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**THE SEARCH FOR CONTRABAND:
ILLINOIS SCHOOL DISTRICTS'
ENCOUNTER WITH
FOURTH AMENDMENT
SEARCH AND SEIZURE.**

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Introduction

Not unlike a nationwide trend,¹ the decade of the 1990's has been a time in which Illinois school districts are experiencing an increasing rate of violent activities and criminal misconduct. Not by happenstance, there has also been an accompanying increase in student drug and alcohol abuse, as well as gang-related actions on school premises.² In an attempt to maintain a safe school environment, school districts are enacting tough policies and procedures to counter these trends and restricting some of the privileges that students earlier enjoyed. Accordingly, during this time there has been a plethora of federal and Illinois court decisions addressing the constitutionality of these districts' policies and actions, especially as they relate to alleged infringements of students' Fourth Amendment rights to be free from unreasonable searches and seizures.

I. What is a Search?

The Fourth Amendment to the United States Constitution protects the right of all people "to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."³ Thus, since people are protected only from unreasonable searches and seizures, it is essential to define what con-

stitutes reasonableness.

The reasonableness of a search is determined on a case-by-case basis by balancing the need to search against the invasion it entails.⁴ In the school context, this means the student's legitimate expectations of privacy (if such expectations exist) are balanced against the need of the school to perform the search to maintain order and discipline.⁵

In 1985, the United States Supreme Court decided the seminal Fourth Amendment case, *New Jersey v. T.L.O.*⁶ The Court held that teachers/school authorities do not need a warrant before searching a student and are not required to adhere to the requirement that searches be based on probable cause.⁷ The United States Court of Appeals for the Seventh Circuit went on to clarify this when it stated that "non-law enforcement government actors come within the purview of the Fourth Amendment only when their searches or seizures of individuals have no other purpose but to aid the government's investigatory or administrative functions."⁸

School officials only need "reasonable suspicion" to justify a search. Moreover, the legitimacy of the search "should depend on reasonableness, under all circumstances, of the search."⁹ The Court provided a two-pronged test to determine "reasonableness":

- (1) whether the action was justified at its inception, and
- (2) whether the search was reasonably related in scope to the circumstances which originally justified the search (given the age and

sex of the student as well as the nature of the infraction).¹⁰

II. Is the Search Reasonable?

The Fourth Amendment's protections apply to elementary and secondary students.¹¹ However, there is a diminished Fourth Amendment protection for schoolchildren because "classroom discipline and school order are crucial to effective education."¹² Yet, there must be a recognizable level when such restrictions become unreasonable in light of the Fourth Amendment.¹³

A. Was the Search Justified at its Inception?

A search is initially justified when there are reasonable grounds for suspecting that the search will produce evidence that a student(s) has violated either the law or school rules. There are two classification of student searches: (1) search of a particular individual(s) who is suspected of misconduct, or (2) a non-individualized, general administrative search when there is no specific suspect.

1. Individualized Suspicion

Individualized suspicion is an essential element of the reasonableness standard for school searches. This provision protects the rights of innocent students against blanket searches undertaken to detect only select students. Case law provides three ways to satisfy the reasonable grounds requirement at the inception of the search when school officials have identified particular students for misconduct: consent, reasonable suspicion, and informant information.

Student consent is the first and easiest way for school officials to secure permission to conduct a search of a particular person. Such consent must be voluntary and not coerced (*e.g.*, no threats or intimidation), and should be secured in writing whenever possible. However, school officials must use caution because there is a question whether minor students can effectively waive their rights to consent without consulting with legal or parental counsel.

A second method to justify a search is to have reasonable suspicion that a particular student(s) is in violation of a law or school policy. Reasonable suspicion does not mean that a school administrator has the right to search a student who merely acts in a way that creates a reasonable suspicion that the student has violated some regulation or law. Rather, a search is warranted only if the student's conduct creates a reasonable suspicion that a particular regulation or law has been violated.¹⁴

In *People v. Pruitt*¹⁵, a student was detained based on a teacher's reasonable suspicion that a stranger in the school may have a weapon. After almost an hour of questioning, the dean of students told the defendant to empty his pockets to "further see just who he was..."¹⁶ The Illinois appellate court ruled that after using an objective test, the dean did not have a reasonable suspicion to tell the defendant to empty his pockets. All the dean had was "an inchoate and unparticularized suspicion or hunch."¹⁷ After the lengthy questioning, the reason for initial concern dissipated.

The final acceptable justification to search a particularized student is informant information. In *Martens v. Dist. No. 220, Board of Education*,¹⁸ the school district received anonymous phone calls stating that a certain student had sold drugs on school property to another student.¹⁹ The federal district court stated that the anonymous tip was adequate to satisfy the reasonable suspicion prong in light of the totality of the circumstances because the school had a drug problem and a tip “was thus not inherently implausible.”²⁰ Further, there was substantial evidence indicating the tip was accurate, and the tip was “not a blanket allegation,” but rather, provided specific details implicating a certain student.²¹

2. General, Non-Individualized Suspicion

In *T.L.O.*, the United States Supreme Court provided that exceptions to the requirement of individualized suspicion are permissible “where the privacy interest implicated by a search are minimal and other ‘safe guards’ are available to assure that the individual’s reasonable expectation of privacy is not ‘subject to the discretion of the official in the field.’”²² The two most recent examples of non-individualized suspicion that have been upheld in public schools include the random drug testing of student-athletes and utilization of metal detectors.

In *Vernonia S.D. 47J. v. Acton*,²³ the United States Supreme Court upheld a suspicionless, administrative search to monitor drug usage among student-athletes. The Court stated the search was conducted as part of a

general regulatory scheme to ensure public safety, not as a criminal investigation to secure evidence of a crime. The school district did not need individualized suspicion of student drug use; the policy was implemented at random.

In deciding the constitutionality of using a metal detector for random searches, the Illinois appellate court in *People v. Pruitt*²⁴ cited *Vernonia* with approval and reversed a lower court’s decision that would require either an individualized reasonable suspicion of wrongdoing or some kind of specific school plan designed to address a compelling State interest before approving the use of metal detectors in schools. The *Pruitt* court went on to state that the search was reasonable since all students were subjected to the search and there was minimal intrusion to the students.²⁵

B. Was the Scope of the Search Reasonable?

Whether the scope of a search becomes an unlawful intrusion into privacy depends upon: (1) the nature of the privacy interest upon which the search intrudes; (2) the character of the intrusion based upon the age and sex of the student (i.e., whether it is minimal or significant); and (3) the nature of the infraction and immediacy of the school concern at issue.²⁶

1. Strip Search

In *Cornfield v. Consolidated High School District*,²⁷ a federal court of appeals upheld an Illinois school district’s use of a strip search to find drug evidence.²⁸ However, the court made clear that this was an exceptional case based upon the facts. The student

was accused of “crotching” drugs and it was determined that a strip search was the least intrusive form of search.²⁹

It is imperative to note that due to the highly intrusive nature of this type of search, a strip search should be avoided unless absolutely necessary. However, if conducted, a school district must exercise extraordinary care that constitutional requirements are met and should (contact legal counsel before) the strip search is undertaken due to the high probability of resultant litigation against the school district.

C. Student Searches and Law Enforcement Officers

Warrant and probable cause requirements applicable to police-initiated searches do not apply to searches done by school personnel with the assistance of law enforcement officers.³⁰ However, what may appear to be a minor distinction between police-assisted and police-initiated searches has tremendous legal consequences due to the higher standard required to sustain a police-initiated search. Consequently, the determination of guidelines for what constitutes a police-initiated versus an assisted search has been the source of much litigation.

1. Police-Assisted v. Police-Initiated Search

The “summoning of police officers to the school does not suggest that a standard other than reasonable suspicion is required where the search or seizure is conducted by school officials not acting at the behest of law enforcement.”³¹

The Federal District court, in *Martens v. District No. 220, Board of Education*,³² addressed the issue of what capacity a deputy sheriff provided search assistance after arriving at the school on another matter, but was later asked by school officials to search a student alleged to possess drugs.³³ In upholding the search, the court ruled that officer was present at the request of a school administrator, and the officer had nothing to do with the decision to originally detain the student.³⁴ Moreover, the court held that no criminal investigation was contemplated — this was “a cooperative effort with law enforcement.”³⁵

Concerning what comprises a police-initiated search, a search initiated by police officers for purposes of collecting criminal evidence requires probable cause and a search warrant. Further, if the police request school officials to conduct a search on behalf of the police, the standard utilized is still probable cause. Otherwise, the police would circumvent the probable cause requirement and allow school officials to conduct their investigations at the lower standard of reasonable suspicion.

Lastly, the Illinois School Code was amended in 1996 to empower school personnel to request assistance of law enforcement officials in searches.³⁶ Specifically, the statute provides that school administrators may request the assistance of law enforcement officials for the purpose of conducting inspections and searches of school property and equipment for illegal drugs, weapons, or other illegal or dangerous substances or materials.³⁷

2. School Liaison Officials

In a relatively new trend, school districts are utilizing off-duty police officers or having a full-time officer assigned to the school district. Once again, the issue is whether these school disciplinarians are acting in their capacity as law enforcement officers or are they solely acting within their role as school officials? As noted above, the distinction is important because of the resultant probable cause requirements the Fourth Amendment places upon police-initiated searches.

In *People v. Dilworth*³⁸, the Illinois Supreme Court ruled that the proper Fourth Amendment standard to apply in cases of school searches by a “liaison” police officer or any public school official is that of reasonable suspicion.³⁹ This means that a city police officer assigned full-time to a school as a “liaison officer” is in the same position as a school official for Fourth Amendment purposes, even though their primary purpose at the school is to prevent criminal activity and disciplinary problems.

III. Illinois School Code

In statutory response to the increased violence in elementary and secondary schools, the Illinois General Assembly amended the School Code to provide school administrators additional measures to maintain safe schools.⁴⁰ The new law provided for searches by school authorities “without notice to or consent of the student and without a search warrant” in “places and areas such as lockers, desks, parking lots, and other school property and equipment

owned or controlled by the school, as well as personal effects left in those places or areas by students...” The law further added that students have no reasonable expectation of privacy in these places and areas or in their personal effects left in these places and areas (except those items carried by students and are located on their bodies). Moreover, any evidence secured that indicates that a law or school policy may be violated may be seized and used in disciplinary proceedings or turned over to law enforcement authorities.⁴¹

IV. Types of Searches

School officials may conduct an investigatory/administrative search if the search can be justified at its inception based on reasonable grounds to suspect the search will turn up evidence that school rules or laws are being violated. Further, the scope of the search must reasonably relate to circumstances that justified interference in the first place.

A. Locker/Personal Effects

1. Locker

It is a general consensus that an administrative search of a student’s locker does not necessarily constitute a search. A locker search is legal only if the school puts students on notice (via student handbook) that (1) there is no reasonable expectation of privacy in student lockers, and (2) that the school retains ownership and control of student lockers.⁴² Yet, there are school districts that enact policies stating that students have privacy from suspicionless searches of their lockers. But regardless, once the item in question has been located, the search

should terminate unless additional evidence is found that would allow the search to continue.

2. Personal Effects

The general common law rule regarding a search of a student's personal effects (*e.g.*, purse, bookbag, jacket) is one of reasonable suspicion on behalf of the school administration.⁴³ For example, in *People v. McKinney*⁴⁴, a student entered a classroom and threatened and battered his teacher in an attempt to confront another student. Defendant removed his jacket, but the teacher placed it in a locked closet, believing it may contain a weapon. The defendant was arrested, and his coat was confiscated and taken to the police department, where it was later found to contain various quantities and types of drugs.⁴⁵

In reversing a lower court's decision to suppress the drug evidence, the appellate court determined that the search was justified at its inception because the teacher had a well-founded belief that defendant had violated a school rule, and she had a reasonable suspicion that defendant was in possession of a weapon on school grounds.⁴⁶

Secondly, as discussed above, in *People v. Dilworth*,⁴⁷ the Illinois Supreme Court upheld a student's conviction on drug charges. In *Dilworth*, a liaison officer confiscated the student's flashlight after the officer was put on notice that the student may have drugs at school. Even though the flashlight was personal property, the Court stated that the officer had an individualized reasonable suspicion that the flashlight contained drugs. Moreover, the

officer limited the search only to the flashlight.⁴⁸

It is worthwhile to again note the recent 1996 amendments the Illinois General Assembly enacted regarding the expectation of privacy in a student's personal effects.⁴⁹ The amendments, in part, provide school administrators with the authority to search students' personal effects left in or on school property. There would be no expectation of privacy in those items, except for those things carried by students on their bodies.⁵⁰ Consequently, school authorities arguably no longer need reasonable suspicion as provided in *New Jersey v. T.L.O.* to search personal effects in these areas. This provision may be challenged as an infringement upon students' Fourth Amendment rights.

B. Drug Testing

In *Vernonia S.D. 47J. v. Acton*,⁵¹ the United States Supreme Court upheld a district drug policy that authorized random urinalysis drug testing of student-athletes. The Court balanced the competing interests of the students and the school district and considered the following: (1) the nature of the privacy interest upon which the search intrudes, (2) the character of the search, and (3) the nature and immediacy of the governmental concern at issues, and the efficacy of the means for meeting it.⁵² The decision was based on the students' decreased expectation of privacy (they were public school students, the relative unobtrusiveness of producing urine samples, and the severity of the need met by the search) and deterring drug use by children.

C. Metal Detectors

“We long for the time when children did not have to pass through metal detectors on their way to class...”⁵³

Public school district utilization of a metal detector has Fourth Amendment implications since “performing a search is the very purpose and function” of a metal detector.⁵⁴ The First District Appellate Court of Illinois decided two cases relating to the implementation of metal detectors in school buildings.

First, in *People v. Pruitt*,⁵⁵ a school district utilized a random metal detector search conducted by the local police department. After indicating a positive reading, officers administered a protective pat-down search of a student, where an officer found a gun.⁵⁶ The First District court held that a random metal detector search of school students constituted a reasonable Fourth Amendment search, since the intrusion was minimal and the opportunity to harass students was limited because all students were subjected to the search.⁵⁷

Second, the First District appellate court, in *People v. Parker*,⁵⁸ suppressed the admission of a gun into evidence after it ruled that a student was forced to go through a metal detector. In *Parker*, the defendant entered the school, but quickly left when he saw students waiting to go through the metal detectors. An officer stopped the defendant and told him he would have to go through the metal detector, at which point the defendant raised his shirt and displayed a gun. The court determined that the facts of the case constituted a “seizure” of the

defendant since, unlike other proper administrative searches, the student was prohibited from exercising his right not to go through a checkpoint. Consequently, the discovery of the gun was tainted by the unconstitutional stop.

It is of interest to note that in the *Lawson v. City of Chicago*⁵⁹ case, the First District Appellate Court granted immunity under the Tort Immunity Act⁶⁰ to the City of Chicago for any liability for its voluntary undertaking to operate the metal detectors in the public schools and in failing to operate them on the day a student was fatally shot.⁶¹

Lastly, every school district using metal detectors should have a policy governing such searches. Suggested practical tips for inclusion in board of education policies should minimally entail that (1) a metal detector search be random or apply to all students; (2) school officials must give students advance notice that searches will occur, but do not have to say when; and (3) signs should be posted outside the building on the day of the search, notifying students of the search.

D. Camera Monitors

The utilization of a camera to monitor the conduct of students is typically not considered a search, if conducted where students have no reasonable expectation of privacy in the area being filmed (*e.g.*, bus, classroom, hallway).

E. Specially-Trained Dogs

Courts have held that utilization of dogs to sniff for the presence of contraband could constitute a Fourth Amendment search. Case law, however, distinguishes between dogs sniff-

ing people versus dogs sniffing items where there is no expectation of privacy.⁶²

Utilization of dogs to sniff outside lockers, cars and in the hallways is permitted because there is no reasonable expectation of privacy in a public place; therefore, there is no search. Consequently, the only issue is “where” the dog searches because this determines the legality of the search.

Due to the heightened expectation of privacy in one’s body, the use of a specially-trained dog may constitute a search if the search is of a person’s body. Therefore, reasonable suspicion, which includes individualized suspicion of a student, must be present before the dog can sniff a person. A general need to prevent drug/alcohol abuse on campus does not constitute “reasonable suspicion,” absent individualized suspicion.

In 1996, the Illinois General Assembly amended the Illinois School Code to provide the statutory authority for utilization of a specially-trained dog to detect illegal drugs on school premises.⁶³ Ironically, this authority was already present in the School Code and can be found at 105 ILCS 5/10-22.10a.

ENDNOTES

¹ Jeffrey H. Coben et al., *A Primer on School Violence Prevention*, 64 J. Sch. Health 309-313 (1994).

² 1996 Law Enforcement Gang Analysis Survey: National Findings With a Case Study for Illinois, National Crime Research Center (1996).

³ U.S. CONST. amend. IV. *See also*, ILL.CONST. sec. 6. that provides, “The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures... .”

⁴ *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 536-37 (1967).

⁵ *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985).

⁶ 469 U.S. 325 (1985).

⁷ *Id.* at 340-43.

⁸ *Wallace v. Batavia School District #101*, 68 F.3d 1010, 1013 (7th Cir. 1995).

⁹ *T.L.O.*, 469 U.S. at 341.

¹⁰ *Id.* at 341, 105 S.Ct. at 743.

¹¹ *Id.* at 339, 105 S.Ct. at 741.

¹² *Wallace*, 68 F.3d at 1012.

¹³ *Id.*, 68 F.3d at 1014.

¹⁴ *Cornfield v. Consolidated High School District*, 991 F.2d 1316, 1320 (7th Cir. 1993).

¹⁵ 278 Ill.App.3d 194, 662 N.E.2d 540 (1st Dist. 1996).

¹⁶ *Id.* at 209, 662 N.E.2d at 550.

¹⁷ *Id.* at 211, 662 N.E.2d at 551.

¹⁸ 620 F. Supp. 29 (N.D.Ill. 1985).

¹⁹ *Id.* at 30.

²⁰ *Id.* at 32.

²¹ *Id.*

²² *T.L.O.*, 469 U.S. at 342.

²³ 515 U.S. 646, 115 S.Ct. 2386 (1995). *See infra* notes 51-52 and accompanying text.

²⁴ 278 Ill.App.3d 194, 662 N.E.2d 540 (1st Dist. 1996).

²⁵ *Id.* at 204-05, 662 N.E.2d 547.

²⁶ *Vernonia*, 515 U.S. —, 115 S.Ct. at 2391-
95.
²⁷ 991 F.2d 1316 (7th Cir. 1993).
²⁸ *Id.*
²⁹ *Id.* at 1323.
³⁰ *See In Re Boykin*, 39 Ill.2d 617, 237
N.E.2d 460 (Ill. 1968).
³¹ *People v. McKinney*, 274 Ill.App.3d 880,
887, 655 N.E.2d 40, 44-45 (5th Dist. 1995).
³² *Martens*, 620 F.Supp 29. *See supra* notes
18-21 and accompanying text.
³³ *Id.* at 31.
³⁴ *Id.* at 32.
³⁵ *Id.*
³⁶ 105 ILCS 510-22.6(e).
³⁷ *Id.*
³⁸ 169 Ill.2d 195, 661 N.E.2d 310 (Ill. 1996),
cert.denied, 116 S.Ct. 1692 (1996).
³⁹ *Id.* at 214-15, 661 N.E.2d at 320.
⁴⁰ 105 ILCS 5/10-22.6(e).
⁴¹ *Id.*
⁴² *State v. Engerud*, 94 N.J. 331, 463 A.2d
934 (1983).
⁴³ *People v. Taylor*, 253 Ill.App.3d 768, 771,
625 N.E.2d 785, 787 (4th Dist. 1993).
⁴⁴ 274 Ill.App.3d 880, 655 N.E.2d 40 (5th
Dist. 1995).
⁴⁵ *Id.* at 883-84, 655 N.E.2d at 42.
⁴⁶ *Id.* at 887, 655 N.E.2d at 44.
⁴⁷ *See supra* notes 38-39 and accompanying
text.
⁴⁸ *Id.* at 209, 661 N.E.2d at 318.
⁴⁹ *See supra* notes 40-41 and accompanying
text.
⁵⁰ 105 ILCS 5/10-22.6(e).

⁵¹ 515 U.S. 646, 115 S.Ct. 2386 (1995).
⁵² *Id.* at —, 115 S.Ct. at 2391-96.
⁵³ *Pruitt*, 278 Ill.App.3d at 202, 662 N.E.2d
at 545.
⁵⁴ *Id.* at 201, 662 N.E.2d at 545 [*citing*
United States v. Epperson, 454 F.2d 769, 770
(4th Cir. 1972)].
⁵⁵ *Id.* at 194, 662 N.E.2d 540 (1st Dist.
1996). *See supra* notes 15-17 and accompa-
nying text.
⁵⁶ *Id.* at 199-200, 662 N.E.2d at 544.
⁵⁷ *Id.* at 204-05, 662 N.E.2d at 547.
⁵⁸ 284 Ill.App.3d 860, 672 N.E.2d 814 (1st
Dist. 1996).
⁵⁹ 278 Ill.App.3d 628, 662 N.E.2d 1377 (1st
Dist. 1996).
⁶⁰ 745 ILCS 10/1-101 to 101 to 10/10-101
(1996)(The official title is the Local Govern-
mental and Governmental Employees Tort Im-
munity Act, but will be referred to in this article
as the Tort Immunity Act).
⁶¹ *Lawson*, 278 Ill.App.3d at 634-35, 662
N.E.2d at 1383.
⁶² *Horton v. Goose Creek Independent*
School District, 690 F.2d 470 (5th Cir. 1982),
cert. denied, 103 S.Ct. 3536 (1983).
⁶³ 105 ILCS 5/10-22.6(e).

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THE ABCs OF ADMINISTRATION: TENURED TEACHER TERMINATION

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Board of Education of Round Lake Area Schools, Community Unit School District No. 116 v. The State Board of Education, John F. Rosner, and Barbara Cohn No. 2-96-1230 (Ill. App. 2d Dist. Sept. 22, 1997).

Facts of the Case

In the spring of 1994 the Board of Education of Round Lake Area School District, C.U.S.D. No. 116, adopted its calendar for the 1994-95 school year. A two week winter break beginning December 19 was scheduled. The 1994-95 school year was interrupted on October 17 by a teacher strike which was not resolved until settlement ratification on December 12. That settlement modified the remaining school year calendar, including elimination of winter and spring breaks. Just prior to settlement ratification, Education Association Grievance Chair Jeanne Kearby met with Superintendent Mary Davis to discuss the issue of winter break vacations which teachers had scheduled based on the original calendar. Davis agreed to consider requests of teachers who came to see her and provided proper documentation. Davis informed principals that all leave of absence requests should be forwarded to her, and that principals were not to approve requests on their own.

On December 14 learning disabilities teacher Barbara Cohn, following consultation

with her principal the previous day, forwarded a request to Davis for leave during the first week of the originally scheduled winter break. The request was accompanied by photocopies of her tickets. The next day Davis denied the request unless Cohn could provide “verification that booking was made prior to the school year.” The following day, December 15, Cohn provided verification that the booking was made October 3. Davis denied Cohn’s request in writing, because “travel arrangements were finalized November 11, 1994.” The correspondence went on to warn Cohn that ignoring the denial would be considered insubordination and result in “proper administrative discipline.”

Cohn prepared lesson plans, and attempted to arrange for a substitute via the school clerk. Davis was informed of the substitute request and directed Cohn’s request be denied. Cohn departed for her week vacation on Saturday, December 17. No substitute was provided for her L.D. classes the 19th, 20th or 21st, but Davis arranged for a substitute the last two days of the week. Cohn returned to work on December 26, and at the principal’s request filled in as a substitute instead of meeting her regular L.D. classes. On December 19, Cohn again provided Davis with documentation of the October 3 booking date. Davis sent notice to Cohn on January 6, 1995, that her leave remained unapproved and indicated that action was to be forthcoming.

A certified letter dated January 12, containing “Notice of Charges,” was sent to Cohn by Board President James Hult. The

letter notified Cohn that she was charged with insubordination and abandonment for her absence during the week of December 19-23, 1994, and that the Board would consider the charges on January 19. The letter stated she would “be afforded the opportunity in Closed Session [sic] to respond to the specific charges,” and that “she could appear with her attorney or other representative.” *Cohn 2*, 1997. Cohn did not attend the board meeting, instead allowing Kearby and two other Association members to represent her. The three representatives were denied access to the closed session by Hult and Board attorney Robert Trevarthen. Cohn was subsequently terminated by resolution in open session.

Cohn filed for a hearing and it was conducted on May 18, 1995. Hearing Officer John F. Rozner reinstated Cohn on October 2, 1995, finding Cohn’s conduct remediable. Rozner cited Superintendent Davis’ failure to reduce to writing the agreement with Kearby, to adequately communicate the agreement to principals, to insure principal’s communicated it to teachers, to be available to administer the agreement, and to administer the policy consistently. Rozner cite the actions of Hult, Traverhern and the Board as “inexcusable denial of [Cohn’s] constitutional due process rights,” characterizing their actions as “smacking of union animus.” He outlined the facts the Board would have had if a proper hearing had been conducted. Rozner stated that “[T]he Board may have concluded as I have that this was not a case of willful defiance but rather the product of a confused set

of rules, and values.” The Board sought administrative review of Rozner’s decision in circuit court. The trial court upheld the reinstatement. The Board appealed, contending Rozner’s conclusions were against the manifest weight of the evidence because Cohn’s actions were not remediable, and that her due process rights had not been violated.

Rationale and Decision of the Court

Appellate Court’s Role

The Appeals Court first visited their role in reviewing administrative appeal orders of the circuit court. The Appellate Court’s role is to review the hearing officer’s decision, not the circuit court’s decision. The Administrative Review Law (735 ILCS 5/3 -101 *et. seq.*) mandates that an administrative agency’s factual findings are “held to be prima facia true and correct.” 735 ILCS 5/3 -110. Factual issues such as witness credibility are not reevaluated. The court will not substitute its judgment for that of the hearing officer and overturn an administrative agency decision even if an opposite conclusion is reasonable. The court will review the facts only to determine if the finding of the hearing officer is against the manifest weight of the evidence standard. If evidence supporting the hearing officer’s decision is found in the record, the decision should be affirmed. Determinations of law are not accorded the same deference as are factual findings. Administrative agency findings on a question of law are not binding on the court. Deference is given

to agency interpretation of a particular statute. In summary, the appellate court's role when presented with a mixed question of fact and law is to determine first whether the hearing officer's findings of fact are against the manifest weight of the evidence, then to independently analyze the case and apply those facts to questions of law.

Tenured Teacher Dismissal

In Illinois, contractual continued service (tenure) limits teacher dismissal to "cause." Insubordination is causal grounds for dismissal, and "imports a wilful or intentional disregard of the lawful and reasonable instructions of the employer." Black's Law Dictionary 801 (6th ed. 1990). Guidelines are reasonable if related to job efficiency, safety or discipline, clearly set out and communicated, and not excessively burdensome on the employees legal protections. Warnings and discipline must be explicit and specific to the relevant conduct. "Logic and common sense dictate that one cannot be insubordinate for failing to follow an unreasonable rule." The Appellate Court could not find any evidence that the leave policy Davis articulated at the hearing was clear to Cohn. The hearing officer noted that Board President Hult was still confused about what the policy was long after Cohn's termination. Nor could the court find any evidence that disciplinary provisions for leave policy violations were explicit or specific. The court found the policy to be unreasonable, and consequently Cohn's con-

duct could not be insubordinate.

The Court also addressed remediability, citing the two-pronged Gilliland test as whether the teacher's conduct (1) has caused significant damage to students, the faculty, or the school, and (2) could not have been corrected had superiors warned the individual charged. Applying the facts to the law, the Court noted that the hearing officer's finding that Cohn was not guilty of an irremediable offense was supported by the numerous administrative failures of Davis. In a stinging indictment, the Court stated, "We do not believe that a tenured teacher that unknowingly fails to conform to a 'spur-of-the-moment' oral policy reaches the level of conduct our legislature envisioned when it drafted section 10-22.4 of the School Code. We agree that the Board failed in its burden to prove damage to the school, faculty, or students." Nor did the Board demonstrate that Cohn's conduct could not have been corrected had she been properly warned.

The appeals court affirmed Cohn's reinstatement, holding the hearing officer's finding that Cohn was not guilty of an irremediable offense was not against the manifest weight of the evidence.

Implications for School Administrators

1. Put it in writing. State policies, regulations, rules and directives clearly and precisely.
2. Make Board policy and administrative rules reasonable. Implement policy and regulation review procedures which

- look specifically at reasonableness.
3. Ensure that policy and rules are adequately communicated to employees.
 4. Take steps to ensure that rules are not excessively burdensome on employees legal protections and due process rights.
 5. Have a working familiarity with the law. Do legal homework to prepare for cognizant interpretation of legal advice, and ask relevant and clarifying questions if something is unclear. Coursework, seminars, inservice, and outside consulting is far less than expensive than three levels of judicial review, and 7 months of teacher backpay.
 6. Operate in good faith. It's the right thing to do. Additionally, neither hearing officers nor judges are impressed with anything less. Admonishments like those articulated by the hearing officer and Courts in this case tend to reflect poorly on education administrators and school boards generally, and subsequently bathe the entire school administration business in a poor light.
 7. Administrators who, without the benefit of precise policy clearly articulated, position themselves to be the sole authority to make judgments which directly affect peoples' lives, may derive some authoritarian satisfaction from the power. That satisfaction is likely to be short lived.

REJECTING THE LOWEST BIDDER: GOOD FAITH IS NOT ENOUGH

Paul C. Burton, J.D., M.S.Ed.

Doyle Plumbing and Heating v. Bd. of Educ. of Quincy Public Sch. Dist. No. 172, No. 4-97-0198, 4-97-0274, *cons.* (Ill. App. 4th Dist. July 30, 1997).

Facts of the Case

During the summer of 1996, the Board of Education of Quincy Public School District No. 172 authorized replacement of the boilers in the Junior High. The Board subsequently employed a contractor, Architechnics, Inc., to “design and coordinate” the project. In January, 1997, bids were solicited. Five bids were received, the lowest submitted by Doyle Plumbing and Heating of Jacksonville, Illinois, at \$416,895. E.A. Wand Heating and Plumbing, a local Quincy company, submitted the next lowest bid at \$420,750.

The Building Committee recommended that the project be awarded to Wand based on concern for the time necessary to travel between Jacksonville and Quincy to service the boilers. When informed of the Building Committee’s recommendation that the project be given to Wand, Doyle threatened to sue. The Board allowed Doyle to attend a special meeting on February 26, 1997. At that meeting Ed Doyle presented information regarding his company’s historical experience with boiler projects. Doyle identified geographic locations of past projects, and provided service particulars, including the ob-

servations that his response times were well within industry standards. He also made the observation that service of boilers was easily handled. Doyle was asked if he was willing to insure the District against any damages incurred as a result of delayed service times, such as loss of state aid if the district had to shut down. Doyle said he could not.

Wand was awarded the bid on a 4-2 vote of the Board based upon the recommendation of the Board’s Building Committee. Doyle filed suit against the Quincy School District and Wand Heating and Plumbing alleging a violation of 105 ILCS 5/10-20.21 (West 1994).

Section 10-20.21 of the School Code provides that Boards must “award all contracts for purchase of supplies, materials or work or contracts with private carriers for transportation of pupils involving an expenditure in excess of \$10,000 to the lowest bidder, considering conformity with specifications, terms of delivery, quality and serviceability, after due advertisement ... “The statute notes some exceptions to the rule, the court holding that none applied in this case. The Board argued that the word “serviceability” provided statutory authority for its exercise of discretion in rejecting the lowest bid on the basis of a question regarding the bidder’s ability to provide timely service.

Rationale and Decision of the Court

The court held that 105 ILCS 5/10-20.21 (West 1994) cited by Doyle was applicable in this case. The threshold question reached by the court was determining the meaning of

“serviceability” as used in the statute. To determine the meaning of “serviceability,” the court applied the rules of statutory construction, citing as the primary rule, “to ascertain and give effect to the true intent and meaning of the legislature.” *In Re Application for Judgment and Sale of Delinquent Properties for the Tax Year 1989*, 658 N.E.2d 1049, 1053 (1995). To ascertain the meaning of terms in a statute, the court first looks to the language of that particular statute to determine legislative intent, giving the terms their ordinary meaning. If the meaning is not clear, the court looks beyond the language to the purpose of the law.

Finding no clear legislative intent in the plain meaning of the term “serviceability” as used in 105 ILCS 5/10-20.21 (West 1994)), the court turned to other “lowest bidder” statutes for guidance. See The Illinois Purchasing Act, 30 ILCS 505/6(a) (West 1994); The State Paper Purchasing Act, 30 ILCS 510/2 (West 1994); Park District Code, 70 ILCS 1205/8-1(c) (West 1994); North Shore Sanitary District Act, 70 ILCS 2305/11 (West 1994); Sanitary District Act of 1917, 70 ILCS 2405/11 (West 1994)), Public Community College Act, 110 ILCS 805/3-27.1. Noting that although no specific definition of the term “serviceability” occurred in any of the statutes, some did provide indications of the meaning. In each such case, the term “serviceability” referred to the product, not the bidder. The logical extrapolation was that the legislature’s use of the term in the Code was intended to apply only to the product, not the ability of the bidder to respond to service calls.

The Court then visited the purpose of the

law, citing competitive bidding statutes as, “inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption and to secure the best work supplies at the lowest price practicable.” *Court Street Steak House, Inc. v. County of Tazwell*, 163 Ill.2d 159, 165, 643 N.E.2d 781, 784 (1994), quoting 10 G. O’Gradney & C. Miller, *McQuillin on Municipal Corporations* 29.29 at 375 (3rd ed. 1990). The court stated that

“This purpose would clearly not be served by interpreting “serviceability” to refer to the bidder’s ability to provide maintenance on the supplies, materials or work when the contract makes no reference to service. That interpretation would stifle competition because it would protect favoritism. The shield of serviceability could be raised in defense of any contract being awarded to a local bidder on out-of-town projects if it could lose the contract just because it was farther away than a local bidder, i.e., simply because it was from out of town.”

Based on the indications of meaning from other statutes, and the apparent intent of the legislature in using the term, the court concluded that “serviceability” in 105 ILCS 5/10-20.21 (West 1994)) does not refer to the bidder’s ability to maintain or repair the product, and thus cannot include any consideration of the bidder’s ability

to respond to service calls. The District's argument therefore failed. The appellate court affirmed the judgment of the lower court, sustaining the issuance of a writ of mandamus awarding the boiler bid to Doyle.

Implications for School Administrators

Bid Specification Development

Do not rely solely on the expertise of a contractor to develop bid specifications which are intended to provide a valid basis for board action, and subsequently withstand judicial scrutiny. If the Board of Education has a concern about an element of the project being bid which is important enough that it might result in the rejection of a bid, such concern should be explicitly stated in bid specifications. Board of Education action regarding a bid which is based upon an element of concern not specified in that bid, even if considered in good faith, may be considered inadequate by the court.

Bid Specification Process

The court's decision in Doyle suggests a three step process for bid specification development. First, technical specifications developed by contractors should be supplemented with any practical considerations the board feels may be significant enough to influence the bid selection process. Second, practical considerations included as supplementary bid specifications must be consistent with the intent of any governing statute(s). Third, once the bid specifications are considered adequately prepared for publication they should

be reviewed by the board's attorney for compliance with statutory requirements and legal adequacy. If the meaning of statutory language may be a question, that issue should be resolved prior to bid publication to avoid insupportable board decisions and subsequent adverse judicial rulings. The board's attorney is also capable of providing a review of the controversies arising in Code bidding cases, and can thus help identify and resolve questions regarding the legal adequacy of bid specifications. Engaging the board's attorney in preventive legal analysis is always less costly than litigation.

Interpreting Statutes

All district board and administrative action based on a statute is subject to correct interpretation of that statute's language. What is correct will be determined according to the rules of statutory interpretation. To assume a meaning for a word used in a statute invites legal error. This case illustrates that knowing what a statute says is only the first step in determining what that statute means in practical terms. Administrators should be in doubt about the meaning of any term which has not been subject to legal research. Consult legal council when in doubt about the meaning of a critical statutory term. She has the expertise and resources necessary to provide you with the meaning of statutory language. Case law, the rules of statutory interpretation, and legislative intent can each operate to establish the correct legal meaning of statutory language. Avoid the assumption that any understanding of the meaning of a term in a statute is adequate to survive judicial scrutiny.

NONCERTIFIED PERSONNEL IN DISTRICT DISSOLUTION

Paul C. Burton, J.D., M.S.Ed.

Spear v. Board of Educ., 683 N.E.2d 218 (Ill. 1997).

Facts of the Case

In the Spring of 1992, Highland Park School District 107 and two others were legally dissolved by voter referendum in accordance with the School Code. 105 ILCS 5/11B 1-14 (West 1992). The three districts dissolved then formed a new district, North Shore School District 112. Ray Spears, a custodian for former School District 107, was not employed by the new Board, and subsequently filed suit claiming breach of an implied contract of employment. Spears alleged that the failure of Highland Park School District 107 to provide him with 60 days notice in accordance with 105 ILCS 5/10-23.5 (West 1992) created an implied contract of employment with the newly formed district for the 1993-1994 school year. The Circuit Court dismissed the suit on motion of the new district. Spears appealed contending the trial court's granting of the dismissal motion was erroneous, and claiming entitlement to reinstatement, contract damages, and consequential damages.

Rationale and Decision of the Court

The court first addressed Spear's belief that Highland Park School District 107's

failure to give him the 60 days notice of dismissal as required by 105 ILCS 5/10-23.5 (West 1992) created an implied contract of employment with the new school district for the 1993-1994 school year. The relevant part of Section 10-23.5 reads:

"If an educational support personnel employee is removed or dismissed *as a result of a decision of the school board to decrease the number of education support personnel* employees by the board or to discontinue some particular type of educational support service, written notice shall be given the employee ... at least 60 days before the end of the school term ..." (emphasis added).

The Court pointed out that statutory construction and interpretation is a question of law for the court, and that the first observation is of the plain language of the statute. The court also noted that regardless of its own opinion of the "desirability of results surrounding the operation of the statute," the court was limited to interpreting the statute as it was written, and was not at liberty "under the guise of construction, [to] supply omissions, remedy defects, annex new provisions, substitute different provisions, add exceptions, limitations, or conditions, or otherwise change the law so as to depart from the plain meaning of the statute."

The court observed that the 60 day notice in 105 ILCS 5/10-23.5 (West 1992) was required only when the school board reduces personnel, and that there was no evidence that District 107 reduced personnel. The court then ruled that because the statute was silent regarding any duty to notify in cases of district dissolution, the 60 day provision “does not appear to create a duty to notify which would be transferred to the new district.”

The court went on to note that the similarity to the 60 day notice provision of Section 10-23.5, and that required for tenured teachers in 105 ILCS 5/24-12, is different because teachers are in a “readily distinguishable class of school employees” who are provided “special statutory procedural safeguards.” Additionally, 105 ILCS 5/11B-1 et. seq. governing the creation of a new combined school district provides tenured teacher safeguards, but fails to provide any such protection for noncertified personnel. “The failure of the statute to include persons such as the plaintiff strongly intimates that the legislature did not intend to confer upon persons a right to continued employment.”

The court then addressed the implied contract contention, noting that employment in Illinois other than that covered by a fixed term, is presumed to be “at will,” and at will employees are “terminable by either party for good reason, bad reason, or no reason at all.” The court concluded that the “limited” facts before it tended to support an implied dismissal of Spears rather than an implied contract for em-

ployment. The trial court’s dismissal was affirmed.

Implications for School Administrators

On its face, this case provides useful clarification of the court’s limited role in statutory interpretation. A less salient but more important message lies between the lines. Administrators cannot prevent disgruntled noncertified employees from pursuing redress for alleged wrongs. However, it is reasonable to anticipate that circumstances which adversely affect employment, like district consolidation, will lead any employee to review all available arguments which might save their job. The private business sector addresses the problem of possible costly litigation arising from such circumstances by actively engaging adversely affected employees in career development seminars, job fairs, resume writing workshops, and active employment searches. Districts have everything to gain and nothing to lose by emulating their corporate counterparts in these instances. Much of what business does (or claims to do), and advocates that education adopt as this year’s panacea to solve all of our “problems” is nonsense. But “much” is not “all.” In this case, a little consulting money, a little time, and a little attention may be far less costly than defending a suit through the courts. Attorney’s fees are not directly recoverable from plaintiffs regardless of how marginal the merits of their cases may be. Think prevention. If positive results accrue to the effort, the district is money and positive publicity ahead. Besides, maybe it’s the right thing to do.

SHORT BRIEFS: Recent Cases of Interest

Paul C. Burton, J.D., M.S.Ed.

Board of Education of Maine Township High School District 207 v. International Ins. Co., No. 1-97-0122 (Ill. App. 2d Sept. 2, 1997).

Maine Board of Education (Board filed for declaratory judgment against International Insurance Company) concerning coverage under an all-risk policy for over 16 million dollars of asbestos-related property damage. The Company claimed exemption under the 'Latent Defect Exclusion' of the policy. The court found the language of the coverage was clear and unambiguous by providing the dictionary meaning of "latent defect" as applied in *Heider v. Leewards Creative Craft Crafts, Inc.*, 245 Ill. App. 3d 258, 268 (1993), a case which also specifically held that asbestos fibers present in a building was a latent defect as the fibers were not detectable by the naked eye. Trial court for Company affirmed.

Implication: Check district insurance policies and determine what is and is not covered. Any questions should be directed to the insurer and subjected to legal analysis. BOE study sessions are ideally suited for addressing insurance questions.

Coleen M. Wales v. Bd. of Educ. of Comm. Unit Sch. Dist. 300, et al., No. 97-1062 (7th Cir. July 21, 1997).

A Non-tenured teacher was terminated after receiving an unsatisfactory performance evaluation. She first received an unsuccessful arbitration ruling addressing her theory that the evaluator failed to properly consult with her. She then filed a Department of Education Office of Civil Rights complaint alleging retaliation for standing up for pupils' rights. That complaint was filed as unfounded. Wales then filed a First Amendment complaint in Federal Court alleging her termination resulted from her exercise of protected speech (i.e. a memo she wrote to her Principal). The Northern District Court ruled that the speech was not protected. The 7th Circuit reviewed the case and applied, among other cases, *Pickering v. Board of Education*, 391 U.S. 563 (1968). In doing so, the Court noted that speech has more than one purpose, that *Pickering* "expresses optimism" that courts can apply mixed motive analysis and separate protected (public, generally) from unprotected (private, generally) speech. The Court found that Wales memo was closer to private unprotected speech than protected speech, even though containing aspects of both. The Court concluded that "[A] school district is entitled to put in its classrooms teachers who share its educational philosophy." Northern District for School District affirmed.

Implication: If the 7th Circuit Court has difficulty separating protected from unprotected speech, it is little wonder school administrators and board attorneys experience similar difficulty. Specific policy regarding speech modeled on

Pickering, and backed up with clear faculty guidelines, including case-derived examples, communicated specifically and routinely may help.

Board of Educ. v. IELRB, 682 N.E. 2d 398 (Ill. 1997)

Third year probationary teacher Cecilia Bitner was employed by Chicago Schools (Board) on March 12, 1990, the date three years later her mandatory of probation tolled. The first two years of employment she received excellent performance ratings. Five weeks prior to the expiration of the three year probationary period, she received a notice of unsatisfactory performance. On April 4, 1993, she received the next stage notice of unsatisfactory performance for probationary teachers. Following an unsuccessful grievance filed by the union, Bitner was terminated for unsuccessful performance. Arbitration resulted in her reinstatement with back pay, the final and binding award issued by the administrative law judge (ALJ) on October 12, 1994. The Board refused to comply with the ALJ's ruling, claiming it was against public policy. The Illinois Education Labor Relations Board (IELRB) issued a decision finding the Board had violated the Illinois Labor Relations Act. IELRB's ALJ also issued an order, received by the Board on August 30, 1995, to show cause why sanctions should not be imposed. The Board had 30 days to respond. Two days after the deadline, it asked for an extension, which was denied. On September 27th the Board responded to the

order to show cause regarding possible sanctions. The ALJ declined to impose sanctions. The original ALJ decision, once it became final, was appealed to the courts. The Appeals Court found the failure of the Board to meet the "clear and unambiguous" terms of the Illinois Administrative Code to be dispositive. The IELRB decision was affirmed and an order of enforcement entered.

Implications: Courts take ALJ decisions and Administrative Code deadlines seriously. The time, place and manner to address public policy questions which run counter to established law coincides with sessions of the Illinois Legislature.

Community High School Dist. No. 155 et al. v. Property Tax Appeal Bd., 682 N.E.2d 235 (Ill. 1997).

The Henry County Board of Review (HCBR) reduced the county's assessment of Crystal Lake Apartment's (CLA) 100 unit complex from \$1,448,040 to \$1,300,000. CLA appealed to the Property Tax Appeal Board (PTAB) seeking further reduction in the assessment to \$950,000. Notice was sent to the School Board (Board), which sought to intervene in the appeal. CLA notified the Board they had been added as an interested party. CLA objected, stating that the Board failed to provide representation authorizing resolutions of their governing board as required by PTAB rules. The Board responded that they had, according to PTAB rules, 20 days to refile the

request with the resolution attached. The PTAB subsequently dismissed the Board's intervention request, and the Board filed for administrative review by the court. Both OLA and PTAB filed motions to dismiss claiming the circuit court lack of jurisdiction because the decision was not final and the change requested exceeded \$300,000, making the Appellate Court the proper jurisdiction for administrative review. The circuit court granted the dismissal based on final decision grounds, and found the lack of jurisdiction based on amount in controversy claim to be premature. The Board appealed.

The Appellate Court first visited how a change in assessed valuation is measured. The Board contended that the measure is the difference between the HCBR valuation at \$1,300,000, and the CLA appraiser's valuation of \$1,116,555, a difference of \$183,445. The Court disagreed, citing *County of Coles v. Property Tax Appeal Board*, 657 N.E.2d 673 (1995) as establishing that the amount is fixed at the instant it is submitted to the PTAB, in this case the difference between \$1,300,000 and \$950,000, or \$350,000. The Court further clarified *County of Coles* as establishing that the amount is not altered by subsequent actions of the parties, and that "[T]here is no statutory authority that provides that an amendment to an original petition before the PTAB supersedes the original petition ... "The Circuit Court's decision to dismiss the Board's complaint for lack of jurisdiction affirmed.

Implication: The doctrine of *stare decisis* is applied routinely by the courts in cases with similar facts. Finding cases on point which guide decisions are routine practice for courts and attorneys. Administrators increasingly need broad understanding of existing legal precedent as background to advising boards of education on courses of action, and interpreting advice from attorneys. Advanced legal coursework, seminars, workshops and bulletins should be read routinely and thoroughly.

Board of Educ. of Comm. Unit Sch. Dist. No. 428 v. Bd. of Educ. of High Sch. Dist. No. 214, 680 N.E.2d 450 (Ill. 1997).

A special education student residing with and attending school in the district of foster parents still resides, for purposes of special education costs, with natural parents who retain legal custody. 105 ILCS 5/14-1-15.01 (West 1994). District of natural parents, who gave foster parents power of attorney, must reimburse special education costs to district of foster parents where student attends school.

Implication: The legal significance of a power of attorney fails to rise to the level of significance provided by establishment of a guardianship for special education residence purposes. As the costs of reimbursement for special education services can be substantial, districts need to be aware of special education students enrolled in other districts where residence is based on something other than the statutory description of parent or guardian.

RESIDENCY AND TUITION FREE EDUCATION: HISTORY, UPDATE, AND COMMENTARY

Paul C. Burton, J.D., M.S.Ed.

Joel R. v. Bd. of Educ. of Mannheim Sch. Dist. 83, No. 1-96-4411 (Ill. App. 1st Dist. Sept. 30, 1997).

Facts of the Case

13 year old Joel R. came to Melrose Park, Illinois from Mexico in July, 1996, to live with his maternal aunt, Ericka Salazar. Joel was born in El Paso, Texas and was a United States citizen. Ericka's attempts to enroll Joel in Mannheim District 83 Middle School on a tuition-free basis were systematically denied, first by district officials, then by the School Board. In Ericka's first contact with the District, bilingual teacher Angie Latragna told Ericka she needed legal custody to enroll Joel. Ericka then obtaining legal custody from Joel's parents in Mexico by the execution of a document in Mexican court. Armed with the document, she again attempted to enroll Joel. A school secretary told her the Mexican document was insufficient, as legal guardianship established in an American court was required. Ericka appealed to Middle School Principal Marilyn Finesilver, who refused to enroll Joel on the same "lack of legal guardianship" grounds. When Ericka explained that Joel's mother was not a U.S. citizen and could not come to the U.S. to go to court and arrange a guardianship, "Finesilver responded that if Joel's mother was

not a legal resident of the United States, he could not be admitted ..." District Superintendent John Ludolph verified to Finesilver that she had made "a proper residency decision," then called Ericka and reiterated that determination to her. Neither Ludolph nor Finesilver communicated the District's residency policy which granted Ericka the right to appeal an adverse decision to the Board.

Ericka subsequently involved a congressman on her behalf, resulting in a meeting on September 23, 1996, with Ludolph and Board attorney Todd Faulkner. Ludolph and Faulkner explained at this meeting that the denial of tuition-free enrollment was based on *Turner v. Bd. of Educ.*, 294 N.E.2d 264 (1973). The District still refused to enroll Joel. Ericka retained an attorney and another meeting was held on October 11, 1996, with Ludolph, Faulkner, Finesilver, Ericka, her attorney, and Joel attending, among others. At this meeting Joel's living conditions in Mexico, and circumstances of his return to the United States, were presented. Tuition free enrollment continued to be denied to Joel. However, Ericka finally learned of her right to appeal to the Board in a letter from Ludolph following this meeting. Ericka appealed to the Board. The Board affirmed Ludolph's "proper residence decision" and subsequent finding that Joel's "sole purpose" for living in Melrose Park was obtaining free schooling. Based on the "sole purpose" rationale, Joel was denied tuition free enrollment by the Board. Ericka sued on Joel's behalf requesting injunctive relief in

the form of an order requiring District 83 to enroll Joel on a tuition-free basis.

Rationale and Decision of the Courts

The Circuit Court issued a 10 day temporary restraining order allowing Joel immediate enrollment in Mannheim Middle School. The Circuit Court then held a full evidentiary hearing on November 7 and 8, 1996. As a result of that hearing, the Court overruled the District's decision primarily based on "finding credible Ericka and Joel's assertion that Joel's purpose of living in Melrose Park was not solely for education purposes." The Circuit Court further stated that "Ericka was never afforded any meaningful opportunity to articulate any and all reasons for Joel's presence in her home in spite of her attempting to do so on numerous occasions," and that "once the [District] made the decision not to admit Joel ... they became intractable from their position." The District appealed.

The Appellate Court first reviewed the Constitution, Illinois Statutes, and relevant case law regarding free public schooling in Illinois. The Court then visited the standard for appellate review, determining that this case presented a mixed question involving both law and fact, making the issue for review "whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n. 19, 72 L.Ed. 2d 66, 102 S.Ct. 1781 (1982). The Court noted that a mixed question of law and fact necessitates a three

step analysis: (1) establishment of basic, primary or historical facts, (2) selection of the applicable legal rule, and (3) application of law to fact to determine "whether the rule as applied to the established facts has been violated." *United States v. McConney*, 728 F.2d 1195, 2000 (9th Cir. 1984) (*en banc*). The Court then stated that the standard of review in the first two steps have been "long settled;" (1) questions of fact in Illinois, whether determined by a judge in a nonjury case or a jury, are given deference and are reviewed under a manifest weight of the evidence standard, and (2) questions of law are reviewed without deference under a de novo standard.

The Appellate Court then reviewed the record and determined that the Circuit Court's finding of facts was more than sufficiently supported by the evidence. Of particular importance was the trial judge's belief that the testimony of Ericka was more credible than the District's. Next, having previously determined that the correct legal rule(s) had been applied, the Court conducted a de novo review which went directly to the question of applying the law to the facts of the case. Even if the case itself was insufficient to invite the Court to review the entire line of Illinois residency cases, the District's stated reliance on *Turner* as the definitive case applicable to determining the residency status of Joel R. for tuition free school attendance purposes invited that review. "Under this regime, the court could indeed consider 'a panoply of ... circumstances ...'" *Id.* citing *Kraut v. Rachford*, 366 N.E.2d 497 (1st

Dist. 1977). That is exactly what the Appellate Court did in its de novo review of “whether the law was correctly applied to the facts as found by the circuit court.”

“Applying the law to the facts of the instant case, we find the circuit court did not err. First, it is uncontroverted that Joel lives indefinitely on a full-time basis with Ericka. Second, it is also clear that Ericka exercises complete control over Joel and is fully responsible for his care to the exclusion of Joel’s parents who reside in another country. Third, Ericka is Joel’s legal guardian. Fourth, there was ample evidence of other non-educational factors being a part of the reason Joel moved to Melrose Park: the abject poverty and lack of social and economic opportunities he faced in Mexico; the desire to learn more about the country of his birth; and the need to eventually aid his parents financially. All of these factors support the circuit court’s legal conclusion that Joel was a bona fide resident of District 83 and that his move to the district was not solely for educational purposes. Thus, we find no error in the circuit court’s decision.”

History of School Residency Law and Adjudication

The Court’s articulation of the rule of law selected for application under the second part of the three part Pullman analysis leaves several unanswered questions. School administrators’ need for complete information to facilitate decision making invites additional attention to the statutory, judicial and historical parameters of residency, including the questions unanswered by the court in stating the rule of law. The court stated:

The 1970 Illinois Constitution places an obligation upon the State to “provide for an efficient system of high quality public educational institutions and services” (Ill. Const. 1970 art. X para. 1) and grants a right to a tuition-free education at the elementary and secondary levels. *Lewis E. v. Spagnolo*, 287 Ill. App. 3d 822, 233 Ill. Dec. 380, 679 N.E.2d 831 (1997). To that end the Illinois School Code provides that local school boards must establish free schools through the secondary level to accommodate residents of their districts between the ages of 6 and 21 years. 105 ILCS 5/10-20.12a (West 1994). A child presumptively resides in the school district where his parents reside; how-

ever, for school purposes, this presumption may be rebutted by circumstances showing a different residence. *Kraut v. Rachford*, 51 Ill. App 3d 206, 212, 9 Ill. Dec 240, 366 N.E.2d 497 (1977). The child's residence in a district other than that in which his parents reside is sufficient to entitle him to attend school tuition-free in the district in which he resides so long as such residence was not established solely to enjoy the benefits of free schooling. *Turner v. Board of Education*, 54 Ill. 2d 68, 294 N.E.2d 264 (1973); *Asley v. Board of Education*, 275 Ill. 274, 114 N.E. 20 (1916). Among the panoply of factors taken into consideration in making this determination are the following: the permanency of the child's residence, the extent to which the child's parents still exercise care custody and control over the child; and the presence of non-educational reasons for the child's residence apart from his parents. *Israel S. v. Board of Education*, 235 Ill. App. 3d 652, 176 Ill. Dec. 566, 601 N.E.2d 1264 (1992); *Kraut*,

51 Ill. App 3d at 212-13.

The Appellate Court refers to "*Turner* and its progeny" and whether the Circuit Court correctly applied the "*Turner* doctrine" to the *Joel* case. But the idea that residency is that of parents, but may be elsewhere if not primarily for school purposes, and idea of "control" is at least a 102 years older than *Turner*. In an 1871 publication by then State Superintendent of Public Instruction Newton Bateman, L.L.D., residency was described as follows:

As a general rule, the residence of parents is the residence of their children. Boarding children in a district does not, of itself, entitle them to the benefits of the free school in said district. The mere *temporary* residence of a family in a district, solely to enjoy the benefits of the free schools, and with the intention of removal as soon as that purpose is accomplished, does not entitle the children to the privileges of said schools. The removal of a portion of a family from the legal domicile (sic) to another district, in order to send to the free schools thereof, does not confer the right to do so. As a general rule, the residence of their parents is the residence of employees; hence the privilege of the free school in an-

other district is not acquired by placing children temporarily at service in that district. This includes those who are placed in families to attend school and do chore-work for their board, etc. The most liberal policy is, however, recommended toward this class of children. The state has as much interest in their education as in that of the more favored; and although not legally eligible to attend free, the directors should permit them to do, so when not inconsistent with the rights of others and the welfare of the school. Children who have been apprenticed, or adopted into a new family; or who have been placed permanently in the care of others, with no intention of withdrawal; or those over whom parents have relinquished all control from whatever cause; or those who have no parents or guardians, or whose parents or guardians live in another state or country, and exercise no control over their children, or those who have no permanent abode, but go from place to place in search of employment, and whose only home is where they find work;-the children in all the above classes are to be enumerated in the district where they live,

and are entitled to all the rights and benefits of the free schools in said district. Boards of directors are authorized to decide all questions of residence in their respective districts. (8 *Wend.*, 140. 23 *Pick.*, 178. *Story's Conflict of Laws*, ch. 3.) BATEMAN'S COMMON SCHOOL DECISIONS, 198 (1871).

The Illinois General Assembly acted as far back as June, 1883, to give statutory weight to the "control" principle. In An Act To Secure to All Children the Benefit of an Elementary Education, the legislature enacted language requiring school attendance of every child, and making the responsibility "[T]hat every person having the control and charge of any child or children, between the ages of eight and fourteen years, shall send such child or children to a public or private school for a period of not less than twelve weeks in each school year ..." ILLINOIS INSTITUTE OF CONTINUING LEGAL EDUCATION, ILLINOIS SCHOOL LAW 1-42, (Illinois School Law Ed. 1980).

The fundamental ideas of parental residence, "sole purpose" and "control" regarding residency included in the "*Turner* doctrine" were over 100 years old when that 1973 decision was rendered. Applying these classic elements of residency, the *Turner* Court held that the granting of a guardianship to a relative "solely" for school attendance purposes was insufficient to entitle the child in question to tu-

tion free schooling. The guardianship order in *Turner* had actually stated it was granted specifically so that child could attend the school serving the home of the guardian. Nothing in *Turner* required a relative to obtain a guardianship to establish custody to qualify for free schooling in the district.

Turner cites earlier cases dealing with residency, and refers to American Law Reports, 83 A.L.R. 2d 497, as containing relevant discussion of residency. These cases and A.L.R. are revealing.

The Illinois Supreme Court stated in *Ashley v. Bd. of Educ.*, 114 N.E. 20 (1916) that

[T]he right to attend school is not limited to the place of legal domicile. A residence, even for temporary purpose, in a school district, is sufficient to entitle children of school age to attend school. The only requirement, so far as residence is concerned, is dwelling in the school district. Every child of school age in the state is entitled to attend the public schools in the district in which it actually resides for the time being, whether that be the place of its legal domicile or the legal domicile of its parents or guardian, or not.

Ashley goes on to quote BATEMAN'S COMMON

SCHOOL DECISIONS, 135 (1890), the language of which was practically identical to the 1871 edition quoted above.

In *Saxe v. Bd. of Educ. of Sch. Dist. 36*, 206 Ill. App. 381 (1917), a child residing by "agreement" with a grandmother was denied tuition free enrollment. The Illinois Supreme Court affirmed the Appellate Courts holding that the Circuit Court was correct in determining that the agreement "was made in good faith and not for the purpose of avoiding payment of tuition; that since the making thereof the grandmother has had full custody and control of [the child] ..." The Court went on to clarify the law of residency:

As a general proposition of law it cannot be questioned that, during the lifetime of the parents, their domicile is the legal domicile of their minor child. It remains then to be determined in this case whether it is indispensable to appellee's right to attend school in district No. 36 that his legal domicile be in that district. The very recent case of *Ashley v. Board of Education*, 275 Ill. 274, decided since this appeal was taken, is decisive of this question and also of this case, under facts as above found. A reference to that case will render further discussion of the law unnecessary here. After considering the sections of the school

law applicable to the facts, the court there said: "It is not essential to the right of a child to attend the public schools of the State that it should have a legal domicile in the place in which the school is held. The schools are required to be maintained for all persons in the district over the age of six and under twenty-one years of age. The residence required under this language is not such as would be required to establish a right to vote or which would fix the liability of a township or county for the support of a pauper. The right to attend school is not limited to the place of the legal domicile. A residence, even for a temporary purpose, in a school district is sufficient to entitle children of school age to attend school. The only requirement, so far as residence is concerned is dwelling in the school district. Every child of school age in the State is entitled to attend the public schools in the district in which it actually resides for the time being, whether that be the place of its legal domicile or the domicile of its legal guardian, or not. For this has always been the view which has been held, so far as we are informed,

by those charged with the administration of the school law."

In *Dean v. Bd of Educ.*, 53 N.E.2d 875 (1944), children were placed in a home through a charitable society pursuant to a court order granting that society care, custody and control of the children. The court order was made with the consent of the children's father. A society official was granted guardianship. Due to a lack of room at the society home, and pursuant to the routine procedure of placing children in temporary homes pending adoption, the Dean children were placed in a home whose attendant school district was different than that of the appointed guardian. That district refused tuition free enrollment. The court cited the *Ashley* case, among others, as providing the dispositive principle of law to decide the case. "The fact that the [] Society did not possess adequate facilities to keep the Dean children in its immediate custody and was compelled to seek accommodations for their support and maintenance in private homes, does not place them in a relationship to the school district in which they live different from the school residence which the children had who lived in the orphanages in the former cases."

The *Turner* reference to "See collected cases in Anno., 83 A.L.R.2d 497, 505-509, 513-526 (1962)" leads directly to *Brownsville Independent School District v. Gamboa*, 498 S.W.2d 448 (1973). This Texas case is striking similar to that of *Joel R.* Two eight year old children, born in the U.S. to Mexican parents, lived in Mexico and then came to the U.S.

to live with a maternal aunt. The local school district denied their request for tuition free admission based on the district's local policy. "Pupils ... will be further required to have residence within the district with a parent or guardian, legally appointed by a court of competent jurisdiction, having lawful control and legally residing in the district." Texas law regarding residency was similar to that of Illinois, incorporating the ideas of care and control and excluding admission if residency was established solely to attend school there. The Texas court held that "sufficient permanency" of one child's residence status existed to require his admission to school on a tuition free basis, and denied the other because residence status was "vague and temporary." The parallel between *Gamboa* and *Joel R.* is unmistakable. Although the Texas state decision is not binding in Illinois, the *Turner* courts reference to A.L.R. signals both the courts belief that the principles involved in residence determination are general, and their apparent willingness to listen to persuasive non-mandatory authority.

Sections of the Illinois School Code (Code) applicable at the time of the District's decision are cited here as (1) they may shed light on some of the reasons behind the District authorities interpretations of residence requirements as manifest in their communications with Ericka, (2) they may shed further light on the selection of particular phrases included in the opinion of the Appellate Court, (3) they may assist in understanding the questions which the case fails to answer regarding the interplay of

various residency sections of the Code, and (4) they provide a basis on which school administrators can view the spectrum of residency in light of subsequently enacted statutory requirements regarding residency determinations, and the policy implications of that law and this case.

Illinois School Code provisions applicable at the time of the District's decision:

ARTICLE 10. SCHOOL BOARDS. 5/10-20.12a.

Tuition for non-resident pupils. To charge non resident pupils who attend the schools of the district tuition in an amount not exceeding 110% of the per capita cost of maintaining the schools of the district for the preceding year. Non-resident pupils attending the schools of the district for less than the school term shall have their tuition apportioned, however pupils who become non-resident during a school term shall not be charged tuition for the remainder of the school term in which they became non-resident pupils. These provisions do not apply to any disabled child eligible for special education services under Article 14. 105 ILCS 5/10-20.12a (West, 1996)

ARTICLE 10. SCHOOL BOARDS. 5/10-22.5a.

Attendance by foreign exchange students and certain nonresident pupils. To enter into written agreement with cultural exchange organizations, or with nationally recognized eleemosynary institutions that promote excellence in the arts, mathematics, or science. The written agreements may provide for tuition free attendance at the local district school by foreign exchange students, or by nonresident pupils of eleemosynary institutions. The local board of education, as part of the agreement, may require that the cultural exchange program or the eleemosynary institutions provide services to the district in exchange for the waiver of nonresident tuition. [105 ILCS 5/10-22.5a (West, 1996)]

ARTICLE 26. PUPILS-COMPULSORY ATTENDANCE. 5/26-1.

Compulsory School Age-Exemptions. Whoever has *custody or control* of any child between the ages of 7 and 16 years of age shall cause such child to attend some public school in the district wherein the child resides the entire time it is in session dur-

ing the regular school term ... “(exception). *emphasis added*, 105 ILCS 5/26-1. (West, 1996)

ARTICLE 45. EDUCATION FOR HOMELESS CHILDREN ACT. 45/1-20.

Enrollment. If the *parents or guardians* of a homeless child or youth choose to enroll the child in a school other than the school of origin, that school immediately shall enroll the homeless child or youth even if the child or youth is unable to produce records normally required for enrollment, such as previous academic records, medical records, *proof of residency, or other documents. emphasis added*, 105 ILCS 45/1-20-1. (West, 1996)

ARTICLE 45. EDUCATION FOR HOMELESS CHILDREN ACT. 45/1-5.

Definitions. “School of origin” means the school that the child attended when permanently housed or the school in which the child was last enrolled. “Parent” means the parent or guardian having legal *or physical custody*. “Homeless person, child or youth” includes, *but is not limited to*, any of the following: ...

emphasis added, 105 ILCS 45/1-20-1. (West, 1996)

ARTICLE 14. CHILDREN WITH DISABILITIES. 5/14-1.11.

Resident District; parent; legal guardian. The resident district is the school district in which the parent or guardian or both parent and guardian, of the student reside when: (1) *the parent has legal guardianship of the student and resides within Illinois*; or (2) *an individual guardian has been appointed by the courts and resides within Illinois, ...* *Emphasis added*, 105 ILCS 5/14-1.11 (West, 1996)

ARTICLE 14. CHILDREN WITH DISABILITIES. 5/14-1.11a.

Resident District; student. The resident district is the school district in which the student reside when: (1) the parent has *legal guardianship* but the location of the parent is unknown; or (2) *an individual guardian has been appointed* but the location of the guardian is unknown, ... “*Emphasis added*, 105 ILCS 5/14-1.11a (West, 1996)

Following are the new Code re-

quirements regarding residency applicable to all Illinois School District’s effective January 1, 1997:

ARTICLE 10. SCHOOL BOARDS. 5/10-20.12b.

Residency; payment of tuition; hearing; criminal penalty.

(a) for purposes of this Section:

(1) The residence of a person who has legal custody of a pupil is deemed to be the residence of the pupil.

(2) “Legal custody” means one of the following:

(i) Custody exercised by a natural or adoptive parent with whom the pupil resides.

(ii) Custody granted by order of a court of competent jurisdiction to a person with whom the pupil resides for reasons other than to have access to the educational programs of the district.

(iii) Custody exercised under a statutory short-term guardianship, provided that within 60 days of the pupils enrollment a court order is entered that establishes a permanent guardianship and grants custody to a person with whom the pupil

resides for reasons other than to have access to the educational programs of the district.

(iv) Custody exercised by an adult caretaker relative who is receiving aid under the Illinois Public Aid Code for the pupil who resides with that adult caretaker relative for purposes other than to have access to the educational programs of the district.

(v) Custody exercised by an adult who demonstrates that, in fact, he or she has assumed and exercises legal responsibility for the pupil and provides the pupil with a regular fixed night-time abode for purposes other than to have access to the educational programs of the district.

(b) Except as otherwise provided under Section 10-22.5a, only resident pupils of a school district may attend the schools of the district without payment of the tuition required to be charged under Section 10-20.12a. However, children from whom the Guardianship Administration of the Department of Children and Family Services has been appointed temporary or guardian of the

person of a child shall not be charged tuition as a nonresident pupil if the child placed by the Department of Children and Family Services with a foster parent or placed in another type of child care facility and the foster parent or child care facility located in the school district other than the child's former school district and it is determined by the Department of Children and Family Services to be in the child's best interest to maintain attendance at his or her former school district.

(c) If a school board determines that a pupil who is attending school in the district on a tuition free basis is a nonresident of the district from whom tuition is required to be charged under Section 10-20.12a, the board shall notify the person who enrolled the pupil of the amount of the tuition charged under Section 10-22a that is due to the district for the nonresident pupil's attendance in the district's schools. The notice shall be given by certified mail, return receipt requested. Within 10 days after receipt of the notice, the person who mail enrolled the pupil may request a hearing to review the

determination of the school board. The request shall be sent by certified mail, return receipt requested, to the district superintendent. Within 10 days after receipt of the request, the board shall notify, by certified mail, return receipt requested, the person requesting the hearing of the time and place of the hearing, which shall be held not less than 10 nor more than 20 days after the notice has been given. The board or a hearing officer designated by the board shall conduct the hearing. The board and the person who enrolled the pupil may be represented at the hearing by representatives of their choice. At the hearing, the person who enrolled the pupil shall have the burden of going forward with the evidence concerning the pupil's residency. If the hearing is conducted by a hearing officer, the hearing officer, within 5 days after the conclusion of the hearing, shall send a written report of his or her findings by certified mail, return receipt requested, to the school board and to the person who enrolled the pupil. The person who enrolled the pupil may, within 5 days after receiving the findings, file written ob-

jections to the findings with the school board by sending the objections by certified mail, return receipt requested, addressed to the district superintendent. Whether the hearing is conducted by the school board or a hearing officer, the school board shall within 15 days after the conclusion of the hearing, decide whether or not the pupil is a resident of the district, and the amount of any tuition to be charged under Section 10-20.12a as a result of the pupil's attendance in the schools of the district. The school board shall send a copy of its decision to the person who enrolled the pupil, and the decision of the school board shall be final.

(d) If a hearing is requested under subsection (c) to review the school board's determination that a nonresident pupil is attending the schools of the district without payment of the tuition required to be charged under Section 10-20.12a, the pupil may, at the request of a person who enrolled the pupil, continue attendance at the schools of the district pending a final decision of the school board following the hearing. However, attendance

of that pupil in the schools of the district as authorized by subsection (d) shall not relieve any person who enrolled the pupil of the obligation to pay the tuition charged for that attendance under Section 10-20.12a if the final decision of the school board is that the pupil is a nonresident of the district. If a pupil is determined to be a nonresident of the district for whom tuition is required to be charged pursuant to this section, the school board shall refuse to permit the pupil to continue attending the schools of the district unless the required tuition is paid for the pupil.

(e) Except for a pupil referred to in subsection (b) of Section 10-22.5a, a pupil referred to in Section 10-20.12a, or a pupil referred to in subsection (b) of this Section, a person who knowingly enrolls or attempts to enroll in the schools of a district on a tuition free basis a person known by that person to be a nonresident of the district shall be guilty of a Class C misdemeanor.

(f) A person who knowingly or willfully presents to any school district any false information regarding the residency of a pupil

for the purpose of enabling that pupil to attend any school district shall be guilty of a Class C misdemeanor.

(g) The provisions of this are subject to the provisions of the Education for Homeless Children Act. (105 ILCS 45/1-1 et seq.). Nothing in this Section shall be construed to apply to or require the payment of tuition by a parent or guardian of a “homeless child” (as that term is defined in Section 1-5 of the Education for Homeless Children Act) (105 ILCS 45/1-5) in connection with or as a result of the homeless child’s continued education or enrollment in a school that is chosen in accordance with any of the options provided in Section 1-10 of that Act. (105 ILCS 45/1-10).

Comments on the Statute

The wording of the statute is an apparent attempt to deem student residency as based exclusively on legal custody, “[E]xcept as otherwise provided under Section 10.22.5a, ...” Limiting student residency to legal custody, even with the rather liberal language of definition employed by the statute, is a major shift in policy which may raise U.S. Constitutional questions. The statute operates to narrow the qualification for tuition free schooling to only those stu-

dents who reside with someone having legal custody as defined by the statute, with some statutory exceptions. Although the basis of tuition free attendance is generally driven by the applicable statute, the statute may not interfere with any right(s) held under the U.S. or state constitution.

The Supreme Court has considered a constitutional challenge to the principle of requiring that residency in the district not be primarily for the purpose of attending school. In *Martinez v. Bynum*, 461 U.S. 321 (1983), the Court held that the principle did not violate either the Fourteenth Amendment or the right to unencumbered interstate travel because anyone could still gain the benefit of schooling by establishing residency. In *Plyler v. Doe*, 457 U.S. 202 (1982), the Court struck down a statutory provision which empowered local school districts to refuse enrollment to children not legally admitted into the U.S., and withheld state education funds from districts for education of such children. The Court explained that undocumented aliens are protected by the equal protection clause, and any statutory classification must further a substantial interest of the state. The Court struck down the statute as failing the substantial interest test, and further observed that the impact of the law was to cause children innocent of any unlawful conduct to suffer the consequences. If 105 ILCS 5/ 10-20.12b disallows the establishment of residency except by “legal custody,” it raises impact and rights questions similar to *Plyler* and *Martinez*.

“If a school board determines that a

pupil who is attending school in the district on a tuition free basis is a nonresident of the district from whom tuition is required to be charged under Section 10-20.12a, the board shall notify the person who enrolled the pupil of the amount of the tuition charged under Section 10-22a ... “If?” Does this mean to imply that the school board does not have to make this decision? Or does the legislature mean “when” the school board makes such a decision? Even “when” seems to leave room for the school board to ignore any given case.

“[T]he school board shall within 15 days after the conclusion of the hearing, decide whether or not the pupil is a resident of the district. Since the school board is required to make the determination in the first instance, their adverse decision operating as the catalyst to initiate the request for hearing from the party enrolling the pupil, this requirement is like having the circuit court review its own decisions to render a ruling regarding whether they were correct in their original determination.

The “required to be charged” and other wording of the statute appears to invalidate the holding of *Cohen v. Wauconda Community Unit School Dist. No. 118*, 779 F. Supp . 88 (N.D. Ill. 1991), which held that it was not mandatory that a district charge tuition.

105 ILCS 5/10-20.12b lacks clarity. The statute fails to remedy improper exclusion of pupils properly eligible to attend a school district tuition free, as in the case of *Joel R.* What it does is tie residence to legal custody, and attempts to make this change in policy pal-

atable by rendering the meaning of “legal custody” less ambiguous. However, Joel R. still may have been improperly excluded under this statute, because the school secretary decided that the Mexican document granting custody to Ericka lacked authority. The facts of Joel’s case tell us that two primary decisions were made which effectively excluded Joel. First a bilingual teacher said Ericka needed legal custody according to a registration checklist. Then a school secretary informed Ericka “that the Mexican document was not sufficient to enroll Joel because it did not establish, through an American court, that Ericka was Joel’s legal guardian.” In other words, the school secretary did not consider the Mexican custody document to have been issued by a court of competent jurisdiction. The problem in this case was that the first two decision makers lacked the sufficient legal knowledge to make the decision, not that the definition of “legal custody” was unclear.

As the principal, superintendent, school attorney, and school board all dealt with the bilingual teacher and school secretary’s successive decisions, the errors were never corrected. According to the case, in the face of a questionable decision, all these officials became “intractable in their decision.” This could mean the court felt these officials failed to consider whether the decision was competent or not. 5/10-20.12b does nothing to correct this problem. Nor did any of these officials bother to inform in a timely manner the “person who enrolled the pupil” that an appeal of this

decision was board policy. This statute does nothing to correct this failure to inform. There is no provision requiring the school to inform a “person who enrolled the pupil” of the existence or requirements of the statute. Nor does the statute deal with a case like Joel R.’s where the district fails to enroll him in the first place. The language seems to be designed to discourage people like Ericka from enrolling their children in the district for fear of criminal prosecution. The chilling effect of the statute does much to discourage enrollment in cases like Joel’s where there is a legitimate question requiring careful scrutiny. On balance, the statute does little to eradicate attempted improper enrollments, to effect cognizant initial decision making by proper officials, to provide safeguards against “intractable” decision makers, or to ensure proper checks and balances regarding decisions. As a matter of fact, the statute operates to lend legal credence to the improper denial of Joel R. from tuition free schooling by replacing sound public policy of the last 120 years plus with a rigid legal custody requirement of questionable constitutional validity.

Comments on the Case

Although the opinion lacked further clarification, it is noteworthy that the primary question regarding residency in custody transfer cases is the intent of the transferee to remain on a permanent basis. *Connelly v. Gibbs*, 445 N.E.2d 477 (1st Dist. 1983). Applying that ruling to *Joel R.*, if Ericka and the parents of Joel considered the custody transfer to be

permanent, then the appropriate question would be whether that intention was supported by the evidence. *Connelly* sets the criteria for making this determination by giving more weight to the acts of the parties rather than to their declarations. Applying that principle to the *Joel R.* case, the district's contention that Ericka had stated that the primary purpose of Joel's living in Melrose Park was to attend school was an insufficient basis for making the determination because the district should have given more weight to act of the parents and Ericka. The contention by the district, which Ericka denied and was found to be credible on by the court, was also insufficient because, according to the court, Ericka was never given an opportunity to provide an explanation of the facts surrounding Joel's coming to live with her.

Implications for Administrators

A careful reading of relevant School Code provisions regarding residency, followed by a careful reading of the history behind *Turner, Israel, Kraut, and Connelly*, supplemented by *Joel R.*, would have been recommended in light of the *Joel R.* decision had 105 ILCS 5/10-20.12b not rendered the exercise moot. Fine tuning of district residence policy may also have been warranted, including the merit of confining residence decisions to Principal's and Superintendent's with appropriate review. That may still be the case, but district policy is likely superseded in many instances by the new statute section. Check dis-

trict policy and revise according to 105 ILCS 5/10-20.12b

The Circuit Court's finding "that once the decision was made by [District official's] not to admit Joel ... they became intractable from their position" implies the need for careful consideration of circumstances in similar questions, whether they involve residency or other matters. A generally heightened understanding and adherence to the constitutional requirement and public policy supporting due process would serve all district official's well. In this case all relevant law, statutes and district policy operated to allow relevant evidence to be considered and reviewed. Where due process is circumvented, delayed, or appears to be operated strictly in form (i.e. where official's become intractable following initial decisions), courts are inclined to find fault with the process. Where relevant evidence has not been properly allowed or fairly considered in administrative hearings, courts will also likely find fault. Where due process rights are violated and relevant evidence fails to be considered, administrative decisions are unlikely to withstand judicial scrutiny. This is particularly the case where the consequences of the denial are severe (i.e. denial of tuition-free education). It makes good financial and public relations sense for school district representatives to go out of their way to operate in accordance with the spirit and the principles of due process. School officials should allow the greatest possible opportunity for petitioners to develop and present their cases, and consider

all relevant evidence in a light most favorable to the party who will bear the consequences of an adverse decision. Whether 105 ILCS 5/10-20.12b will be tested constitutionally, and regardless of the outcome if it is, school administrators are never in error when they strive to adhere to the spirit of due process.

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