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**MANDATED COMMUNITY SERVICE:  
LAW, DATA AND RECOMMENDA-  
TIONS\***

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\*Revised and expanded version of a paper presented at the 43rd Annual Conference of the Education Law Association, November 20-22, 1997, Seattle, Washington.

The past decade beginning in 1987 has given rise to a cluster of reform initiatives to improve American schools, especially the public elementary, middle, and high schools. The initiatives include, among others, charter schools, vouchers for school choice, single-sex schools, single-race schools, site-based school management, drug testing for athletes, portfolio assessment, school prayer, curriculum standards in the various academic areas, national goals, national academic testing, stricter dress codes and uniforms, increased use of computer-based teaching, distance learning via high technology, home schooling, and service learning, also known as community service.

While some of the initiatives, such as national goals and distance learning, did not give rise to serious legal issues, others did. For example, the vouchers for school choice initiative raised issues related to the religion clauses of the First Amendment (use of tax money to send students to parochial schools), and the drug testing initiative involved the search and seizure

provision of the Fourth Amendment (intrusiveness of the test into the expectation of privacy during the performance of bodily functions, seizure of a urine sample, and individualized suspicion).

I shall not engage here in trying to establish a contest concerning whether the initiatives with serious legal ramifications are more profound and significant for our country than those without such legal issues. Nor shall I engage in trying to assess which issue with legal ramifications is jurisprudentially most complex and significant to our established understanding of fundamental constitutional rights. I only submit to you here that the initiative of mandated community service as a high school requirement for graduation has evoked serious legal challenges grounded in the First, Thirteenth, and Fourteenth Amendments and that they deserve our close attention. These challenges can serve as a window for examining the initiative and its role in the reform of American public schools. I shall start with the legal issues and then turn to other core issues of the initiative.

**LEGAL ASPECTS OF MANDATED COMMUNITY SERVICE: 1997 UPDATE<sup>1</sup>**

To date three cases from Pennsylvania, New York and North Carolina together constitute the spectrum of legal challenges to mandated community service. These cases from the Third, Second, and Fourth Circuits were,

in chronological order, *Steirer v. Bethlehem Area School District*,<sup>2</sup> *Immediato v. Rye Neck School District*,<sup>3</sup> and *Herndon v. Chapel Hill-Carrboro City Board of Education*.<sup>4</sup> All three community service programs in the Bethlehem, Rye Neck, and Chapel Hill high schools required students to complete a minimum number of service hours (sixty, forty, and fifty, respectively) without pay for one or more private or public nonprofit organizations that serve the community, but students could not displace paid employees.

Students could choose an organization from a pre-approved list or submit their choices of non-listed groups for approval. Variations regarding some administrative and curricular details existed. However, they were not critical to the central idea: community service was a requirement for graduation. The requirement was based on the beliefs that a service experience is educative and that community service primarily benefits the students as citizens living in a democratic community rather than the individual, direct recipients of student service.

The legal challenges by high school students and parents involved a total of five claimed violations of the First, Thirteenth, and Fourteenth Amendments to the Constitution. No single claim was common to all three cases when we consider their litigation histories from federal district court to appellate court to petition to the Supreme Court for writ of certiorari (See Figure 1).

Figure 1

Mandated Community Service: Litigation Scorecard

		Plaintiff Claims				
		Students			Parents	
		1st A. Express Belief	13th A. Invol. Servit.	14th A. Personal Liberty	14th A. Privacy	14th A. Parental Liberty
<i>Steirer v. Bethlehem</i>	Dist. Ct.	Y	Y			
	3rd Cir.App.	Y	Y			
	Petit. Cert.	Y	Y			
<i>Immediato v. Rye Neck</i>	Dist. Ct.		Y	Y	Y	Y
	2nd Cir.App.		Y	Y	Y	Y
	Petit. Cert.			Y		Y
<i>Herndon v. Chapel Hill</i>	Dist. Ct.		Y	Y	Y	Y
	4th Cir. App.		Y	Y		Y
	Petit. Cert.			Y		Y

Y= Yes, brought by plaintiff

Only in *Steirer* did the students contend that “performing mandatory community service is expressive conduct because it forces them to declare a belief in the value of altruism.”<sup>5</sup> As such, they claimed that mandatory community service was a violation of their First Amendment rights. The Third Circuit framed this First Amendment issue in its own way, asking whether the act of performing community service is an affirmation of a belief. The court concluded, based on a precedent from 1977,<sup>6</sup> that the performance of community service did not intend to convey a special message to members of the community and that community members were likely to perceive students as simply completing their graduation requirements.<sup>7</sup> In short, mandatory community service constituted non-expressive conduct; therefore, the First Amendment did not protect the students.

In all three cases the students and parents claimed violations of their Thirteenth and Fourteenth Amendment rights. The students claimed that unpaid mandatory community service constituted involuntary servitude as prohibited in the Thirteenth Amendment, which was ratified in 1865. All three appellate courts, led by the Third Circuit, denied the students’ claims and confined the Thirteenth Amendment to “situations akin to African slavery.”<sup>8</sup> The courts stated that the students had options, such as attending another school,<sup>9</sup> and that the community service requirement was in “no way comparable to the horrible injustice of human slavery.”<sup>10</sup>

The parents of the students asserted that they have a constitutional liberty right, as found in the Fourteenth Amendment, to have the primary responsibility for rearing and educating their children. This right, they claimed, permits them to exempt their children from mandated community service. The parents further requested the courts to apply a heightened level of review (strict scrutiny) because their liberty right, they claimed, is a fundamental constitutional one. The courts acknowledged that parents do have a substantive due process liberty right in the upbringing of their children.<sup>11</sup> However, without explicit direction from the Supreme Court the courts refused to break tradition by applying a heightened standard of review instead of the lower rational basis standard. The courts then held that the community service requirement met the rational basis standard and that the parents did not have the right in education to be “unfettered by reasonable government regulation.”<sup>12</sup>

The students, like their parents, also claimed violations of their Fourteenth Amendment due process liberty rights. They, too, requested a strict scrutiny level of review. The courts rejected their claims because 1) the students cited no precedents to support their assertion that the decision to help others has always been left to individual conscience and belief and 2) there existed no precedent that individual choice constituted a fundamental right implicit in the ordered concept of liberty such that it earned a strict scrutiny review.<sup>13</sup> In short,

the courts were reluctant “to expand the substantive reach” of the Constitution’s clauses.<sup>14</sup>

Finally, the students also claimed violations of their Fourteenth Amendment substantive due process privacy rights. The students claimed that in discussing their community service with their teachers and classmates and in reporting their service to the directors of the schools’ programs they would be required to disclose personal information protected by the Constitution. The courts held that even if the students had such a privacy right, community service programs furthered the state’s legitimate educational interest and that disclosure, if any, of personal information was minimal (that is, no more invasion of privacy than existed in more traditional school assignments).<sup>15</sup>

In summary, the lower courts rejected all five claims brought in the three cases; the Supreme Court denied certiorari in each case on a total of four separate claims (the privacy claim was never brought to the attention of the highest court, as shown in Figure 1); all decisions were unanimous; and the courts took a “contextual approach”<sup>16</sup> in deciding the cases not only as explicitly mentioned with regard to the Thirteenth Amendment claim but with all five constitutional claims. The challenged mandated community service programs did not violate any claimed constitutional rights, according to the judges in these three cases.

## EDUCATIONAL ASPECTS

### Justification Bases (Purposes)

Educational leaders and parents must consider some fundamental educational issues when they begin to discuss implementing community service as a requirement for graduation from high school. They also must continue their consideration periodically whether or not they have instituted a program for their schools. School leaders must decide the goal or purpose of community service so they can justify incorporating a service element into their required curriculums. The goal or purpose provides coherence and direction to a program and the myriad of details that flow from requiring students to perform community service. A community service requirement explicitly involves a grounding in values and leads to the teaching of values, a situation that always evokes robust controversy among taxpayers.

Three main justifications, or purposes, of mandated community service exist. The most common of the three centers on the psychological and social development benefits students are likely to receive from participating in such a program. Indeed, the Bethlehem, Rye Neck, and Chapel Hill high schools emphasized the personal growth that students gain from serving the community. That is to say, students gain a sense of worth, pride, confidence, competence, self-awareness, usefulness, and self-esteem.<sup>17</sup> The courts accepted this type of justification.

The second justification centers on the cognitive, or intellectual and academic, benefits students are likely to gain from participating in such a program and from reflecting upon their experiences. Reflection via discussing, reading, writing, and other means under the guidance of their teachers to probe the meaning of their service leads students to knowledge about the structure and problems of a democratic community. Students learn substantive content in science, social studies, and other academic areas as teachers and students relate the service projects to the content under study. Reflection also fosters the development of cognitive and social skills, such as problem solving and communication. Further, as the students look beyond their personal lives and local communities and as community service becomes an extension of the academic curriculum, students can learn the skills of public life, such as public speaking, organizing meetings, and developing civic action plans.<sup>18</sup> The defendant schools alluded to but did not emphasize this type of justification in the three court cases. The intellectual and academic justification is not one that is commonly emphasized, judging from the literature examining and criticizing the manner in which most community service programs actually operate.<sup>19</sup> The courts also accepted this type of justification in that the material before them included acknowledgment of and reference to its elements.

The third justification centers on civic education. This justification focuses on the ben-

efits that the students and the community at large gain from the development of social responsibility. Democracy cannot survive without the active participation of citizens in their community's life. Service to the community is an obligation we all have. It is a price we pay for a democratic life. Service learning teaches students the value of community life and their responsibilities to the community that has nurtured them. Community service, therefore, fosters a sense of community in the youth of the community. The courts did accept this justification in that it, too, was included in a list of seventeen purposes of the Bethlehem High School community service program. For example, purpose number seven is "to help students understand their responsibilities as citizens in dealing with community issues."<sup>20</sup>

A minor, fourth type of justification focuses not on the benefits to be gained by the students but on the benefits obtained by the community at large and, thereby, on the good will established between the school and the community. This good will justification is related to, but not the same as, the third one above that focuses on a philosophical, or political theory, gain by the community. The gain in this justification is a concrete one in terms of economics and community relations. This fourth justification centers specifically on the gain of civic organizations from the work of the students, on the money saved by the community by having free labor from the students, and the sense of good will created with the community's



adults from recognizing that the students are helping the community by partially paying back the costs of their free schooling. The defense lawyers for the three challenged programs did not present these benefits to the courts.<sup>21</sup> Thus, these courts did not have the opportunity to comment on this type of justification. However, in a prior case involving required work in the school cafeteria by students in grades four through twelve the court upheld the program on the basis that students were helping to repay the cost of a public school education.<sup>22</sup> In retrospect, had the defense lawyers in *Steirer*, *Immediato*, and *Herndon* added this fourth type of justification, the courts probably would have accepted it, too.

#### Recent Survey Data of Students<sup>23</sup>

Most of the data available on the reactions of students to mandated community service is anecdotal by the students and their teachers, or the data are the result of unstructured interviews of only several students at a given school. In an effort to gather some survey data systematically, a group of seminar students and I during the Fall 1996 semester designed a questionnaire for students who were participating in service learning in New Jersey public high schools. Our survey questionnaire (see Appendix) had two parts. Part 1 consisted of a 30-item list of statements to which students responded on a 4-point scale of Strongly Agree (4), Somewhat Agree (3), Somewhat Disagree

(2), and Strongly Disagree (1). Part 2 consisted of one open-ended item seeking information on needed improvement in the student's service learning program. (We are now in the process of refining the survey questionnaire.)

The 30-items reflect our reading of the literature,<sup>24</sup> our interviews with students and teachers, and our view of the learning theory, justifications, and legal issues involved in service learning. For example, because we were alert to liability and risk management issues, we included an item about safety training; because we noted Judge Briant's<sup>25</sup> negative remark about service learning in *Immediato* we included an item about the possibility of learning more from an extra course than from participation in a community service project. The thirty items fall unevenly into six general categories: Giving to the Community; Learning Beyond the Classroom; Personal Reflection; Peer Support; Family Support; and Curricular Support.

The data we have so far come from 87 students in a New Jersey public high school. These students constituted all the students willing and available to complete the survey at a student assembly during the Spring 1997 semester. The students made up about 50 percent of the entire number of students participating in the community service program on that spring day. Although we were not able to perform more than computation of mean scores and some cross tabulations, we did obtain information important to us.

The items with the four highest mean

scores (that is, closest to Strongly Agree) were: My family supports my community service (3.58); the community service that I do is meaningful to me (3:45); I believe in the goals of our community service program (3:43); and I feel glad when I do community service through my school (3.38). The items with the four lowest mean scores (that is, closest to Strongly Disagree) were: In my school the community service program is integrated primarily with one of my courses (1.68); I received safety training for my community service work (2.00); I discuss my community service with my teachers and the discussions help me to understand my service experience better (2.01); and I would be learning more with an extra course instead of performing community service (2.06).

Two cross-tabulations of items are of particular note. We cross-tabulated items 15 and 7 (integration with a course and personal meaningfulness, respectively). In the 4x4 cross tabulation matrix the highest number of responses in a single cell was in the cell formed by Strongly Agree on meaningfulness of community service with Strongly Disagree on integration of integration of community service into the ongoing curriculum. This single cell was a corner cell of the 16-cell matrix, indicating two extreme responses. Specifically, 23 students of the 79 responding to these two questions reported that they found very high personal meaningfulness even though there was very low integration of their service with their courses.

We also cross-tabulated items 14 and

7 (schools should require community service and personal meaningfulness, respectively). In this cross tabulation matrix the highest number of responses in a single cell was in the cell formed by Strongly Agree on meaningfulness of community service with Strongly Agree with making community service a graduation requirement. This single cell was also a corner cell of the 16-cell matrix, indicating two extreme responses. Specifically, 26 students of the 82 responding to both questions combined very high personal meaningfulness with their belief that community service should be required. In other words, for these students the requirement of community service did not detract from the high degree of meaningfulness of their service learning project.

The data we collected are not surprising at all. They corroborate what the literature and our interviews indicate. The students supported their school program in terms of goals and learning, found their service learning meaningful, and were glad when they helped other people. Most of all, students recognized that their families support service learning, a fact that many teachers and administrators treat lightly and do not build upon. At the same time, the students acknowledged that their school has not dealt with the supervision and risk-management aspects of service learning in terms of training students for the service tasks they perform or the need for training in safety measures for those tasks. Nor does their school integrate the service learning projects with academic courses

where their teachers can relate their projects to course content.

Unfortunately, the literature indicates a similar lack of integration of service learning with academic courses as well as a lack of structured and guided reflection on the service experience. This is so despite the strong advocacy of integration and reflection in the education literature. Nevertheless, students in general are positive about service learning even with its apparent limitations as it is currently instituted in the schools by and large.

In another study done at Rutgers University,<sup>26</sup> unrelated to my work and coincidentally conducted in the same time period from 1995-1997, a doctoral student examined the impact of service learning on self-esteem (the personal growth justification) and civic inclusion (civic education justification). In that study self-esteem is defined as "the extent to which one prizes, values, approves, or likes oneself . . . the overall affective evaluation of one's own worth, value, or importance."<sup>27</sup> Civic inclusion is defined as "more than civic education, civic literacy, or even civic participation. Civic inclusion encompasses a sense of being part of the community and the acknowledgement of the social responsibilities that citizenship entails."<sup>28</sup>

The study focused on the ninth grade class at the Peddie School, an independent school, in Hightstown, New Jersey, with both boarding and commuter students. Of the 89 students in the freshman class 79 chose to participate, with 27 in the experimental community

service group and 52 in the control group. To collect the data the researcher used the Coopersmith Self-Esteem Inventory, three paper and pencil questions on a pre-test and post-test survey to measure civic inclusion (that is, the changes in beliefs and values regarding community service experience),<sup>29</sup> and interviews with 13 of the 27 students who performed community service in their freshman year.

The results of the study in regard to self-esteem showed that there were no "significant mean differences between the groups that did and did not participate in community service."<sup>30</sup> In regard to civic inclusion the students who did participate in the community service program exhibited a higher sense of civic inclusion than those who did not participate.<sup>31</sup> Similarly, students who participated in community service showed greater interest in pursuing additional community activities than students who did not participate.<sup>32</sup> The data from the interviews verify these findings.<sup>33</sup> The researcher in her concluding remarks makes a significant point regarding the place of service learning in the culture of the school; "One specific point about the Peddie school community service program that came across during the interviews was how important service was viewed by the entire school community. This is seen through the reflection on service during Chapel Talks, in class, and stated by the Headmaster in the view book."<sup>34</sup> Except for the finding of no difference on the self-esteem measure, these data from the Peddie students are also not surprising.

## RECOMMENDATIONS FOR A SOUND COMMUNITY SERVICE PROGRAM

Based on my understanding of the related legal and educational literatures, interviews with students, teachers, and administrators, the two sets of survey data presented above, and personal experience, I now present eight major recommendations for establishing and maintaining a sound, worthwhile community service program for schools. The following recommendations do not appear in a rank order of most to least important. Rather, all are important and interdependent.

1. The director of the program should be an educator who has a personal commitment to service learning. This educator (teacher or administrator) should exhibit an understanding of the role of service organizations in democratic community life and a passion for guiding students in their intellectual, psychological, and social growth through service learning. Without a personal commitment, understanding, and passion on the part of the director of the program the students, staff, other educators, and community members are not likely to respond positively to working their ways through the obstacles and details faced in having students (especially those who are resistant or reluctant) participate in a mandated community service program. Students need a passionate, compassionate, and understanding leader committed to the notion that education should go beyond classroom learning so that it can become

an integral part of the student's total life in the community. The program director needs to be able to represent the students and school to the broader community and vice versa.

2. School leaders should define community service as activity under the aegis of the school which helps people in need directly and/or helps people indirectly through organizations that serve the community at large. The organizations may be public or private civic groups that provide charitable service to the needy, such as County Home for the Aged Poor, Lighthouse for the Blind, or the March of Dimes Birth Defects Foundation. The organizations also may be public or private civic groups that provide service for the entire community, not just the needy, such as the Neighborhood Nature Center, the City Volunteer Fire Department, and the Town Landscape and Drainage Project. By serving through such total-community organizations students in effect help themselves as well as others. With a broad and inclusive definition community service will not be synonymous with involuntary charitable work provided to a needy person. Students will have the option to serve their communities in alternative ways. Thus, an inclusive definition will eliminate the legal and moral rhetoric used by some people who rally against mandated community service by raising the concept of involuntary charitable work.<sup>35</sup>

3. The goal of a school's community service program should be to provide opportunities to students for personal growth (personal pride, self-worth, and self-esteem), intel-

lectual and academic development (analyzing problems, solving problems, and learning substantive content), social skills development (communication, negotiation, and public speaking), and civic education (learning civic responsibility and the values of community life). The aim of community service leaders should be to broaden the concept of learning so that it encompasses learning beyond the classroom and includes learning by participating in community life. With an expansive goal the student and educators will feel comfortable in connecting service learning with the core of the school's other activities.

4. School leaders should integrate their service learning programs into their ongoing school curriculums. Whether the community service program is in a middle school that is semi-departmentalized or in a high school that is departmentalized, various teachers during the school day should allude to and draw on the students' service experience in the community as they teach the content of their academic fields. Thus, for example, a science teacher can discuss the projects of a nature center, drainage plan, or river pollution clean-up with students involved with such projects. Similarly, a social studies teacher can discuss socio-economic issues related to the aged poor, day care centers in contemporary American culture, and health care problems in today's society. The same applies to other areas of the curriculum, such as language arts, music, art, foreign languages, and mathematics. Guidance counse-

lors, too, should integrate a student's experiences into the counseling process.

One way to accomplish the integration of service learning into the ongoing curriculum is to implement an interdisciplinary course or unit entitled Contemporary Issues in Our Society and to arrange for several teachers to teach it simultaneously. Such an approach will not only integrate the service learning but it also will connect several curriculum areas together. Many other ways to accomplish integration are also possible. In any way it occurs integration is a key to a sound service learning program. Departmentalization should not and need not become a barrier or even an obstacle to curricular integration.<sup>36</sup>

By connecting service learning to the academic courses and guidance program teachers can prevent the fragmentation of a student's experiences. Teachers can help students to understand their experiences and their role in the larger scheme of community life. In this way a community service program need not be seen as an unconnected addition to the school's requirements. Community service can become a vehicle for unifying a student's various roles in school and home life.

5. School leaders, especially the director of the community service program, should include time and strategies for debriefing and reflecting on the students' experiences. It is through guided reflection that teachers can help students to understand the meaning of community service in general and the students' ongo-

ing activities in particular. The act of reflection, advocated by every educational theorist when discussing learning, is essential to the success of a community service program not only for personal growth and intellectual development but also for the acceptance of civic responsibility.

Teachers should talk with students about their service learning projects. Teachers should encourage students to write about their activities and/or make works of art expressive of their reactions to service, and/or present their service projects' reports to community groups. Teachers should guide students in making a conscious effort to understand their experience within the context of their community lives. It is not enough for students simply to check off items on a report sheet to indicate that they have fulfilled their minimum number of service hours. As the leaders of service learning in Maryland have put it, "The reflection phase is most important for students to learn from their experience."<sup>37</sup> Time for debriefing and reflecting is a critical element lest service learning become a routine chore external to daily high school life.

6. School leaders and teachers should create a learning environment where students can spend time talking, reading, writing, making art, and planning exhibits and presentations connected with their community service projects. A positive learning environment that promotes individual study as well as group interaction will facilitate the integration of service learning into the larger curriculum. Such an

environment will also facilitate the achievement of the goals of the service program and schooling in general by providing for a variety of ways of learning.

7. School leaders should establish a formal evaluation program whose feedback will help fine tune the service learning program. The evaluation process and its instruments should measure and assess short-term and long-term effects of service learning on students, teachers, administrators, parents, and community members. The evaluation process should combine paper and pencil measures with observations and interviews. Just as formal evaluation is a requirement for mandatory courses such as language arts, biology, algebra, and American history so must evaluation become a part of a mandated community service program. The evaluation should be a multi-faceted and longitudinal one to fit the unique characteristics of each individual school's community service program.<sup>38</sup>

8. School leaders should establish and maintain community awareness and support for their service learning program. Service learning by its very nature must be a cooperative endeavor between a school and its community. Neither the school nor the community can succeed without the other. To maintain open avenues for the students to perform their community service the school needs close and frequent communication with the many organizations that will host students. Through discussions about the goals of the community service program,

through feedback from the service organizations, and through a number of events with attendant publicity citizens will become aware of students performing service. The benefit of positive public relations for the school and the host organizations is mutual. However, it is the school's responsibility to be the nerve center that facilitates the ultimate success of its community service program.

### CONCLUDING COMMENTS

The legal challenge to mandated community service is over unless dissatisfied students, parents, and their lawyers approach their situation differently. It is over not only in the Third, Second, and Fourth Circuits but in all circuits in light of the unanimity of the three separate circuit decisions and the refusal of the Supreme Court to hear any appeal. The legal organization that has backed the plaintiff families so far, The Institute for Justice (headquartered in Washington, D.C.), realizes this situation and will allocate further resources and time to challenge service learning only if one or more external and/or internal changes occur.

For example, one external change might be a swing to ultra conservative libertarian politics with a resultant change in the views of the federal judges. Another might be a change in the statutes and constitutions of some states that would encourage challengers to ground their claims not in the federal constitution but in state statutes and state constitutions, as did challeng-

ers to school funding laws after the Supreme Court's *San Antonio* decision in 1973.<sup>39</sup> However, such changes may not be easy to effect or necessarily effective. An effort to change the Colorado constitution with a Parents Rights amendment failed in 1996. Furthermore, the legislative bills that were enacted in Kansas and Michigan giving parents the primary control over the care and upbringing of their children may not be strong enough to overcome the right of the government to set the curriculum and require community service as part of it once the parents choose to enroll their children in the public schools. That is, in the language of the courts the parents do not have the right to provide their children with an "unfettered" education.<sup>40</sup> Thus, the status quo of late 1997 is likely to continue until much stronger parental rights are enacted.

In any case, at this time I know of no court challenge to Maryland's state mandate—the only state mandate at this time—for community service passed in 1992, effective for the graduating class of June 1997 for the first time. According to the final report for the Class of 1997, as published by the Maryland State Department of Education based on information supplied directly by the 24 local school systems, 42,532 (98.9%) students fulfilled their service learning requirement. Of the 497 who did not fulfill the requirement, 448 have at least one other unmet requirement. Thus, only 49 students did not graduate solely because of the service learning requirement. Note that Mary-

land is in the Fourth Circuit where *Herndon* was decided in 1996.<sup>41</sup>

An internal change might be a shift by lawyers to use a case that combines claims of violation of the free speech and the religion clauses of the First Amendment with claims based on the substantive due process right of the Fourteenth Amendment. The reasoning is to strengthen the opposition to mandated community service by connecting it to precedents that protect fundamental religious beliefs, free speech, and parental rights. Of course, the lawyers must wait for or solicit such a special legal situation. It is possible for the Institute For Justice or its ally, the Rutherford Institute (headquartered in Charlottesville, Virginia), to attract such a case because they invite and welcome inquiries on the Internet. For example, the homepage of the Institute for Justice states, “If you seek a courtroom champion for individual liberty, free market solutions, and limited government, look only as far as the Institute for Justice . . .” The viewer needs only to click on the option “Contact Us” to proceed further.<sup>42</sup>

Another possible internal change is for the lawyers to accept the fact that courts will use a rational basis for review and then to set out to show that the defendant school district is not even meeting that low standard of performance. They might succeed in this effort by indicating that the school is not meeting the recommendations found in the educational literature (e.g., not providing time for teacher-guided reflection; not providing for external supervi-

sion and safety training of the students at the host organization location, and not providing any evidence that the program has “improve[d] the students’ ego and moral development” nor any evidence that it has “promote[d] higher-level thinking skills such as open-mindedness.”<sup>43</sup> The lawyers might attempt to demonstrate that the school won approval of its program based on the three main justifications treated above but in actuality has provided for only partial achievement of the personal development purpose and neglected the intellectual and academic purposes as well as the civic education purposes.

The common emphasis and reliance on the personal growth foundation for community service stands out in a recent article that refers to service learning for high school seniors. In reference to a program almost twenty years old with weekly seminars, the principal, giving one example only, wrote:

In a recent seminar, one student commented on her experience visiting a nursing home:

“They were playing Bingo, and this lady who was blind wanted to play. It was sad. But I was able to help her as they read out the letters and numbers, and it made me feel good to be there for her.”

Such occasions provide students with the most valuable experience of all: feeling needed by others.<sup>44</sup>

Until changes such as the above men-



tioned possibilities take place externally and internally, the legal scene will be quiet regarding mandated community service. The legal organizations will shift their attention to new avenues of courtroom action involving “individual liberty, free market solutions, and limited government.”

In any case, school leaders have an obligation to reconsider their implementation of service learning as a reform initiative. They need to recognize profoundly that for a community service program to be successful service learning must involve more than just the participating students and the director of the program. Service learning must not be only an add-on. It must become an integral part of the school and community cultures, and it can do so only when most teachers and citizens connect themselves with it. Teachers will connect with service learning when they build on it to teach their content fields which is what they focus on. When teachers achieve the intellectual and academic purposes of service learning with their students through curricular integration and reflection, then the entire program will benefit. When teachers, administrators, directors, and parents engage students in examining and learning civic responsibility in democratic life, then the entire program will benefit. When school leaders coordinate well with community leaders and establish a firm sense of good will, then the entire program will benefit. When the community service program benefits in the above dimensions, students will gain solidly in personal

growth. In short, school leaders need to effect a solid four-legged platform to support service learning.<sup>45</sup>

School leaders have an obligation to reconsider and restructure their community service programs in three significant ways. First, they need to strengthen their efforts to achieve the personal growth, cognitive, civic education, and good will purposes of service learning. Second, they need to provide ongoing staff development training for teachers on how to integrate service learning into the curriculum and how to deliberately guide students in reflection about their service learning experiences. Third, they need to establish a continual process of evaluation of their programs to provide feedback data for improvement and positive public relations. School leaders need to know who is shaping community opinion and which organizations openly or covertly are active in the community.<sup>46</sup>

The payoff for reconsideration and restructuring will be multiple. Community service programs will become richer, stronger, and in tune with the voluminous literature on service learning that sets forth the historical, theoretical, and practical underpinnings of service learning. Community service programs will gain support within the schools and outside in the community when all four justifications actually and actively support service learning. As a result community service programs will hardly be vulnerable to legal challenges or political attacks by local activists with destructive agendas be-

cause these programs will be sound and worthwhile. Community service programs will be what theorists and practitioners intended: initiatives to strengthen education.

## ENDNOTES

<sup>1</sup> The section draws from a more detailed account of the three cases in Ronald T. Hyman, *Mandated Community Service in High School*, 116 ED. LAW REP. 847 (May 15, 1997).

<sup>2</sup> *Steirer v. Bethlehem Area School District* 789 F. Supp. 1337 [75 ED. LAW REP. 273] (E.D. Pa. 1992). *See also* 987 F. 2d 989 [81 ED. LAW REP. 734] (3rd Cir. 1993), *cert. denied*, 510 U.S. 824, 114 S. Ct. 85, 126 L. Ed. 2d 53 (1993).

<sup>3</sup> *Immediato v. Rye Neck School District* 873 F. Supp. 846 [108 ED. LAW REP. 92] (S.D.N.Y. 1995). *See also* 73 F. 3d 454 [106 ED. LAW REP. 85] (2nd Cir. 1996) *cert. denied*, \_\_\_ U.S. \_\_\_, 117 S. Ct. 60, 136 L. Ed. 2d 22 (1996).

<sup>4</sup> *Herndon v. Chapel Hill-Carrboro City Board of Education* 899 F. Supp. 1443 [104 ED. LAW REP. 246] (M.D.N.C. 1995). *See also* 89 F. 3d 174 [110 ED. LAW REP. 1037] 4th Cir. 1996 *cert. denied*, \_\_\_ U.S. \_\_\_, 117 S. Ct. 949, 136 L. Ed. 2d 837 (1997).

<sup>5</sup> *Steirer*, 987 F. 3d at 993.

<sup>6</sup> *Spence v. Washington*, 418 U.S. 405, 409-411 (1977).

<sup>7</sup> *Steirer*, 987 F. 3d at 997.

<sup>8</sup> *Id.* at 1000.

<sup>9</sup> *Immediato*, 73 F. 3d at 460.

<sup>10</sup> *Herndon*, 89 F. 3d at 181.

<sup>11</sup> For a detailed list of cases on parental rights regarding education of children see Donald F. Uerling and John S. Strobe, *The Parental Right To Direct the Education of the Child in a Public Setting*, Paper presented at the 1997 Conference of the Education Law Association. (November 20-22, 1997). *See also* an earlier discussion of this topic by Ralph D. Mawdsley, *Parental Rights and Public Education*, 59 EDUCATION LAW REPORTER 271 (May 24, 1990).

<sup>12</sup> *Immediato*, 73 F. 3d at 461, quoting from another education case *Runyon v. McCrary*, 427 U.S. 160, 178 (1976).

<sup>13</sup> *Id.* at 463.

<sup>14</sup> *Herndon*, 89 F. 3d at 180.

<sup>15</sup> *Immediato*, 73 F. 3d at 463 and *Herndon*,

899 F. Supp. at 1454.

<sup>16</sup> *Steirer*, 987 F. 2d at 1000.

<sup>17</sup> *Id.* at 991 and *Herndon*, 899 F. Supp. at 1452-1453.

<sup>18</sup> Material distributed by the Maryland State Department of Education; *Immediato*, 873 F. Supp. at 853; and Boyte, *Community Service and Civic Education*, 72 PHI DELTA KAPPAN 765, 766-767 (June 1991).

<sup>19</sup> Boyte, *supra* note 18, at 765,766-767.

<sup>20</sup> *Steirer*, 789 F. Supp at 1339.

<sup>21</sup> Perhaps the lawyers felt that the mention of these benefits, although they did exist, would weaken their cases in light of the lawyers' assumption that the courts would look favorably only on benefits to the students.

<sup>22</sup> *Bobilin v. Hawaii Board of Education*, 403 F. Supp. 1095 (D. Hawaii 1975).

<sup>23</sup> I thank Professor Douglas Penfield and Gail Verona, doctoral student, for their help in processing the data.

<sup>24</sup> Two new, fairly comprehensive edited volumes have appeared in print recently. Rather than cite a long list of separate articles and books, I shall only refer the interested reader

to the individual chapters of these books and their various sets of references: COMMUNITY SERVICE LEARNING: A GUIDE TO INCLUDING SERVICE IN THE PUBLIC SCHOOL CURRICULUM (Rahima C. Wade ed, 1997) and JOAN SCHINE, SERVICE LEARNING: NINETY-SIXTH YEARBOOK OF THE NATIONAL SOCIETY FOR THE STUDY OF EDUCATION, 1 (1997).

<sup>25</sup> *Immediato*, 873 F. Supp. at 850.

<sup>26</sup> Judy Reese, The Impact of School-Based Community Service on Ninth Grade Students' Self-esteem and Sense of Civic Inclusion (1997) (Unpublished Ed.D. dissertation, Rutgers University.) (on file with author).

<sup>27</sup> *Id.* at 21.

<sup>28</sup> *Id.* at 18.

<sup>29</sup> *Id.* at 32 and 88-89.

<sup>30</sup> *Id.* at 66.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 67.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 68.

<sup>35</sup> For examples of such rhetoric *see* Petition

for Writ of Certiorari at *i, Immediato*, 73 F. 32 454 (2nd Cir. 1996) *cert. denied*, \_\_\_\_\_ U.S. \_\_\_\_\_, 117 S. Ct. 60, 136 L. Ed. 2d 22 (1996); Petition for Writ of Certiorari a 4-5, *Herndon*, 89 F. 301 174 (4th Cir. 1996) *cert. denied*, \_\_\_\_\_ U.S. \_\_\_\_\_, 177 S. Ct. 949, 136 L. Ed. 2d 837 (1997); L. Steirer, *When Volunteerism Isn't Noble*, N.Y. TIMES, April 22, 1997 at A21. See the responses to Steirer in *Letters to the Editor*, N. Y. TIMES, April 23, 1997, at A22. See also (Herndon 89 F. 3d at 179,) for the inclusion of such rhetoric in a judicial opinion, "Freedom from compulsory charitable service is not among the rights the Court has recognized. . ."

<sup>36</sup> For material demonstrating the compatibility of service learning with seven core curricular areas see the chart prepared by John Battaglia of the Fort Lee (New Jersey) High School, June 1997).

<sup>37</sup> Material distributed by the Maryland State Department of Education. See also the emphasis on reflection in E. Austerlind *et al.*, *What Constitutes a Worthwhile Community Service Program?* 41 FOCUS ON EDUCATION 31 (19--).

<sup>38</sup> In particular see the chapter by Richard K. Lipka, *Research and Evaluation in Service Learning: What Do We Need to Know?* in Schine, ed., *supra* note 24, at 56.

<sup>39</sup> *San Antonio v. Rodriguez*, 411 U.S. 1, 93 s. Ct. 1278, 36 L. Ed. 2d 16 (1973).

<sup>40</sup> See text and note 15 *supra* regarding parental rights.

<sup>41</sup> For a commentary and early report on the progress of the students' efforts to satisfy their 75-hour requirement see the article by Jeff Archer, *Maryland Students Scurry To Fulfill Service Learning*, 16 EDUCATION WEEK 5 (April 16, 1997).

<sup>42</sup> The Internet addresses are: <[www.ij.org](http://www.ij.org)> and <[www.rutherford.org](http://www.rutherford.org)>, respectively. The Rutherford Institute says on its home page, "Do You Need Legal Assistance? The Rutherford Institute defends civil liberties of all people governed by the United States Constitution. If you are experiencing interference with your right under the Bill of Rights, please contact us...The Rutherford Institute stands ready to challenge community service requirements if they should harden religious beliefs or practices."

Indeed, it was The Rutherford Institute that backed and represented Brittney Kaye Settle, a high school freshman, who, after not being permitted to write a term paper on the life of Jesus, sued her school district for violation of her First Amendment rights. See Ronald T. Hyman, *Student's Claim to Free Speech v. Teacher's Ordinary Authority*, 17 ILLINOIS SCHOOL LAW QUARTERLY 82, 98 (1997).

<sup>43</sup> *Steirer*, 789 F. Supp. at 1339.

<sup>44</sup> Raymond J. Pasi, *Success in High School*, 54 EDUCATIONAL LEADERSHIP 40, 42 (May 1997).

<sup>45</sup> For excellent guidance see the two volumes edited by Wade and Schine, *supra*, note 24.

<sup>46</sup> See Hyman, *supra* note 42, for more on this point.

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## **TEXTBOOK RENTALS AND SCHOOL FEES: LEGAL IMPLICATIONS FOR LOCAL SCHOOL DISTRICTS**

**Elizabeth T. Lugg, J.D., Ph.D.**

### Introduction

When providing for the establishment of public schools, the State of Illinois included in section 1 of article VIII of the Illinois state constitution: “The general assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education.”<sup>1</sup> Yet, as both public school administrators and parents of public school children are well aware, public schools in Illinois are far from free. The majority of school districts across Illinois legally charge parents for textbook “rentals” and for miscellaneous supplies.<sup>2</sup> It has become politically popular to charge “user fees” rather than for state legislatures to appropriate sufficient funds to ensure that all children have access to quality academic programs and school activities.<sup>3</sup>

### Statutory Basis for School Fees

To determine whether a public school can charge or assess student fees, the state constitution, state statutory laws, state regulations, and school district rules must be carefully analyzed to determine if such fees are valid.<sup>4</sup>

In Illinois the state constitution and the state school statutes seem to be at odds. As stated above, the Illinois state constitution mandates the general assembly to provide a system of free schools.<sup>5</sup> It is stated in the constitution that schools “shall be free.”<sup>6</sup> Under any common definition this means that the public schools should be without cost to those attending. However, the state school statutes specifically allow school boards of local school districts to rent textbooks to the children of the district. Section 10-22.25 of the Illinois School Code provides that the school board shall have the power “[t]o purchase textbooks and rent them to the pupils.”<sup>7</sup> While such a policy is not required by the law, it has become the common practice throughout the state, thereby causing schools not to be “free” at all. How can these two pieces of statutory law be reconciled?

### *Hamer v Board of Education of School Dist. No. 109*<sup>8</sup>

Not surprisingly it took a decision by the Supreme Court of Illinois to make “sense” out of these two seemingly contradictory statutes. In 1969 Paul Hamer, whose four children attended School District No. 109, was asked to pay a textbook rental fee for each of his children and was told that if he had any problems making the payment he could work out a confidential arrangement with the treasurer of the district. Although Hamer neither paid the rental fee nor worked out an arrange-

ment, his children were supplied with textbooks for the 1969-70 school year. Eventually as the school year progressed and Hamer still failed to pay the fee or to make other arrangements, the textbooks were taken from his children. It was at this point that Hamer sued the school district.

The constitutional arguments advanced by Hamer at this point were numerous and involved both the federal and the Illinois constitution.<sup>9</sup> Hamer never claimed that he was financially unable to pay the textbook rental fee, but rather that, as a taxpayer of District 109, he had standing to challenge the constitutionality of the law. In short, Hamer argued that charging pupils for the use of textbooks violated section 1 of article VIII of the Illinois constitution; the exact dichotomy mentioned above. In making his argument to the court, Hamer cited precedent from Idaho and Michigan which held that textbooks were a necessary part of education therefore should be provided at no charge. Neither of the holdings, however, were binding on the Illinois Supreme Court.

In making its decision, the Illinois Supreme Court first looked at a 1925 case *Segar v Board of Education of District of City of Rockford*<sup>10</sup> in which it had found no authority for the contention that a constitutional provision for “free schools” meant that textbooks were required to be furnished free of charge. The court was unimpressed with the later Idaho and Michigan decisions which had been cited by Hamer, and chose instead to decide the case

before it by looking to the “natural and popular meaning of the language [free schools] used as it was understood at the time the constitution was adopted [in 1870].”<sup>11</sup> Continuing with extremely narrow and rather convoluted reasoning, the court finally came to the following decision:

“Our examination of the contemporary statutes, writings and well-known practices convinces us that the popular and natural meaning of the term “free schools” at the time the constitution was adopted by the constitutional convention and ratified by the voters did not include furnishing textbooks to the students at public expense. . . We hold that section 1 of article VIII of our constitution does not prohibit the legislature from authorizing school boards to purchase textbooks and rent them to pupils.”

The obvious weakness with this reasoning is that there are numerous things which were not considered necessary to a free common school education in 1870 which public schools today would consider extremely necessary, both legally and educationally (i.e. building administrators, integrated schools, technology, a safe physical plant including indoor plumbing). Society has come a long way since 1870 in understanding what constitutes insidious discrimination and what is required for true equal educational opportunity. Requiring individuals to pay substantial sums, sometimes hun-

dreds of dollars, to insure that they are in compliance with the compulsory education laws of the state of Illinois is starting to seem to many to be a method by which school districts can silently discriminate against certain segments of the society.

When Hamer lost in 1970 he did not give up. In the 1977 case of *Hamer v Bd. of Ed. of Tp. High Sch. Dist.*<sup>12</sup> Paul Hamer brought a class action suit as representative of the class, on behalf of himself and all parents and guardians of children attending school in School District #113.<sup>13</sup> This case brought up many procedural issues regarding the class action suit, thereby forcing the issue of the constitutionality of textbook rental fees to the periphery. Ultimately Hamer was equally unsuccessful at the appellate court level in declaring section 10-22.25 of the school code unconstitutional. Consequently, the 1970 decision of the Illinois Supreme Court continues to be the controlling law on the issue of textbook fees in Illinois.

### Student Fee Waivers

Even after reviewing all of the elements, including the *Hamer* case, listed above, an extremely important factor in determining whether school fees are legal is the existence of a fee waiver provision within the state statutes and the actual availability of such waivers. Although 19 of the 34 states which statutorily allow student fees do have some type of statutory waiv-

ers for those unable to pay, the waiver provisions either lack concrete eligibility requirements or are too vague to offer any real legal protection for the children of the district. Moreover, if student fees make up the bulk of the discretionary or “soft” money of individual schools, administrators become increasingly hesitant to waive school fees creating a conflict of interest between the school district and the parents/children it serves. As a result, fee waiver programs become highly prone to inadequate administration at the district and local level unless there are explicit statewide eligibility and procedural guidelines.<sup>14</sup>

Merely having a state statute allowing for fee waivers such as section 10-22.25 of the Illinois School Code, does not guarantee that any given fee waiver program is adequate. There exists in Illinois a statute which requires the state board to regulate school districts to adopt written fee waiver policies, and yet major differences in those policies exist from district to district.<sup>15</sup> Illinois also requires school districts to waive all fees assessed by the district on children whose parents are unable to afford them.<sup>16</sup> Yet simply looking at the wording of the statute shows the enormous discretion which is left to the local district in determining what constitutes “unable to afford.” The result is that, even with the supposed statutory safeguards, there still exist numerous inadequate fee waiver programs across the state.

If children and their families are discouraged from using the fee waiver program or



are improperly denied fee waivers when requested, the program is inadequate. Individuals can be discouraged from using a fee waiver program in various ways, including such common occurrences as not giving notice as to the availability of fee waivers prior to registration and the criteria for obtaining such a waiver, by requiring parents to leave the registration line and go to the office to obtain the proper forms only to find that no one in the office knows where the forms are, or by forcing parents to register through a separate line clearly marked "fee waivers" in an attempt to humiliate and therefore discourage the application for such a waiver.

One of the most deceptive policies that a school can use to discourage low-income students from selecting elective academic courses with limited class size is to impede poor children from registration until the fees are paid or a fee waiver is formally granted. This practice prevents low-income students from registering for elective classes that fill up within one to three days after school registration begins and forces them to select another elective that may not match their educational interests; a form of "economic tracking."<sup>17</sup> Illinois has a law which forbids discrimination or punishment of any kind against students whose parents are unable to pay fees, and yet such "punishment" does continue to occur in some districts.<sup>18</sup> Without statewide standards, and more importantly enforcement of those standards, such abuses of fee waiver programs will continue to occur.

### Implications for Administrators

Despite any constitutional equal protection claims which may or may not be successfully made, at this time, both through statutory and common law, certain school fees are legal in the state of Illinois. That being the case, what are the implications for public school administrators? Even though student fees such as textbook rentals are legally permitted, local district administrators need to continue monitoring the policies of their districts to assure (1) that the fees have been properly and legally authorized by the school board; (2) that adequate notice is given to students and their families about fee waivers prior to registration; (3) that the criteria which the district uses for eligibility is valid and not arbitrary or discriminatory; (4) that confidentiality is maintained throughout the process of granting fee waivers; and (5) that the process avoids stigma to those individuals applying for the waiver.

Public school administrators should also keep in mind that the controlling Illinois Supreme Court case on this issue, *Hamer*, is now almost 30 years old. It is a different court hearing cases in a different time and a different society today; a society much more attuned to possible discrimination or unequal treatment of any group. Given the rather obscure reasoning used in *Hamer*, it is not inconceivable that, if given the right set of facts, pushed by the right legal counsel, that the *Hamer* decision may not ultimately be overturned. The only proactive

stance which can be taken against that possibility is to be cautious as to the reliance which any given school district puts on school fees. Currently in Illinois, many districts are highly reliant on students fees to make ends meet. Should *Hamer* be overturned those districts would be in a very uncomfortable position. Now is not too early for all administrators to take a look at their budgets to see where they fall on the scale.

## ENDNOTES

<sup>1</sup> ILL. CONST. art. X, § 1 (“shall be free”).

<sup>2</sup> ILL. REV. STAT. ch. 5, para. 10-23.11 (Purchase and rent of textbooks). One middle sized public school district in central Illinois charges even kindergartners \$53.00 for textbook rental and supplies yet produces none of the textbooks which were “rented.”

<sup>3</sup> David G. Challad, *Student Fee Waivers in Public Schools: Have Fees Created a Private School Within a Public School?*, 121 CLEARINGHOUSE REV. 37 (June 1996). In addition to making school districts reliant on this hidden “tuition”, the Illinois State Legislature in December 1997 also decided to provide additional funding to public schools through an increased tax on a variety of goods and services including cigarette sales and gambling. Nothing like relying on the continuation of vices to ensure that the next generation of Illinois citi-

zens have an adequate education!

<sup>4</sup> David G. Challad, *Student Fee Waivers in Public Schools: Have Fees Created a Private School Within a Public School?*, 121 CLEARINGHOUSE REV. 37 (June 1996). See also John Dayton & Martha McCarthy, *User Fees in Public Schools: Are They Legal?*, 18 J. OF EDUC. FIN. 127 (Fall 1992); Patricia M. Harris, *Student Fee in Public Schools: Defining the Scope of Education*, 72 IOWA L. REV. 1401 (1987); Patricia J. Kendall, *Public School Fees in Illinois: A Re-examination of Constitutional and Policy Questions*, 1984 U. ILL L. REV. 99 (1984).

<sup>5</sup> ILL. CONST. art. VIII, § 1.

<sup>6</sup> ILL. CONST. art. X, § 1 (“shall be free”).

<sup>7</sup> ILL. REV. STAT. ch. 5, para. 10-22.25 (1996)

<sup>8</sup> *Hamer v Board of Education of School Dist. No. 109*, 265 N.E.2d 616 (1970).

<sup>9</sup> *Hamer*’s constitutional attacks included the first amendment (right of assembly), the fourth amendment (search and seizure), and the fourteenth amendment (due process and equal protection of the laws) of the federal constitution; sections 1 (right to privacy), 2 (due process), 6 (search and seizure), 14 (law granting special privileges), 17 (right of assembly), 19 (right to remedy and justice), and 20 (recurrence to fun-

damental principles) of article II; article III (distribution of powers); sections 22 (special laws prohibited) and 23 (release of public debts prohibited) of article IV; section 1 (right to free common school education) of article VIII; and sections 1, 2, 3, 9, and 10 (taxation) of article IX of the Illinois constitution.

<sup>10</sup> *Segar v Board of Education of School District of City of Rockford*, 317 Ill. 418, 148 N.E.289 (1925).

<sup>11</sup> 265 N.E.2d at 620.

<sup>12</sup> *Hamer v Bd. of Ed. of Tp. High Sch. Dist.*, 367 N.E.2d 739 (1977).

<sup>13</sup> It should be noted that Paul Hamer was both the representative and the attorney for the class. Perhaps his constitutional arguments would have stood a better chance had he employed counsel other than himself.

<sup>14</sup> David G. Challad, *Student Fee Waivers in Public Schools: Have Fees Created a Private School Within a Public School?*, 121 CLEARINGHOUSE REV. 3, 123 (June 1996).

<sup>15</sup> ILL. REV. STAT. ch. 5, para. 2-3.96 (1996).

<sup>16</sup> ILL. REV. STAT. ch. 5, para 10-20.13 (1996).

<sup>17</sup> David G. Challad, *Student Fee Waivers in Public Schools: Have Fees Created a Pri-*

*vate School Within a Public School?*, 121 CLEARINGHOUSE REV. 37, 124 (June 1996).

<sup>18</sup> ILL. REV. STAT. ch. 5, para 28-19.2(1996).

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## **THE NEW IDEA: CAN STUDENTS WHO ARE DISCIPLINE PROBLEMS CLAIM SPECIAL EDUCATION STATUS TO AVOID SUSPENSION/EXPULSION?**

**R. Andrew Lugg, Ph.D.**

Ever since the Supreme Court's decision in *Honig v Doe*<sup>1</sup>, school administrators have faced the restriction of ten days maximum suspension for special education students or risk litigation and censure over the iteration of the student's Free Appropriate Education (FAPE). The new IDEA has addressed many concerns about the suspension of a special education student. It has allowed special education students to be suspended for a maximum of forty-five days in cases where a special education student knowingly was in possession of an illegal drug or knowingly carried a firearm or other weapon onto school property. Despite the problems for administrators in determining exactly whether a student really knew or was capable of knowing what they were doing, this provision of the revised IDEA is actually one of the more administrator friendly provisions. One provision, the sole purpose of which seems to be to cause administrators headaches is section 615. Procedural Safeguards, subsection (k) Placement in an Alternative Educational Setting, subsection (8) Protections for Children not yet Eligible for Special Education and Related Services.

This provision of the new IDEA is provided in an attempt to clarify what a school administrator is to do if a non-special education student, on the verge of being suspended or expelled, claims that he or she is entitled to special education services and, therefore, comes under the protections of the IDEA. This provision states that a non-special education student "may assert any of the protections provided for . . . if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred."<sup>2</sup> Thus, if a district can be determined to have knowledge that a student was eligible for special education services before the student committed the act that precipitated the disciplinary action, they are entitled to all the protections of the IDEA.

While on the face there seems to be nothing legally new in this section of the IDEA, the criteria of how a school district is determined to have knowledge that a student should have been receiving special education services contains a section which is extremely vague. The new IDEA states under (B) Basis of Knowledge, that:

- (a) local educational agency shall be deemed to have knowledge that a child is a child with a disability if - (i) the parent of the child has expressed concern in writing (unless the parent is illiterate or has a disability that prevents com-

pliance with the requirements contained in this clause) to personnel of the appropriate education agency that the child is in need of special education and related services; (ii) **the behavior or performance of the child demonstrates the need for such services** [author's emphasis]; (iii) the parent of the child has requested an evaluation of the child pursuant to section 614; or (iv) the teacher of the child, or other personnel of the local education agency, has expressed concern about the behavior or performance of the child to the director of special education of such agency or to other personnel of the agency.<sup>3</sup>

Section (I), (ii), and (iv) are not new to special education law. In 1989 the Office of Civil Rights (OCR) determined that a school district had violated federal regulations when it expelled a student with Attention Deficit Hyperactivity Disorder (ADHD) without examining the possibility that the student's behavior may have been caused by the student's disability. The student's parents had requested that the student be fully evaluated but the district had failed to do so. In a subsequent ruling in 1990, OCR found that a school district had made an illegal change of placement for a student that the district had reason to believe had a disability, but had failed to classify as such.<sup>4</sup>

In 1987, a federal district court held in *Doe v Rockingham School Board*<sup>5</sup> that a stu-

dent suspected of having a disability was entitled to procedural safeguards. The court ruled that because that district had been informed of the student's learning disability by the student's psychologist, the district had prior knowledge of the student's disability and, therefore, the student was entitled to the due process protections of the IDEA. The court also ordered the district to provide that student with an appropriate educational program.<sup>6</sup> Thus, the idea that non-identified students with disabilities are still entitled to the protections, due process and otherwise, of the IDEA has been recognized in the case law of special education. The limits provided by the case law on how a non-disabled student, who is being suspended or expelled, is to be identified by a school district as potentially disabled fit within sections (I), (iii), and (iv) of the new amendments to the IDEA.

One case that recognized the possible abuse of the stay-put rule of the IDEA by non-disabled students was the 1994 case of *M.P. v Governing Board of Grossmont Union School District*<sup>7</sup>. In *M.P.* a federal district court in California noted that students without disabilities could circumvent state education laws and gain protection of the IDEA by claiming to have disabilities. In response to this the Office of Special Education Programs (OSEP) issued a memorandum that stated that students not previously identified as eligible for protection under the IDEA could not invoke the stay-put provision to avoid disciplinary sanctions such as suspensions or expulsion.<sup>8</sup> In cases in which

a parent or student made a request for an evaluation or due process hearing after the student in question had already been suspended or expelled, school districts were not obligated to reinstate the student to an in-school status during the pendency of the evaluation or hearing. This is because in cases such as this, the stay-put placement would be the out-of-school placement.<sup>9</sup>

Two appellate court decisions that deal with the issue of disciplined students claiming the protections of the IDEA are *Hacienda La Puente Unified School District of Los Angeles v Honig*<sup>10</sup> and *Rodriguez L. v Waukegan School District*<sup>11</sup>. In *Hacienda* the U.S. Court of Appeals for the Ninth Circuit affirmed the ruling of the hearing officer who had overturned the school district's expulsion of a student who had been determined by the school district not to be eligible for special education services. The student in question had been expelled for frightening other students with a starter pistol. Prior to this incident the student's parents had requested that the student receive a special education evaluation. After evaluating the student, the district determined that the student did not meet the requirements for special education services. After the incident with the starter pistol, the student's parents requested a due process hearing to determine the eligibility of the student for special education services and to determine if the misbehavior of the student was related to a disability. The hearing officer determined that the

student was, contrary to the district's evaluation, Socially and Emotionally Disturbed (SED). The hearing officer also ruled that the incident with the starter pistol was a manifestation of the student's disability and that the school district had denied the student the due process rights of the IDEA by expelling him. The district was ordered to reinstate the student.<sup>12</sup>

The school district appealed this decision to district court, contending that it was necessary for a student to be identified as having a disability before the procedural safeguards of the IDEA could be invoked. Since the district's evaluation had determined that the student did not have a disability, the district claimed that the hearing officer did not have the jurisdiction to consider the parent's complaint. The district court found for the parents and the school district appealed to the U.S. Court of Appeals for the Ninth Circuit.

The appellate court upheld the lower court's ruling, holding that the hearing officer did have jurisdiction to hold a hearing on such issues, however, the court's ruling avoided the question of whether the stay-put provision prohibited expulsion of students not diagnosed as having disabilities. The court stated that even if a student had not been previously identified as disabled, the student still had the right to raise the question of an alleged disability in an IDEA administrative due process hearing. To rule otherwise, the court stated, would violate the core purpose of the IDEA, which is to prevent school districts from indiscriminately excluding

disabled students from educational opportunities.<sup>13</sup>

In 1996 the U.S. Court of Appeals for the Seventh Circuit (the circuit which includes Illinois) delivered an important ruling that upheld the Office of Special Education Programs' position on nondisabled students avoiding discipline by invoking the procedural protections of the IDEA. In *Rodiricus*, the circuit court upheld a lower court ruling that a student in general education could not avoid expulsion by claiming protection under the IDEA, unless the school district knew or reasonably should have known that the student had a disability. The court held that the school district had no reason to suspect that the student in question had a disability, even though he had a poor academic record and a history of disciplinary contacts. The idea that the student might have had a disability was never suggested until he was recommended for expulsion.

The appellate court stated that it was impossible for the stay-put provision of the IDEA to be automatically applied to every student who applies for special education. If this were allowed, any disruptive non-disabled student could forestall any attempts at discipline by simply requesting an evaluation and demanding to stay-put. This, the court said, would disrupt the already overburdened public school system. The Seventh Circuit Court of Appeals did, however, concur with the Ninth Circuit Court of Appeals' decision, stating that in cases involving a truly disabled student who had not

been previously identified, the stay-put provision is necessary to keep the student in school until a hearing officer has resolved the dispute.<sup>14</sup>

The Seventh Circuit court also offered guidance to other courts in determining whether a school district had knowledge or should have had knowledge that a student had a disability. The court gave four factors that should be weighed in making such a decision: 1) the likelihood that the student will succeed on the merits of his or her claim; 2) the irreparability of the harm to the student if the stay-put provision is not invoked; 3) whether the potential harm to the student outweighs the potential harm to the school district; and 4) where does the public interest lie. The court also noted that the student involved must be able to show that he or she reasonably would have been found eligible for special education services through the IDEA administrative procedures.<sup>15</sup>

What these two cases tell us is that, prior to the 1997 amendments to the IDEA, if a general education student claimed due process discipline protections under the IDEA there were two possible outcomes. These outcomes were determined by whether a district could be deemed as having or should have had knowledge that the student in question was disabled. If the district had knowledge or reasonably should have known, as in the *Hacienda* case, the district would be required to provide the protections of the IDEA to the student in question. Conversely, if the school district did not have knowledge that a student was disabled,

they were not required to automatically provide the protections of the IDEA to any student who applied for a special education evaluation. The new amendments to the IDEA seem to reflect this prior case law, except for one point.

In stipulating how a court or hearing officer can determine if a school district has knowledge that a student is eligible for disciplinary due process under the IDEA, the 1997 amendments state that a school district would be deemed to have knowledge if “the behavior or performance of the child demonstrates the need for such services.”<sup>16</sup>

With this definition the new amendments to the IDEA seem to include a provision that overturns the Seventh Circuit Court of Appeals’ ruling in *Rodriecus*. In *Rodriecus*, the appellate court ruled that poor academic record and a history of disciplinary contacts was not enough to constitute knowledge on the district’s part of the student being disabled. Under the provisions quoted above, a hearing officer or court might rule that such a student record could constitute knowledge on the part of the district that the student in question is eligible for the protections of the IDEA. The regulations put forth by the Department of Education, that purportedly were suppose to clear-up the many discrepancies in the 1997 amendment, do not even mention this issue.

The implications of this broad definition of knowledge are potentially troubling for school districts. How does a school district

judge whether it can be said to have knowledge under such a guideline? The answer is that, at present, it cannot. The future holds the answer to this question in either revised regulations from the Department of Education or, more unfortunately, in case law from litigation. The practical implications for school districts is, that until this issue is addressed in some manner, they need to be cautious and conservative in their handling of suspension and expulsion proceedings. If a student who is about to be suspended or expelled has a past history of similar misconduct, it would be prudent for the district to perform an expedited evaluation of him or her, similar to the one required when an evaluation is requested by a student of his or her parents after a disciplinary proceeding has begun. While this is yet more unneeded paperwork and bureaucracy for districts, it would be wise for them to be cautious, as no district wishes to be the one involved in the possible litigation which could ultimately settle this issue.

## ENDNOTES

<sup>1</sup> Honig v Doe, 484 U.S. 305 (1988).

<sup>2</sup> Act of June 4, 1997, Pub. L. No. 105-17, (111 Stat.)

<sup>3</sup> Act of June 4, 1997, Pub. L. No. 105-17, (111 Stat.)

<sup>4</sup> MITCHELL L. YELL, THE LAW AND SPECIAL EDUCATION 341 (1998).



<sup>5</sup> Doe v Rockingham School Board, 658 F.Supp 403 (W.D. Va. 1987).

<sup>6</sup> YELL, *supra* note 4, at 341.

<sup>7</sup> M.P. v Governing Board of Grossmont Union School District, 21 IDELR 639 (S.D. Cal. 1994)

<sup>8</sup> Memorandum Off. Spec. Ed. Prog. 95-16 (1995).

<sup>9</sup> YELL, *supra* note 4, at 342.

<sup>10</sup> Hacienda La Puente Unified School District of Los Angeles v Honig, 976 F.2d 487 (9<sup>th</sup> Cir. 1992).

<sup>11</sup> Rodiricus L. v Waukegan School District, 24 IDELR 563 (7<sup>th</sup> Cir. 1996).

<sup>12</sup> YELL, *supra* note 4, at 342.

<sup>13</sup> YELL, *supra* note 4, at 342.

<sup>14</sup> YELL, *supra* note 4, at 343.

<sup>15</sup> YELL, *supra* note 4, at 343.

<sup>16</sup> Act of June 4, 1997, Pub. L. No. 105-17, (111 Stat.)

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## COURT LIP SYNCs TO GOSS v. LOPEZ

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

*Smith v. Severn and North Boone Comm. Sch. Dist. 200, No. 96-1563 (7th Cir. Nov. 13, 1997).*

### Facts of the Case

On Friday, October 14, 1994, North Boone High School District 200 Principal Karen Severn supervised the homecoming assembly, an event including a lip-sync contest. She had taken precautions to avoid the previous year's disruption which consisted of performances by several students, including Brandon Smith and friends, which was "determined to be inappropriate for a school assembly (i.e. repeated crotch grabbing and other tasteless conduct.)" The crotch-grabbing plus resulted in "disqualification" and "verbal admonishment." Precautions for 1994 included notice to all students that signing up for the contest and prior approval of routines was required. Brandon and friends did not sign up or receive approval. Instead, they conspired with another group to sign up to perform a number from the musical "Grease," with intentions to rush on stage during that performance, chase the "Grease" performers off stage, and do a rendition of "Angel of Death" by Slayer. Disguised with face makeup and body paint, Brandon and friends prepared to execute their plan. Faculty mem-

ber Barb Fedderson, responsible for the lip sync contest, saw Brandon and company preparing to take the stage and told him, "don't do anything you'll regret." Brandon and friends executed their plan while the video camera recorded Severn's unsuccessful attempts to close the stage curtain on the group.

In the performance, Brandon and his group made a mock attack on a woman and her child. After the woman was knocked to the ground, Brandon produced a chain saw which he lifted to his groin area in simulation of an erect penis. He then approached the woman and child and pretended to mutilate the woman with the chain saw while his friends joined in beating her with their guitars.

Severn contacted Cheryl Smith, Brandon's mother, on Monday, October 17, setting a meeting for Tuesday, October 18. At the Tuesday meeting, attended by Severn, Brandon, Mrs. Smith, and Fedderson, a discussion of the incident took place, including a showing of the video tape of the lip-sync performances and the reaffirmation of Fedderson's "warning." At the conclusion of the meeting, Severn informed Mrs. Smith that Brandon was suspended for three days "for his insubordinate conduct." Mrs. Smith was informed that she could appeal the suspension. Severn then sent written notice that Brandon was suspended for disorderly conduct, weapons, insubordination, and gang activity. The notice included the right to appeal, which Mrs. Smith requested and was granted by the school board on January 24, 1995.

The hearing involved a great deal of discussion regarding the status of school work completed during suspensions. As a result of the suspension, Brandon's grades in P.E. and English were affected. Mrs. Smith filed suit and Brandon graduated. The suit claimed violation of due process and equal protection rights as guaranteed under both U.S. and Illinois Constitutions.

Smith filed in Illinois court, and the district at their option removed the claim to federal district court. The school district moved for summary judgment on the federal claims, and a magistrate judge ordered Smith to file a response in approximately 30 days. Nothing was filed for 3 months, until the day before the hearing.

## RATIONALE AND DECISION OF THE COURT

### Due Process

In determining whether Mrs. Smith's procedural due process claim was meritorious, the court turned to *Goss v. Lopez*, 419 U.S. 565 (1975). In that case, the U.S. Supreme Court held that students of state established and maintained schools have both liberty and property interests in their attendance. The consequence of having these Constitutional-based interests in school attendance give rise to due process protection when deprivation of those rights occurs. In *Lopez* the Court articulated

that minimal due process is warranted in state school suspension cases of 10 days or less. In other due process cases, the Court had recognized that "at the very least" due process consists of "prior notice and an opportunity to be heard in a manner appropriate to the nature of the case." Id. at 579 (citing *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950)). Applying this *de minimis* general due process requirement to the state school suspension of 10 days or less context, the Court specifically stated that due process consists of being given "oral or written notice of the charges [against him] and if he denies them, an explanation of the evidence the authorities have and the opportunity to present his side of the story." Id. at 581.

The 7th Circuit Court noted that Severn's handling of the suspension of Brandon satisfied the *Lopez* due process requirements. Fedderson had warned Brandon not to break school rules. Severn's had notified Mrs. Smith of the Brandon's behavior (notice of charges), played the videotape of the incident at the October 18th meeting (evidence and pre-suspension hearing), given Mrs. Smith and Brandon an opportunity to tell their version of the events (opportunity to be heard), then notified Mrs. Smith that Brandon was suspended for 3 days for insubordination (notice of suspension and reason). The Court went on to say that Severn's adding of additional charges to the written suspension notice was of no matter because there was one proper charge, that the school board

review of the suspension was completely gratuitous as it was not required by due process guidelines, and thus did not give rise to any additional due process rights.

### Equal Protection

The manner in which a court applies analysis to a claim of violated equal protection depends on whether the nature of the violation is to a fundamental right, a suspect class, or to a state action involving neither. A fundamental rights claim is scrutinized for explicit or implicit guarantee by the U.S. Constitution. As public education is not mentioned in the U.S. Constitution either explicitly or implicitly, it is not a fundamental right, and thus does not give rise to strict scrutiny. See *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). Because students generally are not a suspect class, no heightened scrutiny is applied to school suspension cases. Absent a fundamental right or suspect class, analysis is applied on a rational basis. A rational basis analysis requires deference to rational state action addressing a legitimate state interest. A state's conduct will not be disturbed "as long as it is rationally related to a legitimate state interest."

The Court in *Smith* stated that there was, "without a doubt," a rational basis to support the suspension of Brandon, and noted four characteristics that placed him outside the class of students similarly situated as participants in the lip sync contest. Brandon had been ad-

monished the previous year for inappropriate behavior at the lip sync contest, he ignored Fedderson's warning, he brought a chain saw and live boa to school (no other student did this), and "he was the only student who wielded a chain saw in a sexually explicit manner" and then used it to graphically depict mutilation of a woman and child. As no evidence exists that any other students engaged in similar conduct, "Severn was free, within reason, to fashion a remedy appropriate to the particular circumstances."

Affirmed.

### Implications for School Administrators

The 7th Circuit Court was not humored by Mrs. Smith's suit. Stating in unequivocal terms that the suit was "plainly frivolous," and characterizing the litigation as based on the "wholly unremarkable disciplinary action of a modest suspension," the Court made the remarkable observation that:

[s]omething has gone badly wrong when the scarce judicial resources of the federal courts are brought to bear on a case which has so little merit as this one. This is the type of case which trivializes the work of the courts and the Constitution we seek to interpret. Moreover, these cases divert judicial energy from litigants who have serious and valid claims. Sanctions were not sought in this case, so we take no ac-

tion in this regard, but in our view, this type suit exemplifies the frivolous litigation that Federal Rule of Civil Procedure 11 and Federal Rule Appellate Procedure 38 are intended to deter.

The fact that courts are very reluctant to impose sanctions for the filing of frivolous suits should not deter school board attorneys from seeking sanctions in appropriate cases. The court's reluctance to impose the sanctions should be the primary safeguard, not the school board attorneys failure to seek imposition. School administrators aware of court procedures and options can ask school board attorneys for an explanation of why certain courses of action are or are not taken, including the seeking of sanctions against attorneys who file frivolous suits against school districts and their employees. The answers can provide insight and substantive evaluative material to facilitate attorney and firm evaluation. The adoption of Federal Rule of Civil Procedure 11 should have tolled the passing of any "old boys club" of attorneys subordinating everything to avoid offending fellow attorneys. Defending frivolous suits is a time consuming and expensive business for school districts who have limited time and resources. In its own subtle and judicial manner, the 7th Circuit appears to be encouraging proper use of Rule 11. School administrators and school boards should join the encouragement.

## **FOR WHOM THE STATUTE TOLLS: INDECENT LIBERTIES WITH SCHOOL CHILDREN**

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

*People v. Laughlin, No. 2-97-0125 (2d Cir. IL., Dec. 2, 1997).*

### Facts of the Case

While a teacher at Crystal Lake's North Junior High School in the late 1970's, Virgil Laughlin was accused of touching the genitals of a student. He resigned and moved to Nebraska in June, 1979. In October, 1995, Laughlin was charged in Illinois with having "sexual contact with three underage boys between August, 1977 and June, 1979." The statute of limitations under which Laughlin could be charged 18 years after the alleged incidents, 720 ILCS 5/3-7 (West 1996), sections 3-7 of the Illinois Criminal Code, as explained by the Court, specifies that the normal 3 year period "within which a [felony] prosecution must be commenced does not include any period" that, quoting the statute, "defendant is not usually and publicly resident within this State." 720 ILCS 5/3-7(a) (West 1996). Laughlin was convicted and sentenced to 54 months. He appealed his conviction arguing that the tolling provision of the Criminal Code, quoted *supra*, is unconstitutional because it infringes upon his fundamental right to travel, is vague, and creates an imper-

missible distinction between Illinois resident's and those not usually or publicly resident.

### Rationale and Decision of the Court

Laughlin's burden, as the party challenging the statute's constitutionality, was to demonstrate its invalidity. The Court reasoned that Illinois common law presumes statutory constitutionality and resolves reasonable doubts in favor of upholding the legislation. Laughlin argued that the statute of limitations vests rights protected by both U.S. and Illinois constitutions. The Court found Laughlin's arguments without merit, stating that "Defendant never states what these rights are. We will not research and argue defendant's case for him, and we will not address this argument."

Laughlin further argued that the statutory phrase "usually and publicly resident within this State" is vague and thus violates his due process rights. The Court found this argument to be without merit as "[A]ny ambiguity that defendant claims is contained in the statute does not apply to him, as he clearly was not resident in Illinois, either usually or publicly, since June, 1979."

Turning his argument to U.S. Constitutional Equal Protection Clause requirements of the Fourteenth Amendment, U.S. Const., Amend XIV, likewise required by Article 1, Section 2, of the Illinois Constitution, Ill. Const. 1970, art/1, sec. 2, Laughlin contended that the statute creates impermissible distinction be-

tween Illinois residents and those not usually or publicly resident. Observing that both constitutional equal protection claims are subject to the same analysis, the Court stated that under equal protection the state is required to deal with similarly situated individuals in a similar manner, but that treating different classes differently does not violate that prohibition as long as the division of people is not for reasons unrelated to the legislation. The level of scrutiny applied to any statutory analysis depends upon the statute's creation of classifications or impingement upon constitutional rights. Suspect classes created by a statute, such as race, or infringement upon a fundamental right, trigger strict scrutiny. Statutes will not survive strict scrutiny application unless the legislation is necessary to promote a compelling state interest and is narrowly tailored to serve that purpose. Legislation not impinging upon fundamental rights or creating suspect classifications will be subject only to less stringent rational basis analysis. Rational basis analysis is limited and deferential. If "any statement of facts can reasonably be conceived to justify the statute it will be upheld." Applying that law to the facts in Laughlin's case, the Court found that a rational basis analysis was applicable, and that the right to travel was limited. "A person who has committed an offense punishable by imprisonment has only a qualified federal right to leave a jurisdiction prior to arrest or conviction." In addition, a person has a right to defend himself from charges before evidence becomes "ob-

scured by time," but no right to be arrested once a crime has occurred. Finding no impingement upon a fundamental right, or the creation of a suspect classification, by the statute in question, the Court applied a rational basis test and found the state has a rational basis for the statute. Noting that "a statute of limitations is a legislative assessment of relative interests of the state and a defendant in administering and receiving justice," the Court dismissed Laughlin's appeal and affirmed the lower court's conviction.

#### Implications for School Administrators

If there was sufficient evidence to convict Laughlin some 20 years after the indecent liberties occurrences, a substantial question exists regarding the failure to criminally prosecute the case when discovered. The Court's opinion indicates the school accepted Laughlin's resignation following "a complaint that defendant had touched the genitals of a student at the school." There is insufficient information to determine whether the school actually accepted Laughlin's resignation, whether that action was simply an easy way out for the district at the time, or if any number of possible reasonable explanations existed for allowing the accusation to go unprosecuted. The unfortunate fact appears to be that accepting resignations from teachers accused of serious offenses was standard practice in the school business at one time. That practice, if applicable in this case, seri-

ously jeopardized both the potential for service of justice and placed other children at increased risk of being molested. Laughlin was convicted and justice was eventually administered. School district acceptance of resignations as an easy way to deal with criminal accusations deserves conviction too. School children as potential future victims cry out for all school administrators to follow the lead of those who vigorously pursue criminal accusations to ensure the service of justice for all involved, including both innocent teachers and students..

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