

# Educational Issues and School Law

## Editor's Notes

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School law seeks to improve the professional skills of American educators by helping them learn about the law, legal processes, and the workings of the legal system. The intent of school law is not to make teachers or administrators into amateur lawyers, but rather to help prepare them to avoid potential litigation by giving them a better understanding of the role of school law as educational issues unfold. Since law-related education has different goals and content from professional legal education, it follows that those who teach in law-related programs have not historically been lawyers. More recently, however, an increasing number of those who teach school law have obtained law degrees, which often adds keen insights into the learning process, a familiarity with the total curriculum, as well as a deeper understanding of schooling issues.

Teachers are, of course, the ones who carry the instructional burden which is why it is important to provide them with tools they'll need—such as an accurate knowledge of important points of law and legal process. They need to be advised of the many pedagogical understandings and techniques that are particularly suitable for law-related education enabling them to gain confidence for using this knowledge in their own schools. And, finally, as educators become increasingly familiar with law-related materials, they will learn to use a wider variety of community resources when working with their students.

This first of two issues of *Thresholds in Education* directly related to educational issues and school law does not suggest a detailed, step-by-step process for handling educational issues from a legal standpoint. Instead, it does tell the reader some aspects of law that educators need to know, and it seeks to give its readers some idea of the range of teacher education possibilities in this field. The articles in this issue give practical tips on many aspects of education—including the importance for teachers to share a common understanding of law-related education.

In the article, "Following the Americans with

Disabilities Act into the New Millennium: Employment Compliance for Educators," Albert Miles and Xin Fu have taken a hard look at the 1990 Americans with Disabilities Act (ADA) and the new EEOC "Guidance on Reasonable Accommodations and Undue Hardship" under the Americans with Disabilities Act of 1999. This review of the requirements of ADA and important cases speaking to these requirements which are concerned with job descriptions, interviewing, and evaluations gives excellent insights into serious legal liabilities inherent in such areas.

George Willis' discussion of "Legal Roots of School Choice" looks at compulsory education through the more recent school vouchers and charter schools. He takes a critical look at whether free choice of schools has or hasn't become the "magic bullet" for allowing students to attend private institutions at the expense of our state and local governments.

Robert Morris' article, "Revisiting *Brown v. Board of Education of Topeka, Kansas: A Better Focus on Cultural Diversity*" points out how today's administrators need to be extremely sensitive to the varied backgrounds of their students. His investigation into pluralism, diversity, and how to design instruction for multicultural students is a reminder of how our schools are ever shaped by a changing population.

Next is a valuable study titled "Perceptions of Home-School Regulations by Home-School Parents and Public School Superintendents." Authors Pamela Riegle and Joseph McKinney explore the perspectives of public school superintendents and parents of home schoolers in Indiana. Specifically, the study looks at current Indiana curricular and instructional regulations imposed on the home-schooled children in Indiana.

Richard Murray's study, "Tinkering with Student Dress: A Review of School Uniform Law," critiques a number of the reasons why dress codes and school uniforms remain "hot" topics in education. Besides looking at research on the effects of school uniforms, Murray covers the legal implications and motivational limitations.

The final article, written by David Dagley, is entitled "T-Shirt Speech" and looks at the various ways that courts deal with speech issues—particularly speech that is printed on school children's t-shirts. A small group of court cases dealing with slogans printed on t-shirts during the 1990s is analyzed to better understand the current authority of school officials in

controlling student speech.

Each of these articles has a particular perspective and a particular outcome in mind. That could, of course, be a limiting factor, but it isn't—given the strength of these articles and the understandings they attempt to develop as they deal with the larger legal issues.

Coming  
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Thresholds in Education  
**SPECIAL ISSUE:**

**Educational Issues & School Law II**

Robert C. Morris, Editor

- Student-on-Student Violence:  
School District Liability Under Federal Law
- Educational Solutions to School Violence
- Peer to Peer Sexual Harassment
- Free Speech and the Internet:  
Protecting Both Children and Individual Rights  
Students' Fourth Amendment Rights & School Officials'
- Responsibilities: Implications For Law & Practice



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# Following the Americans With Disabilities Act Into the New Millennium: Employment Compliance for Educators

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Paying serious attention to the hiring, retention and accommodation of teachers, administrators, and staff with disabilities is a new idea to some. It will take on more importance as diversity is respected in the new century. Today, after nearly a decade since the passage of the Americans with Disabilities Act of 1990 (ADA), many educators still have little or no structures in place to follow the ADA in the areas of job descriptions, interviewing, hiring, job evaluation, and providing for reasonable accommodations to applicants or employees with disabilities.

In addition to the serious legal liabilities inherent in such inaction, there are real human costs to applicants and employees with disabilities who stand to benefit and contribute excellent work to our educational institutions. This article will first review the requirements of the ADA and some cases which speak to these requirements. Next, the article will refer to the U.S. Equal Employment Opportunity Commission (EEOC) Guidelines (1995) on the pre-offer interview and proposal of a plan for educators to implement the ADA in job descriptions, interviewing, and evaluations. Finally, there will be a discussion of the new EEOC Guidance on Reasonable Accommodations and Undue Hardship under the ADA (1999). The consideration and implementation of a positive ADA model concerning employment and reasonable accommodation issues will be of assistance to administrators as they prepare to

succeed in the next millennium. It seems clear that diversity and inclusion of all the diverse parts of our culture into all employment will be an important theme in the next century, and the inclusion of qualified teachers and employees with disabilities in education-related jobs will increase in importance.

The Americans With Disabilities Act, known as Public Law No. 101-336, was signed into law by President Bush on July 13, 1990, to redress the inequi-

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ties still facing Americans with disabilities. Section 504 of the Rehabilitation Act of 1973 had done much but, seventeen years after its passage, many of the forty-three million Americans with one or more physical or mental disabilities had little or no recourse in seeking an end to discrimination in areas such as education, employment, housing, and access to public services until the ADA became law. The ADA was hailed as the most sweeping anti-discrimination legislation since the Civil Rights Act of 1964. Its penalties were designed to get attention and include set damages under Title VII of Civil Rights Act (1964) and a jury trial, the use of state remedies, an

internal grievance procedure at the workplace, a completed complaint to a federal agency requesting an inquiry, and no allowance for a state to use the defense of sovereign immunity. No exhaustion of administrative remedies is required by the ADA, so all of the above suits, grievances and complaints could be done simultaneously.

Good faith is a defense under the ADA, and the

employer may decide, with the burden of showing why, what the essential functions of a job are and which accommodations would be reasonable. The ADA affects many areas, but this article will focus on Title I of the ADA, which is employment. It has proven to be a well-used part of the ADA. Both public and private schools are affected by the ADA.

The ADA requires that a person with a disability, who makes that disability known, be considered qualified for a job if he or she can do the essential functions of the job with or without reasonable accommodations. Thus, the first step in following the ADA in employment, after the ADA Coordinator is in place, is to define the essential functions and put them in each job description. This can best be done by the person currently in the job and his or her supervisor. If there has been no update of job descriptions to include essential functions, there often can be no legal defense against a charge of violation of the ADA. Notice of the right of employees and applicants to use the ADA must be given prominently. Written essential functions for each job enable both employer and employee to use the ADA in the most fruitful way (Guidance, 1999).

## Cases

Once the essential functions are published and in use, they should be used in advertising, interviewing, promotions, and terminations. Reasonable accommodations will be considered in the light of enabling a person to do the essential functions. Recent cases which have considered the ADA illuminate some of the above ideas.

Public schools and colleges are covered by Title II of the ADA which is Public Entities, yet they still must follow the employment rules of Title I, and with less administrative requirement in the plaintiff bringing litigation, as seen below.

In *Wagner v. Texas A & M University* (1996), a professor alleged employment discrimination in violation of the Americans With Disabilities Act (ADA, 1990). The court held that when filing a Title II claim under the ADA, there is no requirement that the plaintiff file administrative complaint or otherwise follow the procedural requirements of Title I.

The ADA covers both public and private schools, and is being litigated in the courts regarding private and public schools.

In *McGrenaghan v. St. Denis School* (1997), a teacher with a disabled child claimed violations of the

Americans With Disabilities Act (ADA, 1990). The court held that a genuine issue of material fact existed as to whether the teacher's job transfer was an adverse job action, and this precluded summary judgment on her ADA claim. When courts find a willing violation of the ADA by a school or college, substantial damages may be awarded, including set federal damages, plus any effective state claims.

In *Meling v. St. Francis College* (1998), a terminated physical education professor alleged that her termination was because of a perceived disability in violation of the Americans with Disabilities Act (ADA, 1990). Following a jury trial, the trial court awarded the professor \$225,000 in compensatory damages and \$150,000 in punitive damages and ordered her reinstatement. The court held that the evidence was sufficient to compel a rational jury to conclude that the professor was disabled within the meaning of the ADA; evidence clearly established that the college acted with reckless indifference to the professor's rights under the ADA which justified an award of punitive damages.

If a teacher or other employee is not qualified under the ADA definition of being able to do the essential functions of the job with or without reasonable accommodations, then that person cannot use the ADA to bring litigation against his or her employer, as seen in the case below.

In *Motzkin v. Trustees of Boston University* (1996), a former associate professor alleged disability discrimination. The court held that the professor was incapable, with or without accommodation, of performing the essential functions of his job and, therefore, was not a qualified individual with a disability under the Americans with Disabilities Act (ADA, 1990).

It is clear that correct employment actions in regard to the ADA are important in the light of the fact that courts today are enforcing the ADA with educational employers. Two employment areas in which the Equal Employment Opportunity Commission (EEOC) is assisting all involved in understanding and implementing the ADA in employment are the EEOC Guidelines (1995) regarding interviewing, issued in November, 1995, and the new EEOC Guidance on Reasonable Accommodation and Undue Hardship (1999) which was published in March, 1999. Both of these are briefly mentioned below. Still, it is important to get the full text of each and understand all of this material.

## **The Interview**

The timing and nature of the job interview changed with the implementation of the ADA. It is crucial that all persons involved in the interview process, including site-based management committees, teachers, staff, and secretaries be familiar with the changes, as addressed in the EEOC Final Guidelines on Pre-Employment Disability-Related Questions (1995) issued in November, 1995.

The timing of interviews now starts with the pre-offer interview which is based only on questions about the essential functions of the job and job-related tests, if the tests are given to all applicants in a job category. Here, it is important not to discuss any disability-related questions nor to conduct medical examinations before a conditional job offer is made. Questions should be similar for all applicants. The questions may be prepared in advance of the interview and should reflect the same essential functions listed in the job description of the respective position. If, in the pre-offer interview, the employer becomes aware, either by constructive or inquiry knowledge of an applicant's job-related disability, the employer may ask what kind of accommodation the job applicant needs but may not discuss any physical or mental disability or non-job-related accommodations with the applicant until after the conditional job offer when a job-related medical exam for all applicants to a certain job is given. In the pre-offer interview, an employer cannot ask applicants how many days they have been sick, if they can perform major life activities that are not job-related, or other things noted in the EEOC Guidelines (Guidelines, 1995).

In the pre-offer interview, an employer can ask about an applicant's ability to perform specific job functions with or without reasonable accommodations, about an applicant's non-medical qualifications and skills (re: education, work history, licenses), to describe or demonstrate how the applicants would perform the essential job functions (if this is asked of all applicants in the same job category), whether an applicant can meet the attendance standards, and other things listed in the EEOC Guidelines. After the pre-offer interview, a conditional job offer can be made.

The ADA began the idea of a conditional job offer. It should be made clear that this is not a final job offer. This is an offer conditioned on the applicant taking a medical exam related to the essential functions, if such is required of all applicants for a certain job, and on worker's compensation and other questions, if appli-

cable. The conditional job offer may be followed by the medical examination and the post-offer interview.

The post-offer interview can be held after the conditional job offer, as part of, or after the medical examination. Here, an employer may ask disability-related questions relevant to the essential functions. Also, post-offer questions may be asked about one's worker's compensation history, prior sick leave usage, and whether an applicant needs reasonable accommodations to perform the essential functions. An employer should get a signed release of medical records from the applicant before reviewing or discussing his or her medical history. All ADA medical records must be kept confidential and apart from the personnel files.

After the post-offer medical examination, worker's compensation documentation, prior sick leave and reasonable accommodation questions and answers are finished, a final offer may be made. If not, the conditional offer may be withdrawn.

In all of the interview process as noted above, only the right questions must be asked, using the right timing. Federal EEOC Guidelines (1995) exist to help employers train, inform widely on lawful interview methods, and to make applicants aware of their rights in interviews.

## **Reasonable Accommodations**

The ADA states in Title I that a person with a known disability is qualified if he or she can do the essential functions of a job with or without reasonable accommodations. Current employees who become disabled, as well as job applicants, can request reasonable accommodations to do the essential functions of a job under the ADA. An employer's defense to not granting an accommodation is that it would be an "undue hardship," which means it would be too difficult, too costly, or it would fundamentally alter the job (Guidance, 1999).

In March, 1999, the EEOC published the Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans With Disabilities Act (1999). As with the EEOC Guidelines (1995) mentioned above relative to interviewing, this article will present just an overview, and it is important for people involved in interviewing or reasonable accommodations to get the full texts and read them carefully.

It is a good idea for the ADA coordinator to name an ADA committee or task force to meet regularly, in confidence, to consider ADA policies and requests for

reasonable accommodations. Documentation of all reasonable accommodation requests and their outcome should be kept.

The EEOC Guidance (1999) states that reasonable accommodations should be considered in three categories: (a) adjustments to a job application process, which should be considered even if it seems unlikely that the applicant will secure the position if he or she meets the pre-selection requirements of education, etc.; (b) adjustments to the work environment or to the manner or circumstances under which the position held is customarily performed; and (c) modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment, such as attendance at a retirement party.

An employee who cannot do the essential functions of the job with or without reasonable accommodations is not qualified under the ADA. An employer does not have to eliminate an essential function or lower a production standard to provide reasonable accommodations, but may do so if they wish (Guidance, 1999).

Undue hardship refers to financial difficulty as well as accommodations that are disruptive or would fundamentally alter the nature of the educational operation. An employer must consider each reasonable accommodation request on a case-by-case basis with allowance for the request to be informal (a statement that a function cannot be done because of a medical reason) and for informal interaction with the person requesting accommodations. Suggestions for accommodations should be solicited from the person requesting accommodations, his or her doctor, as well as external and internal sources. Only after such interactions should the defense of undue hardship be considered. If undue hardship is determined in a case, the person requesting accommodations should be told why there seems to be undue hardship and be allowed to respond.

An employee can request reasonable accommodations at any time during the application process or during the period of employment. The employer may ask for reasonable documentation of the disability when an individual requests reasonable documentation and signs a release of medical information form. Only medical information about the disability that is job related should be requested when the disability and need for accommodation is not obvious or the employee has already given the employer sufficient information. Documentation should specify the existence of an ADA disability (without which there is no ADA

coverage) and explain the need for reasonable accommodations.

The employer may choose among reasonable accommodations as long as the chosen accommodation is effective. An employee has a right to refuse an effective accommodation, but may thus not be able to do the essential functions and remain in the job (Guidance, 1999).

An employer cannot deny reassignment to an open position as a reasonable accommodation to a probationary employee, as long as the employee adequately performed the essential functions before the need for accommodations arose. Otherwise, the person would not be qualified.

An employer may not tell other employees that an individual is receiving reasonable accommodations. Before undue hardship is determined, all possible sources of outside funding should be considered before considering the accommodation too costly.

The above ideas are only some of those presented in the 46 questions and answers and text of the EEOC Guidance (Guidance, 1999), including the Instructions for Investigators. It is clear and helpful and should be read entirely for understanding.

## **Conclusion and Suggestions**

The proper use of the ADA and the EEOC Guidelines (1995) and Guidance (1999) in applications and employment will assist educational employers to help people while following the law. This is not legal advice and all ADA training and ADA related actions, such as those of an ADA Task Force, should be approved by an attorney. Suggested steps in following the ADA in employment are:

1. Name ADA Coordinator and, also, ADA Task Force or Committee, if desired.
2. Write and communicate the essential functions of each position.
3. Train all job interviewers and all those who will meet applicants, such as secretaries, in the right content and timing of questions, and let no one participate in a job interview until and unless he or she is familiar with the appropriate EEOC Guidelines and has gone through interview training.
4. Make certain that all job applicants and current employees know about and have access to the EEOC Guidance on Reasonable Accommodation and Undue Hardship (1999) and school and college ADA policy, including the steps in requesting and

- discussing possible, reasonable accommodations.
5. Give wide notice of all ADA rights for job applicants and current employees including the name and location of the ADA Coordinator.
  6. Make certain that all parts of the ADA are being complied with—including facilities and auxiliary services.
  7. Keep an ADA file. Be sure to keep medical records separate from personnel and other records.
  8. Write an ADA self-evaluation plan and an ADA Grievance policy and procedure using input from students, faculty, staff, parents and the public with disabilities.

By following the above suggestions and working closely with an attorney to add or subtract suggestions and adapt all thinking to the facts of a particular situation, and by watching for any impact the possible, upcoming decisions of the U.S. Supreme Court may have regarding the ADA, educational administrators can bring in and keep more employees with disabilities

and thus improve their ability to serve a more diverse population in the next millennium.

#### References

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- Civil Rights Act, 42 U.S.C. Section 2000(e) *et seq.* (1964).
- Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act [online]. (1999). Washington D. C.: The U.S. Equal Employment Opportunity Commission. Available: <http://www.eeoc.gov/docs/accommodation.html>
- Final Guidelines on Pre-employment Disability-related Questions and Medical Examinations. (1995). Washington D. C.: The U.S. Equal Employment Opportunity Commission.
- McGrenaghan v. St. Denis School*, 979 F. Supp. 323 (1997).
- Meling v. St. Francis College*, 3 f. Supp. 2d 267 (1998).
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- Rehabilitation Act, 29 U.S.C. 794 (1973).
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# Legal Foundations of School Choice

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**T**he most divisive of the educational issues of today—from charter schools, privatization, vouchers, and tuition tax credits to national goals and standards and a national curriculum—all have some kind of legal basis that has evolved over a period of time. Yet these issues, stripped from their historical context, as they usually are within public debate and within the popular media, are often treated as if in a legal vacuum. The result is more heat than light and more hard feelings than enlightenment. The bitter defense of extreme—and sometimes illegal—positions prevents constructive compromise. Few Americans seem to know that the United States Constitution indirectly but clearly places legal control of schools in the hands of the individual states. A taxpayer may declare, “I have no children, so why should my taxes be used to support schools from which I receive no

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***Most private schools are also religious schools and wish to maintain their distinct religious views and values.***

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benefit?” never realizing that the legal basis for public support for schools was well established by a series of court decisions in the 1870s, let alone considering how educating all citizens benefits everyone, not just those children in schools at the present moment. Indeed, as more and more states passed compulsory school attendance laws in the latter half of the nineteenth century, the principle that education was no longer voluntary created the obligation of those states to provide free public schools.

Even though many of the current national debates about education take place under the banners of equity or choice, the most controversial issues they entail center on the legal right of private schools to exist along with public schools and on the degree of regulation and/or support private schools may expect from state

governments. For instance, many Americans now believe that the best way to improve education generally, and thus to ensure that no children are handicapped by learning less than others, is through the widespread use of vouchers, certificates provided to parents by state or local governments to pay for the education of their children at the schools—public or private—of the parents’ own choosing. In this view, choice of schools becomes the magic bullet that will cure all our national educational maladies. If all parents are given the financial wherewithal to opt their children out of bad schools, then bad schools will wither away, good schools will flourish, and everyone will learn more. However naive this view may be, it is based on the assumptions that there are real choices to be made between different (usually public and private) schools and that these choices should be supported with public funds. Let us consider some of the salient United States Supreme Court decisions that provide the legal roots for today’s debates on such issues.

As accustomed as Americans now are to the existence in the United States of both public and private schools, the legal status of both kinds of school remained unclear at the beginning of the nineteenth century. In fact, the national educational system could have evolved much differently than it did into one in which education was entirely compulsory and public or into one in which education was entirely voluntary and private. The Supreme Court dealt with the legal right of private schools to exist in *Trustees of Dartmouth College v. Woodward* (1819), its first case on education. Prior to American independence from Great Britain, Dartmouth College had been legally chartered as a private institution. Yet, in 1816, the legislature of the State of New Hampshire passed a law which turned Dartmouth into a public institution. When the resulting case reached the Supreme Court three years later, the Court ruled in favor of the appeal of the Dartmouth trustees on the grounds that the United States Constitution prevents states from “impairing the obligation of contracts”; that is, a contract, once legally entered into, remains legal permanently regardless of

the subsequent passage of any law. Since Dartmouth's charter was in effect a legal contract, the Court ruled that New Hampshire violated the Constitution; and the Court, in so doing, laid the legal basis for the existence of private schools.

While the Dartmouth decision established and protected the right of private schools to exist, it did not prevent states from regulating both public and private schools. Early in the nineteenth century, the issue of regulating schools seemed unimportant to most Americans, but by the end of the century, with the principle of compulsory school attendance firmly in place in most states, the issue was taking on increasing urgency. If all children were required to attend school, what should happen to them there? What were they entitled to? In 1868, the United States had ratified the Fourteenth Amendment to the Constitution, which read in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

These golden phrases (especially what became known as the "due process" and "equal protection" clauses) required interpretation. How exactly did they apply to the actions of states in providing schools to all children, especially private schools, which in one way seemed to be carrying out a state function in educating children but which, in another way, seemed to have been left free from state regulation.

In the second decade of the twentieth century, two cases clarified these issues—though not completely. The first arose in Nebraska. In 1919, the Nebraska legislature passed a law that required the medium of instruction in all Nebraska schools to be the English language and permitted the teaching of other languages only as foreign languages and only to students who had completed the eighth grade. The law had been passed in response to the public furor in Nebraska against Germany due to the participation of the United States in World War I. The furor was intensified because many small towns in Nebraska had been settled almost exclusively by German-speaking immigrants, and such towns were filled with private schools in which the medium of instruction was German—the language students spoke at home. Such schools became objects

of suspicion. How far could Nebraska go in regulating them?

In the resulting case, *Meyer v. Nebraska* (1923), the Supreme Court ruled the Nebraska law unconstitutional on the grounds that in light of the due process clause of the Fourteenth Amendment, a teacher in a German-speaking school had been unfairly prevented from following his chosen occupation and that parents may reasonably choose such a school to send their children in compliance with compulsory attendance laws. Here the Court was laying down a standard of reasonableness, affirming that states may make reasonable regulations that apply to both public and private schools but that parents may make reasonable choices of their own about the education of their children. The balance between the state's right to regulate and the parent's right to choose is still an issue today. Indeed, how the Court's general principles and rulings apply to new or changing circumstances is always evolving. Another important result that derived from *Meyer v. Nebraska* was that states may reasonably require private schools to teach basic academic subjects such as reading, mathematics, and American history; but states may not prevent private schools from teaching whatever additional subjects they wish. This principle permits private schools to teach religion, something which the First Amendment principle of separation of church and state prevents public schools from doing.

An even more pointed law passed by the state of Oregon in 1922 resulted in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary* (1925). The Oregon law required all children of school age to attend public school—a perhaps ingenious but otherwise transparent attempt to regulate private schools out of existence by depriving them of students. In ruling this law unconstitutional, the Court held that private schools themselves were valuable property that could not be destroyed indirectly in this way and that, as it had ruled in the *Meyer* Case, parents retain the right to send their children to private schools.

The legal basis that the three foregoing decisions collectively establish can be summarized as follows: Private schools may exist, parents may choose to send their children to them, the state may reasonably regulate them (especially in requiring them to teach basic academic subjects), but the state may not prevent them from pursuing additional educational activities that are otherwise legal. Of course, the limits and the specifics of what is permitted by the principle of reasonableness

will continue to be worked out, and new cases that further define the balance struck by these three cases will almost certainly emerge.

These three cases, however, represent only one side of today's issues concerning state regulation and parental choice. Since these cases clearly establish the legal basis for a dual (public and private) system of education, we can ask, "Should not private schools receive public support, since private schools carry out a public function in educating children under the law?" Thus, we need also to consider the legal basis for the use of public funds in private schools.

Prior to 1930, the answer to the question of public support for private schools was unequivocally "No." The national compromise that had evolved over a long period of time was that the United States would have a dual system of education, but that public schools would be paid for by public funds and private schools would be paid for by private funds. However, the *Cochran v.*

Supreme Court answered this question negatively. Their reasoning was that the only beneficiaries of the textbooks purchased for use in the private schools were the school children themselves, not the private institutions. This reasoning became known as the "child benefit theory"—that is, public money may be used in private schools for any purpose that benefits individual children but not for any purpose that benefits the private institution as an institution.

Although the child benefit theory seemed straightforward, it opened the door to the sometimes acrimonious debate (and sometimes tortured reasoning) about where the line lies between these two types of benefits and about what falls on either side. Initially, only textbooks were seen as benefiting the child; but in *Everson v. Board of Education* (1947), transportation of children at public expense to and from private schools became a second item on the child benefit list. This was a particularly controversial decision because it

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*Louisiana State Board of Education* (1930) decision drastically altered that compromise. In 1928, the state of Louisiana had passed a law which provided free textbooks for all students in the state. Under that law, public money would be used to buy textbooks for use in both public and private schools. The law clearly stated that the textbooks purchased for the private schools were to be the same books used in the same basic academic courses as in the public schools. In other words, although a large proportion of the Louisiana population was Roman Catholic and many Louisiana children attended Roman Catholic parochial schools, the law was intended to maintain the First Amendment principle of separation of church and state because the public money used within private schools would be used for precisely the same purposes as public money used within public schools. Nonetheless, the Fourteenth Amendment still loomed large. Were citizens' rights to due process and equal protection being violated by using their public tax money in support of private institutions?

In upholding the Louisiana law in *Cochran*, the

seemed in some ways to run contrary to the decision in *Pierce v. Society of Sisters*, which had prevented the state from depriving private schools of students. In contrast, *Everson v. Board of Education* required public officials to aid private schools in gaining students, something that many people thought benefited the private school itself. Furthermore, implementing public transportation of children to private schools has proved for better than a half century to be a major headache for everyone involved, whether they had believed in the child benefit theory or not. Problems go far beyond just drawing up workable bus schedules within a school district. To this day, many states and localities are still working out what rules and guidelines should be followed concerning such questions as: How far away from home may any private school student be transported at public expense? Must private school students be transported across school district boundaries? What private schools are eligible and ineligible to have students transported to them?

In 1948, the School Lunch Act provided federal funds to parochial schools, effectively adding food as

the third item on the child benefit list; and for half a century, textbooks, transportation, and food have remained relatively unchallenged as the principal items the child benefit theory covers. However, in more recent years, various kinds of medical services and psychological and academic testing required by states have also been added to the list, although not without considerable controversy about which side of the line each of these actually falls.

Although *Cochran v. Louisiana State Board of Education* opened the nation to debate that would extend the child benefit theory to more and more items, until the last decade or two, most private school educators—with some exceptions—have not seemed particularly interested in attempting to push the theory to its extreme by arguing that private schooling itself benefits the child and should therefore be paid fully with public funds. The due process clause alone would seem to rule out any possibility of making this argument stick. Indeed, private school educators have yet to press this extreme line of reasoning all the way to a definitive Supreme Court ruling. There seem to be two reasons why we still lack such a definitive ruling.

The first reason is that private school educators historically have feared they will almost certainly lose such a case. The child benefit theory has two sides to it, and one is that there are, in fact, uses of public funds in private schools that benefit those schools and thus those uses are unconstitutional. There is little reason to believe that general or unspecified public financial support of a private school—providing funds that could be used for teachers' salaries or maintenance of the physical plant—could pass this constitutional test. Therefore, many private school educators have reasoned, why press for an Armageddon we cannot win? The result might be that some items now on the child benefit list could be removed. Why run the risk of losing some of what we now have when there is little prospect of making any gains?

The second reason is that private school educators historically have feared that they will win. This seems paradoxical but is easy to explain. The *Dartmouth*,

*Meyer*, and *Pierce* cases have affirmed the right of the private school to exist and to have students, but they have also affirmed the right of the state to reasonably regulate all schools within its boundaries. Private schools, however, are subject to lesser degrees of regulation than public schools, and due to the First Amendment principle of separation of church and state, only private schools may teach religion. (Note that public schools may teach about religion, but they may not proselytize for any particular religious point of view.) Most private schools are also religious schools and wish to maintain their distinct religious views and values. If they were to receive general public funding, they would almost certainly be placing themselves under increasing public regulation (perhaps closely approximating the regulation of public schools) and thereby undermining the distinct religious purposes for which they exist in the first place and for which they have been chosen by parents. Eventually they might become very much like public schools themselves. Thus, reducing parents to a choice between two schools that are alike in all but name is not much of a choice at all.

During the 1980s and 1990s, there have been efforts mostly by ideologues to obscure the child benefit theory and to blur over the line it has drawn. Most such people have talked a lot about choice and very little about regulation, yet the two make little sense unless considered together and in historical context. More national confusion than enlightenment has been created. We may be ready to add to that confusion, or we may be able to see clearly where we should go by considering the historical roots of the issues we face.

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*Everson v. Board of Education*, 330 U.S. 1, 67 Sup. Ct. 512 (1947).

# Revisiting Brown vs. Board of Education of Topeka, Kansas: A Better Focus on Cultural Diversity

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Educators never fathomed the greater impact on the teaching of multicultural students when the Supreme Court ruled in 1954 on the landmark case of *Brown vs. Board of Education of Topeka, Kansas*. The court's mid-century decision would come to have an even more dramatic impact on schooling by the close of the 20th century. The ruling's effect on education has made school available to all children on equal terms, stating that it is unconstitutional to operate segregated schools under the premise that they are separate but equal. The *Brown* ruling was, of course, primarily aimed at the integration of Black Americans who were being segregated in their own schools. It was demonstrated that many of the Black students

different family customs and values. Those blatant—as well as subtle—changes in school populations have resulted in an urgent need for multicultural thinking and approaches in education.

Even so, many educators continue to teach the same subject matter, using the same methods they have always used, with little regard for the changes going on around them. For many, sensitivity to the variety of ethnic and cultural backgrounds currently within our communities is evolving slowly—probably the result of our inherent resistance to change. But, as more groups come to demand change, more emphasis is being placed on educating all Americans equally. In 1979, Edmundo Vasquez, a consultant for multicultural

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studying at the Black schools were not even close to the same level of achievement as those of their White counterparts. It was argued successfully that separate schools for Black students caused low self-esteem and could never adequately give these children the same opportunities for education that others enjoyed. Since that court decision at mid-century, our country has witnessed a population boom among other racial and cultural groups along with a determination among these groups to secure their rights in schools and other social institutions. As children from Hispanic and Asian cultures have entered our country in ever-increasing numbers, the *Brown* ruling has come to take on new meaning. Not only do we have students of varied cultural/ethnic backgrounds in classrooms, but they come from different language environments and

education from the University of New Mexico, outlined four goals for all children. They were:

- To reflect diversity and life in the world;
- To recognize and reduce racism and discrimination;
- To provide alternatives for personal choice; and
- To increase student mastery of basic skills by using culturally relevant materials (Rothkopf, 1979).

While more than two decades old, these goals for multicultural education are valid today, even though the world of today is vastly different from the world of 1979. We are a world grown closer by vast changes in technology while at the same time, a population that is more diverse than it has ever been. The following census figures from 1990 indicate the changes in population growth during the decade of the 1980s in the United States (Buckner, 1993):

backgrounds also bring to school only one type of culture, and it is usually completely foreign to the average performance levels of the school and the expectations of fellow students from other cultures. When two or more cultures are not compatible, the schooling process ultimately fails to teach, students fail to learn, and little if any socialization takes place (Protheroe & Barsdate, 1991). It should be noted that oftentimes it isn't a student's lack of desire to succeed or low ability that holds him or her back. Often, the failure can be traced directly to culture clash. In most cases, a teacher may misread a student's aptitude, intent, or ability as a result of the differences in styles of language use and interactional patterns. A very common clash for teachers occurs when they use teaching strategies or discipline models that are at odds with the experience of students. What could be

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***In this program, teachers were instructed in the history and culture of Alaska's Indian and Eskimo groups as well as pedagogical strategies for dealing with these populations.***

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considered a typical punishment for a classroom offense in this country may never be used or even considered in another country's schools. The approach is then ineffective as a strategy for dealing with a student from another culture. One interesting research finding that illustrates this dilemma has been that a classroom which allows greater movement and interaction better facilitates the learning and social styles of African-American boys, while a more structured, inhibitive class will unduly penalize these same boys. Perhaps cultural sensitivity on the part of teachers in allowing African-American boys to interact more with peers in their classrooms while performing assigned tasks will ultimately reduce the number of African-American boys assigned to special education classes and affect their educational outcomes dramatically.

Another important problem that occurs in Eurocentric classrooms is that the minorities in a classroom may resist learning within the White cultural frame of reference because they feel that to learn within that

mode would result in loss of their identity, self-worth, and sense of community. Furthermore, those who do not conform to this form of learning are often accused of "acting White," which may result in loss of friendships within their own culture. These conforming students may not necessarily be accepted into White culture either. They are then faced with the dilemma of "acting White" and being successful academically while being alienated from their cultural group.

Since the *Brown* decision has been extended to fuller inclusion of all minorities in the school, educators have been called upon to teach more about the contributions of Blacks, Hispanics, Native Americans, and other ethnic and racial groups long absent from the curriculum. If one looks at an Ethnocentric approach that is based on a study of values and behaviors of a variety of ethnic groups, one might begin to view the world as if they were "using another lens to view the world and come to the realization that my way of looking at it is different from yours." (Viadero, 1990). The approach to education where the focus is on differences between cultures instead of commonalities has been challenged by critics such as Thomas Sobol (Viadero, 1990). Sobol attempts to approach individuals separately (separatism) rather than as a group (pluralism). Others, such as ASA Hilliard (1992), contend that the ethnocentric curriculum carries too much baggage. He advocates focusing on cultures rather than excellence in education.

A spin-off of ethnocentric education, Afrocentrism, is a focus on Africa and American Blacks. A number of school systems have developed curricula to focus on the newest approach. The Milwaukee school system is going so far as to create separate schools that will specifically cater to the academic and social needs of Black males. These "magnet" programs are not off-limits to Whites and females but are focusing on the specific needs of Black males.

A final problem identified through research indicates without a doubt that Black children are faring poorly in the public schools. They are entering only slightly behind; but, by the time they reach the third grade, they have slipped six months behind and by sixth grade, a full year (Viadero, 1990). Many believe that White students are succeeding because the school's curriculum makes them feel as though they are at the center of the universe. Of course, the opposite is true when they fail. Afro-centric curriculum proponents contend that a focus developing on a feeling of centrality

	<u>Growth</u> <u>1980-1990</u>	<u>No. (M)</u>	<u>Percent</u> <u>of total</u>
United States	+ 9.8	248.70	100.0
European American	+ 6.0	187.20	75.2
African American	+ 3.2	29.20	12.1
Native American	+ 37.9	1.95	.08
Asian American	+ 107.8	7.27	2.9
Hispanic American	+ 53.6	22.35	9.0

Not only does this chart indicate growth, but it reflects a changing population—a population that must be understood and developed if we are to adequately prepare its young people for the future.

### **Melting Pot or Puzzle Pieces?**

As immigrants from diverse backgrounds came to this country, Americans began calling themselves the “Melting Pot” of the world. This came to mean that these unique cultural groups were fulfilling their respective hopes and aspirations by deliberately submerging their identities into a melting pot. They were giving up their individuality and becoming a part of a greater, more or less, homogeneous nationality. Mitchell (1980) expresses the melting pot theory as this formula:  $A+B+C=A$  wherein A, B, and C represent different social groups, and A represents the dominant one in America—White Anglo-Saxon. Over a period of time, all groups would eventually conform to the values, mores, and lifestyles of the dominant group. Students in this situation are taught from a one-background point of view—Euro-centrism.

A more recent trend in the education of children from diverse cultures is referred to as pluralism. It is considered more like the fitting together of various puzzle pieces. In a pluralistic society, people of different ethnic backgrounds learn to live together, side-by-side, celebrating their differences with mutual respect. In this setting, the existence of varied cultural backgrounds is encouraged as well-fitting puzzle pieces, not melting together losing their individuality (identity). The most current philosophy seems to be encouraging a pluralistic approach to education. The hope is that when a school’s curriculum includes and emphasizes a variety of cultural backgrounds reflective of all its students, a clearer picture of individuality will emerge.

This approach focuses on the differences rather than the similarities of its constituents.

The purpose of the analysis that follows is to determine how administrators can become more aware of the varied backgrounds of their students. This awareness will evolve as a result of focusing on the diversity of an administrator’s student body, while at the same time attempting to develop understandings of similarities and common elements that can be the focus of all students. Finally, a pluralistic goal for achieving multicultural education needs to be identified by school administrators. That goal should be directed toward either creating a more harmonious fitting of the “puzzle pieces,” thereby not melting cultures together; or to emphasizing and respecting the unique features of cultures, i.e. cultural differences. Specific ideas and strategies for dealing with either of these positions, as well as a few methods for reaching all students successfully, is what follows.

### **Problems with Diversity in the Classroom**

It has long been known that children do not come to the classroom as “empty vessels” but come with internalized standards of communication, interaction language use, and behavior from their homes. These standards are affected by parenting styles, family structures, and rules for social interaction—all heavily influenced by cultural values and traditions (Protheroe & Barsdate, 1991). An example of the influence of one’s cultural values and traditions can be readily seen in Native American children who have been encouraged to be only spectators at adult activities. As a result, they have become somewhat skilled observers of the nonverbal; and they have become better able to understand the behavior cues of adults around them. These children tend to use nonverbal communication strategies more frequently than verbal ones. Of course, this kind of “personality difference” could easily be misconstrued in a mainstream classroom to mean that the student is uninterested or lacks understanding. The rules for social interaction are often discrete and hidden—especially in the example of Native Americans.

Schools have been structured to reflect middle class, Euro-centric, cultural standards. In this kind of setting, students from diverse backgrounds will experience cultural conflict constantly since their accustomed methods of learning and communicating will probably not match mainstream standards. Students with varied

in African American students can raise students' self-esteem and their achievement levels.

### **A Pluralistic Approach to Culturally Sensitive Instruction**

Once the culture conflicts have been identified, educators can proceed to adapt their curriculum to meet the needs of all their students making special efforts to include those with culturally diverse backgrounds. Protheroe and Barsdate (1991) cite four features of a culturally sensitive approach to instruction. The first of these is to maintain a pro-student philosophy capitalizing on each student's strengths and viewing cultural ways of learning as resources to be pursued rather than deficits to be remedied. A second feature for developing cultural sensitivity in instruction relies on the premise that there is no best way to effectively teach all of the students all of the time (Brown, 1990). Educators postulate that to successfully teach multicultural children, "most students can learn the same things but they learn them for different reasons." In order to reach a diverse population, it is necessary for the teaching techniques to be varied. Teachers should encourage students to develop their own reasons for learning. A third feature of culturally sensitive instruction is for the teacher to rely on the path of least change. Students build on knowledge that they have already acquired. The challenge for teachers here is to use that body of knowledge already attained to facilitate the acquisition of new skills. The fourth and final feature of culturally sensitive instruction is to maintain high expectations for achievement for all students, modifying only the methods for attaining desired outcomes. Too often students from diverse backgrounds are put into a slow-learner track because of a misunderstanding of cultural values and customs on the part of educators. A student often will work to reach expectations if there is no miscommunication among all interested parties.

If one accepts these four features as sound educational thinking, questions arise as to how these features can be applied to culturally sensitive instruction. Two studies are noted here which reflect research designed to increase the school's success in implementing a culturally appropriate curriculum. The first study known as the "KEEP Program" took place with Native Hawaiian students (Protheroe & Barsdate, 1991), and the second with Eskimo and Indian children in Alaska (Noordhoff & Kleinfeld, 1993).

The "KEEP Program" (Kamehameha Early Education Project) was developed to increase a school's success when working with low-achieving Native Hawaiian students. The heart of the program is to modify the classroom routines in order to "mesh" all students' cultures in ways that will ensue a "generation of academically important behaviors" (Protheroe and Barsdate, 1991). This modification was approached by observing what was actually taking place both in the home and in the school. Any cultural conflicts readily appeared. For example, researchers noted that at home the family concentrated on group learning while the school was emphasizing independent work. These differences were producing cultural discontinuity that hindered the educational process.

The school where the Keep Project was housed began to modify its teaching techniques by encouraging cooperative learning. By building on a familiar mode of learning, the students' on-task behaviors increased. Using the premise of "least change," teachers were able to capitalize on prior student knowledge. After four years of implementation, the KEEP Program reported dramatic achievement gains. These results have reached national attention, but critics of the Project report that this type of research is not replicable

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with other cultures. The key here, however, is to find the culture clash that exists and modify classroom instruction to match the target population's cultural patterns.

The second study focuses on secondary teachers from the University of Alaska-Fairbanks who participated in a teacher education program entitled "Teachers for Alaska" (TFA), which is a fifth-year certification program. In this program, teachers were instructed in the history and culture of Alaska's Indian and Eskimo groups as well as pedagogical strategies for dealing with these populations. All strategies to be used were linked to the contexts in which these students worked best. The teachers were encouraged to learn experientially about their students as well as

students' families through discussions, home visits, and involvement in the community.

Results indicate that engaging students in activities rather than using a teacher-centered approach is very successful. The minority students relate that teaching is effective when subject matter is related to their backgrounds enabling them to make connections. These results definitely have relevance for the development of a multicultural program; however, here again, the research was carried out with a select group of minority students—not the typical variety seen in many school districts.

### **A Basic Strategy for Dealing with Culturally Diverse Students**

There are some basic ideas and strategies that can be effectively implemented for teaching students of culturally diverse backgrounds. Many of the ideas which teachers use with students are not new. Cooperative learning as an alternative approach, which shifts the emphasis from competition to shared learning, has been hypothesized to better match the cultural characteristics of many of our students including Blacks, Mexican Americans, and Native Americans. Whole language strategies also encourage engagement of minority students as they are able to use their background, life experiences as a frame of reference for learning new material. Research cited by Harste (Protheroe & Barsdate, 1991) reflects that whole language is "the only approach to teaching reading and writing that does not deny children their culture."

It is important in the multicultural classroom to be able to modify instruction to match the cognitive styles of students. Using multiple stimuli in the classroom and a variety of teaching strategies is helpful for reaching all students. In a culturally sensitive classroom, however, the teacher *must* focus on those strategies from which the diverse students learn best.

In an article on culturally assaultive classrooms, Clark, DeWolf, and Clark (1992) cite several examples of things to avoid where cultural diversity is an issue. Culturally assaultive classrooms include discussions of cultures only as they existed in the past—such as Indians helping the Pilgrims at Thanksgiving or an incorrect stereotype of Indians in little clothing, scalping people. These classrooms concentrate on the differences between cultures rather than similarities, emphasizing particularly those in conjunction with "holiday units" rather than incorporating a year-round curricu-

lum with cultural diversity.

An attitude of embracing diversity must saturate the classroom. Administrators and teachers need to become active pluralists by endorsing diversity, encouraging the fit of the puzzle pieces rather than emphasizing the differences between them. The focus should be on the child's world of today and not on an historical world. Children's experience should be enriched by diversity and not burdened with fear, apprehension, anxiety, and low self-esteem.

### **A Design for Success**

An ethnocentric approach to teaching cultural diversity is not feasible; it is a shotgun approach giving students a smattering of many different cultures while ignoring the similarities. Teachers already have a crowded curriculum of information to impart to their students and adding more is probably not the best answer, but they will need to offer an option. A broader, more truthful, historical view of all cultures represented in a particular school should be incorporated into the basic curriculum. The melting pot theory has dissolved. Basic ethnic characteristics need to be recognized and embraced in this democratic society. Human culture is the product of the struggles of all humanity—not the possession of a single, racial, or ethnic group. In a pluralistic society, the puzzle pieces must be put together to facilitate living side by side in harmony with respect for one another.

It is interesting to note that many of the same teaching strategies that were used in the mainstream classroom of the 1970s are encouraged in culturally sensitive instruction. Inclusion of whole language, cooperative learning, and the acknowledgement of cognitive learning styles have been embodied in the regular classroom not that long ago. It is important to reinforce the use of these strategies within our culturally diverse population enabling them to become more self-confident and thus more successful in the classroom.

These and other teaching strategies can reach many of our minority students, but another step must be taken to ensure the success of these students. Teachers need to become knowledgeable about the cultures students bring to the classroom. If, for instance, a Native American student does not respond in a situation, it may be because of his/her culture, not lack of knowledge of the subject matter. Courses for pre-service teachers and in-service courses for

experienced teachers need to incorporate information on the relevance of culture to learning in order for teachers to relate to their students.

Specific methods for dealing with multicultural students must become a part of teacher education to make teachers more culturally sensitive in their instruction while still maintaining valid scholarship as the goal for effective curriculum content. Teacher educators need to be proactive in preparing their students to deal with this pluralistic world. As Asa Hilliard (1992) expresses, "Nothing less than the full truth of the human experience is worthy of our schools and our children."

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# Perceptions of Home-School Regulation by Home-School Parents and Public-School Superintendents

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Until the start of the twentieth century, home schooling was the norm in the United States (Spring, 1994). Today, the return to this schooling option by parents has brought much controversy (Wade, 1993). Because education is not addressed in the Constitution of the United States, the responsibility for education has reverted to states by virtue of the Tenth Amendment. This divestiture of responsibility has created a wide variance of how states and even school districts address home schooling. With states setting their own rules on home schooling, issues such as certification of educators, accountability for attendance,

children were being home-schooled nationwide. This represented a tripling of the number of children receiving home instruction in just five years. The U.S. Department of Education estimated that between 700,000 and 750,000 children (2% of the nation's school-age population) were home-schooled during the 1995-96 school year (Lines, 1998). The National Home Education Research Institution placed the number of children who are home-schooled in the U.S. at well over a million students (Ray, 1997).

The purpose of this study was to explore the respective perspectives of public-school superintendents and home-school parents in one state (Indiana) on issues related to the regulation of home schools. In particular, the study examined if public-school superintendents' perceptions of home schooling and their perceptions of current Indiana home-school regulations influenced their relationships with home schoolers. Further, the study explored home-schooler perceptions of Indiana regulations on home schooling.

## The Evolution of Home School Regulation

The Tenth Amendment places the responsibility for education with the individual states. This does not mean that the federal government does not influence education. Through constitutional interpretation by the federal courts and enforcement of due process and Fourteenth Amendment rights, the federal government has greatly influenced education and, therefore, home education.

With this divestiture of responsibility for education to individual states has come a wide variance on how states address home schooling. With each state setting its own rules on home schooling, issues such as certification of educators, accountability for attendance, and educational progress are handled in many different ways. Many of the home-school legalities have been

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***Many superintendents stated that the home schoolers in their district fell into two distinct groups: parents who care and are genuinely trying to provide their children with a better education through home schooling, and parents who are simply avoiding the constraints of compulsory education.***

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and educational progress are handled in many different ways. Newer issues of services and facilities offered to home schoolers and participation of home schoolers in extracurricular activities have evolved (Hawkins, 1996).

Home schooling is a small but rapidly growing phenomenon. In 1990, an estimated 250,000 to 350,000

established by case law (Klicka, 1995).

Challenges to state statutes on home schooling were traditionally based on the Fourteenth Amendment to the Constitution, asserting parent liberty to home school, or the First Amendment to the Constitution, asserting free exercise of religion. Today, newer issues concerning participation in public-school activities and access to services tend to be the focus (Hawkins, 1996).

States have the legal right to mandate compulsory attendance in an educational program of children because an educated population is in the best interest of the state (see *Fogg v. Board of Education* [1912] and *Scown v. Czamecki* [1914]). Beyond compulsory attendance, a number of cases have established home-school legal precedence.

The earliest battles were for the right for schools other than the public schools to even exist. In *State v. Peterman* (1904), the Indiana Court of Appeals held that the Indiana compulsory attendance law allowed the operation of home schools, saying essentially that a home school is a private school. In *Pierce v. Society of Sisters* (1925), using the Fourteenth Amendment, the Society of Sisters in Oregon challenged the right to school children in their religious setting, following the state's mandate for public-school attendance. Oregon's mandate essentially made all schools except Oregon public schools illegal. The District Court of the United States for the District of Oregon, and eventually the Supreme Court, ruled in favor of the Society of Sisters. This ruling secured the right of private schools to coexist as an acceptable alternative to public schools. Home schools in Indiana are considered private schools.

In *Wisconsin v. Yoder* (1972), an Amish family challenged the 16 years upper age limit on compulsory education based on religious freedom. The Yoder family wanted the right to pull their children out of school after the eighth grade. The Supreme Court of Wisconsin ruled the Yoder family prevailed, establishing religious freedom as a recognized exemption to compulsory attendance laws. The U.S. Supreme Court upheld the ruling for Yoder. Religious freedom was recognized as an exemption from compulsory attendance laws for the Amish, furthering the right of home schools to exist on religious grounds.

In *Scoma v. Chicago Board of Education* (1974), the U.S. District court found *People v. Levisen* (1950) to be reasonable and constitutional. *People v. Levisen*

was a ruling by the Illinois Supreme Court that home schools qualify as private schools. This decision by the District Court was applicable to the Indiana statute that also defines home schools as private schools (I.C. 20-8.1-3-34).

In *Mazanec v. North Judson-San Pierre School Corporation* (1985), the Federal District Court for the state of Indiana ruled that parents have the constitutional right to educate their children in a home environment. Further, they recognized that "it is now doubtful that the requirements of a formally licensed or certified teacher [for home schools] ... would pass constitutional muster" (p. 1160). In the *Mazanec* case, school officials felt the Mazanec children were not being given an education equivalent to that provided in the public schools because the primary teacher in the home, the mother, only had an eighth-grade education. This case demonstrated that any statute for teacher credentials would not be legal in Indiana.

In another case centered on the qualifications of the home-school teacher, in *Newsrom v. Minnesota* (1985), the Supreme Court of Minnesota ruled that the Minnesota teacher qualification component of the compulsory attendance law was vague and, therefore, unconstitutional. The home schooling of the Newsrom children was in compliance with compulsory attendance.

But, in contrast with the previous teacher certification cases, in *State v. Merlin* (1988), the Supreme Court of North Dakota ruled that requiring certification of teachers of home schoolers was legal. As a side note, the State Legislature of North Dakota changed their statute following this ruling to allow home-school teachers to simply be monitored by a certified teacher attesting to the growing political clout of home schoolers.

In 1988, in the case of *Murphy v. State of Arkansas*, the Eighth Circuit Court of Appeals ruled that the state was within its rights to monitor home schooling through the use of achievement tests. In contrast to this ruling, Indiana does not have any method of monitoring home-school academic progress.

In May, 1993, the Michigan Supreme Court, in *People v. Dejonge*, affirmed the compelling interest test as it applied to parents' rights to educate their children. The Dejonge family refused to use a certified teacher or to become certified as teachers, based on religious objections. The court ruled that Michigan's teacher certification requirement was unconstitutional,

once again providing legal precedent supporting the lack of teacher qualifications for home schools in Indiana.

In *Null v. Board of Education of Jackson County* (1993), the federal district court ruled that a West Virginia statute that disallowed the further home schooling of students for poor performance was legal. Any student who scored below the fortieth percentile on standardized tests and did not improve above the fortieth percentile after a year of remedial home schooling could no longer be home-schooled. This ruling established precedence for creating home-school mandates concerning educational progress. The court ruled that the law has a rational basis and did not violate parents' equal protection rights or liberty interests.

The parental right to home school has been the issue in recent cases. In *Delconte v. North Carolina* (1985), the issue of not allowing parents to instruct their children in a home-school setting was challenged on the basis that the parents' constitutional freedom was violated. The Supreme Court of North Carolina ruled that the parents prevailed.

The case of *Employment Division of Oregon v. Smith III* (1990), although not a home-school case, addressed home-school parental rights. This case challenged the job dismissal of two American Indians for ingesting "peyote" as part of their religious belief. The U.S. Supreme Court explained that the First Amendment did not protect drug use, but declared "...to the Free Exercise Clause in conjunction with other constitutional protections such as ...the right of parents, acknowledged in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), to direct the education of their children, see *Wisconsin v. Yoder*, 406 U.S. 205 (1972) invalidating compulsory attendance laws as applied to Amish parents who refused on religious grounds to send their children to school" (p. 881). Klicka (1993) explained that this statement supports home-school parents because home-school parents are protected by the combination of religious freedom and the fundamental right of parental control of the education of their children. This combination overrides any state regulations over areas such as teacher certification. The defendants in *Smith* did not have the right to override the state statute against drug use.

In *Snyder v. Charlotte Public School District*, (1984), a sixth-grade student enrolled in a parochial school wanted to enroll in the band course at the local

public school. The Michigan Supreme Court ruled that the student had the right to attend the public school and that right was not conditional upon full-time attendance; so only attending the band course was allowed. In a number of other cases where home schoolers have desired participation in public-school courses or extra-curricular activities, home schoolers argued their rights of access based on First Amendment and Fourteenth Amendment rights and have lost (*Bradstreet v. Sobal*, [1995], and *Palmer v. Merluzzi*, [1989]).

While the courts have played a significant role in determining the status of home schooling, so have state legislatures. Lines (1996) found that state legislatures have responded more vigorously than the courts, making home schooling legal in all fifty states. Beyond the basic legalities of existence, home-school regulation varies greatly from state to state. The legalities of Indiana on home schooling follow.

### Home School-Regulation in Indiana

Home-school registration in Indiana is totally voluntary, so only home-school parents who wish to register with the Indiana Department of Education (IDE) are registered. Also, no home-school parents have ever contacted the IDE to unregister their students upon return to public or private schools or upon progress beyond the twelfth grade. In Fall, 1996, the Indiana Department of Education had approximately 5,500 registered home-school families. The Indiana Department of Education provides a list of all known home schoolers in each district to the district superintendent at the start of each new school year and relies on superintendents to contact all known home schoolers in their districts for updated pupil counts of home schoolers. Therefore, this update process is dependent on the relationship between the superintendent and the home-school families in the district as well as the diligence of the superintendent to make contact according to former state attendance officer, G. Nettles.

Access to public-school courses and extracurricular activities is not addressed in the state statute. Therefore, these issues are addressed by local school boards. In a 1995 case in Delaware County, a student was denied a position on the swim team based on a rule of the Indiana High School Athletic Association (IHSAA). Because the student had been home-schooled the previous year and was placed in that same grade upon returning to the public school, the student was seen as not making educational progress, which is

a requirement of the IHSA to compete. The Delaware Superior Court ruled that the student must be allowed to compete (Rendfeld, 1995).

In a comparison of home-schooling statutes among the states, it is clear that Indiana statutes on home schooling are among the most lenient in the country. Home schools in Indiana are recognized as private schools. They must meet 180 days per year, the same as public schools. They must provide instruction in English. There are no requirements for teacher certification or testing or other means to assure educational progress. Parents must keep records of attendance, but these records are not submitted to anyone unless the state compulsory attendance officer requests them or the superintendent of the public school in the area of residence of the home-schooled children requests them. If requested by the Indiana Superintendent of Public Instruction, the home-school parents must provide the number of students and their grade levels. Home schools must provide an education equivalent to the public schools, but what is equivalent is not defined or enforceable under the present system (Ind. Code Ann. 20-8.1-3-17, 17.3, 23 to 24, 34 & Klicka, 1995).

### **Comparing Indiana Regulation with Other States**

In comparing Indiana to other states on home schooling, Indiana is one of only eight states with no home-schooling statute, no teacher certification, no educational progress mandate, and no registration of home-school programs or home-school teachers. While Indiana recognizes home schools as private schools, 35 other states have separate home-school statutes.

Seventeen states have minimum teacher qualifications. The most rigid of the qualifications include state certification to teach or a college degree. Nine states with certification standards require only a high school diploma or G.E.D. (Klicka, 1995). Thirty states require some form of educational progress analysis. Eight states require standardized tests in particular grades, and four states allow home-school parents to use portfolios to demonstrate educational progress (Klicka, 1995). Connecticut requires a periodic portfolio review of home-schooled academic work. Six states require remedial education for home-schooled children who score below a certain percentile on core subjects on standardized tests (Lines, 1997). Thirty-eight states require registration of home-school programs or home-school teachers (Klicka, 1995). Twenty-four states require home schoolers to register with the local public-school superintendent.

### **Method: Participants**

For the superintendents' questionnaire, the entire population of Indiana school district superintendents in office during the 1996-1997 school year was polled. Of the 297 superintendents polled, 192 responded to the initial mailing and three more to the follow-up, resulting in a total of 195 responses—a return rate of 66%.

The desired population for the home schoolers was all home-school families in Indiana. This population is very elusive, with only estimates of the total numbers available. The Indiana Department of Education estimated approximately 5,500 voluntary registrants. Of the 550 questionnaires mailed to home-school families, 35 were returned by the post office as undeliverable. An additional four forms were returned by recipients because they no longer home-schooled their children. Of the remaining 511 forms, 132 were returned completed by home-school families for a 26% return rate.

### **Method: Instrumentation and Procedures**

Both the superintendent questionnaire and home-school family questionnaire were created specifically for this study. Each questionnaire was divided into three parts: current relationship with the home schoolers or public school representative, personal perceptions of home schooling and of current Indiana regulations on home schooling, and demographic information.

A pilot study was conducted with both questionnaires to address validity of questions and to clarify or remove any ambiguous items. Both questionnaires were submitted to a panel consisting of home-school experts, home-school parents and former public school superintendents for review and revision. Chi-square statistical analysis was performed using SPSS 4.1 statistical software. All responses were established to be non-parametric and orthogonal.

Nine questions concerning current Indiana regulations on home schooling and personal perceptions of home schooling were presented to the superintendents and home-school parents. Possible responses included [*strongly agree, agree, neutral, disagree, and strongly disagree*]. Null hypotheses were created for each of the statements to compare the responses of the queried groups. The statements were:

1. The concept of "equivalent education" has been sufficiently defined for home-schooled students.
2. Current curriculum standards for home schools are

sufficient to insure home-schooled students receive an equivalent education to that provided in public schools.

3. Home-schooled students should have to demonstrate educational progress through standardized achievement tests.
4. Home-school teachers should have to demonstrate competence to teach.
5. Registration with the Indiana Department of Education should be mandatory for home schoolers.
6. Current state regulation of Indiana home schools is sufficient to insure home-schooled students receive an equivalent education to that provided in the public schools.
7. The overall education programs offered in home schools are satisfactory to meet the equivalent education standard.
8. Children who are home schooled have no more difficulty making a healthy, social adjustment to the world outside their homes than students in the public schools.
9. The home-school movement in Indiana will continue to grow.

### Results: Demographics

The demographic profile of the home-school respondents showed that 122 (92.4%) of home-school main teachers in the study were the mothers. A total of 95.5% of the respondents (126) were home schooling three or fewer children. Eighty-eight percent of the respondents (116) had been home schooling for six years or less.

The education level of the main teacher ranged from less than a high school education to having an advanced college degree. Seven respondents (5.3%) had less than a high school degree. Thirty-five respondents (26.5%) had a high school degree or G.E.D. Fourteen respondents (10.6%) had a vocational or trade school degree. Twenty-eight respondents (21.2%) had some college. Thirty-four respondents (25.8%) had a college degree. Fourteen respondents (10.6%) had an advanced college degree.

Seventy-two respondents (55%) intend to home school their children through high school. Forty percent of the respondents (53) intend to home school only through junior high/middle school or less. Nearly 55% (72) of the home-school respondents intend for their children to have a college degree or higher level of education, and 69% (91) intend for their children to

have some form of higher education. Four respondents (3%) had an ultimate education goal of less than a high school degree for their children.

In response to the question for home schoolers regarding outside resources used with their home-school programs, the highest percentage response, 114 (86.4%), was use of the public library. A licensed teacher was the lowest response at 14 (10.6%). Use of facilities or classes offered by the local public school was the second lowest response at 17 (12.9%).

Of the respondents to the superintendents' questionnaire, 162 (83%) were superintendents, and 34 (17%) were administrators appointed to have responsibility over home schoolers for the district. The number of years the respondents had held their current position ranged from zero to 31 years with a mean of seven years. Forty-six percent (90) had held their position for five years or less. Eighty-one percent (159) of the respondents had held their position for ten years or less.

The most common school setting for the superintendent respondents was rural at 140 (71.7%) of the responses. Suburban school settings accounted for 42 (21.5%) of the responses. Urban settings made up only 6.8% (13) of the responses.

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### ***The purpose of this study was to explore the respective perspectives of public-school superintendents and home-school parents in one state (Indiana) on issues related to the regulation of home schools.***

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School districts with home-school policies numbered 94 (48%). Slightly more, 102 districts (52%) did not have a school district policy regarding home-schooled students.

The range for the number of known home-schooled students in the district was from one to more than 300. Thirty-six percent of the respondents (71) did not know how many students were home-schooled in their district. Ninety of the superintendent respondents (46%) had 25 or fewer, known, home-schooled students in their district. Thirty-four, (nearly 17%) of the respondents had more than 25, known, home-schooled students in their district.

In the 1996-1997 school year, student enrollment for the superintendents' districts ranged from 264 to 43,000 students. One hundred and five of the superintendent respondents (54%) had 2,000 or fewer students. One hundred and fifty-three of the school districts (nearly 80%) had fewer than 3,600 students. Nine respondents (4.6%) had student counts of 10,000 or more students for the 1996-1997 school year.

## Results: Hypotheses

The results of the Chi-square statistical analysis on the null hypotheses provided the following results.

1. There is no difference in perceptions that the concept of "equivalent education" has been sufficiently defined for home-school students based on group membership. This hypothesis was rejected at ( $p < .01$ ). There is a difference based on group membership concerning perceptions of "equivalent education" being sufficiently defined for home schoolers
2. There is no difference in perceptions of current curriculum standards for home schools being sufficient to insure that home-schooled students receive an equivalent education to that provided in the public schools based on group membership. This hypothesis was rejected ( $p < .01$ ). Perceptions of curriculum standards for home schools are different for superintendents than home schoolers.
3. There is no difference in perceptions that home-schooled students should have to demonstrate educational progress through standardized achievement tests based on group membership. This hypothesis was rejected ( $p < .01$ ). Superintendents and home schoolers do not agree on a need to demonstrate education progress by home schoolers through standardized achievement tests.
4. There is no difference in perceptions that home-school teachers should have to demonstrate competence to teach based on group membership. Home schoolers and superintendents differ in their perceptions concerning home-school teachers needing to demonstrate competence. This hypothesis was rejected ( $p < .01$ ).
5. There is no difference in perceptions that registration with the Indiana Department of Education should be mandatory for home schoolers based on group membership. This hypothesis was rejected ( $p < .01$ ). Superintendents and home schoolers differ in their perceptions on registration with the Indiana Department of Education.
6. There is no difference in perceptions that current state regulation of Indiana home schools is sufficient to insure home-schooled students receive an equivalent education to that provided in the public schools based on group membership. This hypothesis was rejected ( $p < .01$ ). Superintendents and home schoolers differ in their perceptions of current home-school regulations being sufficient to insure that home-schooled students receive an equivalent education to that provided in the public schools.
7. There is no difference in perceptions that the overall education programs offered in home schools are satisfactory to meet the equivalent education standard based on group membership. This hypothesis was rejected ( $p < .01$ ). Home schoolers and superintendents differ in their perceptions of the programs provided in home schools.
8. There is no difference in perceptions that children who are home-schooled have no more difficulty making a healthy, social adjustment to the world outside their home than students in the public schools based on group membership. This hypothesis was rejected ( $p < .01$ ). Home-school parents and superintendents differ on the perceptions of home-schooled students adjusting to the world outside their homes.
9. There is no difference in perceptions that the home-school movement in Indiana will continue to grow based on group membership. This hypothesis was rejected ( $p < .01$ ). Superintendents and home-school parents differ on their perceptions concerning the continued growth of the home-school movement in Indiana.

All nine null hypotheses were rejected, demonstrating a consistent difference of opinion between the home schoolers and superintendents. Table 1 on the next page provides the Chi-square analysis.

Two additional null hypotheses were created to analyze the superintendent's relationship with the home schoolers with regard to home-school regulation and home-school education in general. The results were as follow.

S1. Superintendents' (or their appointees') characterizations of their professional relationships with home-school families in their districts are not influenced by their perceptions of current Indiana home-school

**Table 1.**  
Chi-Square Statistical Analysis of Hypotheses  
Comparing Perceptions of Home Schoolers and  
Superintendents

Hypothesis	Chi-Square	df	p-value	Reject Ho*
1	159.20155	4	.00000	yes
2	245.37747	4	.00000	yes
3	168.15119	4	.00000	yes
4	157.35632	4	.00000	yes
5	169.69404	4	.00000	yes
6	236.03779	4	.00000	yes
7	254.11409	4	.00000	yes
8	215.41674	4	.00000	yes
9	79.31962	4	.00000	yes

\* at alpha = .01

regulations. This null hypothesis was not rejected since the p-value of .27 was not significant at the .01 level. Therefore, superintendents' perceptions of current Indiana home-school regulations are not influencing the relationships they have with the home schoolers in their districts.

S2. There is no difference between the superintendents' (or their appointees') characterizations of their professional relationships with home-school families in their districts and the superintendents' perceptions of home-school education programs. This hypothesis was not rejected with a p-value of .01942 significant at the .01 level, (but was extremely close to being rejected, and would be at any larger value of alpha). Superintendents' opinions of home-school education programs do not influence the relationships they have with home schoolers in their districts.

One additional null hypothesis was designed to look at the perceptions of home schoolers regarding their relationship with the public-school representative and home-school regulation. Results of this hypothesis were as follows.

PI. There is no difference between the home-school parents' characterizations of their relationships with their local school district's home-school representatives and their perceptions of current Indiana home-school regulations. This hypothesis was not rejected with a p-value of .20849 with alpha region of .01. Parents' perceptions of current Indiana home-school regulations do not influence the relationships they have with their local public school superintendents. Table 2 provides the Chi-square statistical analysis on the three additional null hypotheses.

**Table 2.**  
Chi-Square Statistical Analysis of Superintendent and  
Parent Hypotheses

Hypothesis	Chi-Squares	df	p-value	Reject Ho*
S1	14.39452	12	.27623	no
S2	24.14779	12	.01942	no
PI	20.26578	16	.20849	no

\* at alpha = .01

## Discussion

Both queried groups did agree on one topic. Both superintendents and home schoolers expressed the belief that there are children in Indiana receiving little or no education through home schooling. They had this belief for different reasons. The superintendents believed that many home-school parents have chosen home schooling as a way to avoid compulsory attendance laws and avoid school disciplinary actions. Many home-school parents believed that public schools were encouraging poor-performing students and problem students to leave school for home schooling in order to eliminate them from the public schools.

Many superintendents stated that the home schoolers in their district fell into two distinct groups: parents who care and are genuinely trying to provide their children with a better education through home schooling, and parents who are simply avoiding the constraints of compulsory education. Even among the parents who are trying to home school well, superintendents raised concerns about the ability of the best-

intentioned home-school parent to provide an adequate educational experience. Given that seven of the respondents to the home-school survey had less than a high school diploma, the superintendents may have legitimate concerns that children who are home schooled are not receiving an adequate education.

McGraw (1989) identified the education level of the main teacher in the home schools. McGraw found that 21% of the main teachers in the home schools had a high school diploma, 5% had attended a vocational or trade school, 23% had some college education, and 50% had a college degree or advanced degree. In the present study, 5.3% had less than a high school diploma, 26.5% had a high school diploma or G.E.D., 10.6% had attended a vocational or trade school, 21.2% had some college, 25.8% had a college degree, and 10.6% had an advanced degree.

As the number of home schoolers has increased, the percentage of home-school teachers with a college or advanced degree has decreased. This may mean that home schoolers in the 1980s were better educated and therefore better prepared to teach their children at home than many of the parents who home school their children today. This condition could contribute to an inferior education for children who are home schooled.

Because of the great difference of opinion between the two queried groups in the study, regulation of home-school topics at the local school district should be addressed. The percentage of districts with a home-school policy identified in the present study was 48%. Forty-five percent of the home schoolers stated that they intend to send their children back to an organized educational setting. Many home-schooled students will be returning to the public schools. The schools must be prepared to address issues such as course and grade placement of returning students and credits earned from knowledge gained while being home schooled.

Post-secondary educational organizations also need to have policies regarding home-schooled students. Eighty-two percent of the respondents in the study stated that they intend for their children to attend some type of post-secondary school.

In 1989, McGraw found that 44.7% of school districts had a home-school policy. Ninety-four schools (48%) with a policy in the present study represents only a 3% increase. As the number of home schoolers has increased, more districts feel they need to have a policy, but many districts have left themselves vulnerable to problems with home schoolers without a policy.

Although the present study found that a variety of relationships exist between Indiana superintendents and home schoolers, from confrontation-to-cooperation-to-no-relationship, the cooperative relationships were rare. As the number of home schoolers continues to grow in Indiana and nationwide, superintendents may need to rethink their position on home schooling. They may need to become more open-minded and cooperative for the sake of the home-schooled children. Knowles (1988), who conducted a longitudinal, ethnographic study of Utah home schools, beginning in 1985, found that his home schoolers believed that even when cooperation existed between the home schoolers and school administrators, it was not to the liking of the school administrators.

Providing facilities or services to home schoolers is not addressed in the Indiana state statute. Decisions to provide facilities or services fall to local school boards. As is evident from the number of home schoolers in the study who responded to having access, many school boards in Indiana are already working with home schoolers in this area. Knowles (1988), studying home schooling in Utah, found that some school boards had voluntarily enacted explicit policies of cooperation, permitting part-time school attendance. Boothe, Bradley, Flick, and Kirk, (1997) found that 58% of the school executives responding to their national survey (stratified random sample of  $n=6102$  with a 16% return rate) allowed home schoolers access to public schools. Only 19% of the public-school executives did not allow access to home schoolers as a matter of policy. The remaining 23% responded that they did not know if their district allowed home schoolers to access facilities or services in their schools.

A desire for interaction with the public schools has been expressed by home schoolers. The three most requested facilities or services—sport participation, use of school computer facilities, and club participation—would cause little impact on the schools financially while giving the public school administrator an opportunity to build a relationship with the home-school parents through the exposure. National, state, and local associations supporting home schoolers have spread across the Nation. Every state has at least one home-school association. At the national level, the major support organization is the National Home School Legal Defense Association (NHSlda) which has its headquarters in Washington, D.C. The NHSlda has a staff of attorneys who are available to provide families with

legal assistance and defense in their state or community. The NNSLDA is an advocacy group for home schoolers and in conjunction with state and local associations, it has developed a great deal of power as a lobbyist for home schooling at all levels of government (Farris, 1997).

It is clear that through court action and legislation, home schoolers have been given many rights. Concurrently public schools have lost, to varying degrees, control over the education of home-schooled children. Public school superintendents have not always reacted favorably to this lack of control. In the best interest of the students, public schools should open their doors and provide facilities and services to home schoolers. This may be the best way for superintendents to influence the education process of the home-school population in a positive way.

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# **‘Tinkering’ with Student Dress: A Review of School Uniform Law**

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## **The Citadel**

The legal debate over school uniforms has reached a new intensity as schools and school districts begin to move away from a permissive, “opt-out,” uniform, dress policy to truly mandatory policies. Research and anecdotal evidence has shown that when all students in a school or district are required to wear uniforms, significant positive results are achieved. Launched into national prominence by (then President) Bill Clinton in his 1996 inauguration speech, and subsequently supported by (then First Lady) Hillary Clinton, school uniforms came to be seen by advocates as a fairly simple remedy to many of today’s, complex school problems. The school uniform issue, however, had already achieved spotlight status for educators in 1994, with the implementation of mandatory school uniforms in the Long Beach (CA) Unified School District. Billed as a method to combat a host of problems, including gang violence, clothing related crimes, and peer pressure concerning clothing, a mandatory uniforms policy has remained a hot topic in education ever since. These policies have forced the courts in many areas to review the ensuing debate between advocates of students’ First Amendment rights to freedom of expression and school districts’ obligation to provide a safe and orderly school climate.

## **Research on the Effects of School Uniforms**

The reasons given by parents and educators for adopting uniform policies vary in emphasis from district to district. Responses to surveys indicate that focus on school work is expected to improve as the distracting influence of peer pressure is reduced. It is also hoped

that student behavior will become more orderly with a consequent reduction in student-on-student violence. A review of current school uniform policy statements discloses three main justifications for implementation to improve the learning environment, to ensure and promote a safe school, and to counter status pressure by peers to imitate a certain style of dress. On the other hand, those who oppose such policies argue that they violate a student’s rights to freedom of expression. In addition, they unduly constrain identity experimentation by students as part of their normal development. Finally, such policies constitute an invasion by the

school into the private lives of students and parents. Opponents also claim that there is no research to show that uniform dress codes influence academic achievement and student behavior for the better. Research on the effects of uniforms, however, has become available in recent years.

Since the student/teacher relationship is the most important in any school setting, perhaps the most relevant research focus has been on teacher expectations of students according to their style of dress. What has been found in research on teachers’ perceptions of students’ appearance cues is disturbing. Behling and Williams (1991) found that clothing can produce a “halo effect” wherein a student perceived by a teacher to be appropriately dressed is seen as well-behaved, a high academic achiever, and someone with academic potential. This “halo effect” tended to be escalated when models in the study wore a dress uniform of pants or skirt and a blazer. Researchers also found that students who wear school uniforms tend to be seen as more attractive than those wearing usual student attire.

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They are perceived as having more leadership ability and as being more accomplished at a task and more intelligent.

Recent tragic events of school violence such as the episode in Littleton, Colorado, have led educators to take a closer look at the influence of peer pressure on student dress and behavior. Upon analysis, many school violence incidents show that students often signal their withdrawal from the student body by adopting clothing and other forms of expression. Research clearly shows the effects of appearance on students' perceptions of other students. Students judge their peers by clothing to determine their social status (Kaiser, 1990), leadership ability (Morganosky & Creekmore, 1981), and academic potential (Dare, 1992). Research shows the importance of clothing as symbolizing gang affiliation (Rooney, 1993) and the importance of clothing to female adolescents (Connor, Peters, & Nagasawa, 1975; Daters, 1986). Surprisingly, there is evidence in research that students begin to formulate perceptions through clothing as early as the second grade. Parr and Halperin (1978) found that seventy-five percent of their second-grade sample believed that clothing communicated something about the individual. Additional research on the effects of school uniforms has revealed significant results in school climate (Murray, 1996, 1997) and student self-esteem (Gregory, 1996).

### **Legal Implications for School Uniforms**

More than thirty years after John and Mary Beth Tinker donned black armbands as a symbol of their protest against the Vietnam War, the courts continue to struggle with questions concerning schools and student clothing. Today, mandatory school uniforms are the focus of the debate over the conflict of students' rights to free expression versus schools' obligation to assure a safe and orderly environment (Douvanis, 1996).

To justify clothing regulations, districts must establish that the dress code (i.e. school uniforms) is rationally related to improvement of the educational process, that the necessity for the dress code outweighs the individual's interest in expressing his or her personal preferences in clothing, and that no less intrusive alternative is available (For example, see *Massie v. Hena*, 455 F.2d 779,783 (4d Cir. 1972); *Olesen v. Board of Education*, 676 F.Supp. 820 (N.D.Ill. 1987); *Nelson v. Moline Sch. Dist. No. 40*, 725 F.Supp. 965 (D.Ill. 1989); and *Broussard by Lord v. School Bd. of the City of Norfolk*, 801 F.Supp. 1526 (D. Va. 1992).

In a quest to promote schools as safe havens (Brown and Douvanis, 1994), courts will increasingly rely on empirical evidence that student uniforms inhibit gang activity (*Olesen v. Board of Education*), reduce violence, and improve academic achievement (limited support established by *Wallace v. Ford*). Because there are different court decisions even within the same circuit, school officials and their attorneys must review the court decisions that have hegemony over their districts.

With the rampant adoption of school uniforms nationally, President Bill Clinton requested Secretary of Education Richard W. Riley to create and distribute the United States Department of Education Manual on School Uniforms. The manual provides several legal recommendations for those schools and school districts considering implementation of mandatory uniforms. The School Uniform Manual's suggestions include:

- Protect students' religious expression by releasing from participation those students whose religious beliefs are substantially burdened by a school uniform requirement.
- School districts must not arbitrarily implement school uniform policies. Policies must be a result of a disruption to the learning environment where other lesser measures have been or would be ineffective.
- Assist families that need financial help.
- Do not require students to wear a message. (Example: political message)
- Protect students' other rights of expression such as wearing a political campaign button as long as the item does not contribute to substantial disruption. (*United States Department of Education Manual on School Uniforms*, 1998)

In a review of literature and recent decisions, the courts provide support for mandatory school uniform policies in five areas: enhancing the learning environment of the school; student conduct and school authority; student membership in gangs; creating a safe school atmosphere; and the school's right to govern.

### **Enhancing the Learning Environment of a School**

Perhaps the most compelling argument for mandatory school uniforms lay in a school district's desire to enhance the learning environment. As evidenced in *Phoenix Elementary School District No.1 v. Green*, 189 Ariz. 476; 943 P.2d 836 (1997), the Court appeared

to be supportive of mandatory school uniform policies wherein the policy is intended to enhance the learning environment of a school. In this case, the court upheld the “content-neutral” mandatory uniform policy of Phoenix Preparatory Academy (a public middle school). Perry Zirkel (1998) interprets the decision and its findings as designating the school as a non-public forum. Thus, the “District’s content-neutral dress code constitutionally regulates the Student’s First Amendment speech rights in the non-public forum of their school” (Phoenix Elementary Sch. Dist. No.1). The court agreed with the district that the dress code bore a reasonable relation to the pedagogical purpose of the school, and the students were provided with alternate avenues of expression.

### Student Conduct and School Authority

In *Flory v. Smith*, the courts held that student conduct can be regulated by school officials if authorities have the power to adopt certain rules of conduct in the first place and, assuming such power exists, whether the regulations are reasonable. That school boards have such power (even off school property) was consummated in *Wood v. Strickland*. School officials are allowed to maintain proper discipline in cultivating a learning environment (*Katchak v. Glasgow Indep. Sch. Sys.* and *Massie v. Henry*). Although the courts overruled a school board decision, *Smith v. Hobart* provides guidance by insisting on the relationship between student misconduct and academic performance (“a student’s misconduct must be directly related to the student’s academic performance, *Smith*, 811 F.Supp. at 399). In *Wallace v. Ford and Richards v. Thurston*, school officials were afforded more power to promulgate dress codes than to command haircuts. Although Soglin indicates that school authorities have rules that provide standards to guide student conduct, both *Jenkins v. Louisiana Bd. of Educ.* and *Murray v. West Baton Rouge Parish Sch. Bd.* indicate that such school rules do not have to be developed with the same specificity as criminal codes. Soglin, Jenkins, and Murray provide inherent authority of school officials to discipline. The courts have generally restricted the application of broad rules to handicapped children in need of special services.

### Student Membership in Gangs

*Tinker* established a student’s right to wear clothing that would not cause a school disruption. Citing district

policy to protect the health, safety, and welfare of other students, the courts in Olesen allowed a ban on all gang activities, including the wearing of gang symbols, jewelry and emblems, and the wearing of earrings by male students. Olesen suggests the court’s desire to make schools safe havens for learning rather than places of fear, intimidation and violence. Olesen posits that school policies will be upheld by the courts against First Amendment claims if school officials can document that the learning environment is threatened or the rights of other students are being infringed. Anti-gang dress codes foster safety in the school (i.e., a compelling state interest) unlike dress codes in the 1960s which addressed general concerns of school decorum.

### Creating a Safe School Atmosphere

In *Hazelwood*, the censored speech partially concerned issues related to sexuality. A heightened concern for student safety might produce a *Hazelwood*-type protection for school district requirement of uniforms. If a school committee and administration acts to limit clothing with sexually risqué slogans and thereby disperse an already somewhat highly charged atmosphere in order to protect students and enhance the educational environment—even when the specific items banned may be relatively innocuous in today’s world—the court is unlikely to conclude that this action violated the First Amendment (Goldstein et al., 1995). In *Tinker*, the establishment of substantial and foreseeable substantial disruption supports the use of clothing restriction to deter disruption in the learning environment.

### School’s Right to Govern—General Overview

The education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges (*Hazelwood*, 484 U.S. at 273). The need for a clear and concise board of education policy on the reduced expectations of privacy for the students is an essential major policy step (*New Jersey v. TLO*). Ruling that privacy rights sometimes must yield to the fight against drugs, the 6 to 3 Supreme Court decision allowing random drug testing of student athletes provides language that the courts might consider in such legal challenges. Since “students have a lowered expectation of privacy because of the public schools’ role as *guardian* and tutor (Scalia, 1995; *Veronia Sch. Dist. v. Acton*, 115 S.Ct. 2386, 1995

WL 373274.), the requirement of student uniforms as a “war on gangs and violence” might receive court support.

Since *Hazelwood* affords educators greater control in deciding when the school will affirmatively “promote” or “lend its name and resources” to particular speech, the safety needs of students might allow schools to require uniforms if empirical evidence establishes that uniforms reduce violence. If dress code restrictions or uniforms were to be upheld based on the school’s right to govern, Maloney (1991) presents an index of protected rights that must be considered by the courts:

- 1) First Amendment right of free expression;
- 2) Ninth Amendment rights retained by the people;
- 3) Fourteenth Amendment right of privacy;
- 4) Fourteenth Amendment right of due process;
- 5) Fourteenth Amendment right of equal protection;
- 6) Right to be let alone;
- 7) Failure of the “reasonableness” test.

Burke (1993) stresses that the constitutional rights of students must be weighed against the safety needs of students. Relying on *Olesen*, Burke (1993) and Maloney (1991) find limited support for school districts to enforce “anti-gang” dress codes. *Soglin v. Kauffman* and *Poling* are two potential examples of support for mandating uniforms. For example, the Sixth Circuit based its decision in *Poling* on the majority holding in *Hazelwood* and ruled that civility is a legitimate pedagogical concern.

## Summary

Community concerns about school violence, research linking dress to improved student achievement and conduct, and court decisions providing support for school-mandated dress codes demonstrate that uniform dress codes may become an important tool in improving school climate. Although no one claims that uniforms are a panacea for youth problems, the research and feedback clearly show that uniforms may be an important piece of the puzzle for improving schools. It is apparent from anecdotal records and stakeholder feedback that school uniforms are making a positive difference in helping to reduce school violence and improve student discipline. Research further shows improvements in school climate and student self-esteem. One may wonder how uniforms have affected teacher expectations and how many students from low

socio-economic backgrounds may prosper from increased expectations.

With research to support the positive effects of school uniforms, all schools must now consider the legal conditions for implementation. School officials may now have support from the courts if the need for uniforms is warranted and no less intrusive alternative is available.

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*Flory v. Smith*, 145 Va. 164, 134 S.E. 360 (1926).  
*Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 571.  
*Jenkins v. Louisiana Bd. of Educ.*, 506 F.2d 992 (5d1 Cir. 1975).  
*Katchak v. Glasgow Indep. Sch. Sys.*, 690 F.Supp. 580 (W.D. Kentucky 1988).  
*Massie v. Henry*, 455 F.2d 779, 783 (4d1 Cir. 1972).  
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# T-Shirt Speech

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We have experienced a pendulum-swing of sorts over the last three decades regarding control enjoyed by school boards over curriculum, student speech, and student behaviors. School boards could control student behaviors, including their speech, with seeming impunity until 1969 when the U.S. Supreme Court changed the rules sharply reducing the authority of school boards to control student speech and behaviors that communicated a message. During the 1980s, however, two successive cases operated to return more control to school officials. A small group of interesting cases occurring mostly in the 1990s involved attempts by school officials to punish students for their t-shirts. The way the courts have dealt with t-shirts, particularly the slogans printed on them, can be instructive in understanding the current status of school authority in controlling student speech. Exploring the ways that courts have dealt with speech issues regarding speech printed on schoolchildren's t-shirts is the subject of this article.

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## Traditional Control

Prior to the social upheaval accompanying the Vietnam War era, it was presumed that school boards and their officials had almost absolute control over the school curriculum and over behaviors of students in the school setting. Potential plaintiffs who were upset about school decisions in these areas bore the burden of proof in showing that the school board's actions were irrational. Because public schools were seen as

*acting in loco parentis*, and because it was uncertain whether constitutional rights extended to students, the courts generally upheld the actions of school authorities. To overcome the favored position of the school board, plaintiffs were required to carry both burdens of production and persuasion to show the irrationality of the school board's actions.<sup>1</sup>

When a Michigan school board decided, 125 years ago, to add high school to its common school program, and a taxpayer sued the school board for going beyond its mission, the Michigan Supreme Court upheld the school board's right to control its curriculum.<sup>2</sup> Later, similar unsuccessful challenges to the addition of physical education,<sup>3</sup> vocational education,<sup>4</sup> and health education<sup>5</sup> continued to reinforce the authority that school boards have over curriculum. Even a challenge against a school board's decision to offer an ungraded elementary school was dismissed, indicating that the school board's authority over curriculum would remain absolute.<sup>6</sup> And a parental objection to teaching materials that the parent said promoted the religion of secular humanism gained an injunction in federal district court, but that injunction was later overturned by the appellate-level court.<sup>7</sup> In the traditional view, and continuing today, the selection of instructional materials and decisions about curriculum are within the authority of the school board.

The traditional control of school boards over curriculum matters extended to control over student behaviors as well. For example, an Arkansas court permitted a school board to punish a female student under a policy forbidding the wearing of transparent hosiery, low-necked dresses, or cosmetics.<sup>8</sup> In another situation, the Oklahoma Supreme Court upheld the expulsion of a student who refused to take singing lessons.<sup>9</sup> Another example of school board control occurred wherein a Massachusetts student objected to having her work graded by a fellow student, insisted that the teacher grade it, and absented herself in protest.<sup>10</sup> The Supreme Judicial Court of Massachusetts upheld the school board's decision to extend her absence for the rest of the school year.

The school board's right to control student behaviors sometimes extended beyond the school grounds. In *O'Rourke v. Walker*,<sup>11</sup> Connecticut's highest court permitted the punishment of a boy for annoying two girls on their way home from school when it could be shown that the miscreant's behavior affected the morale and efficiency of the school. In another situation, a female student's suspension was upheld after she was punished for riding in a car with boys.<sup>12</sup>

Behaviors that were purely speech related were also subject to control by the local school board. For example, a student in a Fresno, California, school criticized the management of the schools in a class meeting and was punished by the school board.<sup>13</sup> A California appeals court upheld the punishment. Similarly, when a student wrote an item for the local newspaper criticizing board policies and ridiculing the board, the Iowa Supreme Court let the student's exclusion stand.<sup>14</sup> A situation of almost identical facts ended the same way in Wisconsin.<sup>15</sup> Clearly, in the traditional view, school boards and their appointed officials enjoyed almost unfettered discretion in controlling both the curriculum and the behaviors of schoolchildren under their tutelage.<sup>16</sup>

### **Tinker v. Des Moines Independent Community School District**

The traditional view, that school boards had absolute control over student behaviors and speech, became severely limited with *Tinker v. Des Moines Independent Com. Sch. Dist.*<sup>17</sup> *Tinker* began when Mary Beth Tinker and her brother John were excluded from school for wearing armbands on their upper arms to protest the Vietnam War. In this landmark case, the U.S. Supreme Court observed that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>18</sup> The court held that a student may express his opinions, even on controversial subjects, if he does so "without 'materially and substantially interfering with the requirements of appropriate

discipline in the operation of the school' and without colliding with the rights of others."<sup>19</sup> The Court went on to observe that "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of

the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."<sup>20</sup>

The effect of the *Tinker* case was both immediate and far-reaching. The recognition that a behavior was "speech" in the constitutional sense precipitated a switch in the burden of proof from the plaintiff parent or child to the school board. Once a behavior was considered speech, or once a plaintiff could convince the court that the school official's action impaired a Free Speech right, the burden was no longer on the plaintiff to

show that the official's action was irrational. Rather, the burden switched to the school board and its officials to show that a compelling government interest warranted squelching the speech with no less intrusive means. The compelling interest the school board was required to prove after *Tinker* was, simply stated, that a "material and substantial disruption" would occur if the students were allowed to continue the speech. With this switch in burden and concomitant heightened scrutiny, it became more difficult for school officials to control behaviors that communicated an idea.

### **Bethel School Dist. No. 403 v. Fraser**

The U. S. Supreme Court made it possible for school officials to regain some control over speech behaviors when it heard and decided *Bethel School Dist. No. 402 v. Fraser*.<sup>21</sup> In this case, Matthew Fraser was suspended for three days and had his invitation to be the graduation speaker withdrawn after he gave a nomination speech filled with sexual innuendos in a student assembly.<sup>22</sup> The Court decided in favor of the school district and upheld the authority of school officials to impose sanctions for offensively lewd and indecent student speech.<sup>23</sup>

The *Bethel* decision serves to return control to

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school officials for student speech that may not rise to the standard required in *Tinker*, but is nonetheless inappropriate within the school setting. Undergirding this decision is the view that schools have a purpose in teaching lessons of civility and mature conduct and that it is difficult for schools to meet this mission in a climate marked by vulgarity, lewdness, and indecent speech.

### **Hazelwood School Dist. v. Kuhlmeier**

Applications of *Tinker* became further limited when the U. S. Supreme Court decided *Hazelwood School Dist. v. Kuhlmeier*.<sup>24</sup> In *Hazelwood*, a high school principal excised two articles from the page proofs of the student newspaper before it went to press. The newspaper was a work product of a for-credit journalism class. The student editor claimed that the principal's action was an unconstitutional, prior restraint on student speech. The high court held that school officials do not violate the First Amendment by exercising editorial control over what is printed in school-sponsored publications, as long as their actions relate to a legitimate, pedagogical purpose.<sup>25</sup> The Court also broadened the definition of "curriculum" in disputes over student speech:

The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, as long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.<sup>26</sup>

By this language, curriculum became any expressive activity perceived to be school-sponsored. This is a much broader definition of curriculum than the traditional view of what is taught. By this interpretation, traditional control of the curriculum in its narrow sense (what is taught) was extended to include curriculum in the *Hazelwood* sense (speech that is school-sponsored). Consequently, finding speech to be school-sponsored, even if the speech originates from the thoughts or actions of students, brings the speech under the control of school officials.

### **T-Shirt Speech**

Subsequent to *Bethel* and *Hazelwood*, a small number of cases began to occur in which school officials were challenged for attempting to control the wearing of t-shirts that carried printing or pictures on them. This section examines those cases.

*Gano v. School Dist. 411 of Twin Fall Cty., Idaho*,<sup>27</sup> was the first case after *Bethel* and *Hazelwood* to involve the punishment of a student for refusing to return to school without a t-shirt with printing found objectionable by the school administration. The plaintiff student, at the request of other students, drew a caricature of three high school administrators (principal, vice-principal, and dean of students), depicting them in an alcoholic stupor in the high school stadium during the homecoming game. The students transferred the cartoon to t-shirts for sale during homecoming week. Upon discovery of the t-shirts, the offended administrators punished the creator of the drawing with two days' suspension. Records of that punishment were subsequently withdrawn. This litigation began when the artistic student refused to return to school without wearing the t-shirt. The student moved for a preliminary injunction to keep the school administrators from suspending or interfering with his wearing of the t-shirt until the litigation had run its course.

The district court first examined the message provided by the drawing on the t-shirt. To the court, the t-shirt portrayed the three administrators consuming alcoholic beverages on school property, an activity that would be a misdemeanor under Idaho law. There was no evidence that the three administrators had ever done such a thing. Thus the t-shirt, according to the court, falsely accused the administrators of committing a crime. The court observed that the role of schools includes teaching about the limits of proper conduct, and quoted from *Bethel*:

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil,

mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in [here].<sup>28</sup>

The court labeled the caricature on the t-shirts as “clearly offensive.”<sup>29</sup> For this reason, the court denied the student’s motion for preliminary injunction.

In *Broussard by Lord v. School Bd. of City of Norfolk*,<sup>30</sup> a middle school student brought a Fourteenth Amendment and Free Speech claim under 42 U.S.C. 1983, after she was punished for refusing her principal’s request to cease wearing a t-shirt with the words “Drugs Suck” printed upon it. The student’s mother, as next friend, argued that the words were protected speech that did not rise to the “material and substantial disruption” standard under *Tinker*. The school district argued that the objectionable word “suck” met the standards supplied by both *Tinker* and *Bethel*, and the court agreed.

In its analysis, the court began by framing *Bethel* as a balancing test: “the freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”<sup>31</sup> But, after identifying the competing values for balancing, the court indicated that its thumb belonged heavily on the school’s side of the scale. Schools, the court said, “need not tolerate student speech that is inconsistent with its ‘basic educational mission’ even though government could not censor similar speech outside the school.”<sup>32</sup> The court then completed its analysis in light of both *Fraser* and *Tinker*. First, the court decided that the word “suck,” when printed on a middle-school student’s t-shirt, was “lewd, indecent, or offensive.”<sup>33</sup> The court concluded that the t-shirt speech could be punished under *Fraser*. Second, the court also agreed with the school district that the printed word “suck” could reasonably cause a disruption (the court’s version of the *Tinker* standard).<sup>34</sup> The school district was awarded judgment in its favor.

The dispute in *McIntire v. Bethel School, Indep. School Dist. No. 3*,<sup>35</sup> began after students were punished for wearing t-shirts to school bearing the words “[t]he best of the night’s adventures are reserved for people with nothing planned.” The t-shirts had been designed, printed, and sold by a student, who

testified that she was not aware that the slogan had come from an old advertising campaign for Bacardi Rum. Students had worn the t-shirts for several months during the school year without incident. When the school superintendent was advised of the source of the slogan, he directed the principal to stop the wearing of the t-shirts, pursuant to the school district’s policy against the wearing of clothing that advertised alcohol.

A student brought suit against the school district and its officials and sought relief enjoining the school district from prohibiting students from wearing the t-shirts to school or school activities. The school district and its administrators responded with a motion to dismiss on grounds of qualified immunity. The school board members were granted their motions to dismiss, but the superintendent’s motion was denied. To the court, it was “clearly established law” at the time of the superintendent’s actions that, absent a showing of the *Tinker* standard, the superintendent’s prohibition of the t-shirts violated the students’ First Amendment rights.<sup>36</sup> The court disagreed with the school district’s argument that *Hazelwood* or *Bethel* was applicable to this situation. The t-shirts were not school-sponsored, so *Hazelwood* was inapposite. The court also believed that *Bethel* was not applicable because there were issues of material fact as to whether the t-shirts actually advertised alcohol.<sup>37</sup>

The students’ motion for injunctive relief was granted. The court did not strike against the dress code policy prohibiting printed, liquor advertisements on clothing, nor did it even suggest that such prohibitions were not part of the legitimate pedagogical objective of teaching students about the effect of alcoholic beverages or the illegality of their consumption by minors. Rather, the case turned on the lack of evidence that the slogan printed on the t-shirt was perceived by anyone in the school community as an advertisement for Bacardi Rum.

From reading the federal district court’s opinion in this case, it is unclear when *Bethel* should apply. The court called the Supreme Court opinion in *Bethel* “oblique at best and certainly less than clear.”<sup>38</sup> The court then explored the relationship between *Tinker*, *Hazelwood*, and *Bethel*:

If a public school is not a public forum, the proper inquiry for First Amendment purposes then focuses on whether the students’ speech or expressive activity is school-sponsored speech or speech or expression which might

reasonably be perceived to bear the imprimatur of the school. If the speech is school-sponsored, the *Hazelwood* and *Fraser* standard applies. If the speech or expressive activity is not school sponsored or that which might reasonably be perceived to bear the school's imprimatur, *Tinker* provides the standard for determining whether the First Amendment requires the school to tolerate the particular student speech or expressive activity. Because the Court concludes that that the message on the t-shirts is speech protected by the First Amendment and defendants have failed to prove that the speech is an advertisement for an alcoholic beverage and that the prohibition and punishment of such speech is rationally related to a legitimate pedagogical concern, or that the speech is inconsistent with the school's educational mission, or any basis for a reasoned forecast that the t-shirt message would be perceived as an advertisement for an alcoholic beverage and would substantially interfere with or disrupt the work or discipline of the school, or infringe on the rights of other students, Plaintiffs have made a *prima facie* showing of a deprivation of their First Amendment rights.<sup>39</sup>

There is no discussion by the court about the printed material being "offensive," or any other adjective identified with the *Bethel* decision. Simply stated, because the slogan was not known to be a liquor advertisement, the school would have to show that the slogan would "substantially disrupt or materially interfere with the work or discipline of the school or that it would infringe upon the rights of other students"<sup>40</sup> before the school could prohibit the t-shirt.

Pyle by and through *Pyle v. So. Hadley School Com.*<sup>41</sup> began when students got into trouble for wearing two t-shirts to school. One t-shirt read "See Dick Drink. See Dick Drive. See Dick Die. Don't be a Dick." The other t-shirt read: "Coed Naked Band: Do It To the Rhythm." The school district's dress code policy prohibited clothing with designs or comments that are obscene, profane, lewd, or vulgar, that harass others, or that advertise alcohol, tobacco, or illegal drugs. For an extended period of time, two students and their father continued a campaign to challenge the policy. For wearing the t-shirts, along with others of

the "Coed Naked" variety, the students earned punishment for either lewdness or sex harassment.<sup>42</sup> The students brought suit against the school district and sought injunctive relief against enforcement of the dress code.

In its analysis, the court identified three alternatives for situations where the Free Speech rights of students are pitted against a school's right to control student behaviors:

These cases reveal at least three approaches to the First Amendment rights of high school students. First, "vulgar" or plainly offensive speech (*Fraser*-type speech) may be prohibited without showing disruption or substantial interference with the school's work. Second, school-sponsored speech (*Hazelwood*-type speech) may be restricted when the limitation is reasonably related to legitimate educational concerns. Third, speech that is neither vulgar nor school-sponsored (*Tinker*-type speech) may only be prohibited if it causes a substantial and material disruption of the school's operation.<sup>43</sup>

Based upon the pleadings, the court could find no evidence that a *Tinker*-type disruption had arisen from the wearing of the t-shirts, and found it irrelevant. Nor were the t-shirts school-sponsored, so *Hazelwood* could not apply. To the extent that school administrators were attempting to wear t-shirts that the school officials found obscene, profane, lewd, or vulgar, the court bowed to the discretion of school administrators under *Bethel v. Fraser*. Where to draw the line on when sexual innuendo becomes actionable was left to academicians and their elected superiors. On this aspect of the school policy, injunctive relief for the students was denied.<sup>44</sup>

With regard to the part of the policy prohibiting clothing that harasses others, however, the court granted the students an injunction. The harassment provision of the policy, according to the court, permitted school officials to pick and choose which message it would support and which message it would punish. Quoting a decision from the Third Circuit Court of Appeals, the court observed that the "constitutional line is crossed when, instead of merely teaching, the educators demand that students express agreement with the educator's values."<sup>45</sup> The school district could punish harassing behavior when the behavior rose to

the standard articulated in *Tinker*.

*Baxter v. Vigo County School Corp.*<sup>46</sup> arose out of punishments given to an elementary-age student who wore t-shirts to school with the words "Unfair Grades," "Racism," and "I Hate Lost Creek" printed upon them. The parents brought civil rights' actions against the school district, the school principal, and county and state welfare officials. Among the parents' allegations were complaints that the school and welfare officials had conspired to bring neglect and abuse charges against them. The Federal District Court dismissed all claims, and the parents appealed. The Seventh Circuit Court of Appeals affirmed the lower court on all aspects. Relevant to this article is the court's analysis on whether or not the school principal enjoyed qualified immunity in punishing the student for her t-shirts.

The court noted that the plaintiffs in *Tinker* were in junior high school and high school, with the youngest plaintiff aged 13. The court also noted that the plaintiffs in both *Bethel* and *Hazelwood* were of high school age. Because the Supreme Court gave indications in *Bethel* and *Hazelwood* that age is a relevant factor in assessing the extent of free speech rights in school, and because the child here was at least six years younger than any of the plaintiffs in these other cases, the court was unable to conclude that the plaintiffs had demonstrated that the right the school principal allegedly violated was "clearly established." Consequently, the principal was entitled to qualified immunity and the dismissal of the action with respect to him was affirmed.<sup>47</sup>

Jeglin by and through *Jeglin v. San Jacinto Unified Sch. Dist.*,<sup>48</sup> focused on a school policy denying the right of students to wear clothing bearing writing, pictures, or other insignia which identifies any professional or college sport teams. The policy indicated that it had been adopted to target the impact of youth gangs upon its schools. By specifying that it was targeting youth gangs, the court identified the potential for impairment of the constitutional right of association in the policy. The court, therefore, analyzed the policy in light of *Tinker* and determined that a material and substantial disruption could be forecast at the high school level but not at the elementary and middle school levels if the policy were not implemented. Injunctive relief was thus granted with respect to application of the policy at the younger grade levels, but denied with respect to its application at the high school level.

In *Phillips v. Anderson County School Dist. No. 5*,<sup>49</sup> a middle school student was suspended for his

refusal to remove a jacket made to resemble the Confederate battle flag. Applying *Tinker*, the federal district court granted the school district's motion for summary judgment because the school district could reasonably forecast a material and substantial disruption if wearing the jacket were not curtailed. Another case involving depictions of the Confederate flag arose in *Denno v. Sch. Bd. of Volusia County*.<sup>50</sup> A middle school student waved a small, 4-inch, Confederate flag in the cafeteria. While he was being taken to the principal's office, he observed another student complying with a request to remove or reverse a t-shirt with the Confederate flag printed on it. He yelled to the other student to "stick up for his principles." Because of these actions, the student received a nine-day suspension. The federal district court granted the school's motion to dismiss on grounds of qualified immunity. According to the court, it was not clearly established law that it was constitutionally infirm to tell a student he cannot wave a Confederate flag or encourage another student to not remove a t-shirt depicting the Confederate flag.

A final case does not involve t-shirts *per se*, but is probably similar enough to inform decisions of school officials about t-shirt speech. In *Chandler v. McMinnville School District*,<sup>51</sup> students were punished for wearing buttons and stickers on their clothing with slogans that showed solidarity with teachers who were on strike against the school district. Slogans on the stickers and buttons included the word "Scab" with a line drawn through it ("no Scabs"), as well as statements like "Scab we will never forget," "Students united for fair settlement," and "We want our real teachers back." Two students, whose fathers were among the striking teachers, were punished for wearing the stickers and buttons that called the replacement teachers "scabs." In response, the students filed 42 U.S.C. 1983 suits against the school district, alleging violations of Free Speech rights. At the federal district court level, the school district's motion to dismiss was granted on grounds that the slogans were "offensive" and "inherently disruptive."

The Ninth Circuit Court of Appeals analyzed the situation in a manner similar to that used by the federal district court for Massachusetts in *Pyle*,<sup>52</sup> above. It determined that the slogans calling replacement workers "scabs" could not be considered vulgar, lewd, obscene, or plainly offensive within the meaning of *Fraser*. Next, the speech was clearly not school-

sponsored, therefore, it could not come under the control of the school through *Hazelwood*. Finally, the court examined in light of *Tinker*, and found that the federal district court erred in finding the “scab” buttons inherently disruptive.<sup>53</sup> The appellate court reversed the lower court.

### Observations and Conclusions

Wearing plain t-shirts without printing or pictures on them would not implicate speech rights under the First Amendment since what one wears generally is not “speech” in the constitutional sense.<sup>54</sup> T-shirts in a particular color or worn in a particular way, however, might be representative of a youth gang, and policies designed to limit wearing such shirts might implicate associational rights under the First Amendment.<sup>55</sup> A school could state within its conduct code a preference for wearing or not wearing a particular item of clothing, but it should limit its reasons to a belief that such standards promote an effective learning environment. If the dress code policy articulates a purpose of thwarting youth gangs, the school district must be prepared to bring evidence that youth gangs are causing material and substantial disruptions (per *Tinker*) in all of the schools covered by the policy, due to the associational rights represented by membership in youth gangs.

Traditional control of the curriculum continues to this day. Suppose t-shirts are produced as part of a teacher’s delivery of the curriculum, for example, in a computer class learning to use a flatbed scanner and software for producing t-shirt transfers. What is produced in this class would be curriculum in its more narrow, traditional sense (what is taught), and control of what happened therein would continue as it always had.

*Hazelwood* expands the definition of curriculum to include anything that might be perceived within the community as bearing the school district’s imprimatur—a much wider definition of curriculum than the traditional. When *Hazelwood* applies, the speech rights raised by student plaintiffs become automatically

subsumed under the school officials’ right to control the curriculum (in both the narrow and wider sense). Presumably, t-shirts produced for school-related activities or under sponsorship of the school would come under the *Hazelwood* rule. Therefore t-shirts and t-shirt speech produced by groups such as student clubs, the theater department, the junior class, the cheerleaders, or the football team, can be controlled by the school district under its authority recognized under *Hazelwood*.

When t-shirts are purchased with writing on them or are printed by students away from the school, the writing on them remains the students’ speech when brought into the school. School officials may not assert control over these shirts under *Hazelwood*. Control of these types of t-shirt speech can only be exerted under

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***To control printings on t-shirts under Tinker, school officials must be able to present evidence that the t-shirt message would substantially disrupt or materially interfere with the work or discipline of the school, or that it would infringe upon the rights of other students.***

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*Tinker* or *Bethel*. To control printings on t-shirts under *Tinker*, school officials must be able to present evidence that the t-shirt message would substantially disrupt or materially interfere with the work or discipline of the school, or that it would infringe upon the rights of other students.<sup>56</sup> This is a particularly high standard to prove and requires facts that go beyond just an undifferentiated fear of disruption.

Being able to assert the right to control t-shirt speech under *Bethel* requires close examination of the court’s language. Which adjectives accurately state the *Bethel* standard: vulgar, lewd, sexually explicit, indecent, offensive, patently offensive? The U. S. Supreme Court scattered adjectives describing Matthew Fraser’s speech in four places in the *Bethel* decision. In announcing its holding, the court used two adjectives, one with an adverb modifier: “[w]e hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech.”<sup>57</sup> On the prior page, the court observed “[s]urely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive tenor in public discourse.”<sup>58</sup> Farther down the same page, the court called the pervasive sexual innuendo in Fraser’s speech plainly offensive.<sup>59</sup>

Prior to announcing its holding, the Court observed “[t]hese cases recognize the obvious concern on the part of parents, and school authorities acting in loco parentis, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.”<sup>60</sup> Collecting all of these adjectives together, one might restate the *Bethel* test as: school officials may exert control over student speech that is offensively lewd, indecent, vulgar, offensive, plainly offensive, and sexually explicit.

In examining the cases involving t-shirt speech, it appears that, clearly applies, if the speech printed on the t-shirt connects in any way to sex, whether vulgarity, sexual innuendo, or vague sexual references.<sup>61</sup> In *Pyle* by and through *Pyle v. So. Hadley School Com.*,<sup>62</sup> the Federal District Court gave the school discretion to decide which “Coed Naked” t-shirts contained sexual content. Once it was recognized as sexual in nature, *Bethel* applied, and the court academically abstained. In *Broussard* by *Lord v. School Bd. of City of Norfolk*,<sup>63</sup> the little girl’s “Drugs Suck” t-shirt was found to be controllable by school officials on grounds of both *Tinker* and *Bethel*. Though one might criticize the applicability of *Tinker* in this situation,<sup>64</sup> one cannot discount the sexual imagery connected to the word “suck.” Because the word was offensive in the sexual sense, its use could be controlled by school authorities.

In the absence of sexual references, the applicability of *Bethel*, particularly the utility of the singular adjective “offensive,” becomes problematic. It appears that if the objectionable t-shirt is offensive because it states a political position, and the school official is thus subjectively offended by it, then *Bethel* would be inadequate justification to control the speech. The federal district court in *Chandler v. McMinnville School District* found it sufficient to brand the “scab” buttons and stickers “offensive.”<sup>65</sup> However, the appellate court overruled. Being merely “offensive,” that is, subjectively offensive, wasn’t adequate justification.

For the school administrators falsely depicted in an alcoholic stupor in *Gano v. School Dist. 411 of Twin Falls Cty., Idaho*,<sup>66</sup> it wasn’t sufficient for the school administrators to be subjectively offended by the t-shirts. Rather, the court focused on statutory prescriptions against the depicted behaviors, the potential for defamation claims, and the collective interest in promoting a proper view of alcohol in the life of the community. These factors indicate that the objectionable

speech must be objectively, rather than subjectively, offensive to be controllable under *Bethel*.

Further support for the view that speech must be objectively offensive for *Bethel* to be applicable can be found in *Broussard* by *Lord v. School Bd. of City of Norfolk*.<sup>67</sup> In weighing the value of expert testimony relevant to the argument that the use of the word “suck” had passed beyond having only a sexual connotation and now also meant “deplorable,” the federal district court for the Eastern District of Virginia implied that the word must be objectively offensive for *Bethel* to apply.<sup>68</sup>

Policies against t-shirts promoting alcohol, tobacco, or illicit drugs are common, but their legitimacy has not been specifically addressed by the courts in these t-shirt cases. The federal district court for the Western District of Oklahoma never reached that question in *McIntire v. Bethel School, Inden. School Dist. No. 3*.<sup>69</sup> The case turned instead to whether the slogan printed on the t-shirt was perceived as an alcohol advertisement. Because it appeared that the slogan was not generally perceived as such an advertisement, the school district’s motion to dismiss was denied and the plaintiff student’s motion for injunctive relief was granted.

The federal district court for Idaho upheld the punishment meted out on the student who caricatured his school administrators in an alcoholic stupor, branding the depiction “clearly offensive.”<sup>70</sup> The court did not describe exactly in what way the caricature was offensive, although it was undoubtedly subjectively offensive to the administrators depicted on the t-shirt. The cartoon was not offensive in the sexual sense, though it might have been objectively offensive to the community at large. It is possible that an argument could be made that *Tinker* extends to permit school officials to prohibit clothing that advertises alcohol, tobacco, or illegal drugs. The language from *Tinker* is instructive: to be controlled, the speech must “substantially disrupt or materially interfere with the work or discipline of the school.”<sup>71</sup> Certainly the work of the school includes teaching about the benefits of a healthy lifestyle, the dangers of using such products, and the importance of refraining from activity that is criminalized within the state. Such advertisements, therefore, are likely to “materially interfere with the work or discipline of the school.”

Only a few cases involving t-shirt speech are currently available. These cases are useful in displaying

the interaction of the legal tests supplied by *Tinker*, *Hazelwood*, and *Bethel*. Though trends seem clear, more cases involving t-shirt speech will be required to fully understand the controls that school administrators can exert over this unique form of communication.

## References

- <sup>1</sup>See, e.g., *Hargett v. Franklin County Bd. of Educ.*, 374 So. 2d 1352 (Ala. 1979).
- <sup>2</sup>*Stuart v. S.D. No. 1, Kalamazoo*, 30 Mich. 69 (1874).
- <sup>3</sup>*McNair v. S.D. No. 1*, 288 P. 188 (Mont. 1930).
- <sup>4</sup>*Mercure v. Board of Education, Columbiana School Dist.*, 361 N.E. 2d 273 (Ohio, App. 1976).
- <sup>5</sup>*City of Dallas v. Mosely*, 286 S.W. 497 (Tex. Civ. App. 1926).
- <sup>6</sup>*Schwan v. Bd. of Educ. of Lansing*, 183 N.W. 2d 594 (Mich. App. 1970).
- <sup>7</sup>*Smith v. Bd. of School Commissioners of Mobile County*, 827 F. 2d 684 (11<sup>th</sup> Cir. 1987).
- <sup>8</sup>*Pugsley v. Sellmeyer*, 250 S.W. 538 (Ark. 1923).
- <sup>9</sup>*School Board Dist. No. 18, Garvin County v. Thompson*, 103 P. 578 (Okla. 1909).
- <sup>10</sup>*Wuff v. Inhabitants of Wakefield*, 221 Mass. 427, 109 N.E. 358 (1915).
- <sup>11</sup>102 Conn. 130, 128 A. 25 (1925).
- <sup>12</sup>*Tanton v. McKinney*, 197 N.W. 510 (Mich. 1924).
- <sup>13</sup>*Wooster v. Sunderland*, 148 P. 959 (Cal. App. 1915).
- <sup>14</sup>*Burdick v. Babcock*, 31 Iowa 562 (1871).
- <sup>15</sup>*State v. District Board of School District No. 1*, 116 N.W. 232 (Wis. 1908).
- <sup>16</sup>LaMorte, *School Law: Cases and Concepts* 84 (5<sup>th</sup> ed., 1996).
- <sup>17</sup>89 S. Ct. 733 (1969).
- <sup>18</sup>89 S. Ct. at 736.
- <sup>19</sup>89 S. Ct. at 740, quoting *Burnside v. Byars*, 363 F. 2d 744, 749 (5<sup>th</sup> Cir. 1966).
- <sup>20</sup>89 S. Ct. at 740.
- <sup>21</sup>106 S. Ct. 3159 (1986).
- <sup>22</sup>The text of the speech was as follows: "I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be." 106 S. Ct. at 3167. (J. Brennan, concurring).
- <sup>23</sup>106 S. Ct. at 3165. The majority opinion in *Bethel* supplied the following quote from Judge Newman in *Thomas v. Bd. of Educ., Granville Central School Dist.*, 607 F. 2d 1043, 1057 (2d Cir. 1979) (concurring): "[T]he First Amendment gives a high school student in the classroom right to wear *Tinker's* armband, but not *Cohen's* (F\*\*\* the Draft) Jacket." See *Cohen v. California*, 91 S. Ct. 1780 (1971). This quote portends as early as twenty years ago that *Bethel* or another case similar to it would ultimately be an important case in t-shirt speech cases.
- <sup>24</sup>108 S. Ct. 562 (1988).
- <sup>25</sup>108 S. Ct. at 571.
- <sup>26</sup>108 S. Ct. at 569-70.
- <sup>27</sup>674 F. Supp. 796 (D. Idaho 1987).
- <sup>28</sup>674 F. Supp. at 796, quoting *Bethel School Dist. v. Fraser*, 106 S. Ct. at 3164.
- <sup>29</sup>674 F. Supp. At 798.
- <sup>30</sup>801 F. supp. 1526 (E.D. Va. 1992).
- <sup>31</sup>801 F. supp. at 1535, quoting *Bethel*, 106 S. Ct. at 3163.
- <sup>32</sup>801 F. supp. at 1535, citing *Hazelwood School District v. Kuhlmeier*, 108 S. Ct. at 567, in turn citing *Bethel School Dist. v. Fraser*, 106 S. Ct. at 3164.
- <sup>33</sup>801 F. supp. at 1536.
- <sup>34</sup>An expert witness for the school district, a school administration professor, testified that suggestive words such as "suck" create disturbances in the school atmosphere. 801 F. Supp. at 1534. This conjures up images of Obi-Wan Kenobi, the Jedi master of *Star Wars*<sup>TM</sup> fame: "I detect a disturbance in the Force." The record supplied by the court shows little evidence of a substantial level of disruption, or for that matter, any evidence of distraction. It would have taken a Jedi Knight to detect a disruption in this situation. The court apparently saw no difference between the words "disruption," "disturbance," or "distraction," nor any reason to bother with qualifying adjectives like "material" or "substantial."
- <sup>35</sup>804 F. supp. 1415 (W.D. Okla. 1992).
- <sup>36</sup>804 F. supp. at 1420.
- <sup>37</sup>804 F. supp. at 1426.
- <sup>38</sup>*Id.*
- <sup>39</sup>804 F. supp. at 1427.
- <sup>40</sup>*Tinker v. Des Moines Indep. School Dist.*, 89 S. Ct. at 740.
- <sup>41</sup>861 F. Supp. 157 (D. Mass. 1994).
- <sup>42</sup>One of the students wore without incident a t-shirt commemorating the Smith College centennial which read "A Century of Women on Top."
- <sup>43</sup>861 F. Supp. at 166.
- <sup>44</sup>861 F. Supp. at 170.
- <sup>45</sup>861 F. Supp. at 173, quoting *Steirer v. Bethel Area School District*, 987 F. 2d 989, 994 (3rd Cir. 1993).
- <sup>46</sup>26 F. 3d 728 (7th Cir. 1994).
- <sup>47</sup>26 F. 2d at 738.
- <sup>48</sup>827 F. Supp. 1459 (C.D. Cal. 1993).
- <sup>49</sup>827 F. Supp. 488 (D.S.C. 1997).
- <sup>50</sup>959 F. Supp. 1481 (M.D. Fla. 1997).
- <sup>51</sup>978 F. 2d 524 (9th Cir. 1992).
- <sup>52</sup>See text accompanying note 43, *supra*.
- <sup>53</sup>978 F. 2d 524, 530.
- <sup>54</sup>*Bivens v. Albuquerque Public Schools*. 899 F. Supp. 556 (D.N.M. 1995).
- <sup>55</sup>See *Jeglin by and through Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459 (C.D. Cal 1993).

<sup>56</sup>89 S. Ct. at 740.

<sup>57</sup>106 S. Ct. at 3165.

<sup>58</sup>106 S. Ct. at 3164.

<sup>59</sup>*Id.*

<sup>60</sup>106 S. Ct. at 3165.

<sup>61</sup>Support for this view is found in one of very few cases decided entirely on the basis of *Bethel*. *Heller v. Hodgins*, 928 F. Supp. 789 (S.D. Ind. 1996), a student responded loudly "I am not a whiteass, fucking bitch!" to the whispered claim of another student in the cafeteria. The student making the loud response, not the one who originally called her the name, was the one punishable by the school administration. The court called the expletive "vulgar, lewd, and plainly offensive."

<sup>62</sup>861 F. Supp. 157 (D. Mass. 1994).

<sup>63</sup>801 F. Supp. 1526 (E.D. Va. 1992).

<sup>64</sup>*See* n. 34, *supra*.

<sup>65</sup>97 The student making the loud response, not the one who originally called her the name, was the one punishable by the school administration. The court called the expletive "vulgar, lewd, and plainly offensive."

<sup>65</sup>861 F. Supp. 157 (D. Mass. 1994).

<sup>65</sup>801 F. Supp. 1526 (E.D. Va. 1992).

<sup>65</sup>*See* n. 34, *supra*.

<sup>65</sup>978 F. Supp. at 526.

<sup>65</sup>674 F. Supp. 796 (D. Idaho).

<sup>65</sup>801 F. Supp. 1526 (E.D. Va. 1992).

<sup>65</sup>801 F. Supp. at 1534.

<sup>65</sup>804 F. Supp. 1415 (W. D. Okla. 1992).

<sup>65</sup>*Gano v. School Dist. 411 of Twin Falls City, Idaho*, 674 F.

Supp. 796, 798 (D. Idaho 1987). Again, the reader is reminded that the student was punished for refusing to come to school without the shirt, not for creating the shirt.

<sup>65</sup>89 S. Ct. at 740. 8 F. Supp. at 526.

<sup>65</sup>674 F. Supp. 796 (D. Idaho).

<sup>65</sup>801 F. Supp. 1526 (E.D. Va. 1992).

<sup>65</sup>801 F. Supp. at 1534.

<sup>65</sup>804 F. Supp. 1415 (W. D. Okla. 1992).

<sup>70</sup>*Gano v. School Dist. 411 of Twin Falls City, Idaho*, 674 F.

Supp. 796, 798 (D. Idaho 1987). Again, the reader is reminded that the student was punished for refusing to come to school without the shirt, not for creating the shirt.

<sup>71</sup>89 S. Ct. at 740.