



QUARTERLY REPORT

**January – March 2008**

The Quarterly Report provides information on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have this sent electronically or wishes 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 [kmcadowel@doe.in.gov](mailto:kmcadowel@doe.in.gov).

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## TEACHER LICENSING AND MINIMUM PROFICIENCY EXAMINATIONS

In the 2008 session of the Indiana General Assembly, the legislature passed House Enrolled Act (HEA) 1210, which was intended to assist prospective teachers who were unsuccessful in passing the minimum proficiency test (Praxis I). Under the legislation, a prospective teacher who had failed one or more sections of the Praxis I could request a “proficiency review” from the Office of Educator Licensing and Development (formerly, the Division of Professional Standards) within the Indiana Department of Education. The “proficiency review” was intended as essentially a “waiver” process. The prospective teacher could have the negative results waived if verification is supplied that demonstrates, *inter alia*, the applicant has failed the Praxis I at least twice before seeking the “proficiency review”; failed each section by three (3) or fewer points; attempted each section not more than three (3) years before requesting the “proficiency review”; successfully completed each required section of the Praxis II examination;<sup>1</sup> attained an overall grade-point average (GPA) of 2.8 or higher on a 4.0 scale; attained a GPA of 3.0 or higher on a 4.0 scale in the content area; and demonstrated successful completion of the student teaching experience. The applicant would also have to provide letters of recommendation from a faculty member in the applicant’s content area and from another “pedagogy faculty member.”

Although passed by both legislative chambers, the Governor vetoed the bill on March 12, 2008. In his veto message, the Governor indicated HEA 1210 “is not the right answer” to address the difficulties some school corporations have experienced in attracting and maintaining qualified teachers. “We must continue to think and act creatively to attract qualified teachers to our toughest schools, where the need for their talents are [sic] greatest, rather than lowering the standards we will accept for teachers in those or any of our schools.”

Minimum proficiency examinations for teachers have been subjected to many legal challenges in recent years in a number of states.<sup>2</sup>

### New York

*Elsa Gulino, et al. v. New York State Education Department, Board of Education of the City School District of the City of New York*, 460 F.3d 361 (2<sup>nd</sup> Cir. 2006). In this long-running dispute, African-American and Latino educators claim that the use of the Liberal Arts and Sciences Test (LAST) to certify public school teachers has a disparate impact on minority educators, allegedly violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (The LAST replaced the National Teacher Core Battery or NTE test.) The Federal district court entered judgment on behalf of the defendants, but the U.S. Second Circuit Court of Appeals vacated the district court’s judgment and remanded for a determination as to whether LAST has been properly validated for its purposes. The LAST was one component of the New York State

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<sup>1</sup>The Praxis II would be the content area(s) within which the applicant intends to teach.

<sup>2</sup>See, e.g., “Teacher Competency Assessment and Teacher Preparation: Disparity Analyses and Quality Control,” **Quarterly Report** January-March: 2000.

Teacher Certification Examinations and consisted of multiple choice sections as well as an essay portion. Although the district court did find that the LAST had a disparate impact, the court also found the test was “job related” which would negate any allegation of discrimination. The 2<sup>nd</sup> Circuit did not believe the district court used the proper standard for determining the validity of an employment test, nor did the record support the district court’s finding that the majority of teachers would have passed the test but for the essay portion. The Plaintiff class in this suit claims that white test-takers pass the LAST at an average rate of 93%, while African-American and Latino test-takers pass at rates of 50-56.4%. The 2<sup>nd</sup> Circuit found that the State Department of Education was not a proper party under Title VII because it is not the employer of the class members. The Board of Education is the employer and, as a consequence, is a proper party.

The Board of Education sought review by the U.S. Supreme Court. However, on June 23, 2008, the Supreme Court denied the petition for writ of certiorari. See *Board of Education v. Gulino*, 2008 U.S. LEXIS 5139 (2008).

***Falchenberg v. New York City Department of Education***, 375 F.Supp.2d 344 (S.D. N.Y. 2005). Terminated teacher sued the school district, alleging it failed to accommodate her dyslexia as required by the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* The Federal district court dismissed her suit. She had been advised that in order to be properly certified, she had to pass a test administered by the National Evaluation Systems, Inc. (NES). She requested accommodations for a purported disability (dyslexia), which NES granted (a reader and a transcriber). NES did not grant further accommodations she requested. She refused to take the test and lost her teaching position. The district court found that she was not a “qualified person with a disability” under the ADA because she did not take the test, a qualification established by the state in order for one to obtain a teacher license. (This test, the LAST, was found to be a job-related test by the Federal district court in the *Gulino* case, *supra*. However, the 2<sup>nd</sup> Circuit determined the wrong standard was used to reach this determination.) In any event, Falchenberg is not challenging the test as discriminatory; she is challenging NES’s disinclination to provide all the accommodations she requested.

The defendants eventually moved for summary judgment, which the court granted. ***Falchenberg v. New York State Department of Education, et al.***, 2008 U.S. Dist. LEXIS 49979 (S.D. N. Y. 2008).

The court noted that the LAST tests primarily in five (5) areas of knowledge: (1) scientific, mathematical, and technological processes; (2) historical and social scientific awareness; (3) artistic expression and the humanities; (4) communication and research skills; and (5) written analysis and expression. The fifth part does require the examinee to write an essay of 300-600 words. This section represents 20 percent of the test score on the LAST. The essay must be an original work that addresses an assigned topic. The essay must be in multiple paragraphs and “conform to the conventions of edited American English.” *Id.* at \*6.

As noted *supra*, Falchenberg and NES had a series of disagreements over the extent of accommodations Falchenberg requested. In 2002, she sought the use of a “dictionary, extra time, frequent breaks, [and an] oral exam.” *Id.* at \*8. NES denied the requests, stating that a

dictionary would “fundamentally alter the measurement of the skills the examination is intended to test.” Documentation supplied by Falchenberg regarding the extent of her dyslexia did not support other requested accommodations. She continued to register to take the LAST and continued to request accommodations only to have NES deny her requests. She then refused to participate. NES did approve the use of a transcriber and other accommodations. *Id.* at \*9-10. Nevertheless, Falchenberg never participated in any administration of the LAST. *Id.* at \*11.

The court noted that “[w]here an examinee seeks an accommodation that would preclude accurate evaluation of abilities measured by the test, denial of the requested accommodation is not unlawful.” *Id.* at \*14-15, citing ADA regulations at 28 C.F.R. § 36.309(b)(3).

Demonstration of the examinee’s ability to spell, punctuate, capitalize and paragraph is an inherent part of the LAST. Falchenberg seeks an accommodation that would permit her to avoid having to demonstrate these skills. Falchenberg’s request thus seeks a modification that would fundamentally alter the nature of the LAST.

*Id.* at \*16. All candidates for certification are required to demonstrate these same standards, including punctuation, capitalization, and paragraphing. Exempting Falchenberg from demonstrating this level of competency would “not put her on an even playing field with the non-disabled.” *Id.* at \*17 (internal punctuation and citation omitted). Falchenberg admitted that spelling, punctuation, capitalization, and paragraphing are important skills students need to learn and teachers need to demonstrate. *Id.* at \*20. Because these skills are necessary ones for teachers to demonstrate, Falchenberg’s claims must fail.

Sad to say, her efforts, like those of many test takers, have been defeated by the requirement to spell and punctuate.

*Id.* at \*2.

## **Massachusetts**

***Massachusetts Federation of Teachers, AFT, AFL-CIO v. Board of Education***, 767 N.E.2d 549 (Mass. 2002). Teacher union sued the State Board of Education and the State Commissioner, seeking to enjoin the implementation of a rule that would require math teachers in certain low-performing schools to take a Mathematics Content Assessment to evaluate their mastery of the subject matter prior to renewal of their licenses. The State Board’s action grew out of an extensive legislative reform act initially passed in 1993. Massachusetts’ highest court found the State Board’s rule was intended to implement legislative education reforms, which included accountability provisions for teachers. The regulations did not violate the Fourteenth Amendment’s Equal Protection or Due Process clauses, nor did the regulations conflict with existing collective bargaining agreements.

## Texas

*Fields v. Texas Education Agency*, 754 F.Supp. 530 (E.D. Tex. 1989), *affirmed*, 906 F.2d 1017 (5<sup>th</sup> Cir. 1990), *cert. den.*, 498 U.S. 1026, 111 S. Ct. 676 (1991) also grew out of a legislative statewide school reform package. The Texas act required teachers to pass the Texas Examination for Current Administrators and Educators (TECAT), a basic reading and writing test, in order to obtain recertification. The plaintiffs were minority teachers who did not pass the test. They alleged the TECAT had an impermissible adverse impact upon minority teachers. Perusing the “Four Fifths Rule,” the court noted the pass rates between white teachers and minority teachers were within 80 percent. The court found “no statistical disparities that suggest the equivalent of intentional discrimination in the facially neutral TECAT, nor any proof of its discriminatory impact on the employer’s work force.” 754 F.Supp. at 542. The court refused to further break pass rates into age categories, finding that such an argument ran “counter to the stated [EEOC] guidelines, statistical reasoning, and...the law.” *Id.* at 533. The plaintiffs did not challenge the “job-relatedness” of the TECAT because “reading and writing skills bear [relevancy] to public school teaching.” *Id.* Because the TECAT was facially neutral and job-related, a showing of disparate impact did not constitute *per se* discrimination.

## California

*Ass’n of Mexican-American Educators (AMAE) v. California*, 183 F.3d 1055 (9<sup>th</sup> Cir. 1999), *opinion amended*, 195 F.3d 465 (9<sup>th</sup> Cir. 1999) was a class-action lawsuit challenging the constitutionality of the California Basic Educational Skills Test (CBEST), a minimum competency test candidates had to pass to be certified as teachers. The plaintiffs asserted CBEST had a disproportionate disparate impact on racial minorities and was not properly validated. They also asserted that there was available an equally effective screening procedure that would not have such an adverse impact. The Circuit Court of Appeals found that Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*, would not apply because no federal funds are involved in the development and administration of CBEST. The court rejected the argument that Title VI should apply because other educational agencies (the state board and department of education) received federal funds. 183 F.3d at 1067-69. The Circuit Court also declined to apply Title VII because the affected teachers were not potential employees of the state, and the CBEST is not an employment examination. Although the limitation of the exam to public school teachers “raises a question as to whether it [CBEST] is a true licensing exam,” the state was nevertheless exercising “its police powers,” and a state “will not be liable under Title VII for ‘interference’ with an employment relationship if the alleged interference is an exercise of its regulatory responsibilities.” *Id.* at 1071. This conclusion is bolstered by the fact the CBEST was mandated by the legislature and not by an administrative entity or person responsible for overseeing the affected employees. *Id.* at 1072.

The CBEST, the Circuit Court determined, “is a valid licensing exam, and therefore exempt from liability under Title VII... Discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are evaluated.” *Id.* (citation omitted). In this situation, notwithstanding a “disparate impact,” the

state demonstrated the CBEST was properly “validated” to be “job related for the position in question and consistent with business necessity.” *Id.* (citations omitted). The decision addressed content validity studies, criterion-related validity studies, and construct validation studies, as well as how these relate to the EEOC’s Uniform Guidelines. California employed content validation studies to establish CBEST’s relationship to “job relatedness,” including “job-specific validation” and an actual measurement of job skills. The cutoff score was likewise validated, and reflected reasonable judgments about the minimum level of basic skills’ competency that should be required of teachers. *Id.* at 1078. The three-judge panel later amended its published opinion but did not alter its substantive findings. See *Ass’n of Mexican-American Educators v. California*, 195 F.3d 465 (9<sup>th</sup> Cir. 1999). On March 27, 2000, the 9<sup>th</sup> Circuit set aside the decision of the panel and agreed to review the matter before the full court. *Ass’n of Mexican-American Educators v. California*, 208 F.3d 786 (9<sup>th</sup> Cir. 2000). The 9<sup>th</sup> Circuit, *en banc*, later affirmed the original decision. *Ass’n of Mexican-American Educators v. California*, 231 F.3d 572 (9<sup>th</sup> Cir. 2000).

## **Minnesota**

Minnesota legislation attempted to ensure that teacher licenses were issued to persons who were deemed qualified and competent. Qualifications and competency determinations were based in part upon successful completion of an examination involving reading, writing, and mathematics. The Minnesota State Board of Teaching (MBOT) adopted the Pre-Professional Skills Test (PPST) developed by the Educational Testing Service (ETS) as an objective means to assess such competencies. Jacobsen possessed several degrees and was able to teach under a state-issued provisional license. However, she had a learning disability manifested by her inability to easily read words and letters (dyslexia) and an impairment in her ability to do mathematical problems (dyscalculia). The MBOT set the passing score at 169. Unfortunately, Jacobsen took and failed the math portion of the PPST fourteen (14) times, with an average score of 163. She had been provided every form of accommodation permitted, including twice the time to finish the test, being provided a “reader,” being permitted the use of scratch paper, and being permitted to mark her answers on the examination book itself rather than on the answer sheet. In *Jacobsen v. Tillman*, 17 F.Supp. 2d 1018 (D. Minn. 1998), she sought injunctive relief under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, to have the MBOT issue her a teacher license by either recognizing her “self-determined competence” or by using another standard to assess her teaching qualifications. To establish a violation under the ADA, a plaintiff must demonstrate that she (1) is a qualified individual with a disability; (2) was excluded from participation in or denied the benefits of a public entity’s services, programs, or activities, or was otherwise discriminated against by the entity; and (3) suffered exclusion, denial of services, or other discrimination by reason of her disability. Jacobsen argued the PPST’s math skill test did not accurately measure her ability in this area, bore no relationship to the essential duties of an elementary school teacher, and was employed as a single or sole criterion for licensure. The court did not agree. The following are relevant findings:

- “The objective ability to perform and demonstrate math skills is an inherent part of a teacher’s duties. The State, which publicly validates the competence of a

teacher by issuing a license, is entitled to demand and receive an objective demonstration of competence.” *Id.* at 1025.

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

Both the *Falchenberg* court, *supra*, and the *Dauer* court, *infra*, found the *Jacobsen* decision persuasive.

## **Pennsylvania**

*Dauer v. Pennsylvania Department of Education*, 874 A.2d 159 (Pa. Commw. 2005) involved a veteran teacher who sought to add certification to teach Spanish to her existing teacher certification for elementary education. However, the Pennsylvania Department of Education (DOE) denied her application because she did not have a passing grade on the Praxis II test in Spanish Content Knowledge. Dauer’s teacher certificate was for grades K-6. She was not certified to teach a substantive subject such as Spanish at the eighth-grade level. Dauer was issued an emergency permit that allowed her to teach Spanish subject to satisfaction of the testing requirement. An emergency permit cannot be issued for more than two (2) academic years. *Id.* at 160-61.

Although she had completed all course requirements, she was unable, after multiple attempts, to pass the Praxis II Spanish examination. Despite her failure to pass the test, Dauer sought certification based on her academic and teaching experiences and achievements. She also failed the test offered by the American Council on the Teaching of Foreign Language (ACTFL). *Id.* at 161.

The DOE offered her a hearing. At the hearing, Dauer stated that she had a history of poor testing ability dating from her SAT scores in high school. She also indicated that although she had not at that time been diagnosed as having a disability, she had scheduled an evaluation with a

psychologist. The subsequent evaluation indicated Dauer had a learning disability. Dauer then took the Praxis II with accommodations, but again she failed. Thereafter, the DOE denied her requested certificate. *Id.*

Dauer sued the DOE, claiming that its failure to provide her reasonable accommodations for her disability violated Title II of the ADA. She claimed the DOE erred by not affording sufficient evidentiary weight of her past successful academic and teaching performance. She also asserted violations of her Due Process and Equal Protection rights under the Fourteenth Amendment. *Id.* at 161-62.

The Pennsylvania court noted that the *Jacobsen* case was nearly identical to this dispute, other than Jacobsen's area involved mathematics and Dauer's interest was in Spanish.

The State, which publicly validates the competence of a teacher by issuing a license, is entitled to demand and receive an objective demonstration of competence. While a public entity shall not impose eligibility criteria that tend to screen out an individual with a disability, it may do so if "such criteria can be shown to be necessary for the provision of the...activity being offered." *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 931, n. 6 (8<sup>th</sup> Cir. 1994), quoting 28 C.F.R. § 35.130(b)(8). Thus, the Court finds that the [test] is an essential eligibility requirement for teacher licensure....

*Id.* at 162, quoting *Jacobsen*, 17 F.Supp.2d at 1025. Notwithstanding, the court questioned Dauer's right to seek judicial review of the DOE's determination of her ineligibility.

In the present case, Dauer admittedly failed to pass the Praxis II assessment test required for certification. [Statutory citations omitted.] Therefore, having failed to satisfy all of the requirements for certification, Dauer could have no expectation that a certificate would issue. In this respect, she had no right, privilege or immunity in jeopardy [that would have constitutional protection].

*Id.* at 163. Accordingly, her petition for review of DOE's determination was dismissed.

### **CELL PHONES AND ELECTRONIC COMMUNICATION DEVICES: BALANCING SCHOOL PURPOSES WITH PERSONAL PREFERENCES**

At one time, Indiana's pupil discipline statutes specifically addressed student possession of what are widely known now as "cell phones."<sup>3</sup> The former statutory provision read in relevant part:

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<sup>3</sup>Janis Steck, a third-year law student at the Indiana University School of Law-Indianapolis, assisted in the research for this article. Janis worked as a legal intern in the Office of Legal Affairs, Indiana Department of Education, during the summer of 2008.

## I.C. § 20-8.1-5-4 Grounds for Expulsion or Suspension

...

(b) The following types of student conduct constitute grounds for expulsion or suspension subject to the procedural provisions of this chapter: ...

(12) Knowingly possessing or using on school grounds during school hours an electronic paging device or a handheld portable telephone in a situation not related to a school purpose or an educational function....

The pupil discipline statutory provisions were repealed in 1995 and replaced with the current requirements found at I.C. § 20-33-8 *et seq.*<sup>4</sup> The pupil discipline statutes enacted in 1995 and in effect today do not mention pagers or cell phones. Whether and to what extent the use of cell phones and pagers should be restricted in any school district is now a function of the local school board. See I.C. § 20-33-8-12, conferring upon local school boards the authority to establish written discipline rules.

In 1995, cell phones were not as sophisticated as today. These multi-functional devices now present their own problems, apart from the annoyance occasioned by their many inconsiderate owners. With text-messaging and photography functions, students can readily share information regarding teacher tests or use functions on the device itself to locate answers on the internet or perform calculations. Cell phones have been used to harass and embarrass others by posting pictures or film clips on social networking sites.<sup>5</sup> Indiana school boards have developed discipline policies to regulate the use of such electronic devices.

The Fort Wayne Community Schools' discipline policy indicates that "[a] student will not use during school hours any object that has no educational purpose and may distract from teaching and learning." Examples include "a telephone, pager, or similar device during school hours." Electronic devices are considered to be "in use if they are 'on' or in sight during school hours." The item will be confiscated and may be returned to the parent at the discretion of the principal or the principal's designee.<sup>6</sup> Many school district policies do not specifically prohibit students from possessing cell phones, pagers, beepers, personal digital assistance (PDAs), electronic communication devices (ECDs), and similar electronic devices while on campus, but they do require such devices be either stored in a locker during the school day<sup>7</sup> or not be used during the

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<sup>4</sup>P.L. 131-1995.

<sup>5</sup>See the discussion of "cyber bullying" in "Computers and Online Activity: Student Free Speech and 'Substantial Disruption,'" **Quarterly Report** October-December: 2006.

<sup>6</sup>*Student Rights and Responsibilities—Behavior Code: Rule 4 Personal Property*, [http://www.fwcs.k12.in.us/studentservices/StudentRightsBook/st\\_r\\_r\\_current\\_Eng.pdf](http://www.fwcs.k12.in.us/studentservices/StudentRightsBook/st_r_r_current_Eng.pdf).

<sup>7</sup>See Battle Ground Middle School, <http://www.wvec.k12.in.us/bgm/handbook1.pdf>.

school day.<sup>8</sup> Some schools have outright bans on the possession of such devices.<sup>9</sup> Some policies are briefly stated, such as Richmond Community Schools' policy ("Using on school grounds during school hours an electronic paging device or a handheld portable telephone in a situation not related to a school purpose or educational function, where such constitutes an interference with school purposes or an educational function").<sup>10</sup> Other policies are more detailed and are tailored to address other potential problems, such as invasion of privacy. The policy for the Culver Community Schools, for example, specifically prohibits students from using such devices while at school or at a school-sponsored activity "to gain access and/or view Internet web sites that are otherwise blocked to students at school."<sup>11</sup> The Culver policy also prohibits the possession of cell phones and ECDs "in locker rooms, classrooms, [and] bathrooms...during the regular hour of a school day."

The Evansville-Vanderburgh School Corporation has a policy similar to Culver's, although it elaborates on some subjects. For example, the Evansville-Vanderburgh policy states:

Students may not use cellular telephones, including camera phones, or other electronic communication devices (ECDs) (e.g., personal digital assistants (PDAs) and other devices designed to receive and send an electronic signal) during the school day. Cellular telephones and ECDs must be kept out of sight and turned off (not just placed in vibrate or silent mode) during the school day. In addition, students are not permitted to use cellular telephones, including camera phones, or ECDs to record/store/send/transmit the spoken work or visual image of any person, including other students or staff members, or educational instrument/document (e.g., test, quiz, etc.) any time while on school property or at a school-sponsored event.<sup>12</sup>

Many of the school board policies also indicate that parents are not to call their children at school via their children's cell phones, absent prior approval to do so. Parents are typically directed to call the office.

School districts are not the only ones who have found it necessary to adapt policies to address the problems created by cell phones and similar devices. The College Board, which publishes a

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<sup>8</sup>See Bloomington South High School's *Student Handbook* at <http://www.south.mccsc.edu/handbook0708.pdf>.

<sup>9</sup>See Arsenal Technical High School's *Student/Parent Information Guide* at <http://titans.s716.ips.k12.in.us/~webmaster/PDFdocuments/handbook.pdf>

<sup>10</sup>See <http://www.rcs.k12.in.us/district/policy/pdf/student-codeofconduct.pdf>.

<sup>11</sup>See Culver Community Schools "Bylaws and Policies," Sec. 5136, at <http://www.neola.com/culver-IN>.

<sup>12</sup>See "Policy 5136" at <http://www.neola.com/evansville-in/>.

number of standardized assessments, is particularly direct in this regard. Under *Test Security and Fairness* portion of their directions for those sitting for the Scholastic Achievement Test (SAT), the following appears:

Cell phone use is prohibited; students are strongly encouraged **not to bring cell phones** to the test center. If your phone makes noise, or you are seen using it at any time (including breaks), **you may be dismissed immediately**, your scores may be canceled, and the device may be confiscated. This policy also applies to any other prohibited digital or electronic device or both, such as a **BlackBerry, pager, personal digital assistant, iPod, MP3 player, camera or other photographic equipment, or a separate timer** of any kind. We strongly advise you not to bring them.<sup>13</sup>

The College Board has similar language regarding Advanced Placement tests. ACT, Inc., the publisher of the ACT test, indicates that examinees will be dismissed and their answer documents will not be scored if they are found “using any device to share or exchange information at any time during the tests or during breaks (all electronic devices, including cell phones, must be turned off from the time the examinee is admitted to test until dismissed after testing concludes).”<sup>14</sup> The Law School Admission Council also prohibits cellular phones during the administration of the Law School Admission Test (LSAT). “Bringing prohibited items into the test room may result in the confiscation of such items by the test supervisor, a warning, dismissal from the test center, or cancellation of a test score by LSAC.” The prohibition applies to breaks in testing as well.<sup>15</sup> The same is true for the administration of the Medical College Admission Test (MCAT)<sup>16</sup> and the Graduate Record Examination (GRE).<sup>17</sup>

### **Personal Preferences and School Discipline**

Nearly 200 million Americans own cell phones. American novelist and *Horrormeister* Stephen King isn't one of them. He has an intense dislike for this modern convenience, primarily because its users are often detached from any human interaction occurring about them but insist everyone else be subjected to their often inconsequential conversations. He had his cathartic moment, one supposes, when he decided to kill off most cell phone users in the world and leave those users

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<sup>13</sup>See <http://www.collegeboard.com/student/testing/sat/testday/test-security.html?print=true>.

<sup>14</sup>See <http://www.actstudent.org/testprep/taking/prohibited.html>.

<sup>15</sup>See <http://lsac.org/LSAT/day-of-test.asp>.

<sup>16</sup>See [www.aamc.org/students/mcat/about/regulations.htm](http://www.aamc.org/students/mcat/about/regulations.htm).

<sup>17</sup>See <http://www.ets.org/portal/site/ets/menuitem>.

who survived in a zombie-like state. Non-cell phone users were not affected, although they did have to be concerned about the zombies.<sup>18</sup>

In *Laney v. Farley*, 501 F.3d 577 (6<sup>th</sup> Cir. 2007), the Wilson County (Tennessee) Board of Education employed a more humane way to address the pandemic rudeness of many cell-phone users: It confiscated the cell phone for thirty days and assigned the offender to a one-day in-school suspension.

The school board's code of conduct prohibits students from possessing personal communication devices, such as cell phones, on school property during school hours. Violators are reported to the principal. The student's personal communication device is confiscated and will be returned only to the student's parent or guardian. For a first offense, the device will be returned to the parent or guardian after 30 days. The student will receive a one-day in-school suspension. Before such consequences are imposed, there must be "at least a rudimentary inquiry into the incident to assure that the offense is accurately identified, that the student understands the nature of the offense, and the student is given an opportunity to present his/her views." *Id.* at 579. Before a student is removed from the school setting, the code of conduct requires that the student receive "a complete due process hearing." *Id.*

Victoria Laney, an eighth-grade student in the school district's middle school, brought her cell phone to school, contrary to the code of conduct. During class, her cell phone began to ring. In accordance with the code of conduct, her teacher confiscated her cell phone and reported the incident to the principal. The assistant principal completed the disciplinary referral, indicating Victoria would serve a one-day suspension and her cell phone would be held for 30 days. The assistant principal also indicated on the referral form that a conference had been held with Victoria and that a letter had been sent home. However, this was not accurate. She had not had a conference with anyone regarding the incident, the seizure of her cell phone, or the one-day suspension. No letter had been sent home. The parents learned of the suspension after Victoria had served her time. *Id.* at 579-80.

Shortly thereafter, the father filed suit on his and Victoria's behalf, claiming primarily a violation of the Fourteenth Amendment's due process provisions based on the one-day suspension and the confiscation of the cell phone. The school board, the principal, and the assistant principal moved to dismiss the complaint against them. The federal district court granted the motion in part but let stand the procedural due process claim against the school board based on the one-day suspension. The school board sought interlocutory review. *Id.* at 580.

The Plaintiffs argued the school board violated the Fourteenth Amendment when the student was not provided a formal hearing or notification of charges prior to her one-day suspension. *Id.* at 581. The 6<sup>th</sup> Circuit noted that any discussion of the Fourteenth Amendment and the exclusion of a student from a public school for disciplinary reasons requires an application of *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729 (1975), the U.S. Supreme Court's seminal case on such matters. In

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<sup>18</sup>*Cell: A Novel* by Stephen King (Scribner 2006).

*Goss*, the Supreme Court found that students facing a ten-day suspension from their public school were entitled to protection under the Fourteenth Amendment’s Due Process Clause. 419 U.S. at 576. Public schools are required to provide to a student notice of the charges against him, an explanation of the evidence school authorities have, and an opportunity for him to present his side of the events. *Id.* The Due Process Clause applies because a suspension from school deprives a student of two rights—a property interest in educational benefits and a liberty interest in one’s reputation. *Id.*, citing *Goss*, 419 U.S. at 573-74. The Supreme Court found that a property interest exists where a state law creates an entitlement to a free public education for its residents between the ages of five and 21 years of age, coupled with a compulsory-attendance law. *Id.*, citing *Goss*, 419 U.S. at 573. Having extended such a right, a state cannot withdraw that right on misconduct grounds absent “fundamentally fair procedures to determine whether the misconduct has occurred.” *Id.* citing *Goss*, 419 U.S. at 574.

In this case, the 6<sup>th</sup> Circuit panel had to determine whether Victoria’s one-day suspension infringed upon her property interest in a public education or her liberty interest in her reputation. The panel seemed to approach a somewhat untenable position—that there can be such a thing as an acceptable *de minimis* infringement of a person’s constitutional rights—but never explicitly stated such a proposition. The court did note that an in-school suspension could be considered a deprivation of a property right in educational benefits, but whether this is so “depends on the extent of her exclusion from the educational process.” *Id.* “An in-school suspension could, but does not necessarily deprive a student of educational opportunities in the same way an out-of-school suspension would[.]” *Id.*

Tennessee has statutory provisions that draw distinctions between in-school and out-of-school suspensions, treating students who are assigned to an in-school suspension as being in “attendance” at school even though such students may not be attending a specific class or school activity. *Id.* at 582, n. 4. Students on in-school suspension are “required to complete academic requirements.” *Id.* at 582. In Victoria’s case, her in-school suspension was not similar to the suspensions at issue in *Goss*. Even though removed from her classroom, she was not denied all educational opportunities. “We conclude, therefore, that Victoria’s one-day in-school suspension does not implicate a property interest in public education.” *Id.* at 583.

With regard to Victoria’s liberty interest in her reputation, the panel questioned whether there could be any injury to her reputation where there had been no deprivation of a property interest. In *Goss*, the Supreme Court found that charges of misconduct resulting in suspension from school could be detrimental to a student’s liberty interest in his “good name, reputation, honor, or integrity.” *Id.*, citing *Goss*, 419 U.S. at 574. These charges “could seriously damage the students’ standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.” *Id.*, citing *Goss*, 419 U.S. at 575. A suspension from a class could be as detrimental to a student’s reputation as suspension from school. Classmates and teachers will know of the disciplinary action, and the suspension could be placed on the student’s permanent record where others may become aware of the infraction and resulting discipline. *Id.*

Other courts, the panel noted, “have been hesitant...to hold that in-school suspensions are detrimental to a student’s liberty interest in his reputation.” In fact, “[w]e can find no court that has held an in-school suspension to trigger the protections of the Due Process Clause arising from a student’s liberty interest in [his] reputation. We decline to extend those protections to such circumstances, and the facts here certainly do not give rise to such a right.” *Id.*

As noted *supra*, the 6<sup>th</sup> Circuit panel toyed with the concept that there could be a *de minimis* constitutional deprivation that would not invoke constitutional protection, but it never actually stated this. The panel observed that “[s]everal courts have held...that shorter temporary in-school suspensions do constitute *de minimis* deprivations of property or liberty,” adding that “[w]e agree with this reasoning and find a one-day in-school suspension to be a *de minimis* deprivation.” *Id.* at 583-84. The facts in this case indicate that Victoria’s one-day suspension was not from school but from her classes; that she was not excluded totally from the educational process; that she was considered under state law to be in “attendance”; and, by state law, she was required during this time to complete “academic requirements.”

A suspension of sufficient length or consequence can implicate the Due Process Clause. An in-school suspension that so isolates a student from educational opportunities that it infringes her property interest in an education, or one so long in duration that it damages one’s reputation, could raise issues simply not present on our facts. We conclude, however, that a one-day in-school suspension, during which the student was required to complete school work and was recorded as having attended school, does not deprive her of a property interest in educational benefits or a liberty interest in reputation. In any event, because such a suspension is a *de minimis* deprivation, it would not implicate due process requirements.

*Id.* at 584. The 6<sup>th</sup> Circuit panel reversed the decision of the district court and remanded with instructions to grant the school board’s Motion to Dismiss. Judge Julia Smith Gibbons, aware of the potential for others to misread the court’s decision, wrote a brief concurring opinion where she emphasized “that imposing an in-school suspension, even of short duration, without procedural safeguards could conceivably violate due process under different facts.” In this case, Victoria experienced no “educational detriment” that would “amount to a deprivation of a property interest” nor did she suffer “any reputational harm that might amount to deprivation of a liberty interest.” *Id.*

### **School Safety and Security**

Cell phone users can be annoying. *Very* annoying. Just ask Niagara Falls (NY) City Court Judge Robert M. Restaino, who became irate when a cell phone rang out (or jingled out) during a court session. When no one would ‘fess up, he said, “Everyone is going to jail. Every single person is going to jail in this courtroom unless I get that instrument now. If anybody believes I’m kidding, ask some of the folks that have been here for a while. You are all going.”

He wasn’t kidding. He ordered all 46 people in the courtroom into custody. They were taken to the city jail, searched, and placed into cells. Fourteen people could not post bail and were

shackled and bused to the county jail. When reporters got wind, the judge ordered everyone released.

Too little, too late. On November 13, 2007, the New York State Commission on Judicial Conduct ordered him removed from the bench. He was suspended with pay while New York's highest court reviewed the matter. See *In the Matter of Robert M. Restaino*, 879 N.E.2d 160 (N.Y. 2007). On June 5, 2008, the New York Court of Appeals removed Judge Restaino from the bench. *In the Matter of the Hon. Robert M. Restaino*, 890 N.E.2d 224 (N.Y. 2008).

In *Price v. New York City Board of Education*, 855 N.Y.S.2d 530 (A.D. 1 Dept. 2008), the New York City Department of Education (DOE) employed a far more rational approach to its problem with cell phones.

In September of 2005, the DOE, pursuant to State law, issued its disciplinary code, which included five levels of disruptive behavior ranging from insubordination to "seriously dangerous or violent behavior." One of the infractions under insubordination, which could involve admonishment or removal from a class by a teacher, is "[b]ringing prohibited equipment or material to school without authorization (e.g., cell phone, beeper)." The Chancellor also issued Regulation A-412, pursuant to State law, that specifically provided that "Beepers and other communication devices are prohibited on school property, unless a parent obtains the prior approval from the principal/designee for medical reasons." 855 N.Y.Supp.2d at 533.

The DOE had sufficient reason for banning cell phones in the school. In the 2005-2006 school year, there were 2,168 incidents involving cell phone use on school property. There were instances where the cell phones were used for seriously disruptive, even criminal conduct. The camera function of some cell phones were used to take and exhibit pictures with inappropriate sexual content. These pictures were used to harass other students and school personnel. Students also used cell phones to cheat on exams. Cell phones were used to call allies to participate in a fight or to threaten and intimidate other students. There were also prank calls made to teachers and "911" calls made as practical jokes. The text-messaging function, which can be engaged in surreptitiously, exacerbates the potential and actual abuse of cell phone usage in the public schools. *Id.* at 535.

Parents and their supporters sought a compromise with the DOE. When a compromise could not be reached, the parents filed suit, claiming, *inter alia*, the DOE and the Chancellor acted *ultra vires* in enacting the disciplinary directives; the ban is over broad and devoid of legitimate purpose; and the ban infringed upon the parents' fundamental constitutional right to provide for the care, custody, and control of their children. The DOE's ban, they asserted, failed to consider that "cell phones are a vital communication tool and security device that New York City public school students and their families rely upon during students' commute to and from school and after-school activities." They added that the cell-phone ban effectively prevented parents from communicating with their children, depriving the parents of their liberty interest. The parents detailed in several affidavits how their children's use of cell phones provided increased safety and security by ensuring parents would know their whereabouts or students could call for help if threatened. *Id.* at 534.

The DOE argued that the formulation of discipline policy under State law was “non-justiciable because the cell phone ban was a product of executive-branch decision making so fundamental as to be outside the reach of judicial review.” *Id.* at 535. Notwithstanding (or in the alternative), the DOE had an articulated basis for its policies. The DOE also denied it had interfered with the parents’ Fourteenth Amendment liberty interests, adding that given the facts in this situation, only a rational basis test should be employed rather than strict scrutiny. Under a rational basis test, the DOE argued, the school district had stated a legitimate governmental interest for which the cell-phone ban was reasonably related to the advancement of that interest (school security). *Id.*

The trial court dismissed the complaint, although it did find some merit to the parents’ concerns. The trial court found the DOE had demonstrated a legitimate basis for its cell phone ban, and that a compromise proposed by the parents (a ban on cell phone *use*) “would be undermined by the time spent confronting and disciplining students.” The trial court also rejected the parents’ constitutional claim, holding that the cell phone ban “was central to the schools’ educational mission.” The parental liberty interest under the Fourteenth Amendment “did not embrace a right to communicate with children by cell phone.” *Id.* at 535-36.

The parents appealed. *Id.* at 536. The appellate court, although sympathetic to the parents’ concerns, found against them. “We find that the Parents’ challenge to the rationality of the cell phone policy is nonjusticiable. Absent a showing of an *ultra vires* act or a failure to perform a required act, the decision of a school official involving an inherently administrative process, which is uniquely part of that official’s function and expertise, presents a nonjusticiable controversy.” *Id.* at 537 (internal punctuation and citation omitted). In this matter, “the Chancellor’s decision to ban possession of cell phones was wholly a matter of policy and no discrete issues of law are implicated.” *Id.* at 538. In declining to accept the parents’ argument that the Chancellor acted *ultra vires*, the appellate court stated:

[W]e agree with the court below which, in considering the policy on the merits, found that it was not [*ultra vires*]. The Chancellor’s determination that a mere ban on cell phone use would not be sufficiently effective was not irrational. It is now routine before theater, movie and other cultural presentations attended by adults for patrons to be asked to turn off their cell phones. Even then there is no guarantee that the cell phone of an inattentive person will not ring at an inopportune time. While the vast majority of public school children are respectful and well-behaved, it was not unreasonable for the Chancellor to recognize that if adults cannot be fully trusted to practice proper cell phone etiquette, then neither can children.

*Id.* “[I]t cannot be denied that the use of cell phones for cheating, sexual harassment, prank calls, and intimidation threatens order in the schools.... As the Department has demonstrated, a ban on possession of cell phones is necessary because a ban on use is not easily enforced.” *Id.* at 538-39. The appellate court also found the DOE was justified in not employing alternative measures, such as lockers, offered by the parents. This did not prevent the appellate court from urging a bit more flexibility on the DOE’s part.

Questions of justiciability aside, we are not unsympathetic to the Parents' wish to be secure in the knowledge that they can reach their children, or be reached by them, in the event of a private or public emergency. However, we note that Regulation A-412 expressly authorizes schools to permit a child to possess a cell phone if he or she has a medical reason.<sup>19</sup> Thus, children who are legitimately predisposed to physical and/or psychological issues will be able to have a cell phone to reach their parents when not in school. We can think of no reason why the Department would not permit schools to entertain reasonable applications for exemptions to the policy which do not necessarily rely on medical issues but involve equally compelling situations. For example, one of the Parents asserted in an affidavit that her daughter was being "stalked" by another student. If a parent establishes that her child is in a similar situation, the school has the ability to extend permission to the child to carry a cell phone. We further recognize that not every situation in which parents would wish to contact or be reached by their children by cell phone can be foreseen.

*Id.* at 539. Nevertheless, "our role is not to choose between two legitimate but competing interests. Because the cell phone policy was within the Department's power, judicial interference is not warranted." *Id.*

The parents' constitutional challenge also failed. The appellate court declined to apply a strict scrutiny analysis because such a test is applied only where governmental action infringes upon a "fundamental" right. Although the asserted parental interest in "the care, custody and control of their children" is "perhaps the oldest of the fundamental liberty interests," this right "is not absolute and is only afforded constitutional protection in 'appropriate cases.'" *Id.* at 540, citing *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054 (2000) and *Lehr v. Robertson*, 463 U.S. 248, 256, 103 S. Ct. 2985 (1983).

In this matter, the DOE is not interfering with any fundamental parental right. "By implementing the cell phone ban policy, the State is not depriving parents of the ability to raise their children in the manner in which they see fit. The ban by necessity will prevent children from calling their parents or receiving calls from them while commuting to and from school. However, scrutiny of the individual Parents' affidavits does not reveal that any fundamental child-rearing function is being taken from them." *Id.* at 541.

The cell phone ban does not directly and substantially interfere with any of the rights alleged by the Parents. Nothing about the cell phone policy forbids or

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<sup>19</sup>This could be a "reasonable accommodation" under Sec. 504 of the Rehabilitation Act of 1973. See, for example, *Moreno Valley (CA) Unified Sch. Dist.*, 22 IDELR 902 (OCR 1995), where the school did not violate Sec. 504 and Title II of Americans with Disabilities Act by suspending student with diabetes, hearing loss, and a learning disability when he refused to turn over an unauthorized beeper to school security. The beeper was not needed for medical reasons but for family convenience in reaching student.

prevents parents and their children from communicating with each other before and after school. Accordingly, the only analysis that need be applied is the rational basis test. That is, the policy will stand if it is rationally related to a legitimate goal of government [citation omitted]. Here, the Chancellor reasonably determined that a ban on cell phone possession was necessary to maintain order in the schools. The goal of discipline is unquestionably a legitimate one. Accordingly, the policy withstands rational basis review and is not constitutionally infirm.

*Id.* at 542.

### **T-SHIRTS AND THE FIRST AMENDMENT: THE COMPETING FREE-SPEECH RIGHTS OF STUDENTS**

Any First Amendment analysis of student speech within a public school context must begin by reference to the U.S. Supreme Court’s four school-speech cases, none of which actually involve a T-Shirt:

1. *Tinker v. Des Moines Independent Community School District*, 393 U.S.503, 507-08, 514 89 S. Ct. 733 (1969) (“pure speech” in a school context cannot be banned absent a reasonable forecast of “substantial disruption” or interference with rights of others).
2. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 681, 683, 685-86, 106 S. Ct. 3159 (1986) (student’s sophomoric speech— which contained offensive, indecent, lewd references— was not protected speech and could be regulated because vulgar or indecent speech and lewd conduct in the classroom or school context is inconsistent with the fundamental values of public school education).
3. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 270-71, 273-76, 108 S. Ct. 562 (1988) (school could exercise editorial control over the style and content of student articles in school newspaper because newspaper was part of journalism class experience and, accordingly, was part of a school-sponsored expressive activity; however, such editorial control must be “reasonably related to legitimate pedagogical concerns.”).
4. *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (a message reasonably viewed as advocating illegal drug use—“Bong HiTS 4 Jesus”—need not result in a substantial disruption before school officials could restrict such speech on school property or at a school event).

As noted in previous articles, T-shirts and student free-speech issues have often bumped up against the legitimate authority of a public school district to ensure a safe educational environment conducive to learning.<sup>20</sup> A new category of disputes actually calls upon the school district to

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<sup>20</sup>See “T-Shirts: Free-Speech Rights versus Substantial Disruption,” **Quarterly Report** July-September: 2005 and April-June: 2006 (Update).

attempt to balance the rights of students with each other. This is particularly evident where religious expression is involved.

A major area of conflict that has gained notable traction in recent years involves disputes between those who oppose homosexuality for religious reasons and those who support tolerance on the basis of sexual orientation. The U.S. Supreme Court, as noted *infra*, had such a case dropped in its collective lap but avoided deciding the matter through a procedural application. This may be the proverbial lull before the storm. The Federal courts are addressing these competing issues and deciding them differently, including in the U.S. Seventh Circuit Court of Appeals, which includes Indiana.

In *Harper v. Poway Unified School District*, 345 F. Supp.2d 1096 (S. D. Ca. 2004), after a school planned “Day of Silence,” Harper—a student who had firmly held religious beliefs that homosexuality is immoral—believed the event was to endorse and promote homosexual activity. Harper decided to wear T-shirts (of his own creation) that used a bible verse to communicate a negative message toward homosexual behavior.<sup>21</sup>

After being reprimanded in class for his violation of the school’s dress code, Harper was sent to the office. In order to return to class, Harper was told to replace his T-shirt. The vice principal found that the T-shirt was “clearly in violation of the dress code because it had a homemade message, as opposed to a printed or more permanent message on the garment” and it displayed inflammatory words. *Id.* at 1099. However, Harper refused and had to discuss the matter with the principal who told Harper that his T-shirt was too aggressive and inflammatory whether homemade or pre-manufactured. *Id.* Consequently, Harper’s punishment was a one-day suspension. He was instructed to leave the school premises. He filed a complaint against the school, alleging violations of the First and Fourteenth Amendments.<sup>22</sup> The school filed a motion to dismiss the claims. *Id.* at 1102.

Before conducting its analysis, the court acknowledged that:

[t]he[ ] fundamental values of habits and manners of civility essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these fundamental values must also take into account consideration of the sensibilities of others, and in the case of a school, the sensibilities of fellow students.

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<sup>21</sup>The first T-shirt worn read: “*I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED*” (on the front) and “*HOMOSEXUALITY IS SHAMEFUL, Romans 1:27*” (on the back). The second T-shirt worn stated: “*BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED*” (on the front) and “*HOMOSEXUALITY IS SHAMEFUL, Romans 1:27*” (on the back). *Id.* at 1099.

<sup>22</sup>The complaint invoked the Freedom of Speech, Free Exercise of Religion, and the Establishment Clauses of the First Amendment, as well as the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

*Id.* at 1103, quoting *Fraser*, 478 U.S. at 681. Furthermore, the court maintained that “[t]he determination of what manner of speech in the classroom...is inappropriate properly rests with the school board, and not with the federal courts.” *Id.*, quoting *Fraser*, 478 U.S. at 683.

In addressing the student’s first cause of action regarding Freedom of Speech, the court was governed by the caveats of the three school-speech related cases discussed *supra*. The court determined that if it found the speech to be “plainly offensive,” then *Fraser* controls; if not, *Tinker* controls. Even though the court maintained that the “speech here is clearly not vulgar, lewd or obscene, a determination of whether the speech is plainly offensive is required under *Fraser*.” *Id.* at 1105. After looking at the dictionary definition of “plainly offensive,”<sup>23</sup> the court determined that a dictionary definition “may be a starting point but...is not the end of the inquiry.” *Id.* Thus, the court concluded that the nature of the expression was “clearly derogatory”; however, it had to determine whether it was “plainly offensive [meaning that the expression is] unmistakably or obviously offensive.” *Id.* The court found the school’s argument – based on a deputy sheriff’s statement – that the “speech at issue could encourage uprising and violence against homosexuals is insufficient in itself to lead the court to conclude as a matter of law that school officials reasonably believed the speech [would] ‘forecast substantial disruption of or material interference with school activities’ to justify censorship.” *Id.* at 1106 (internal citation omitted). Ultimately, the court found that “in the context of the assertions in the complaint viewed as true for purposes of this motion, there may be no reasonable limitation allowed on plaintiff’s expression.” *Id.* In considering the “outer reaches of the First Amendment’s right to free speech,” the court stated that:

There indeed may be no such limit, but when citizens assert, not casually but with deep conviction that the [expression occurs] at a place and in a manner that [may be] taunting and overwhelmingly offensive [to others] of that place, that assertion, uncomfortable as it may be for judges, deserves to be examined.

*Id.*, quoting *Smith v. Collin*, 439 U.S. 916, 99 S.Ct. 291 (1978) (Justice Harry A. Blackmun dissenting). The student’s First Amendment claim was not dismissed.<sup>24</sup> The court then began its inquiry into whether it would grant the student’s motion for preliminary injunction.

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<sup>23</sup>The parties disagreed as to the definition of “plainly offensive” as used in Ninth Circuit precedent, *Chandler v. McMinnville School District*, 978 F.2d 524, 530 (9<sup>th</sup> Cir. 1992). The Ninth Circuit used a dictionary definition of one word to determine whether the language was “plainly offensive.” The Ninth Circuit recognized that a “dictionary definition ‘may not be determinative in all cases.’” *Harper*, 345 F.Supp.2d at 1105 (quoting *Chandler*, 978 F.2d at 530).

<sup>24</sup>Because of the scope of this article, only the student’s First Amendment Free-Speech claim will be addressed. However, in addition, the court denied the school’s motion to dismiss the student’s First Amendment Free Exercise of Religion claim and his claim under the Establishment Clause. The court did grant the school’s motion to dismiss the student’s Fourteenth Amendment Equal Protection and Due Process claims.

In order for a court to grant injunctive relief, the party seeking such relief must show either: “(1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardships tips sharply in the moving party’s favor.” *Id.* at 1119. Because the student’s First Amendment claims survived the school’s motion to dismiss, the court found this to be sufficient to “demonstrate irreparable harm for purposes of the...preliminary injunction.” *Id.* Consequently, the court had to determine whether the student “has demonstrated a likelihood of success on the merits of his claims and whether the balance of hardships tip sharply in his favor.” *Id.* After reviewing the record, the court determined that it is not likely that the student would succeed on the merits of his free-speech claim. Even though the school failed to provide additional evidence as to why the speech at issue is “plainly offensive,” the court cited to *Tinker* in stating it “does not require certainty that disruption will occur, but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption.... Thus, a showing that the suppressed speech might reasonably be forecasted as a material disruption at school negates plaintiff’s claims.” *Id.* at 1120 (internal citation omitted). The court found that evidence of prior tensions and altercations between students that resulted in “volatile behavior” during the previous year’s “Day of Silence” was sufficient to permit the school to suppress the speech at issue. On a final note with regards to the balance of hardships, the court stated:

[T]here is nothing in the record to suggest plaintiff would not be free to proselytize any religious view or any other viewpoint in a manner that does not violate neutral and valid school policies. On the other hand, requiring the [s]chool to allow plaintiff to express this particular viewpoint could result in disruption of the work of the schools or the violation of the rights of other students.

*Id.* at 1122. The school had the responsibility to act *in loco parentis*. The school argued successfully that “the safety and well-being of gay and lesbian students, and the ability of school administrators to regulate anti-gay speech, outweighs [sic] plaintiff’s competing interest.” *Id.* at 1122. Because the scales did not tip sharply in favor of Harper, the injunctive relief was denied. *Id.*

Harper appealed, but the U.S. Circuit Court of Appeals for the Ninth Circuit affirmed (2-1). *Harper v. Poway Unified School Dist.*, 445 F.3d 1166 (9<sup>th</sup> Cir. 2006). A seriously divided 9<sup>th</sup> Circuit denied rehearing, with concurring and dissenting opinions that are particularly barbed. *Harper*, 455 F.3d 1052 (9<sup>th</sup> Cir. 2006). It appeared the clash between relative free-speech rights was headed for the U.S. Supreme Court until the federal district court dismissed Harper’s claims for injunctive relief as moot. The Supreme Court then remanded to the 9<sup>th</sup> Circuit to vacate the matter as moot. *Harper*, 127 S. Ct. 1484 (2007). The 9<sup>th</sup> Circuit has since dismissed the appeal. *Harper*, 485 F.3d 1052 (9<sup>th</sup> Cir. 2007).

Although *Harper* did not resolve the ultimate issue, there are other similar disputes in Minnesota, Ohio, Kentucky, and Illinois.

***Chambers v. Babbitt***, 145 F.Supp.2d 1068 (D. Minn. 2001), also involved a dispute over a shirt depicting a student’s beliefs regarding homosexuality. Chamber wore a sweatshirt with the

message “Straight Pride” on the front and a symbol of a man and woman holding hands on the back. *Id.* at 1069. After receiving complaints from students, the principal, Babbitt,<sup>25</sup> told Chambers that he could not wear the sweatshirt again because of the offense taken by some students and because of school safety concerns.<sup>26</sup> The high school has a dress code that proscribed the wearing of items “with unacceptable writing or graphic depictions which offend anyone or distract from the educational experience” of other students. Examples of “unacceptable writing or graphic depictions” included “socially demeaning or derogatory” language or symbols. *Id.* at 1069. Chambers filed suit, asking for a preliminary injunction, which the court granted.

...[T]he Court’s decision to grant injunctive relief serves to reinstate the *status quo* as of January 16, 2001 [the day before Chambers was told not to wear his shirt], which is that a student’s freedom of expression is protected in the school environment to the extent that a school does not otherwise have a reasonable belief that such expression could lead to substantial disruption of the school environment or material interference with school activities. The school is not left without authority to quell otherwise constitutionally protected speech when the *Tinker* threshold is established. However the extent that the environment remains as it was on January 17, 2001 [(the day Chambers was asked to remove his shirt)], and to the extent that the facts before the Court represent that environment, then the Court cannot make a finding that the requisite threshold [of the likelihood of substantial disruption or material interference] was met.

*Id.* at 1072-73. The court acknowledged the struggles and added pressures that students “who identify themselves as gay, lesbian, bisexual, or transgender” have to go through with their friends, family, and community. *Id.* at 1073. The court maintained that “it is incumbent upon the school, the parents, the students, and the community...to work together so that divergent viewpoints, whether they be political, religious, or social, may be expressed in a civilized and respectful manner.” *Id.* However, the court maintained that such tolerance “includes the tolerance of such viewpoints as expressed by ‘Straight Pride.’” *Id.* Thus, “[w]hile the sentiment behind the ‘Straight Pride’ message appears to be one of intolerance, the responsibility remains with the school and its community to maintain an environment open to diversity and to educate and support its students as they confront ideas different from their own.” *Id.* Although the court understood the intentions behind Babbitt’s decision, the “constitutional implications and the difficult but rewarding educational opportunity created by such diversity of view point are equally as important and must prevail under the circumstances.” *Id.* The court added that it was the

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<sup>25</sup>Babbitt referred to several school incidents that aided in his decision to not allow Chambers to wear his shirt. For example: a student—who was a perceived homosexual—had his car vandalized; a fight arose between a student wearing a Confederate Flag bandana and an African- American student; and there had been fourteen (14) physical fights within the school year.

<sup>26</sup>Chambers wore the sweatshirt stating that “he thought it unfair that there were such events as ‘gay pride parades’ when there were no ‘straight pride parades.’” *Id.* at 1069. He was wearing the shirt in reaction to what he viewed as the school’s promotion of homosexuality through posters that stressed tolerance of diversity. *Id.* at 1073.

“responsibility of the parents and citizens...to raise and nurture its children into decent and caring human beings who treat people with dignity, respect, kindness, and equality.” *Id.* at 1074.

***Nixon v. Northern Local School District Board of Education***, 383 F.Supp.2d 965 (S.D. Ohio 2005), involved a middle-school student who wore to school a T-shirt that had on the front a scriptural passage, but the following appeared on the back:

Homosexuality is a sin!  
Islam is a lie!  
Abortion is murder!  
Some issues are just black and white!

The student was informed he would have to take off the shirt or turn it inside out because it was deemed offensive. He refused. His father supported his son’s decision. The father came to the school and argued with personnel. When he wouldn’t leave, law enforcement was called. He eventually left. The parents later met with the superintendent, who supported the school’s administration. The parents were informed the student would be suspended if he wore the T-shirt to school again. *Id.* at 967-68. The parents sued the school district, seeking injunctive relief.

The school’s policy does prohibit clothing that is “offensive.” School officials exercise discretion in determining which messages are “offensive” and which are not.<sup>27</sup> In this case, there was no evidence the student’s T-shirt caused any disruption at school or that the student had any history of disruption or disciplinary problems. He had worn other T-shirts with religious messages without incident. *Id.* at 968.

The court had little difficulty finding that the student’s wearing of the T-shirt constituted expression under the First Amendment. *Id.* at 969. The question is to what extent the student is free to express himself in a public school context under the *Tinker-Fraser-Hazelwood* trilogy of student free-speech cases. The school claimed the speech was “plainly offensive” (*Fraser* application) and invaded the rights of others (*Tinker* application).

The school acknowledged the student’s wearing of the T-shirt caused no disruption at school, but it had the potential to do so, especially should the message be read by Muslims, homosexuals, or anyone who has had an abortion. The court was not persuaded, noting *Tinker* requires a reasonable anticipation of a disruption of school activities rather than an “undifferentiated fear or apprehension of disturbance.” *Id.* at 973. The school was motivated more by a desire to avoid the discomfort or unpleasantness caused by an unpopular viewpoint. *Id.* at 974. In addition, there is no showing the student’s silent, passive expression of opinion interfered with anyone’s rights. *Id.*

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<sup>27</sup>One T-shirt the school permitted depicted President George W. Bush with the legend “International Terrorist.” This is apparently the same T-shirt at issue in *Barber v. Dearborn Public Schools, infra*.

Accordingly, the court granted the injunctive relief, entitling the student to wear his T-shirt to school until or unless the school can demonstrate his conduct is substantially disrupting or interfering with the school's activities or functions, or that such is likely to occur. *Id.* at 975.

*Morrison, et al. v. Board of Education of Boyd County*, 521 F.3d 602 (6<sup>th</sup> Circuit 2008). In 2002, some students at the Boyd County High School (BCHS) in Kentucky petitioned to start a chapter of the Gay-Straight Alliance (GSA).<sup>28</sup> Although the GSA was originally approved as a student organization, hostility within the BCHS resulted in the school banning all student organizations, including the GSA. The students and their parents sued, alleging the school district violated their rights under the Equal Access Act, 20 U.S.C. § 4071 *et seq.*, as well as their First Amendment rights. The Federal district court granted a preliminary injunction requiring the school district to provide the GSA equal access, noting that although all student organizations, both curricular and non-curricular, had been banned, some groups were allowed to continue to meet during non-instructional time. *Boyd Co. High Sch. Gay-Straight Alliance v. Boyd Co. Bd. of Education*, 258 F.Supp.2d 667 (E.D. Ky. 2003). Thereafter, the parties entered into a consent decree that ended this lawsuit. Part of the consent decree required the school district to adopt policies prohibiting harassment on the basis of actual or perceived sexual orientation and to provide mandatory anti-harassment training to all students.

Prior to the 2004-2005 school year, the school district adopted Policy 09.42811, which prohibited "Harassment/Discrimination" against a number of specified groups, including based on "perceived sexual orientation or gender identity." Prohibited activity included "unlawful behavior" that is "sufficiently severe, pervasive, or objectively offensive that it adversely affects a student's education or creates a hostile or abusive educational environment." However, the policy also stated:

The provisions in this policy shall not be interpreted as applying to speech otherwise protected under the state or federal constitutions where the speech does not otherwise materially or substantially disrupt the educational process....

*Morrison*, 521 F.3d 602, 605. The student Code of Conduct had a variation on this theme. As the policy upon which it was based, it prohibited "Harassment/discrimination" and added examples such as "intimidation by threats of or actual physical violence; the creation by whatever means, of a climate of hostility or intimidation[;] or the use of language, conduct, or symbols in such manner as to be commonly understood to convey hatred, contempt, or prejudice or to have the effect of insulting or stigmatizing an individual." *Id.* at 605-06. Two videos were created to fulfill the anti-harassment training provision of the Consent Decree. *Id.* at 606.

The new policy and training videos created new problems. Some parents believed the training videos and policy would prohibit "their children from speaking about their religious beliefs

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<sup>28</sup>See "Sexual Orientation, the Equal Access Act, and the Equal Protection Clause," **Quarterly Report** July-September: 2002 as well as the subsequent updates to this article

regarding homosexuality.” Some parents withheld their children from receiving the mandatory anti-harassment training. *Id.*

Eventually a lawsuit was filed, asserting claims under the First Amendment (free speech, free exercise) and the Fourteenth Amendment (due process, equal protection). In essence, the parents claimed the policy prevented students from expressing their views that homosexuality is sinful, while the policy and training together undermined the students’ ability to practice their Christian faith. *Id.* at 606-07.

Prior to the 2005-2006 school year, the school board revised its policy and the student code of conduct. Under the new policy, “anti-homosexual speech would not be prohibited unless it was ‘sufficiently severe or pervasive that it adversely affects a student’s education or creates a climate of hostility or intimidation for that student, both from the perspective of an objective educator and from the perspective of the student at whom the harassment is directed.” *Id.* at 607. The Code of Conduct added that “The civil exchange of opinions or debate does not constitute harassment. Students may not, however, engage in behavior that interferes with the rights of another student or materially and substantially disrupts the educational process.” *Id.*

After the school district initiated these changes, both parties moved for summary judgment. The Federal district court granted the school board’s motion.<sup>29</sup> *Id.* A three-member panel of the U.S. Circuit Court of Appeals for the Sixth Circuit (2-1) affirmed the district court’s determination, finding that Morrison’s as-applied pre-enforcement challenge for nominal damages based on the old policy “chilled” his speech could not go forward because Morrison lacked standing to pursue the claim. *Id.* at 608.

In order to have standing, a litigant must trace a concrete and particularized injury (actual or imminent) to the defendants, and further establish that a favorable judgment would provide redress. A majority of the panel found that Morrison had not suffered an “injury-in-fact,” a necessary element in establishing standing. In this case, Morrison has asserted the former policy “chilled” his speech contrary to the First Amendment. However, a mere subjective impression that one’s speech has been “chilled” is inadequate. Morrison would need to assert additional facts that demonstrate a direct impact. “[F]or the purposes of standing, subjective chill requires some specific action on the part of the defendant in order for the litigant to demonstrate an injury-in-fact.” *Id.* at 609. A fear that one’s speech will be inhibited is insufficient to establish an injury-in-fact. *Id.* There has to be a likelihood that a governmental entity will enforce a policy or law such that speech would be inhibited. *Id.* at 610.

In this dispute, Morrison decided to “chill” his own speech based on his subjective belief the school district would discipline him should he speak about his religious objections to homosexuality. However, it is only speculative that this would have occurred. This would be true notwithstanding the subsequent revisions. The original policy indicated that it “shall not be

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<sup>29</sup>There were intervenors in this matter. However, their participation is not germane to this article.

interpreted as applying to speech otherwise protected” under the State or U.S. Constitutions. *Id.* There is no evidence the school district threatened to punish anyone, Morrison included, for violating this policy. *Id.*

In addition to his failure to establish an “injury-in-fact,” Morrison also failed to demonstrate how the awarding of nominal damages would redress his alleged injury, especially an injury based on a policy no longer in existence. “To confer nominal damages here would have *no* effect on the parties’ legal rights.” *Id.* at 611 (emphasis original). Because nominal damages would not redress any injury, Morrison “fails to satisfy the second requirement for standing.”

This case should be over. Allowing it to proceed to determine the constitutionality of an abandoned policy—in the hope of awarding the plaintiff a single dollar—vindicates no interest and trivializes the important business of the federal courts.

*Id.* Judge Karen Nelson Moore dissented, noting that the school board amended its policy only after the litigation had been initiated. She believes that Morrison has stated a claim for nominal damages premised upon the “chill” of his speech occasioned by the former policy and that this presents a “justiciable controversy.” A person of “ordinary firmness” would be deterred from speaking out based on the school board’s original policy, thus satisfying the “injury-in-fact” requirement for standing. Judge Moore also believes the majority have confused mootness with redressability. Morrison’s injury was redressable at the time he filed this action, which is the basis upon which the appellate court should review the matter. *Id.* at 611-625.

### ***The 7<sup>th</sup> Circuit Weighs In***

***Zamecnik, Nuxoll v. Indian Prairie School District #204***, 2007 U.S. Dist. LEXIS 28172 (N.D. Ill. 2007). In *Zamecnik*, as in *Harper*, *supra*, the public school district permitted the GSA to observe a “Day of Silence.” Zamecnik and Nuxoll were two high school students who objected to the “Day of Silence” based on their religious beliefs that homosexuality is immoral, and that homosexual behavior is damaging both to individuals and society. The high school is a relatively large one (4,200 students) and exceptionally diverse. There have been disruptions in the past arising from derogatory, offensive, or demeaning symbols or statements, including displays of the Confederate flag and anti-Muslim threats following September 11, 2001. The school board, in recognition that confrontations based on race, ethnicity, religion, and sexual orientation would seriously disrupt or materially interfere with the operation of the schools, enacted several policies designed to create a positive and tolerant school environment. Part of one policy stated that “Student rights and Responsibilities” require students “[t]o respect the rights and individuality of other students and school administrators and teachers and to refrain from behavior that infringes on the rights of others.” Another school board policy prohibits the wearing of “garments or jewelry with messages, graphics or symbols...which are derogatory, inflammatory, sexual, or discriminatory.”

The “Day of Silence” as sponsored by the GSA (and promoted by the Gay, Lesbian and Straight Education Network) sets aside a specific date to protest anti-gay discrimination and express

support for tolerance of gays. The “Day of Silence” has occurred at the high school annually since 2003. On the “Day of Silence,” participating students can remain silent (except when required to speak). Students and some staff members wear shirts expressing support for GSA. In 2006, the shirt included the phrase “Be Who You Are.”

Zamecnik was a senior and was at school during past observances of the “Day of Silence.” Nuxoll was a freshman. In past school years, Zamecnik has participated in the “Day of Truth,” an event promoted by the Alliance Defense Fund (ADF). The “Day of Truth” is set for the day after the “Day of Silence” and is intended “to counter the promotion of the homosexual agenda and express an opposing viewpoint from a Christian perspective.” Participating students can likewise remain silent on the same basis as students participating in “Day of Silence.” ADF shirts for the occasion contain the organization’s logo along with “The Truth cannot be silenced” and ADF’s website.

In 2006, Zamecnik remained silent during her observance of the “Day of Truth.” She also wore a T-shirt that had “Be Happy, Not Gay” on the back. There were complaints from some students, and school officials eventually required Zamecnik to cross out the “Not Gay” language.

The GSA planned a “Day of Silence” for April 18, 2007. “Day of Truth” was then scheduled for April 19, 2007. However, Zamecnik and Nuxoll wanted to wear shirts that have the “Be Happy, Not Gay” message rather than alternatives the school indicated it would approve (e.g., “Be Happy, Be Straight,” “My Day of Silence, Straight Alliance,” or the message encouraged by ADF on its shirts). School officials would not permit negative statements that would impart a derogatory message. They would permit messages promoting being heterosexual.

On March 21, 2007, the students—represented by ADF, who also represented Tyler Harper—filed a lawsuit against the school district. Nine days later, they indicated they were seeking a preliminary injunction, much to the consternation of the court, which noted that this suit could have been and should have been brought months ago rather than just before the “Day of Silence” and “Day of Truth” observances.

The district court noted that the students, in order to obtain a preliminary injunction, would have to show a reasonable likelihood of success on the merits of their suit; that should the injunctive relief not be granted, they would suffer irreparable harm that outweighs any harm to the school district; that there is no adequate remedy at law; and that the public interest would not be harmed by issuance of the injunction. The district court had to weigh the balance of harms (the students’ interests versus the school district’s interests or the public interest). See *Christian Legal Society v. Walker*, 453 F.3d 853, 859 (7<sup>th</sup> Cir. 2006).

The “central question,” the court observed, “is whether a high school may prohibit negative speech about homosexuality as part of its pedagogical mission to promote tolerance of differences among students.” The district court relied substantially upon the 9<sup>th</sup> Circuit’s

decision in *Harper* to deny injunctive relief, adding that other courts have granted injunctive relief on similar facts.<sup>30</sup>

The court noted that *Tinker*, *Hazelwood*, and *Fraser* are the principal cases addressing student speech within a public school context. The high school students in this dispute argued that the three cases establish “three clearly delineated and distinct categories” for legal analysis. That is, public schools may restrict student speech where it is vulgar, lewd, indecent, or plainly offensive (*Fraser*); where the speech is considered “school sponsored” speech and the restriction is reasonably related to a legitimate pedagogical interest (*Hazelwood*); or where the speech would materially and substantially disrupt the operation of the school or impinge upon the rights of other students (*Tinker*). These cases, the students argue, do not overlap. Neither *Fraser* nor *Hazelwood* would apply. “Under this view, the only appropriate consideration in the present case would be whether the speech that defendants attempt to regulate has a sufficient potential to create the type of disruption that is a concern of *Tinker*.”

The district court was not willing to read these cases in such a restrictive sense. The “rights of others” prong in *Tinker*, including the right to be secure and left alone, has a broader application. Relying upon *Harper*, the district court noted that schools have an interest, if not a duty, to protect minority groups from harassing conduct. This could include derogatory statements about gay youth. A school’s “pedagogical interest” is not limited to a “basic educational mission” or school-sponsored speech. “[A] school has the right to teach civic responsibility and tolerance as part of its basic educational mission; it need not as a quid pro quo permit hateful and injurious speech that runs counter to that mission,” quoting *Harper*, 445 F.3d at 1185-86.

The 7<sup>th</sup> Circuit, the district court wrote, would likely follow *Harper*. In *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7<sup>th</sup> Cir. 1996), *cert. den.*, 520 U.S. 1156, 117 S. Ct. 1335 (1997), a case involving the distribution of religious literature by a student, the 7<sup>th</sup> Circuit observed that although a public school may not act unreasonably, it is not required to tolerate student expression of viewpoints that are fundamentally inconsistent with the school’s basic educational mission. A school could restrict speech “that is insulting to the psyches of other students.”

The Seventh Circuit has not ruled on the question of school officials restricting student speech that is derogatory of a category of students. It is clear, however, that the Seventh Circuit would take into consideration legitimate pedagogical concerns of the school as well as the school’s views of its educational mission, including inculcating rules of civility.... The Seventh Circuit would hold that a high school’s interest in promoting the tolerance of differences among students and protecting gay students from harassment is a legitimate pedagogical concern

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<sup>30</sup>See, e.g., *Nixon v. Northern Local School Dist. Board of Education*, 383 F.Supp.2d 965 (S.D. Ohio 2005), discussed *supra*, where a permanent injunction was issued when the school district could not demonstrate any imminent and substantial disruption that would result from a middle-school student wearing a T-shirt that read “Homosexuality is a sin! Islam is a lie! Abortion is murder!”

that permits the school to restrict speech expressing negative statements about gays.

In this case, the school board's policies promote "tolerance toward and respect for differences among students. Such policies are a legitimate pedagogical interest." The school district also has "a legitimate interest in protecting gay students at its school from being harmed, both physically and psychologically." In a high school setting, the school district can "restrict speech that expresses an opposing view in a manner that is negative toward a group of students," even though such speech would be protected speech outside a public school context.

The district court acknowledged the high school students had an interest in expressing their views in a manner of their choosing, but "for purposes of weighing harms, it must be considered that defendants do not attempt to suppress plaintiffs' views. Plaintiffs will still be permitted to do their silent protest and to wear or display messages positively expressing support for heterosexuality." Any harm to the plaintiffs from preventing them from displaying "Be Happy, Not Gay" would be relatively low given the alternative means of expression that would not be restricted. "On the other side, it is an uncontested fact that derogatory statements about being gay have a tendency to harm gay youth. Therefore, there is a significant likelihood of public harm if the court errs in favor of granting a preliminary injunction." The balance tips in favor of the school district, the district court found.

The district court declined to find the restriction on "Be Happy, Not Gay" by the school district would constitute viewpoint discrimination or a violation of the Equal Protection Clause of the Fourteenth Amendment. There is no discrimination. The school district does not "permit any student or group to use language that is negative or derogatory about another student." The court also disagreed that the school board's policies are vague or overly broad.

Lastly, the court rejected the students' argument that they possess a "hybrid" claim (free exercise claim joined with free speech claim). However, as the students do not have a "sufficiently meritorious free speech claim," they "cannot show that the exercise of their sincere religious beliefs would be substantially burdened by not being able to express 'Be Happy, Not Gay' while in school on a particular day." The motion for preliminary injunction was denied.

The district court's attempt to divine the 7<sup>th</sup> Circuit's likely holding was unavailing. The 7<sup>th</sup> Circuit reversed the district court.

In *Nuxoll, et al. v. Indian Prairie School District #204, et al.*, 523 F.3d 668 (7<sup>th</sup> Cir. 2008), the 7<sup>th</sup> Circuit noted that the U.S. Supreme Court has held that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." 523 F.3d at 669, citing *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673 (1976) (plurality opinion). The school district has not shown that the granting of a preliminary injunction, if narrowly crafted, would cause irreparable harm to it. "So the balance of harms inclines toward the plaintiff, and therefore the school can prevail only if his claim is demonstrably weak." *Id.* at 670.

Judge Richard Posner, writing for the three-judge panel, noted that a judicial policy of not interfering with reasonable policies of public school districts “has much to recommend it,” especially in matters such as these where “the suppression of adolescents’ freedom to debate sexuality is not one of the nation’s pressing problems[.]” *Id.* at 671-72. In this case, Nuxoll does not restrict his comments to a T-shirt with “Be Happy, Not Gay.” He would like to make “more emphatically negative comments about homosexuality, provided only that the comments do not cross the line that separates nonbelligerent negative comments from fighting words, wherever that line may be.” *Id.* at 672. He also wants to distribute Bibles to other students to provide support for his views on homosexuality.

We foresee a deterioration in the school’s ability to educate its students if negative comments on homosexuality by students like Nuxoll who believe that the Bible is the word of God to be interpreted literally incite negative comments on the Bible by students who believe either that there is no God or that the Bible should be interpreted figuratively. Mutual respect and forbearance enforced by the school may well be essential to the maintenance of a minimally decorous atmosphere for learning.

*Id.* On the other hand, the school district’s broad policy may run afoul of the First Amendment through its attempt to protect students from derogatory comments. “But people do not have a legal right to prevent criticism of their beliefs or for that matter their way of life.” *Id.* In this dispute, there is no evidence that Nuxoll has singled out any individual or that his wearing of a T-shirt with “Be Happy, Not Gay” is defamatory. *Id.*

The 7<sup>th</sup> Circuit believes that a “balance between the competing interests—free speech and ordered learning,” would put the school’s argument on “stronger ground.” Nuxoll argued that, based on the Supreme Court’s decisions in *Tinker*, *Fraser*, and *Morse*, the school district cannot ban his speech except where the speech would likely result in disorder or disturbance, be considered lewd, or advocate the use of illegal substances.

If the school children are very young or the speech is not of a kind that the First Amendment protects [citation omitted], the school has a pretty free hand. [Citations omitted] But it does not follow that because those features are missing from this case the school must prove that the speech it wants to suppress will cause “disorder or disturbance,” or that it “materially disrupts classwork or involves substantial disorder” or “would materially and substantially disrupt the work and discipline of the school.”

*Id.* at 673. When case law is viewed as a whole, a school is not required to prove that unless the speech at issue is forbidden, “serious consequences will *in fact* ensure. That could rarely be proved.” *Id.* School officials would need “to forecast substantial disruption” based on the intended student speech. *Id.* “Substantial disruption” is not necessarily restricted to potential violence. No violence was likely in *Fraser* (lewd speech) or *Morse* (banner advocating illegal drug use). In *Morse*, the Supreme Court was concerned in part with the “*psychological* effects of drugs.” *Id.* at 674, citing *Morse*, 127 S. Ct. At 2628-29.

Imagine the psychological effects if the plaintiff wore a T-shirt on which was written “blacks have lower IQs than whites” or “a woman’s place is in the home.”

*Id.*

From *Morse* and *Fraser* we infer that if there is reason to think that a particular type of student speech will lead to a decline in students’ test scores, an upsurge in truancy, or other symptoms of a sick school—symptoms therefore of substantial disruption—the school can forbid the speech. The rule challenged by the plaintiff appears to satisfy this test. It seeks to maintain a civilized school environment conducive to learning, and it does so in an even-handed way. It is not as if the school forbade only derogatory comments that refer, say, to religion, a prohibition that would signal a belief that being religious merits special protection. [Citations omitted.] The list of protected characteristics in the rule appears to cover the full spectrum of highly sensitive personal-identity characteristics. And the ban on derogatory words is general. Nuxoll can’t say “homosexuals are going to Hell” (though he can advocate heterosexuality on religious grounds), and it cannot be said back to him that “homophobes are closeted homosexuals.” The school’s rule bans “derogatory comments...that refer to race, ethnicity, religion, gender, sexual orientation, or disability.”

*Id.* This restriction “would not wash” if it were applied to adults. Adults can handle such remarks better than high school students, and “adult debates on social issues are more valuable than debates among children.” *Id.* A ban on “derogatory comments” would not be constitutional if applied to “any statement that could be construed by the very sensitive as critical of one of the protected group identities.” *Id.*

The balance can be a tricky matter. If the rule should be invalidated, “the school will be placed on a razor’s edge, where if it bans offensive comments, it is sued for violating free speech, and if it fails to protect students from offensive comments by other students, it is sued for violating laws against harassment[.]” *Id.* at 675. Nuxoll, then, is not entitled to a preliminary injunction against the school district’s rule. As the rule was applied to his wearing of the T-shirt with “Be Happy, Not Gay,” that would be a different matter.

“Derogatory comments” itself is a vague term. The expression “Be Happy, Not Gay” is itself a play on words.

One cannot even be certain that it is a “derogatory” comment; for “not gay” is a synonym for “straight,” yet the school has told us that it would not object to a T-shirt that said, “Be Happy, Be Straight.” It wouldn’t object because to advocate *X* is not necessarily to disparage *Y*. If you say “drink Pepsi” you may be showing your preference for Pepsi over Coke, but you are not necessarily deriding Coke. It would be odd to call “Be Happy, Drink Pepsi” a derogatory comment about Coke.

*Id.* Even though Nuxoll acknowledges “Be Happy, Not Gay” is, in his estimation, a “negative comment” about homosexuality, the 7<sup>th</sup> Circuit considered it “only tepidly negative,” certainly not “derogatory” or “demeaning.” Although a school the size of this high school (4,200 students) has had incidents of harassment of homosexual students, it would be “highly speculative” that such incidents would be provoked by Nuxoll wearing a T-shirt with this message or that the educational atmosphere would be poisoned. Such speculation is “too thin a reed on which to hang a prohibition of the exercise of a student’s free speech.” *Id.* at 676.

The district court’s decision was reversed. The district court was ordered to issue a preliminary injunction but only as applied to the wearing of a T-shirt that has “Be Happy, Not Gay” on it. However, the 7<sup>th</sup> Circuit noted that the plaintiff is unlikely to cease the litigation. “This is cause litigation,” the court noted. *Id.* The 7<sup>th</sup> Circuit provided the district court some direction for addressing the competing issues on remand.

The district judge will be required to strike a careful balance between the limited constitutional right of a high-school student to campaign inside the school against the sexual orientation of other students and the school’s interest in maintaining an atmosphere in which students are not distracted from their studies by wrenching debates over issues of personal identity.

*Id.* Judge Ilana Diamond Rovner agreed the matter should be remanded to the district court, and that Nuxoll should be allowed to wear the T-shirt with the aforementioned legend. However, she believes the matter is more easily resolved by referring to *Tinker*, “a case that the majority portrays in such a convoluted fashion that the discussion folds in on itself like a Möbius strip.” *Id.* A student should be able to express his opinion, under *Tinker*, where such speech would not materially and substantially interfere with the appropriate discipline in the operation of the school or collide with the rights of others. *Id.* at 676-77. Judge Rovner also took exception to what she viewed as a denigrating attitude toward student speech by Judge Posner.

Youth are often the vanguard of social change. Anyone who thinks otherwise has not been paying attention to the civil rights movement, the women’s rights movement, the anti-war protests for Vietnam and Iraq, and the recent presidential primaries where the youth voice and the youth vote are having a substantial impact. And now youth are leading a broad, societal change in attitude towards homosexuals, forming alliances among lesbian, gay, bisexual, transgendered (“LGBT”) and heterosexual students to discuss issues of importance related to sexual orientation. They have initiated a dialogue in which Nuxoll wishes to participate.... To treat them as children in need of protection from controversy, to blithely dismiss their views as less valuable than those of adults...is contrary to the values of the First Amendment.

*Id.* at 678 (Rovner, J., concurring). Judge Rovner also disagrees that “free speech” and “ordered learning” are “competing interests.”

The First Amendment provides the school with an opportunity for a discussion about the values of free speech and respect for differing points of view, but it does not grant a license to shut down dissension because of an “undifferentiated fear or apprehension of disturbance.”

*Id.* at 680 (Rovner, J., concurring), citing *Tinker*, 393 U.S. at 508.

The First Amendment as interpreted by *Tinker* is consistent with the school’s mission to teach by encouraging debate on controversial topics while also allowing the school to limit the debate when it becomes substantially disruptive. Nuxoll’s slogan-adorned T-shirt comes nowhere near that standard.

*Id.* (Rovner, J., concurring).

### **COURT JESTERS: MATTER OF GRAVE CONCERN**

Edgar Lee Masters, a Chicago attorney, grew up in Petersburg and Lewistown, Illinois. He made his literary name when, in 1915, he published *Spoon River Anthology*, a collection of 244 “epitaphs” written in free verse that served as monologues of the deceased in the mythical town of Spoon River, addressing all manner of human frailties and strengths. Unfortunately, the names of the characters Masters employed were, for the most part, the names on the tombstones of people buried in the Lewistown cemetery, which, it is said, did not endear him to some (living) members of the local populace. Masters is considered one of America’s great poets.

Jeffrey R. Purtell is not considered much of a poet at all, even though he is from Illinois, lives near Chicago, and is enamored with tombstone verse free from any stylistic or tasteful conventions.

Purtell and his wife Vicki own “an unsightly” recreational vehicle (RV) that is 38 feet long and 12 feet high. They used to store the RV in a rental-storage facility, but in 2001, having fallen upon hard times, they decided to park the behemoth on the driveway of their home in the Village of Bloomingdale, Illinois. Actually, they parked it *across* their driveway (and their lawn), as noted in the photograph provided by the U.S. 7<sup>th</sup> Circuit Court of Appeals.



The neighbors found the RV to be an eyesore. They were dismayed to learn there wasn't a village ordinance against such parking arrangements. Through a petition drive, the neighbors were successful in getting an ordinance passed that would prohibit the storage of RVs on residential property. The ordinance, however, would not take effect until late in November.

In mid-October with Halloween approaching (and the effective date for the ordinance), the Purtells erected six tombstones in what was left of their front yard (the RV was still parked there). “[T]he tombstones were not mere seasonal decorations; they carried a message for the neighbors who had pressed for the RV ordinance. Five of the six tombstones referred to a specific complaining neighbor followed by a short inscription describing the neighbor’s death.” *Purtell v. Mason*, 527 F.3d 615, 618 (7<sup>th</sup> Cir. 2008). The soon-to-be battleground looked like this:



One of the tombstones had a fictional character (“misty-eyed Crysty”). Purtell included her to “balance out” the display. The other five tombstones were directed at neighbors John Berka, Diane Lesner, Betty Garbarz, James Garbarz, and an otherwise unidentified neighbor who owned a crimping shop. The following “epitaphs” appeared on the tombstones<sup>31</sup>:

Old John Burkuh  
Said he didn't give a care  
So they buried him  
Alive up to his hair.  
He couldn't breath  
So now we're relieved  
Of that nasty old jerk!

Old Man Crimp was a  
Gimp who couldn't hear.  
Sliced his wife from ear to ear  
She died...He was fried.  
Now they're together  
again side by side!

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<sup>31</sup>Purtell used a mix of small case and capital letters, à la “Bong HiTS 4 Jesus,” the banner at issue in *Morse v. Frederick*, 127 S. Ct. 2618 (2007). Because this is annoying to read, proper capitalization will be employed. There is no saving the rhyming scheme or meter—or anything else for that matter. His poetic license should be revoked.

Here lies Jimmy,  
The old towne idiot.  
Mean as sin even without his gin.  
No longer does he wear  
that stupid old grin...  
Oh no, not where  
they've sent him!

Bette wasn't ready,  
But here she lies  
Ever since that night she died,  
12 feet deep in this trench...  
Still wasn't deep enough  
For that wench's stench!

Dyeam was known for lying  
So she was fried.  
Now underneath these daisies  
Is where she goes crazy!!  
Roses are red.  
Violets are blue.  
There's still some space  
Waiting for you!

*Id.* at 618-19. Strangely enough, the neighbors took offense at *this* as well. A “neighborhood feud” ensued. Several of the “dead” called the police department, complaining that they felt intimidated by Purtell’s tombstones and his “doggerel verse” (as the court described it). The police officers attempted (unsuccessfully) to get Purtell to remove his tombstones. He did agree, however, to cover the names with duct tape. For the time being, the RV remained in Purtell’s driveway and yard, and so did the tombstones.

“Halloween came and went, and still the tombstones remained,” Judge Diane S. Sykes<sup>32</sup> noted. By November 6<sup>th</sup>, the duct tape had fallen off. The “neighbor-combatants” resumed their feud. The police were called again. Bruce Mason was the “unlucky police officer dispatched to mediate the dispute.” The police spoke with the offended neighbors, and then went to speak with Purtell. He offered to reapply the duct tape, but Mason suggested he dismantle the display altogether. By now the neighbors wanted Purtell arrested. Bob Lesner (the husband of “Dyeam [who] was known for lying”) arrived on the scene and started arguing with Purtell. “Tempers flared, a shouting match erupted, and Lesner chest-butted Purtell.” *Id.* at 619. Mason separated the combatants and told Purtell to remove the tombstones. He refused and Mason handcuffed him. Rather than be arrested, Purtell agreed to end his display.<sup>33</sup>

This is, of course, not the end of the story. Purtell and his wife sued Mason, claiming violations of his First Amendment free-speech rights and his Fourth Amendment right against search and seizure without probable cause. The procedure at the district court level was somewhat convoluted and confused, but eventually Mason was not liable to the Purtells for any damages (or anything else, for that matter). Even though the 7<sup>th</sup> Circuit had now brought the Battle of Bloomingdale to its conclusion, the judges were not finished.

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<sup>32</sup>This decision would have had more of a Dickensian flavor had Judge Sykes been named “Bill Sykes” (also spelled Sikes), but she is neither a reprehensible London thug nor male.

<sup>33</sup>Purtell later complied with the new ordinance and removed his RV.

In closing, a few words in defense of a saner use of judicial resources. It is unfortunate that this petty neighborhood dispute found its way into federal court, invoking the machinery of a justice system that is admired around the world.... We take this opportunity to remind the bar that sound and responsible legal representation includes counseling as well as advocacy. The wiser course would have been to counsel the plaintiffs [the Purtells] against filing such a trivial lawsuit.... Not every constitutional grievance deserves an airing in court. Lawsuits like this one cast the legal profession in a bad light and contribute to the impression that Americans are an overlawyered and excessively litigious people.

*Id.* at 627. Although the denizens of Petersburg and Lewistown were reportedly displeased that Masters culled the names of former residents from the tombstones in the local necropolis to write his masterpiece, when he died in 1950, he was buried in the Lewistown cemetery. Perhaps the 7<sup>th</sup> Circuit's decision will encourage the Purtells and their neighbors to bury the hatchet...just not in each other's backs.

### QUOTABLE . . .

If you improve a teacher, you improve a school.

Federal District Court Judge William H. Orrick in *Ass'n of Mexican-American Educators, et al. v. California, et al.*, 937 F.Supp.1397, 1403 (N. D. Cal. 1996), quoting *Willie v. Commissioner*, 57 T.C. 383, 389 (1971).

### UPDATES

#### ***CONFEDERATE SYMBOLS AND SCHOOL POLICIES***

As noted in previous articles,<sup>34</sup> schools have wrestled with students displaying potential “hate” symbols such as the Confederate Battle Flag. In some cases, the students have indicated they were not condoning racial hatred but were displaying pride in their Southern heritage. Such speech is often within the “expressive conduct” or “symbolic speech” context, which requires that there be a particularized message the wearer intends to communicate coupled with a reasonable understanding that such a message is being conveyed by those who perceive it. Notwithstanding, under *Tinker*, where a substantial disruption or material interference has

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<sup>34</sup>See “Confederate Symbols and School Policies,” **Quarterly Report** January-March: 1999 and July-September: 1999 (Update).

occurred or is likely to occur, such “speech” may be curtailed by the public school in order to ensure a safe environment conducive to learning.

***B.W.A., et al. v. Farmington R-7 School District, et al.***, 508 F.Supp.2d 740 (E.D. Mo. 2007). The school district has had a recent history of unfortunate racial issues. One included a white student urinating on a black student while allegedly stating, “that is what black people deserve.” This incident is disturbing enough; it is even more so because the incident involved third and fourth grade students. There were a number of other racial incidents, including fights, taunting, and confrontations. One other public school district would not engage in any athletic contests with Farmington following a racial incident at a basketball game initiated by the taunting of Farmington students. Disparaging remarks about blacks were commonplace. The high school had 1,100 students of whom 15-20 were black.

The school district had a dress code that stated in relevant part: “Dress that materially disrupts the educational environment will be prohibited.” The dress code also indicated that examples would be provided so as to dispel any ambiguity regarding proscribed items of dress. Following a number of racial incidents, the superintendent informed district administrators that the Confederate flag would be prohibited by the dress code. Notwithstanding, B.W.A. wore a hat to school depicting the Confederate flag with the words “C.S.A., Rebel Pride, 1861.” He was told he could not wear the hat because the Confederate flag was considered a symbol of racism. He was allowed to keep his hat but it had to remain in his backpack while at school. His father complained to school officials, stating in part that “they have more rights than we do.”

The next day, B.W.A. wore a T-shirt and belt buckle containing the Confederate flag. He was required to remove the belt buckle and turn the T-shirt inside out. He refused to do so and was sent home. His mother withdrew him from school later that day. B.W.A. supporters then began a campaign of protest, displaying the Confederate flag outside the school. Racial slurs appeared on bathroom walls. Tension within the high school increased. Another student wore a T-shirt to school with the message, “The South was right[,] Our school is wrong,” with the Confederate flag. He was told to turn the shirt inside-out, but he refused and was suspended for the rest of the day. The next day, the student wore a shirt with the slogan “Our school supports freedom of speech for all (except Southerners).” He was told he could not wear the shirt. He refused to turn it inside out and was again dismissed from school. He later returned with a T-shirt that did not contravene the school dress code.

Lastly, S.B. wore a T-shirt to school containing the Confederate colors and a message in support of B.W.A., which included “Once a rebel, always and forever a rebel.” She was told to turn the T-shirt inside out. She refused and was suspended for the rest of the day.

The students sued the school district, asserting that they have a First Amendment right to wear the Confederate flag at school. The school district argued that the students had no right to wear the Confederate flag to school, especially where the school district had reason to believe that its display would cause a material and substantial disruption.

The Federal district court agreed with the school district that the ban on clothing bearing the Confederate flag was constitutional. In this case, the school district was able to point to past racial incidents, even though the incidents did not involve the Confederate flag. *Tinker* does not require a “direct causal connection between the expression and disruption.” 508 F.Supp.2d at 749, citing *D.B. ex rel. Brogdon v. Lafon*, 452 F.Supp.2d 813, 818 (E.D. Tenn. 2006). Courts have recognized that the Confederate flag “is racially divisive in nature.” *Id.*

Upon consideration, the Court finds that Defendants did not violate the First Amendment because they had reason to believe that students displaying the Confederate flag would cause a substantial and material disruption. [The Superintendent] testified that he believed the urination incident, the September 2005 fight, and the December 2005 fight were racially motivated. [Citations to record omitted] Furthermore, Defendants have provided two affidavits showing that the urination incident and the September 2005 fight were motivated by race. [Citations to record omitted] [The superintendent] also testified that the December 2005 fight led to an Office for Civil Rights investigation. [Citation to record omitted] The urination incident and the September 2005 fight prompted two black students to leave the district. [Citations to record omitted] [The superintendent] testified that the ... newspapers criticized the District for its handling of race relations. [Citation to record omitted] Moreover, there were various incidents at Farmington High where students used racial slurs and hate speech. [Citation to record omitted] Against this backdrop, the Court cannot conclude that Defendants banned the Confederate flag because of nothing more than an “undifferentiated fear or apprehension of disturbance.” *Tinker*, 393 U.S. at 508.

*Id.* The school district did not have to prove conclusively that these incidents were racially motivated.

*Tinker* only requires that school officials “had reason to anticipate” a material and substantial disruption. *Tinker*, 393 U.S. at 509. Additionally, Plaintiffs’ standard [that the school district must prove conclusively that the past incidents were racially motivated] would prevent a school from policing the attire of its students unless it can conclusively show that an incident occurred and all parties admit that it was race-related. *Tinker* does not mandate such a surrender of control of the “public school system to the public school students.” *See Tinker*, 393 U.S. at 526 (Hugo Black, J., dissenting).

*Id.* at 750. School personnel did not violate the students’ First Amendment rights when they prevented them from wearing clothing depicting the Confederate flag. The court dismissed the students’ complaint.

## ***BIBLE DISTRIBUTION***

Gideons International is well known for its campaign to distribute Bibles worldwide. Part of this campaign includes distribution of Bibles to fifth-grade students. This endeavor has met with considerable litigation, including here in Indiana. In ***Berger v. Renesselaer Central School Corporation***, 982 F.2d 1160 (7<sup>th</sup> Cir. 1993), *cert. den.* 508 U.S. 911, 113 S. Ct. 2344 (1993), the 7<sup>th</sup> Circuit Court of Appeals found an Indiana public school corporation violated the Establishment Clause of the First Amendment when it required its fifth-grade students to attend an assembly where, following a presentation by the Gideons, each student was presented with a copy of the Gideon Bible.<sup>35</sup> There have been two other Circuit Courts of Appeal that have addressed the same issue (and reached the same conclusion). See, for example, *Meltzer v. Board of Public Instruction*, 548 F.2d 559 (5<sup>th</sup> Cir. 1977) and *Doe v. South Iron R-1 School District*, 498 F.3d 878 (8<sup>th</sup> Cir. 2007). Federal district courts and state courts have also found the practice unconstitutional. See *Chandler v. James*, 985 F.Supp. 1094 (N.D. Ala. 1997); *Goodwin v. Cross County School Dist. No. 7*, 394 F.Supp. 417 (E.D. Ark. 1973); *Tudor v. Board of Education*, 100 A.2d 857 (N.J. 1953); and *Brown v. Orange County Board of Public Instruction*, 128 So.2d 181 (Fla. App. 1960).

Even with so many federal and state courts finding the practice unconstitutional, disputes in this area continue.

***Roe v. Tangipahoa Parish School Board, et al.***, 2008 U.S. Dist. LEXIS 32793 (E.D. La. 2008) is the latest reported case. As in many of the other cases, this dispute arose out of the distribution of Gideon Bibles to fifth-grade students at the public elementary school. Unlike *Berger, supra*, the Gideons were not going to distribute their Bibles in an assembly. The principal notified the teachers the Gideons would be distributing Bibles all day from a location outside the principal's office. Students who wanted a Bible could have one. The principal's e-mail message to the teachers also stated: "Please stress to students that they DO NOT have to get a bible." When it was time for "Jane Roe's" class to get their Bibles, the students were instructed by their teacher that if they did not want a Bible, they should remain with the sixth-grade class. Roe asserted that she felt pressured to get a Bible because of potential name-calling and teasing by her peers if she did not do so. *Id.* at \*3-4. The lawsuit followed, asserting the Bible-distribution scheme violated the Establishment Clause of the First Amendment.<sup>36</sup>

The school board argued that the Bible-distribution scheme in the public school did not include an element of coercion as was present in *Berger* and as addressed by the U.S. Supreme Court in *Lee v. Weisman*, 505 U.S. 577, 587, 112 S. Ct. 2649 (1992) (finding formal prayer at a middle school graduation ceremony to be an obligatory participation in a religious exercise in violation of the

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<sup>35</sup>See "Bible Distribution," **Quarterly Report** January-March: 1995. Please consult the Cumulative Index for Updates to this topic.

<sup>36</sup>"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Establishment Clause, adding that “at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercises”). *Id.* at \*5-7.

Roe disagreed, stating that she accepted the Bible because of her concerns that her classmates would pick on her. “She feared they would call her ‘devil worshipper,’ and that ‘she don’t [sic] believe in God,’ and that she is a ‘Goth.’” *Id.* at \*7.

The Federal district court noted that this case can be distinguished from *Berger* based upon the evident coercion in that case (children were required to sit through a presentation by the Gideons). *Id.* at \*7-8. In another Louisiana case, the principal had the students lined up whereupon they were escorted into his office where each was presented with a copy of the Bible. One child attempted to decline the offer but was told “just take it.” *Jabr v. Rapides Parish Sch. Bd.*, 171 F.Supp.2d 653 (W.D. La. 2001). “This amounts to active participation and coercion by the principal which is not present in the instant case. In fact, Jane Roe was given the option to not even go with her class to get the Bible.” *Id.* at \*7, \*8.

*Peck v. Upshur County Board of Education*, 155 F.3d 274 (4<sup>th</sup> Cir. 1988) has some elements similar to this dispute. In *Peck*, a table was set up outside a high school classroom one day a year where religious and non-religious material was placed. No one attended the table. High school students could, if they chose, review the material and take (or leave) anything they wished. There was also a disclaimer present, indicating no endorsement by the school of any material on the table. No Establishment Clause violation was found in this case because the offer of a Bible (one of the materials available) was passive, the students involved were secondary students, and the table appeared once a year pursuant to the school’s policy of allowing private religious and non-religious speeches in its public schools. 155 F.3d at 288.

The *Roe* case, the court noted, does not fit squarely within any of these three situations. Although *Peck* seems to be a closer fit, “[t]he court specifically stated that as to elementary school students, the practice would be unconstitutional because of the heightened concerns regarding coercion.” 2008 U.S. Dist. LEXIS 32793 at \*10. The *Peck* court held:

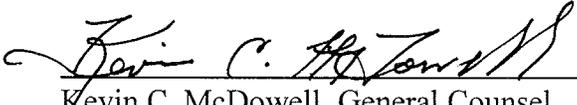
In elementary schools, the concerns animating the coercion principle are at their strongest because of the impressionability of young elementary-age children. Moreover, because children of these ages may be unable to fully recognize and appreciate the difference between government and private speech...the [School Board’s] policy could more easily be (mis)perceived as endorsement rather than as neutrality.

*Peck*, 155 F.3d at 288. See also *Jabr v. Rapides Parish School Bd.*, 171 F.Supp.2d 653 (the courts have expressed a great deal of concern for “the impressionability of students in elementary [schools]...and the pressure they feel from teachers, administrators, and peers.).

The court in *Roe* found *Peck* persuasive on this point, finding that the Bible-distribution scheme did violate the Establishment Clause.

Jane Roe was, in fact, subjected to an unconstitutional element of coercion as she, an impressionable young elementary-age child, experienced pressure to support or participate in religion or its exercise, or otherwise act in a way which establishes religion.

2008 U.S. Dist. LEXIS 32793 at \*11. The court also found the practice violated the three-prong test derived from *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971): there was no secular purpose for the distribution scheme, there is an indication of preference by school officials for the Gideons and their religious ideals, and the requirement that teachers organize students and direct them to the principal's office excessively entangled government with religion. *Id.* at \*11, \*12. Lastly, the court found the practice would also violate the "endorsement" test distilled from *County of Allegheny v. ACLU*, 492 U.S. 573, 109 S. Ct. 3086 (1989). *Id.* at \*11-12.

Date: September 3, 2008   
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