be supported by at least two (2) personal references “from the school or community attesting to the host family’s good reputation and character.” Each member of the host family who is 18 years of age or older must undergo a criminal background check. Also, “[e]xchange students are not permitted to reside with relatives.” § 66.25(j).

Sponsors must report immediately to the Department of State “any incident or allegation involving the actual or alleged sexual exploitation or abuse of an exchange student participant.” This would be in addition to any State or local reporting requirement. § 66.25(m).

### **Tragedy In Wisconsin**

Although the Department of State did not indicate any precipitating event for the amendment of its regulations to require more direct involvement of Sponsors and the closer scrutiny of host families, the case of Kristin Beul, a 16-year-old German exchange student, and her tragic placement in a dysfunctional Wisconsin family had to be a primary motivation.

In Beul v. ASSE International, Inc., 233 F.3d 441 (7<sup>th</sup> Cir. 2000), the U.S. 7<sup>th</sup> Circuit Court of Appeals let stand a jury verdict of \$649,000 against a non-profit corporation that operates international student exchange programs. Beul paid ASSE a \$2,000 fee in order to secure a year in the United States. She was placed with the Bruce family in Wisconsin. The family consisted of Richard, the father (40 years of age); his wife; and their 13-year-old daughter. The Bruce family was selected by Marianne Breber, ASSE’s Area Representative.

As a Sponsor, ASSE was subject to regulations by the Department of State, U.S. Information Agency, that require Sponsors to train their agents, monitor the progress and welfare of the exchange visit, and require a regular schedule of personal contact with the student and the host family. Violations of these regulations are evidence of negligence as they define the duty of care a Sponsor owes to an exchange student. See 22 C.F.R. §§ 62.10(e)(2); 62.25(d)(1), (4). 233 F.3d at 444-45.

Beul arrived in Wisconsin from Germany in September of 1995. She was met at the airport by the father of the host family, Richard Bruce. Breber did not go to the airport to meet her. In fact, from September to January 21, 1996, Breber met only once with Beul and that was at a shopping mall for a brief orientation. Breber gave Beul her telephone number. Breber did call the host family a few times and spoke once or twice with Beul during these conversations, but Breber made no effort to ensure her conversations with Beul occurred outside the presence of members of the host family. Breber never spoke with Mrs. Bruce, who had concerns her husband “seemed to be developing an inappropriate relationship with Kristin.” *Id.* at 445-46.

Beul had “led a sheltered life in Germany. She had had no sexual experiences at all and in fact had had only two dates in her lifetime.” *Id.* at 446. In November of 1995, Bruce entered her bedroom and raped her. This began “a protracted sexual relationship.” In the following months, Bruce would call the high school Beul was supposed to be attending and report her ill. With his wife at work and his daughter at school, Bruce and Beul could continue their sexual relationship. By February of 1996, Bruce had reported Beul as ill 27 times. He showed Beul a gun and told her that should she tell anyone about their relationship, he would kill himself. *Id.*

In January, Bruce called Breber and told her that his wife “appeared to be jealous of the time” that he spent with Beul. He invited Breber to dinner on January 21, 1996. During this time, Breber did not meet privately with either Beul or Mrs. Bruce, and she did not observe anything out of the ordinary. In February, Mrs. Bruce told Breber that she and her husband were getting divorced, and Breber found another host family for Beul. Beul did not want to leave the Bruce residence. Breber brought a sheriff’s deputy to the Bruce house to remove Beul. During this time, the deputy asked Beul—in front of Bruce—whether any inappropriate sexual activity had occurred. Beul answered “no.” Breber learned that same date of Beul’s many absences from school when Breber called to indicate Beul would be living with a different host family. *Id.*

Beul lived with Breber for a few days until the new host family situation could be finalized. During the period, Breber never inquired about a possible sexual relationship between Beul and Bruce. Breber advised the host family that Beul was not to contact Bruce for a month, but Breber never informed Bruce he should not contact Beul. They continued to communicate. Beul “decided that she was in love with Bruce and considered herself engaged to him.” *Id.*

In April, Mrs. Bruce discovered some of Beul’s love letters to Bruce and alerted law enforcement. A deputy interviewed Bruce. Bruce had a previous conviction for having sex with a sixteen-year-old girl. The day after the interview, Bruce killed himself, leaving a suicide note expressing fear of jail. “It is undisputed that the events culminating in Bruce’s suicide inflicted serious psychological harm on Kristin[.]” *Id.*

The 7<sup>th</sup> Circuit rejected ASSE’s argument that Beul’s determination to conceal her relationship with Bruce negated any failure of ASSE’s agent—Breber—to maintain closer contact with Beul, the Bruce family, and the high school. There is no causal relation between ASSE’s negligence and Beul’s harm, ASSE argued.

But it is improbable, and the jury was certainly not required to buy the argument. Suppose Breber had inquired from the school how Kristin was doing—a natural question to ask about a foreigner plunged into an American high school. She

would have learned of the numerous absences, would (if minimally alert) have inquired about them from Kristin, and would have learned that Kristin had been “ill” and that Richard Bruce had been home and taken care of her. At that point the secret would have started to unravel.

Id. at 447. The 7<sup>th</sup> Circuit opined that the high school would not be liable for the consequences of Bruce’s sexual activity with Beul, even if the high school should have reported her frequent absences to Breber. The criminal sexual activity and resulting suicide were not foreseeable by the school.

But part of ASSE’s duty and Breber’s function was to protect foreign girls and boys from sexual hanky-panky initiated by members of host families. Especially when a teenage girl is brought to live with strangers in a foreign county, the risk of inappropriate sexual activity is not so slight that the organization charged by the girl’s parents with the safety of their daughter can be excused as a matter of law from making a responsible effort to minimize the risk. [Citations omitted.] Sexual abuse by stepfathers is not uncommon [citation omitted], and the husband in a host family has an analogous relationship to a teenage visitor living with the family.

Id. at 448. The court also found that ASSE was “standing in the shoes of the parents of a young girl living in a stranger’s home far from her homeland and could reasonably be expected to exercise the kind of care that the parents themselves would exercise if they could to protect their 16-year-old daughter from the sexual pitfalls that lie about a girl of that age in those circumstances. ASSE assumed a primary role in the protection of the girl.” Id.

## **In Indiana**

Indiana has a statutory reference to foreign exchange students. It can be found at I.C. § 20-26-11-10(b). The relevant language is reproduced below.

### **I.C. § 20-26-11-10 Tuition for Children of Certain State Employees and Foreign Exchange Students**

\* \* \*

(b) A foreign student visiting in Indiana under any student exchange program approved by the state board is considered a resident student with legal settlement in the school corporation where the foreign exchange student resides. The student may attend a school in the school corporation in which the family with whom the student is living resides. A school corporation that receives a foreign student may not be paid any transfer tuition. The school corporation shall include the foreign student in computations to determine the amount of state aid that it is entitled to receive.

In essence, a foreign exchange student placed with an Indiana host family through an approved student exchange program has “legal settlement” in the public school district where the host family resides and may attend the public school without payment of transfer tuition. The statutory provision does not address a host of other concerns, such as whether a foreign exchange

student who completes all graduation requirements (including passing the Graduation Qualifying Examination) can receive a high school diploma (the student can); who determines whether a foreign exchange student has met all State and local graduation requirements (the local public school district does); and who is responsible for providing to the public school district a translation of the student's transcript from the student secondary school program in the student's home country (under federal regulations, it is the Sponsor's responsibility, see *supra*).

The Indiana Department of Education also maintains information for schools, Sponsors, and students at its web site. See [http://www.doe.state.in.us/opd/studentexchange/stu\\_exch.html](http://www.doe.state.in.us/opd/studentexchange/stu_exch.html). The web site contains a Question-and-Answer document on various issues as well as links to pertinent federal agencies involved or interested in foreign exchange students.

### **COURT JESTERS: THE HOUND FROM YALE**

There are a number of famous dogs from literature and history: Orion's dogs Arctophonos and Ptoophagos; Odysseus' dog Argos (who recognized his master after his many years of absence and promptly died of joy); Boatswain, Lord Byron's favorite dog; Franklin Delano Roosevelt's dog Fala; and, of course, Nana, Mr. and Mrs. Darling's dog in J. M. Barrie's *Peter Pan*.

Add to the list Rocky, a Labrador Retriever once in residence at the Berkeley Divinity School at Yale University, now made famous by the doggerel of federal District Court Judge Gerald L. Goettel in *Post v. Annand, et al.*, 798 F.Supp. 189 (S.D. N.Y. 1992).

Suzanne Post was a graduate student at the divinity school where James E. Annand was the Dean. Annand kept two dogs at the school, including Rocky, "The villain of this piece, ... a stray who drifted into the Divinity School and became a mascot." 798 F.Supp. at 190.

Annand was preparing to leave on a business trip. Post agreed to care for the dogs in his absence. While being shown how many scoops of dog food to put in the dogs' bowls, Rocky, "apparently eager to get at the food, reared up and bit Post on the nose."<sup>24</sup> *Id.* at 190-91.

Post, now an Episcopal priest, sued Annand and Yale for damages due to Rocky's indiscretion. The district court granted judgment for Post against Annand but not against Yale. Judge Goettel did not let it go at that, however. His decision is replete with canine references.

As to Rocky, he was willing to concede:

There is no indication that Rocky, like the dog in Oliver Goldsmith's *Elegy on the Death of a Mad Dog*, "to gain some private ends, went mad and bit the woman."<sup>25</sup>

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<sup>24</sup>Fortunately, it was her nose. Had she been bitten somewhere else, there may have been a theological responsibility to "turn the other cheek," thus negating the lawsuit. See *Matthew 5: 39; Luke 6:29*.

<sup>25</sup>The actual language in *Elegy* reads:  
"The dog, to gain his private ends,

Id. at 191, *n.* 1.

“While it may not be news when a dog bites a man, it is notable when a dog bites a female minister,” especially in “this dog eat dog world.” Post, as compensation for her injuries, “seeks to take a bite out of the defendants’ pocketbooks.” Id. at 190. She “obviously has a bone to pick as her injuries required substantial medical care, and Rocky is clearly in the dog house.” She filed this lawsuit “[i]n dogged pursuit of damages for her trauma.” Id. at 191.

Although Post brought this suit in a New York court, Connecticut law will apply. Annand is “[h]ounded” by the strict liability imposed under Connecticut law. His argument that New York law should apply is “barking up the wrong tree.” The court arrived at this determination after consulting his “dog-eared copy” of New York law. Annand’s “dogmatic insistence aside,” Connecticut law must apply. Id.

“Unlike the ancient legal maxim, in Connecticut, every dog is not entitled to one bite.” Annand can be liable “for unleashing Rocky on the unsuspecting Suzanne Post.” Id.

Annand was keeping Rocky. His liability is evident. “Whether the Divinity School should be held liable gives us pause.”<sup>26</sup> Id. at 192. “The Divinity School asks, ‘Are we Rocky’s keeper?’”<sup>27</sup> Id.

Post argued that Rocky’s unfettered access to all parts of Yale “suggests that Rocky was not just Annand’s best friend but was nothing less than ‘the Divinity Dog.’” Id.

The judge added a footnote to his “Divinity Dog” comment, observing: “Clearly at a divinity school they have ‘dogma.’ But see *Matthew* 7:6: ‘Give not that which is holy unto dogs.’” Id. at *n.* 2.

Post’s argument, Judge Goettel found, “is essentially the tail wagging the dog.” Although Rocky had access to common areas at the Yale Divinity School, this “is not a sufficient basis to collar the Divinity School,” especially as Yale did not control Rocky’s activities. Id.

Actually, Rocky belonged to Annand’s son, who was “traveling in distant places,” requiring Annand to take Rocky to Yale along with his own dog, Apollo. The court could not resist a comment:

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Went mad, and bit the man.”

Judge Goettel apparently possesses a Poetic License. In any event, Rocky didn’t bite any “private ends.” He bit her nose. See the previous footnote.

<sup>26</sup>Warning: Injudicious use of a pun.

<sup>27</sup>See *Genesis* 4:9, where Cain, in response to God’s inquiry as to Abel’s whereabouts, replied, “Am I my brother’s keeper?”

This reminds us of the old joke about “When does life begin? Answer: When the children leave home and the dog dies.” In all too many cases when the children leave home, they leave their pets with their parents.

Id. at 193, *n.* 3. Summary judgment was granted to Post against Annand but not as to Yale. Thus ends this Rocky relationship.

**QUOTABLE . . .**

Education costs money, but then so does ignorance.

Judge John G. Baker, in Thomas v. Orlando, 834 N.E.2d 1055, 1056 (Ind. App. 2005), quoting Sir Claus Moser, German-born British academic, from the *Oxford* (London) *Daily Telegraph* (August 21, 1990).

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

\_\_\_\_\_  
Kevin C. McDowell, General Counsel  
Indiana Department of Education

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## Index for Quarterly Report Through January – March: 2006

### Legend

J-M (January-March)  
A-J (April-June)

J-S (July-September)  
O-D (October-December)

Access to Public Records and Statewide Assessment .....	(A-J: 98, J-S: 98)
Administrative Procedures: Extensions of Time .....	(J-S: 96)
Age Discrimination, School Bus Drivers .....	(O-D: 98)
Athletic Competition, Students with Disabilities, and the “Scholarship Rule” .....	(A-J: 04)
Athletic Conferences, Constitutional Rights, and Undue Influence .....	(A-J: 01, O-D: 01)
Athletics: No Paeon, No Gain .....	(A-J: 97, J-S: 97)
Athletic Schedules and Gender Equity: Disparity Analysis and Equal Athletic Opportunity .....	(J-S: 04)
Attorney Fees: Athletics .....	(A-J: 01)
Attorney Fees and “Catalyst Theory” .....	(J-S: 03, O-D: 03)
Attorney Fees by Degrees: When Does One “Prevail”? .....	(O-D: 04)
Attorney Fees: Special Education .....	(J-M: 95, J-S: 95, O-D: 95, J-M: 96)
Attorney Fees: Parent-Attorneys .....	(A-J: 96, J-S: 96)
Attorneys, Out-of-State .....	(J-S: 04)
Basketball in Indiana: Savin’ the Republic and Slam Dunkin’ the Opposition .....	(J-M: 97)
Being Prepared: the Boy Scouts and Litigation .....	(O-D: 02)
Bibles, Distribution .....	(J-M: 95, J-S: 95, A-J: 98, O-D: 98)
Board of Special Education Appeals .....	(J-S: 95)
Boy Scouts and Litigation .....	(O-D: 02, J-M: 03, A-J: 03, J-M: 05)
Breach of Contract .....	(A-J: 01)
Bricks and Tiles: Fund-raising and the First Amendment .....	(J-S: 04)
Bricks and Tiles: Wall of Separation .....	(J-S: 03)
Bus Drivers and Age Discrimination .....	(O-D: 98)
Bus Drivers and Reasonable Accommodations .....	(A-J: 95)
Bus Drivers, Performance Standards and Measurement for School .....	(J-S, 00)
Causal Relationship/Manifestation Determinations .....	(O-D: 97)
“Catalyst Theory” and Attorney Fees .....	(J-S: 03)
Censorship .....	(O-D: 96)
Charter Schools .....	(O-D: 98, A-J: 99, J-M: 01, A-J: 01)
Chartering a New Course in Indiana: Emergence of Charter Schools in Indiana .....	(J-M: 01)
Cheerleading Safety: Chants of Lifetime .....	(J-S: 05, O-D: 05)
Child Abuse Registries .....	(J-S: 96)
Child Abuse: Reporting Requirement .....	(O-D: 95, J-S: 96)
Child Abuse: Repressed Memory .....	(J-M: 95, A-J: 95)
Child Obesity and the “Cola Wars” .....	(O-D: 03, J-M: 04)
Childhood Obesity and the “Cola Wars”: The Battle of the Bulge Continues .....	(J-M: 04)
Choral Music and the Establishment Clause .....	(A-J: 96, J-M: 98)
Class Rank .....	(J-M: 96, J-M: 04)
“Cola Wars” and Child Obesity .....	(O-D: 03, J-M: 04)
Collective Bargaining .....	(O-D: 95, J-S: 97)
Collective Bargaining Agreements and Discrimination .....	(A-J: 96)
Collective Bargaining: Fair Share .....	(J-M: 97, J-S: 97, O-D: 99)
Commercial Free Speech, Public Schools and Advertising .....	(O-D: 99)
Community Service .....	(O-D: 95, J-M: 96, J-S: 96)
Computers .....	(J-M: 96, A-J: 96)

Confederate Symbols and School Policies .....	(J-M: 99, J-S: 99)
Confidentiality of Drug Test Results .....	(A-J: 99)
Consensus at Case Conference Committees .....	(J-S: 96)
Contracting for Educational Services .....	(A-J: 97, J-M: 98, O-D: 98)
Court Jesters:	
Bard of Education, The .....	(A-J: 97)
Brewing Controversy .....	(J-S: 01)
Brush with the Law, A .....	(J-S: 99)
Bull-Dozing .....	(A-J: 99)
Burning the Candor at Both Ends .....	(A-J: 00)
Butterflies Are Free .....	(O-D: 02)
Case of the <i>Sham Rock</i> , The .....	(J-S: 02)
Cat with the Chat, The .....	(A-J: 02, A-J: 04)
Caustic Acrostic .....	(J-S: 96)
Court Fool: <u>Lodi v. Lodi</u> .....	(A-J: 96)
Disorderly Conduct .....	(O-D: 05)
Education of H <i>ï</i> E <i>ï</i> R <i>ï</i> S <i>ï</i> K <i>ï</i> O <i>ï</i> W <i>ï</i> I <i>ï</i> T <i>ï</i> Z, The .....	(J-M: 01)
End Zone: <u>Laxey v. La. Bd. of Trustees</u> .....	(J-M: 95)
Girth Mirth .....	(A-J: 98)
<i>Grinch</i> and Bear It .....	(J-S: 00)
Horse ¢ent\$ .....	(J-M: 03)
Horse Feathers! .....	(J-M: 04)
Hound and The Furry, The .....	(O-D: 00)
Hound from Yale, The .....	(J-M: 06)
Humble $\pi$ .....	(O-D: 97)
Incommodious Commode, The .....	(J-M: 99)
Junk Male .....	(A-J: 03)
<u>Kent © Norman</u> .....	(J-M: 96)
Little Piggy Goes to Court .....	(O-D: 98)
Missing Link, The .....	(O-D: 03)
Name-Calling .....	(O-D: 04)
Omissis Jocis .....	(O-D: 96)
Psittacine Bane .....	(A-J: 04)
Poe Folks .....	(J-M: 98)
Poetic Justice .....	(J-M: 05)
Pork-Noy's Complaint .....	(J-M: 02)
Psalt 'N' Pepper .....	(J-M: 00)
Re: Joyce .....	(J-M: 97)
Satan and his Staff .....	(J-S: 95)
Seventh-Inning Kvetch .....	(J-S: 05)
Smoke and Ire .....	(A-J: 01)
Spell Checkmate .....	(J-S: 04)
Spirit of the Law, The .....	(J-S: 97, O-D: 98)
Subordinate Claus .....	(J-S: 03)
Things That Go Bump .....	(J-S: 98)
Tripping the Light Fandango .....	(A-J: 95)
Waxing Poetic .....	(O-D: 95)
Well Versed in the Law .....	(O-D: 99)
What A Croc! .....	(O-D: 01)
"Creationism," Evolution vs. ....	(O-D: 96, O-D: 97, O-D: 99)
Crisis Intervention, Emergency Preparedness .....	(O-D: 98)
Crisis Intervention Plans, Suicide Threats and .....	(O-D: 99)

“Current Educational Placement”: the “Stay Put” Rule and Special Education	(J-S: 97)
Curriculum, Challenges to	(J-S: 96)
Curriculum and Religious Beliefs	(J-M: 96, A-J: 98, J-S: 98)
Decalogue: Epilogue	(O-D: 00, A-J: 01, O-D: 01, A-J: 03)
Decalogue: Thou Shalt and Thou Shalt Not, The	(A-J:00)
Decalogue Wars Continue; Holy Moses, Roy’s Rock, and the Frieze: The	(A-J: 03)
Desegregation and Unitary Status	(A-J: 95)
Distribution of Religious Materials in Elementary Schools	(J-M: 97)
“Do Not Resuscitate” Orders and Public Schools	(J-S: 99)
Dress Codes	(J-S: 95, O-D: 95, J-S: 96, J-M: 99)
Dress Codes: Free Speech and Standing	(A-J: 02, J-S: 05)
Dress and Grooming Codes for Teachers	(J-M: 99)
Driving Privileges, Drug Testing	(A-J: 99)
Driving Privileges, Suspension and Expulsion	(J-M: 04)
Drug Testing	(J-M: 95, A-J: 95)
Drug Testing Beyond <i>Vernonia</i>	(J-M: 98)
Drug Testing and School Privileges	(A-J: 99)
Drug Testing of Students: Judicial Retrenching	(A-J: 00)
Dual-Enrollment and the “Indirect Benefit” Analysis in Indiana	(O-D: 03)
Due Process, ‘Zero Tolerance’ Policies	(J-S: 00)
Educational Malpractice: Emerging Theories of Liability	(A-J: 01)
Educational Malpractice Generally	(A-J: 01, A-J: 03, A-J: 04)
Educational Malpractice In Indiana	(A-J: 01, A-J: 03)
Educational Records: Civil Rights And Privacy Rights	(A-J: 02)
Educational Records and FERPA	(A-J: 99)
Emergency Preparedness and Crisis Intervention	(O-D: 98)
Empirical Data and Drug Tests	(A-J: 99)
Equal Access, Religious Clubs	(J-S: 96, A-J: 97)
Er the Gobble-Uns’ll Git You	(J-S: 96)
Ethical Testing Procedures: Reliability, Validity, and Sanctions	(J-M: 05)
Evacuation Procedures	(O-D: 98, J-M: 04)
Evolution vs. “Creationism”	(O-D: 96, O-D: 97, O-D: 99)
Evolution of “Theories,” The	(O-D: 01, J-M: 05, J-S: 05)
Exit Examinations	(J-M: 96, O-D: 96, J-M: 97, A-J: 98, J-S: 98, O-D: 98)
Extensions of Time	(J-S: 96)
Facilitated Communication	(O-D: 95)
“Fair Share” and Collective Bargaining Agreements	(J-M: 97, J-S: 97, O-D: 99)
FERPA, Educational Records	(A-J: 99)
First Friday: Public Accommodation of Religious Observances	(J-S: 98, O-D: 99)
Foreign Exchange Students: Federal Government Seeks to Eliminate Sexual Abuse and Exploitation	(J-M: 06)
Free Speech, Grades	(J-M: 96)
Free Speech, Graduations	(J-M: 04)
Free Speech, Teachers	(J-M: 97, A-J: 97)
Free Speech, T-Shirts	(J-S: 05)
Gangs and Gang-Related Activities	(A-J: 99, J-S: 99)
Gangs: Dress Codes	(O-D: 95)
Gender Equity and Athletic Programs	(J-M: 95)
Golf Wars: Tee Time at the Supreme Court, The	(O-D: 00)
Grades	(J-M: 96)
Gradation Ceremonies and Free Speech	(J-M: 04)
Graduation Ceremonies, School Prayer	(A-J: 97, J-M:98, O-D: 98)
Grooming Codes for Teachers, Dress and	(J-M: 99)

Growing Controversy over the Use of Native American Symbols as Mascots, Logos, and Nicknames, The . . .	(J-M: 01)
Habitual Truancy . . . . .	(J-M: 97)
Halloween . . . . .	(J-S: 96)
Hardship Rule . . . . .	(A-J: 01)
Harry Potter in the Public Schools . . . . .	(J-M: 03)
Health Services and Medical Services: The Supreme Court and <i>Garret F</i> . . . . .	(J-M: 99)
High Stakes Assessment, Educational Standards, and Equity . . . . .	(A-J: 98)
Holy Moses, Roy’s Rock, and the Frieze: The Decalogue Wars Continue . . . . .	(A-J: 03)
IHSAA: ‘Fair Play,’ Student Eligibility, and the Case Review Panel . . . . .	(J-M: 00)
Indiana Board of Special Education Appeals . . . . .	(J-S: 95)
“Intelligent Design”: Court Finds Origin Specious . . . . .	(O-D: 05)
Interstate Transfers, Legal Settlement . . . . .	(A-J: 99)
Juvenile Courts & Public Schools: Reconciling Protective Orders & Expulsion Proceedings . . . . .	(J-M: 98)
Latch-Key Programs . . . . .	(O-D: 95)
Legal Settlement and Interstate Transfers . . . . .	(A-J: 99)
Library Censorship . . . . .	(O-D: 96)
Limited English Proficiency: Civil Rights Implications . . . . .	(J-S: 97)
Logos . . . . .	(J-M:01)
Loyalty Oaths . . . . .	(J-M: 96)
Mascots . . . . .	(J-S: 96, J-M: 99, J-M: 01, J-S:03)
Medical Services, Related Services, and the Role of School Health Services . . . . .	(J-S: 97, O-D: 97, J-S: 98)
Meditation/Quiet Time . . . . .	(A-J: 97)
Metal Detectors and Fourth Amendment . . . . .	(J-S: 96, O-D: 96, J-M: 97, J-S: 97)
Methodology: School Discretion and Parental Choice . . . . .	(J-M: 99)
Moment of Silence . . . . .	(J-S: 01)
Military Recruiters and Educational Records . . . . .	(J-M: 02, J-M: 04)
<i>Miranda</i> Warnings and School Security . . . . .	(J-S: 99, J-M: 02)
National Motto, The . . . . .	(O-D: 01, J-M: 03)
Native American Symbols . . . . .	(J-M: 01, A-J: 02, J-S: 03)
Negligent Hiring . . . . .	(O-D: 96, J-M: 97)
Negligent Misrepresentation . . . . .	(A-J: 01)
The Open Door Law: When Does a “Meeting” Occur? . . . . .	(J-M: 06)
Opt-Out of Curriculum and Religious Beliefs . . . . .	(J-M: 96)
Orders and Public Schools: “Do Not Resuscitate” . . . . .	(J-S: 99)
Out-of-State Attorneys . . . . .	(J-S: 04)
“Parent” in the Unconventional Family, The . . . . .	(O-D: 04)
“Parent” Trap, The . . . . .	(O-D: 01)
<i>Parent Trap</i> : Variations on a Theme, The . . . . .	(J-S: 02)
The “Parent” in the Unconventional Family: . . . . .	(O-D: 04, O-D: 05)
Parental Rights and School Choice . . . . .	(A-J: 96)
Parental Choice, Methodology: School Discretion . . . . .	(J-M: 99)
Parochial School Students with Disabilities . . . . .	(J-S: 95, O-D: 95, J-M: 96, A-J: 96, A-J: 97, J-S: 97)
Parochial School Vouchers . . . . .	(A-J: 98)
Participation Rule: Student-Athletes and Out-of-Season Sports, The . . . . .	(J-M: 02)
Peer Sexual Harassment . . . . .	(O-D: 97)
Peer Sexual Harassment: Kindergarten Students . . . . .	(J-S: 02)
Peer Sexual Harassment Revisited . . . . .	(J-S: 98, A-J: 99)
Peer Sexual Orientation Harassment . . . . .	(J-M: 03)
Performance Standards and Measurements for School Bus Drivers . . . . .	(J-S: 00)
Pledge of Allegiance, The . . . . .	(J-S: 01, J-S: 02, O-D: 02, J-M: 03, A-J: 03, O-D: 03, J-S: 04, J-S: 05)
Pledge of Allegiance, The: “One Nation, under Advisement” . . . . .	(A-J: 04)
Prayer and Public Meetings . . . . .	(J-M: 97, J-M: 98, O-D: 98, A-J: 99, J-S: 02)

Prayer and Schools	(A-J: 97, O-D: 98)
Prayer, Voluntary Student	(A-J: 97)
Privileged Communications	(A-J: 97)
Proselytizing by Teachers	(O-D: 96)
Protection of Pupil Rights Act, The	(O-D: 02)
Public Records, Access to	(A-J: 98, J-S: 98)
“Qualified Interpreters” for Students with Hearing Impairments	(J-M: 98)
Quiet Time/Meditation	(A-J: 97)
Racial Imbalance in Special Programs	(J-M: 95)
Real Estate Sales and School Accountability Laws	(O-D: 03, J-S: 04)
“Release Time” and the Establishment Clause	(O-D: 04)
Religion: Distribution of Bibles	(J-M: 95)
Religious Clubs	(J-S: 96, A-J: 97)
Religious Expression by Teachers in the Classroom	(J-S: 00)
Religious Observances, First Friday: Public Accommodations	(J-S: 98)
Religious Symbolism	(J-S: 98)
Repressed Memory, Child Abuse:	(J-M: 95, A-J: 95)
Residential Placement: Judicial Authority	(J-S: 95)
Restitution Rule and Student-Athletes, The	(A-J: 01)
Resuscitate” Orders and Public Schools, “Do Not	(J-S: 99)
School Accountability	(A-J: 01)
School Accountability: “Negligent Accreditation”	(A-J: 01)
School Accountability and Real Estate Sales	(O-D: 03)
School Accountability: Standardized Assessment	(A-J: 01)
School Construction	(J-S: 95)
School Discretion and Parental Choice, Methodology:	(J-M: 99)
School Health Services	(J-S: 97)
School Health Services and Medical Services: The Supreme Court and <i>Garret F.</i>	(J-M: 99)
School Policies, Confederate Symbols and,	(J-M: 99)
School Prayer	(A-J: 97, O-D: 98)
School Privileges, Drug Testing	(A-J: 99)
Security, <i>Miranda</i> Warnings and School	(J-S: 99)
Service Dogs	(O-D: 96)
Sexual Orientation, the Equal Access Act, and the Equal Protection Clause	(J-S: 02, J-M: 03, J-S: 03, J-S: 04)
Standardized Assessment and the Accountability Movement: The Ethical Dilemmas of Over Reliance	(J-S: 01)
“State Action,” U.S. Supreme Court	(A-J: 01)
Statewide Assessments, Public Access to	(A-J: 98, J-S: 98)
Statute of Limitations	(J-S: 03)
“Stay Put” and “Current Educational Placement”	(J-S: 97)
Strip Search	(J-S: 97, J-M: 99)
Strip Searches of Students	(A-J: 00)
Student–Athletes & School Transfers: Restitution, Hardship, Contempt of Court, & Attorney Fees	(A-J: 01, J-M: 02)
Suicide: School Liability	(J-S: 96, J-S: 02)
Suicide Threats and Crisis Intervention Plans	(O-D: 99)
Surveys and Privacy Rights: Analysis of State and Federal Laws	(O-D: 05)
Symbolism, Religious	(J-S: 98)
Symbols and School Policy, Confederate	(J-M: 99, J-S: 99)
Symbols and Native Americans	(J-M: 01)
Tape Recordings and Wiretapping	(O-D: 02)
Teacher Competency Assessment & Teacher Preparation: Disparity Analyses & Quality Control	(J-M: 00)
Teacher Free Speech	(J-M: 97, A-J: 97)
Teacher License Suspension/Revocation	(J-S: 95)

Ten Commandments (see “Decalogue”) . . . . .	(A-J: 00, O-D: 00)
Terroristic Threats . . . . .	(O-D: 99)
Textbook Fees . . . . .	(A-J: 96, O-D: 96)
Time-Out Rooms . . . . .	(O-D: 96)
Time-Out Rooms Revisited . . . . .	(J-S: 02)
Title I and Parochial Schools . . . . .	(A-J: 95, O-D: 96, A-J: 97)
Triennial Evaluations . . . . .	(J-S: 96)
Truancy, Habitual . . . . .	(J-M: 97)
T-shirts: Free-Speech Rights Vs. Substantial Disruption . . . . .	(J-S: 05)
“Tuition” and Fees: the Supreme Court Creates an Analytical Model . . . . .	(J-M: 06)
“Undue Influence” and the IHSAA . . . . .	(A-J: 01)
Uniform Policies and Constitutional Challenges . . . . .	(O-D: 00)
Valedictorian . . . . .	(J-M: 96, J-M: 04)
Valedictorians: Saying “Farewell” to an Honorary Position? . . . . .	(J-M: 04, A-J: 04)
Video Games, Popular Culture and School Violence . . . . .	(J-M: 02)
Video Replay: Popular Culture and School Violence . . . . .	(A-J: 02)
Visitor Access to Public Schools: Constitutional Rights and Retaliation . . . . .	(J-M: 05)
Visitor Policies: Access to Schools . . . . .	(J-M: 00)
Voluntary School Prayer . . . . .	(A-J: 97)
Volunteers In Public Schools . . . . .	(O-D: 97, J-S: 99)
Vouchers and the Establishment Clause: The “Indirect Benefit” Analysis . . . . .	(J-M: 03)
Vouchers and Parochial Schools . . . . .	(A-J: 98)
Wiretapping, Tape Recordings, and Evidentiary Concerns . . . . .	(O-D: 02)
‘Zero Tolerance’ Policies and Due Process . . . . .	(J-S: 00)

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