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CONSTITUTIONAL USE OF THE ILLINOIS WAIVER OF EDUCATIONAL MANDATES ACT: A LEGAL OVERVIEW

In February 1995, the State of Illinois enacted the Illinois Waiver of Educational Mandates Act (Act or Public Law 89-3).¹ The purpose of the Act was to provide individual school districts the opportunity to modify or waive certain provisions of the Illinois School Code² or State Board of Education (State Board) regulations that were hindering the educational responsibilities of the local districts. The initial waiver and modification process was completed during the November 1995 veto session of the Illinois General Assembly.

Ironically, what appeared to be simple legislation to draft and enact became troublesome when the State Board received districts' requests. Once these requests were received and processed it became increasingly clear that the philosophy underpinning the legislation may be thwarted by unforeseen consequences caused by loopholes

in the legislation and the nature of the districts' requests. Moreover, it is apparent there are serious public policy concerns with the waiver and modification approval process, not the least of which is that the law may be unconstitutional.

This article provides a historical analysis of the Illinois Waiver of Educational Mandates Act and reviews the public policy surrounding the requisite State Board and General Assembly procedures necessary to deny a waiver or modification request. Moreover, it ascertains whether Public Law 89-3 comprises a constitutional use of legislative authority. The author will provide recommendations to modify the public law to conform to constitutional standards.

Historical Analysis of Deregulation of Educational Mandates in Illinois

In the early 1990s the State of Illinois undertook two legislative efforts to lessen State Board mandates over local governance of education. In September 1991, the General Assem-

bly passed Public Law 87-632 (1991), which required the State Board to file with the General Assembly an annual report listing all State mandates applicable to common schools, except in areas relating to school elections.³

During the same legislative session, the General Assembly enacted Public Law 87-559 (1991), which allowed local school districts to seek waivers from certain State Board rules and regulations relating only to school improvement issues.⁴ Unfortunately, this Act was little utilized because of the narrowness in scope of the available waiver subjects.

After the 1994 Illinois general elections, the General Assembly made a heightened legislative effort to lessen the unprecedented growth of state mandates in local education, which included the School Report Card, the Illinois Goal Assessment Program (I.G.A.P.), and the Quality Review process. This legislative effort was finally culminated in February 1995 when the General Assembly enacted the Illinois Waiver of Educational Mandates Act.

Illinois Waiver of Educational Mandates Act: Statutory Provisions

On February 27, 1995, Illinois Governor Jim Edgar signed Public Law 89-3, the Illinois Education Waiver of Mandates Act. The law permits the State Board of Education to modify and waive its own administrative rules and allows the General Assembly to utilize the joint resolution to deny school districts' waiver requests to modify the Illinois School Code. If a district's request is approved, the waiver or modification will remain in effect for a period not to exceed five years and may then be renewed upon school district request.

The Act provides a detailed application process with which the local school district must comply. First, the school district must make a written request to the State Board and include a statement demonstrating that the intent of the particular regulation or School Code provision can be addressed in a more effective, efficient, or economical manner, or else provide for improved student performance or school improvement.⁵

Before approving the waiver request, each school district's board of education must hold a public hearing concerning the proposed change, soliciting input from parents, students, and district educators affected by the request.⁶ After local board of education approval, the district must submit the application request to the State Board within 15 calendar days. Upon receipt, the State Board of Education has 45 days to review the application and accompanying materials. Within this period the State Board may deny any request which (a) is not based on sound educational practices; (b) endangers the health or safety of students and staff; (c) compromises equal opportunities for learning; (d) fails to demonstrate that the intent of the rule or mandate can be addressed in a more effective, efficient or economical manner; or (e) fails to cite improved student performance as a primary goal. A school district may appeal to the General Assembly any request that the State Board has disapproved.⁷

The State Board can approve, without General Assembly ratifica-

tion, any applications seeking waiver or modification from its own promulgated rules and regulations, as well as modifications of mandates contained in the School Code. Any such request which the State Board does not deny within the 45 day limitation will be deemed granted.

After reviewing the applications, the State Board will submit all requests for waivers of the Illinois School Code to the General Assembly. The General Assembly then has 30 calendar days after it first convenes after receiving the biannual reports within which to take the required statutory action to deny any requests for waiver of the School Code or reverse an appealed decision of the State Board. If the General Assembly fails to act (usually via a joint resolution of the General Assembly) during this timeline, then each waiver or appeal is deemed granted. The action of the General Assembly is final and binding upon the State Board and local school districts.

The State Board must file with the General Assembly a biannual report no later than May 1 and October 1

of every year. These reports must contain a detailed list of all applications the State Board has granted, a list of all applications which have been transferred to the General Assembly for legislative consideration, and any appeals of requests the State Board has denied. In addition, by February 1 of each year, the State Board shall compile a cumulative report summarizing districts' requests by topic, along with the number and percentage of districts for each type of request that has been granted. This report shall also include any recommendation from the State Board regarding the repeal of modification of waived mandates.⁸

Cumulative Requests

In the last three years, the State Board has made six biannual reports to the General Assembly. During this time, the State Board has received a total of 1,242 application requests for waivers or modifications. This equates to an average of a little over 1.5 request per participating school district.

The biannual reports listed 654

total requests, which the State Board already approved, for modification of the School Code or modification/waiver of agency rules and regulations.⁹ As of June 1, 1998, the State Board had denied no application requests; however, 113 applications were either returned to their respective districts or withdrawn.

The reports also listed 475 districts' requests for General Assembly consideration to waive provisions of the School Code. By far the most frequently requested topic is school holidays. Over 550 school districts have requested they be allowed to recognize the contribution or significance of select legal holidays through instructional activities rather than observing the school holiday. Other common subject areas transmitted to the General Assembly include physical education (188), nurse certification (102), and revision of inservice or instructional time (36). Of this number, the General Assembly has only denied 65 school districts' waiver requests (14% of total requests) since the October, 1995 report. Sub-

ject areas most commonly denied include, administrative cost cap (24); accountability issues (8); instructional time (4); sprinklers (4); and corporal punishment (3).

Legal Challenge

Public Law 89-3 presents one main legal challenge it must overcome: the proper enactment of waivers and modifications to the School Code. This is a two-fold challenge: (1) can provisions of the School Code (statutory law) be modified (amended) without following the constitutional requirement of bicameral enactment and presentment of a statute? and (2) whether the joint resolution sufficiently constitutes the necessary “legislative action” to deny a School Code modification request?

It is necessary to understand the two legislative components of Public Law 89-3 that allow school districts to limit the effects of educational mandates: waivers and modifications. Though viewed as similar in this Act; legally, each provision is totally independent of the other and has different

standards that must be maintained to sustain a constitutional challenge.

I. Comparison of Public Law 89-3’s Legislative Provisions: Waiver versus Modification

The Illinois Waiver of Educational Mandates Act provides that school districts must initially petition the State Board for the “waiver” or “modification” of mandates of the School Code or State Board rules. The Act does not define what constitutes a waiver or a modification. Further complicating issues is that the Act does not provide the same approval procedures for modification and waiver requests of the School Code. Consequently, it is essential that local districts’ requests be properly classified.

Waiver Request: A Legislative and Administrative Suspension

Public Law 89-3 allows school districts to request a waiver from educational mandates. Since “waiver” is nowhere defined in Public Law 89-3 nor its accompanying State Board rules,

it is difficult to determine the intention of the General Assembly in selecting and utilizing the waiver concept.

Among suggested possibilities is that the General Assembly intended this Act to allow school districts to waive or “suspend” educational mandates from the School Code and State Board rules for a period not to exceed five years. A suspension of a statute means a temporary stop for a time in which the courts may not enforce the law.¹⁰ At the end of the designated period, the suspended law automatically becomes effective again.

Legislative waivers.

Unlike other states, the Illinois General Assembly cannot unilaterally exercise a legislative suspension. The Illinois judiciary appears to validate a legislative (*e.g.*, School Code) suspension only when the General Assembly and governor have constitutionally-enacted a subsequent legislative act, temporarily suspending the prior law. Illinois has only had one case litigated involving the use of a legislative suspen-

sion. But in that case, the General Assembly did not unilaterally suspend legislation. Rather, the General Assembly suspended a statute by a subsequent, constitutionally-enacted statute.¹¹

State board waivers.

Unlike the School Code waiver provision, Public Law 89-3 does provide for the constitutionally proper means to waive State Board rules. Based upon the same legal analysis as the constitutionality of modification of agency rules, the General Assembly properly directed the State Board to promulgate the necessary rules to allow school districts to waive State Board rules. This is permissible since the waiver of State Board rules is not governed by constitutional mandates, but rather, by directive of the General Assembly.

Modification Request: An Amendment in Disguise?

One of the other essential goals of Public Act 89-3 is to allow districts to modify provisions of the statutorily-enacted School Code or of State Board rules to provide relief from burdensome mandates. Black's Legal Dictionary (1990) defines "modification" as "a change; an alteration or amendment which introduces new elements into the details. . .but leaves the general purpose and effect of the subject matter intact."¹² It is fundamental to acknowledge that a modification constitutes a change in existing law: an amendment.

An amendment is typically accomplished by a like legislative mechanism, usually another statute, which requires adherence to the constitutional enactment and presentment provisions of the Illinois Constitution.¹³ Public Law 89-3, however, does not expressly or impliedly comply with the proper constitutional procedures to enact a statutory amendment to modify the School Code.

Legislative modification.

Unlike requests for legislative waivers, Public Law 89-3 provides that requests for modification of the School Code be treated like requests for modification or waiver of State Board rules. Consequently, the State Board, not the General Assembly, has final approval of modifications of the statutorily-enacted School Code.

Any attempt to modify an existing statute is classified as an amendment. Illinois case law holds that an amendment is not determined by being self-labelled as such.¹⁴ But rather, "it is only when the legislature in passing the subsequent act has under consideration the subject matter contained in the former enactment, and is working along the same legislative line, that the subsequent act can fairly be termed amendatory of the prior act."¹⁵ Thus, an amendment to a statute can only be accomplished by a like legislative action.

Therefore, modification or amendment of statutory law can only be enacted by way of subsequent statutory action. This constitutionally requires bicameral enactment of the

General Assembly and presentment to the governor.¹⁶ Therefore, the procedures for enacting a School Code modification should be the same of those required to enact a statutory amendment. This is not the case in Public Act 89-3.

State board modifications.

Unlike School Code modifications, a modification of State Board rules is constitutionally permissible to those individual school districts who avail themselves to the procedures of Public Law 89-3. State agencies, including the State Board, are empowered solely through statutory provisions. Thus, the State Board received additional responsibilities when the General Assembly enacted Public Law 89-3, which, in part, directed the State Board to provide a legal process for individual school districts to request modification of State Board promulgated rules. Thus, it was permissible for the General Assembly to enact Public Law 89-3 to direct the State Board to allow school districts to modify State

Board rules.

In sum, the General Assembly enacted Public Act 89-3 to enable school districts to either waiver or modify provisions of the School Code or State Board rules. The Act provides the identical procedures for granting modification and waiver requests of State Board rules as those required for statutory modification of the Illinois School Code: State Board approval. Legally, however, there is a large chasm between the required procedures to enact modifications for the General Assembly (legislative body) and the State Board of Education (administrative agency).

II. Legislative Denial: Use of Statute or Resolution

A second type of legal challenge that may be present in Public Law 89-3 regards the failure to include any proactive measure (statutory enactment and presentment to governor) for the General Assembly to deny districts' modification requests of the Illinois School Code. Public Law 89-3

only provides that the General Assembly may disapprove school districts' requests "by adoption of a resolution by a record vote of the majority of members elected in each house."¹⁷

According to the Constitution of the State of Illinois and the parliamentary rules of the Illinois General Assembly, there are two methods by which the legislature can express its opinion on matters of public interest: a resolution or a statute. Statutes and resolutions differ in fundamental character and purpose and also in procedural requirements for passage.¹⁸

Statutes

A statute is the formally enacted declaration of the will of the General Assembly.¹⁹ A statute can create new law, modify existing law, or repeal old law which is no longer the will of the General Assembly.²⁰ A statute is expressed according to the forms necessary to constitute it the law of the state. The Supreme Court of Illinois ratified this notion in *People v. Coffin* (1917) when it stated, "A leg-

islative act is passed only when it has gone through all the forms required by the process of legislation to make it complete."²¹

The Illinois Constitution provides in Art. IV, section 8 that the only way for the General Assembly to enact a law is by way of a bill. When the General Assembly formally enacts a bill and the executive branch approves it, a bill is then called a statute. A statute has the force and effect of law and is binding upon future legislatures, unless the General Assembly would otherwise amend or the judiciary would rule the statute unconstitutional.²² Thus, whenever the General Assembly wishes to supersede, modify, or revoke a previously enacted law, it must utilize a law-enabling parliamentary mechanism: a statute.

However, there are instances when legislative bodies attempt to utilize other legislative mechanisms when dealing with legislative matters and fail to employ the requisite procedures. If this action is legally challenged, the judiciary determines if the subject matter constitutes a "legisla-

tive action.” If so, the prior legislative attempt to bypass the constitutional procedures is struck down, and the legislature is required to enact the legislation according to the constitution. The next step in the constitutional analysis of Public Law 89-3 is to determine if the General Assembly’s passage of the joint resolution constitutes a “legislative act.” This is important because if either the legislative (School Code) modification or waiver provisions require statutory enactment, then use of a joint resolution, as is so provided in Public Law 89-3, may not withstand a constitutional challenge as the proper parliamentary mechanism to implement such legislative requests.

Joint Resolutions

A joint resolution is a resolution adopted by both chambers of a legislature.²³ However, a joint resolution is not a law.²⁴ Rather, it is a parliamentary vehicle used whenever a legislative body merely wishes to express an opinion of a temporal nature

that is typically congratulatory in nature, (*e.g.* recognition of athletic or professional achievements).²⁵

The chief distinction between a “joint resolution” and a “statute” seems to be that the resolution is not legally binding. The Supreme Court of Illinois concurred with this interpretation in *Burritt v. Commissioners State Contracts* (1887) when it stated, “...the legislature may speak by resolution, [but] under our constitution it [the General Assembly] is denied the power to enact laws except in the modes so carefully pointed out.”²⁶

When determining whether to reject a request to waive provisions of the School Code, the General Assembly will enact a joint resolution. Even though adopted by both chambers of the General Assembly, it is not presented to the governor for approval. Consequently, by definition, a joint resolution has not met the constitutional procedural requirements necessary to have the force and effect of statutory law.

In sum, from this examination it appears that the constitutional fram-

ers had envisioned only one method to enact legislative action: bicameral enactment of legislation which is presented to the executive branch for consideration of approval or veto. Only with minor exception, resolutions are appropriate to bind only the legislative body. Further, the General Assembly cannot give a matter the effect of law by utilization of either a joint resolution when the matter is properly the subject of the enactment process.

Summary

Public Law 89-3 squarely places the legislative responsibility for modifying the School Code in the sole hands of the State Board, an executive branch agency. In addition, the Act's legislative modification provision does not allow (a) the legislative branch to carry out its constitutional duty of bicameral enactment, nor (b) the executive (governor) to carry out its constitutional duty of veto or approval of legislation. If challenged, strong arguments could be presented that this Act could not withstand constitutional

challenge in that it violates the separation of powers doctrine.

Public Law 89-3 is in need of statutory revision. It appears that the General Assembly should enact a statute to amend those portions of the School Code from which school districts are requesting modification. According to the provisions of Public Law 89-3, there is no proactive provision for any "legislative action" to enact either a waiver or a modification of the School Code. Moreover, Public Act 89-3 treats both State Board waiver and modification provisions and School Code modifications in a like fashion—the Act only requires school districts submit an application for State Board approval. The Illinois judiciary would only uphold a waiver or suspension if the statute was temporarily superseded by another bicamerally-enacted statute. Consequently, modification and waiver of School Code provisions require bicameral enactment of legislation as provided by article IV of the Illinois Constitution.

Secondly, Public Law 89-3

only requires action (joint resolution) when the General Assembly wishes to deny a School Code modification request. If no General Assembly action is taken, then the waiver or modification request is granted. Thus, it is possible for modification of the School Code without any legislative action whatsoever. Legislative inaction or silence does not constitute a legislative act. Consequently, Public law 89-3 may constitute an unconstitutional Act.

Consequently, there are at least two minimum recommendations that must occur to bring the Act up to constitutional standards:

First, amend Public Law 89-3 to provide clarity. For example, decide who classifies, and by what standards, a request as either a modification or a waiver. In addition, it is vital that the Act define certain terms—"mandate," "modification," and "waiver." This is extremely important since the initial classification determines what legislative or administrative procedures should be utilized to determine if a request should be granted. Secondly, overhaul the Act to maintain compli-

ance with principles of the Illinois Constitution. This would include maintaining separation of powers between branches of government and adhering to the enactment process of article IV of the Illinois Constitution. Finally, it is imperative to note that Public Act 89-3 should be able to withstand a constitutional challenge in regard to waiver and modification requests from State Board mandates.

Policy Concerns & Recommendations

Public Law 89-3 not only presents a constitutional question, but there are also policy issues regarding the wisdom of the waiver concept to lessen educational mandates.

First, there is the potential for the State of Illinois to have 904 different variations of the Illinois School Code, one for every school district in the State. Significant problems can arise by allowing school districts across the State of Illinois to be subject to some laws and not others. The precedent set by the "piece-meal" approval of waiver requests may even-

tually escalate to a point in which the General Assembly may wish to amend the School Code rather than micromanage the affairs of every school district in the State. Fortunately, during the past year the General Assembly did hear the continued pleas of school districts and wisely enacted various laws that amended the School Code to reflect some of the more frequently sought requests.²⁷

Secondly, some members of the General Assembly want to limit the range of rules and laws from which districts can ask to be waived. Legislators consider certain type of requests (e.g., corporal punishment, sprinklers) beyond the original intent of the waiver Act.²⁸ Unfortunately, this would only serve to further frustrate school administrators who believe that some of the most restrictive mandates originate from topics which are already exempt from the waiver provision: special education, teacher tenure and seniority, and teacher certification.

Thirdly, there is growing agreement that local school districts have not utilized this Act to its fullest potential. Specifically, the claim is that districts

are not creative in their requests and that there are more burdensome mandates than the physical education requirement and school holidays.

The May 1998 biannual report showed some signs of improvement. It contained twenty-four different school districts' requests concerning the financial hardship that may be imposed upon a district with the implementation of administrative cost controls.²⁹ Unfortunately, the General Assembly denied all twenty-four requests, but a strong message was sent that this mandate needs revision.

A final policy concern addresses the inevitable question concerning what will happen to the requests already granted concerning modification or waiver of the School Code should the Act be found unconstitutional. The Illinois judiciary has previously addressed similar issues of action taken under the authority of unconstitutional legislation.

In Illinois, the general rule is that when a law is declared unconstitutional it is void at the date of enactment, as though it had never been passed.³⁰ Though legally correct, this

standard has created numerous difficulties for those who relied upon the soundness of the statute and acted thereon before it was ruled unconstitutional. Thus, the Illinois judiciary has allowed exception to the “void at the time of enactment rule” and has held that it will not apply the general rule if an invalid law works to create a hardship on a public officer who in the performance of his/her duty has acted in good faith in reliance on the validity of the statute before any court found that statute invalid.³¹

Consequently, it could be argued that it would cause a hardship to local school districts and the State Board of Education to retroactively deny previously-granted district requests granted by the authority of Public Law 89-3.

References

¹ 105 ILCS 5/2-3.25g.

² 105 ILCS 5/1-101 et. seq.

³ 105 ILCS 5/2-3.104

⁴ 105 ILCS 5/2.35g (1992).

⁵ 105 ILCS 5/3.25g. The Act exempts waiver requests pertaining to special education, teacher certification, and teacher tenure and seniority.

⁶ School districts must provide at least seven days notice in a newspaper of general circulation of such public hearing. Further, seven days prior to the meeting, the district must notify the district’s collective bargaining representative of the public hearing and the opportunity to attend.

⁷ 105 ILCS 5/3.25g

⁸ *Id.*

⁹ Illinois State Board of Education. (1995-98). State board of education biannual report. Springfield, IL: Author.

¹⁰ Corpus Juris Secundum, (1995)(supplement to Corpus Juris Secundum (1953)). Statutes, p. 521.

¹¹ *People v. Lindquist*, 7 N.E.2d 166 (Ill. 1937).

¹² Black's Law Dictionary, p. 1004 (6th ed. 1990).

¹³ IL CONST. Art. IV, section 8; Art. IX.

¹⁴ *Larson v. Thomson*, 44 N.E.2d 899 (Ill. 1942).

¹⁵ Corpus Juris Secundum, (1995)(supplement to Corpus Juris Secundum (1953)). Statutes, p. 412.

¹⁶ IL CONST. Art. IV, section 8; Art. IX.

¹⁷ 105 ILCS 5/2-3.25g.

¹⁸ Garvey, N. F. (1958). The Government and administration of Illinois. New York: Thomas Y. Crowell Co.

¹⁹ Corpus Juris Secundum, (1995)(supplement to Corpus Juris Secundum (1953)). Statutes.

²⁰ *People v. Wright*, 70 Ill. 388 (1st Dist. 1873).

²¹ *People v. Coffin*, 117 N.E. 84, 87 (Ill. 1917).

²² Corpus Juris Secundum, (1995)(supplement to Corpus Juris Secundum (1953)). Statutes.

²³ Black's Law Dictionary, 618 (6th ed. 1990).

²⁴ Illinois Law and Practice, (1981). Constitutional law. pp. 5, 6, 12.

²⁵ Black's Law Dictionary, (6th ed. 1990).

²⁶ *Burritt v. Commissioners of State Contracts*, 11 N.E. 180, 188 (Ill. 1887).

²⁷ P.A. 89-618 modified the School Code to include (a) Shortening date to receive health examinations and immunizations, (b) Extending health education through fifth grade, (c) Clarifying clock hours during institute days,

(d) Allowing personal delivery as notice for staff dismissal, (e) Eliminating treasurer residency requirement. P.A. 90-548 provided for the utilization of non-certificated registered professional nurses, except when duties require teaching or student evaluation.

tional Administration and Higher Education at Southern Illinois University, Carbondale, Illinois.

²⁸ Finke, D. (1995, November 17). House, senate agree on mandate waivers. The State Journal-Register, p. 8.

²⁹ 105 ILCS 5/17-1.5 (1998). This statute limits a school district's increase in administrative expenditures in a given school year to the lesser of 5% or the percentage increase in instructional expenditures for that school year over the prior school year.

³⁰ *Panchinsin v. Enterprise Companies*, 394 N.E.2d 797 (1983).

³¹ *Reich v. Board of Fire and Police Com'rs*, 301 N.E.2d 501 (1973).

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**APPLICATION OF DU PAGE
COUNTY COLLECTOR, 229
Ill.Dec. 295, 691 N.E.2d 405
(Ill.App. 2 Dist. 1998):
LEGALITY OF A TAX LEVY**

Facts of the Case

On December 15, 1993 District 10, which operates within Du Page County, adopted its 1993 real estate tax levy. Because the district operates on a “cash basis” the funds from this levy were to be set aside to be used, not in the 1993-94 fiscal year, but in the 1994-95 fiscal year. Operating funds for the 1993-94 fiscal year were coming from previously adopted levies and other receipts. The 1993-94 budget was adopted on May 12, 1993. The 1994-95 budget was adopted on May 11, 1994. Therefore, the 1994-95 was not yet adopted at the time of the adoption of the levy in December of 1993.

In November 1994, ATI Carriage House, Inc., and Centerpoint Properties, Inc. filed an objection to

the levy. In doing so they cited a section of the Illinois School Code which states that a school district “shall” pass a budget before adopting a levy for a subsequent fiscal year.¹

Decision and Rationale of the Court

Although this case was brought before the Illinois Supreme Court primarily on procedural grounds, the court spent a fair amount of time explaining the relationship between the Illinois Municipal Code and the School Code in respect to a school district’s power to levy taxes. First the court explained the difference between a “deficit basis” district and a “cash basis” district, a term applicable to both school districts and municipalities, and that has a unique meaning in Illinois. In Illinois, cash basis means that current expenses for a calendar year are paid from the proceeds of taxes of former years or other available funds.² “Deficit basis” simply means that the school or municipality has insufficient case reserves

and is utilizing the levy from the current year to meet its expenses.³

To grasp the significance of this distinction one must understand the taxing power of local school districts. School boards have no inherent power to levy taxes. Any power which they might have must be given to them by the state through specific legislation. When the legislative origin of school district taxing authority was moved from the Illinois Municipal Budget Law to the School Code, one important safeguard was omitted. Under the Illinois Municipal Budget Law is a clause stating that

“The failure by any governing body of any municipality to adopt an annual budget and appropriation ordinance, or to comply in any respect with the provisions of this Act, shall not affect the validity of any tax levy of any such municipality, otherwise in conformity with the law.”⁴

The corresponding section in the School Code did not contain such a “savings” clause to ensure that, even

in the event of other procedural error, that the tax levy remains valid.

Using the absence of this clause, those objecting to the levy advanced the argument that, under the School Code, school districts operating on a cash basis were required to adopt a budget prior to passing a tax levy for the year in question. School districts operating on a deficit basis, however, may adopt the levy before the budget.⁵ The Collector for the school district disagreed, saying that the School Code was unclear and needed to be interpreted by the court. At first glance, the court felt that the language of the School Code was fairly clear and unambiguous, and yet two separate, and persuasive arguments were being made:

“The objectors have asserted that section 17-1 implies that a levy is for the fiscal year in which the school district wishes to spend the tax levy. Collector counters that another interpretation of the language would be that a

tax levy is for the fiscal year in which it is made, regardless of when the school district intends to spend the levy.”⁶

The court found the Collector’s interpretation persuasive – that the tax levy is for the fiscal year in which it is approved, regardless of when the district intends to spend the money.

Implications for Administrators

As tax relief groups continue to grow and multiply across the state of Illinois, any court ruling which gives flexibility to local school districts should be appreciated. While this decision may not have a great deal of immediate impact on local administrators and school boards, it should be read as an indication of the attitudes of the justices on the Illinois Supreme Court regarding the issue of school district taxing authority.

Endnotes

¹ 105 Ill.Cod.Stat. 5/17-1 (West 1996).

² Application of Du Page County Collector, 691 N.E.2d 405 (1998).

³ 691 N.E.2d at 407.

⁴ Ill.Rev.Stat. 1939, ch. 120, par. 365.4.

⁵ 691 N.E.2d at 407.

⁶ 691 N.E.2d at 408.

DRUG TESTING AFTER *TODD V RUSH COUNTY SCHOOLS*: SUSPICIONLESS SEARCHES ALLOWED FOR ALL EXTRACURRICULAR ACTIVITIES

As a result of a January 1998 7th Circuit case out of Indiana, *Todd v Rush County Schools*¹ suspicionless searches of Illinois public school students has been extended from school athletes to all participants in extracurricular activities.

Facts of *Todd v Rush County Schools*

The Rush County School district was not atypical of many school districts across the nation. However, the results of a 1994 survey conducted by the Indiana Prevention Resource Center showed that cigarette use for Rush County tenth graders was higher than the Indiana state average. Alcohol use for eleventh and twelfth graders was higher than the state average also. One bright spot, according to the data gathered by the survey, was that marijuana use for ninth and twelfth

graders was actually lower than the state average.

In August 1996, the Rush County School Board approved a program prohibiting a high school student from participating in any extracurricular activities or driving to and from school unless the student and parent or guardian consented to a test for drugs, alcohol, or tobacco in random, unannounced urinalysis examinations.² This policy was, in part, a response to the data collected in the 1994 survey.³ Other individuals had also testified to a growing drug problem at the high school causing the drowning of a senior and an automobile crash where the students were inhaling the contents of aerosol cans. Plaintiff Todd's parents refused to sign a consent form for drug testing. This resulted in the Plaintiff being barred from videotaping the football game. The parents of the three Harmon Plaintiffs also refused to sign a consent form resulting in their children being barred from participating in the Library Club and the Future Farmers of America. The question that was before the court

was whether the Rush County Schools' drug testing program, under which all students who wish to participate in extracurricular activities must consent to random and suspicionless urine testing for alcohol, unlawful drug, and cigarette usage, violates the Fourth Amendment rights of those students.⁴

Vernonia School District 47J v Acton:
Facts and Rationale of the Court

In upholding the school district policy, the court relied heavily on a 1995 United States Supreme Court case, *Vernonia School District 47J v Acton*⁵. The case took place in the Vernonia School District 47J in the logging community of Vernonia, Oregon. Starting in the mid-to-late 1980's teachers and administrators observed a sharp increase in drug use among the students of the district.

“Students began to speak out about their attraction to the drug culture, and to boast that there was nothing the school could do about it. Along with more drugs came more disci-

plinary problems. Between 1988 and 1989 the number of disciplinary referrals in Vernonia school rose to more than twice the number reported in the early 1980's, and several students were suspended. Students became increasingly rude during class; outbursts of profane language became common.”⁶

It gradually was discovered that student athletes, students generally admired and held as role models in the community, were the leaders of this growing “drug culture.” This raised not only social concerns, but also concerns about the increased risk of sports related injury due to drug use. Initially, the Vernonia School District responded to the drug problem by offering special classes, speakers, and presentations designed to deter drug use.⁷ Nothing seemed to work, and in fact the problem escalated. Students not only were becoming even more rebellious, but they were glamorizing drug and alcohol abuse and the “drug culture” which surrounded it. It was at this point that district administrators

considered a drug-testing program. They held a parent “input night” to discuss the proposed Student Athlete Drug Policy and the parents in attendance gave their unanimous approval. The school board approved the policy for implementation in the fall of 1989. Its expressed purpose was to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs.⁸

The policy adopted applied to all students participating in interscholastic athletics. All student athletes were required to sign a drug testing consent form. The written consent of their parents was also required. At the beginning of each sport season, athletes participating in that season were tested. In addition, once each week of the season, the names of the athletes were placed in a “pool” from which a student, with the supervision of two adults, blindly drew the name of 10% of the athletes for random suspicionless drug testing. Those selected were notified and tested that same day, if possible.⁹

During the test, an adult moni-

tored the student. Just the student and the monitor were present during testing. Appropriate precautions were taken to ensure a clean sample was available to be sent to lab while still preserving some privacy for the student.¹⁰ The samples were then sent to an independent laboratory to be tested for amphetamines, cocaine, and marijuana. If the student was taking prescription medication, he or she had the chance prior to providing the sample to provide a copy of the doctor’s prescription so that he or she would not be punished if that medication was found in the sample. If a sample tested positive, a second test was administered as soon as possible to confirm the positive result. If the second test came back negative, no other action was taken. If the second test was also positive, the athlete’s parents were notified to meet with the athlete and the principal. At this meeting, if it was the first offense, the student athlete was given two options: (1) participate for six weeks in an assistance program that includes weekly urinalysis; or (2) be suspended from athletics for the remainder of the

current season for which the athlete was eligible. After the second offense, the athlete was immediately given option two. After the third offense the student was suspended for the remainder of the current season and the next two athletic seasons.

In the fall of 1991, James Acton signed up to play seventh-grade football. He was denied participation because neither he, nor his parents, would sign the required consent forms. The Actons filed suit, alleging that the drug-testing policy violated both the Fourth and Fourteenth Amendments to the United States Constitution and Article I, 9 of the Oregon Constitution.¹¹ After losing in the District Court, the United States Court of Appeals for the Ninth Circuit reversed, holding that the policy did indeed violate both the federal and state constitutions as alleged by the Actons. Ultimately, upon review by the United States Supreme Court, the Ninth Circuit Appellate Court's decision was reversed as regarding a violation of the Fourth and Fourteenth Amendment of the United States Constitution, and remanded for further pro-

ceedings regarding possible violations of the Oregon Constitution.

In coming to that decision, the Court considered several factors. The first factor which was considered was the nature of the privacy interest upon which the drug-testing program at Vernonia intruded. While all citizens have an expectation of privacy under the Fourth Amendment, that right is not absolute and may vary depending on the circumstances. For example, the privacy interest in one's house is much greater than in one's car. A student's privacy interest is far greater in his book-bag (which is owned and controlled by him) than in his locker (which is owned and controlled by the state.) In the majority opinion, Justice Scalia stated:

“Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the “reasonableness” inquiry cannot disregard the schools’ custodial and tutelary responsibility for children. . . . Legitimate privacy expect-

tations are even less with regard to student athletes. . . .As the United States Court of Appeals for the Seventh Circuit has noted, there is “an element of ‘communal undress’ in athletic participation,” *Schall by Kross v Tippecanoe County School Corp.*, 864 F.2d 1309, 1318 (1988). There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to “go out for the team,” they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. . . .Somewhat like adults who choose to participate in a “closely regulated industry” students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.”¹²

Another way to think of this difference in expectation is to remember that participation in athletics is a privilege, not a right. No one is forced to participate

in any given sport. Once the decision to participate is made by the student, however, the individuals running the sport (i.e. the school district) have the authority to regulate that activity. Most school districts require preseason physicals (which may or may not require a urinalysis), adequate insurance coverage or the signing of an insurance waiver, maintaining a minimum grade point, adherence to a code of conduct, proper dress, grooming, training schedule and the like. In addition, according to the Court, even performing a supposedly “private” task (such as urination) in front of one other individual should not be onerous to a student athlete given the lack of privacy in the locker room which occurs on a daily basis.

The next factor considered by the Court in *Vernonia*, was the type of intrusion complained about – providing of a urine sample. The Court acknowledged that it had already recognized that “collecting the samples for urinalysis intrudes upon an excretory function traditionally shielded by great privacy.”¹³ Under the procedures out-

lined in the Vernonia policy, the Court found the type of intrusion to be negligible; hardly different than the type of intrusion on privacy experience by anyone using a public restroom. Male students were fully clothed with their backs to the monitor. Female students were in an enclosed stall with the monitor standing outside.

There is, however, a second side to the concept of intrusion of requiring a urine sample. While the method used to monitor the collecting of the sample may not be terribly intrusive, “the other privacy-invasive aspect of urinalysis is the information it discloses concerning the state of the subject’s body, and the materials he has ingested.”¹⁴ The Court found it significant that the Vernonia policy looked only for specific illegal drugs and not for evidence of epilepsy, diabetes, or pregnancy. Moreover, the drugs screened for did not vary by individual student and the results of the tests were disclosed to only a limited class of school personnel who had a need to know. Results were not turned over to law enforcement authorities or used for internal discipline of the stu-

dent tested.

The final factor considered by the Court was the nature and immediacy of the governmental concern at issue and how effective the drug-testing policy was at answering that concern. In other words, did the state have a “compelling interest” which warranted adopting a drug-testing policy? Was the drug-testing policy reasonably calculated to deal with that compelling state interest? The Court recognized that the nature of the concern was important.

“Deterring drug use by our Nation’s schoolchildren is at least as important as enhancing efficient enforcement of the Nation’s laws against the importation of drugs . . . or deterring drug use by engineers and trainmen . . . School years are the time when the physical, psychological, and addictive effects of drugs are most severe. . . . And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty,

as the educational process is disrupted.”¹⁵

The Court also found significant the fact that Vernonia’s policy targeted only student athletes; a population where drug use can be particularly dangerous to the student’s health. As stated by the Court:

“Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District’s Policy have been demonstrated to pose substantial physical risks to athletes. Amphetamines produce an “artificially induced heart rate increase, peripheral vasoconstriction, blood pressure increase, and masking of the normal fatigue response,” making them a “very dangerous drug when used during exercise of any type.” Marijuana causes “irregular blood pressure responses during changes in body position,” “reduction in the oxygen-carrying capacity of the

blood,” and “inhibition of the normal sweating responses resulting in increased body temperature.” Cocaine produces vasoconstriction, elevated blood pressure, and “possible coronary artery spasms and myocardial infarction.”¹⁶

Consequently, after looking at all of the factors – privacy interest, intrusiveness of the search, and interest of the state – the Court concluded,

“Taking into account all the factors we have considered above – the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search – we conclude Vernonia’s Policy is reasonable and hence constitutional.”¹⁷

Rationale of the 7th Circuit Court of Appeals in *Todd v Rush County Schools*

The 7th Circuit Court of Appeals in deciding *Todd*, chose to adopt the view of the Supreme Court in *Vernonia*

that because of the special relationship between public school personnel and public school students, the Fourth Amendment expectation of privacy is diminished for public school students. In addition, the 7th Circuit had no problem broadening the intentionally narrow ruling of *Vernonia* so as to include all extra-curricular activities.¹⁸ In the words of the court,

“[W]e find that the reasoning compelling drug testing of athletes also applies to testing of students involved in extracurricular activities. Certainly successful extracurricular activities require healthy students.”¹⁹

The court also brought up the concept that, after all, extracurricular activities are a “privilege” therefore, should students voluntarily choose to participate, they can be held to a higher standard.

The very brief opinion of the 7th Circuit seems to take leaps of faith and judgment not supported by the Supreme Court opinion in *Vernonia*. For example, the Supreme Court made it very clear in its opinion that the decreased privacy interest stemmed not

only from the voluntary and privileged nature of school athletics, but also from the element of “communal undress” present in high school athletics. It is highly unlikely that Library Club members or Future Farmers of America are accustomed to undressing in front of one another. Without this second element, this element of “communal undress” it is arguable whether the Supreme Court would have ceded the concept of the student’s privacy interest quite so quickly.

A second point on which the 7th Circuit seems to be on weak ground, is the showing of an immediate and dangerous situation. In *Vernonia*, the facts showed a severe and growing problem of the glorifying of drug abuse within its school district in 1988 and 1989. Discipline cases were multiplying at an alarming rate. Only after the failure of more conventional counseling and intervention methods, did the school district enact drug testing of student athletes in 1989. Student athletes were targeted because of increased health concerns specific to athletes, and because of their role in the growing “drug cul-

ture” of the district.

In contrast, in the Rush County schools, all that was shown by the data of the 1994 survey was that the use of cigarettes by sophomores and alcohol by juniors and seniors was higher than the state average. There was no concrete evidence that discipline problems were increasing. No correlation was even shown between those individuals using nicotine and alcohol and participation in extracurricular activities. The most powerful evidence that indeed there was no immediate or dangerous situation was that the drug-testing policy was not adopted until two years after the survey was done. Therefore, what was not shown by the Rush County Schools, and which was glossed over by the 7th Circuit, was the fact that an immediate and dangerous situation of drug abuse in the school was not present. That being the case, it is very hard to justify suspicionless searches of the majority of the student body as an efficient way to rectify an unproven dangerous situation.

Implications for Administrators

What does this new decision by the 7th Circuit mean to superintendents and principals in the state of Illinois? It had already been made clear by the Supreme Court in *Vernonia* that if a district could show an immediate and dangerous situation involving drug use in the school district, testing of student athletes would be permissible. The drug-testing policy should protect the privacy interest of the student athlete as much as possible while still safeguarding the validity of the sample collected. In addition, the method of selection for random drug testing throughout the season should be indeed random and not discriminatory. The lottery system – drawing out of a hat – used in *Vernonia* fit that requirement. It now appears that, at least for the states of Illinois, Indiana and Wisconsin, this same rationale can apply for all extra-curricular activities. It would probably be ill advised, however, that absent a showing of some evidence of a drug abuse problem in the district, for a local school board to adopt such

a broad policy. If the school district has been plagued by document drug-abuse related discipline and violence problems, the 7th Circuit decision in *Todd* may actually become extremely useful.

If such a policy is adopted, it must be nondiscriminatory on its face and in practice. The results of the drug test must be kept confidential and not used for disciplinary purposes. There should exist an immediate and dangerous situation in the district to justify its adoption. It should be well advertised in student handbooks and parent handbooks that consent to drug testing is a prerequisite for participation in extra-curricular activities. This notification diminishes the individual's privacy interest. Finally, such a policy should apply only to extra-curricular activities. No activity considered to be part of the academic program (i.e. band, jazz band, newspaper, etc.) should be included. Without a doubt, this topic of suspicionless searches is one that should be watched closely for future development both at a state and national level.

Endnotes

¹ *Todd v Rush County Schools*, No. 96 C 1417 (January 12, 1998). By “suspicionless” searches is meant searches conducted without a reasonable suspicion that activity in violation of school policy is occurring. In this case it was a search as a prerequisite to enjoying certain privileges such as participating in extracurricular activities or parking in the school parking lot.

² No. 96 C 1417 at 1 (Jan. 12, 1998).

³ It seems odd that the school district waited two years after the results of the survey had been reported to enact a school policy supposedly to counteract those findings.

⁴ No. 96 C 1417 at 3 (Jan. 12, 1998).

⁵ *Vernonia School District 473 v Acton*, 515 U.S. 646 (1995).

⁶ 515 U.S. at 647, 648 (1995).

⁷ 515 U.S. at 649 (1995).

⁸ 515 U.S. at 650 (1995).

⁹ 515 U.S. at 650 (1995).

¹⁰ For male students, the sample was produced at a urinal while the male student remained fully clothed with his back to the monitor. The monitor stood approximately 12 to 15 feet behind the student, listening for normal sounds of urination. For female students, samples were produced in a closed bathroom stall. Although the student was not actually visible to the monitor, sounds of urination could be heard. After the sample was produced, it was given to the monitor who checked it for temperature and tampering and then transferred it to an appropriately labeled vial.

¹¹ The Fourth Amendment to the U.S. Constitution guards against unreasonable searches and seizures. The Fourteenth Amendment to the U.S. Constitution extends this safeguard against un-

reasonable searches and seizures to those conducted by state officials, including public school officials.

¹² 515 U.S. at 657, 658 (1995).

¹³ 515 U.S. at 658 (1995).

¹⁴ 515 U.S. at 659 (1995).

¹⁵ 515 U.S. at 662 (1995).

¹⁶ 515 U.S. at 663 (1995).

¹⁷ 515 U.S. at 666 (1995).

¹⁸ The 7th Circuit never addressed that part of the policy which also required those students wishing to drive to, and I assume park on school grounds, to submit to drug testing. Consequently, the constitutionality of that provision is still untested.

¹⁹ No. 96 C 1417 at 3 (Jan. 12, 1998).

PRAYER AT GRADUATION: A VIOLATION OF THE ESTABLISHMENT CLAUSE

The propriety of allowing invocations and benedictions at public school graduations has been a matter of debate for many years across the United States. While strong arguments have been advanced on both sides of the issue, a 1992 decision by the United States Supreme Court announced the law which, to this day, governs all 50 states. On June 24, 1992, in the case of *Lee v Weisman*¹ the United States Supreme court decided that the practice of opening graduation exercises with a nondenominational prayer violated the Establishment clause of the First Amendment to the constitution of the United States.

Deborah Weisman graduated from the Nathan Bishop Middle School, Providence, Rhode Island, in June 1989. Keeping with the custom of the school district, the principal had invited a member of the clergy – a rabbi – to deliver the opening invocation and closing benediction prayers at the graduation exercises.² As instructed by the administra-

tion, the rabbi's prayers were inclusive and nonsectarian, although quotes from the Old Testament book of Micah were included.³ In July 1989, Deborah's father Daniel Weisman filed suit in federal court seeking a permanent injunction against the practice of including invocations and benedictions in graduation ceremonies.

The district court held that the practice violated the Establishment Clause of the First Amendment because the ceremony created an identification of governmental power with religious practices, thus appearing to endorse religion.⁴ On appeal, the United States Court of Appeals for the First Circuit affirmed. In a 5-to-4 decision the United States Supreme court voted to uphold the lower courts' decision, holding that "Including clergy who offer prayers as part of an official public school graduation ceremony is forbidden by the Establishment Clause."⁵ The Court questioned the participation of the principal in deciding to have the prayers, choosing a religious representative to deliver them, and providing guidelines to the chosen members of the clergy regarding acceptable

prayers.

The Court went on to express concern for students who might perceive the efforts of the school officials as actually endorsing religion, and may feel coerced in participation with a prayer or religion which they might otherwise reject. The Court stated:

“[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools ... prayer exercises in public schools carry a particular risk of indirect coercion . . . the school district’s supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.”⁶

In responding to the final argument advanced by the school district, that there was no offense because the gradu-

ation ceremony was voluntary, the Court said:

“Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme . . . Everyone knows that, in our society and in our culture, high school graduation is one of life’s most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term “voluntary,” for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years. Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right

and duty to assume in the community and all of its diverse parts. . . .The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance at an event of singular importance to every student, one the objecting student had no real alternative to avoid.”⁷

The Court found that although attendance at graduation ceremonies was purportedly voluntary, subtle public and peer coercive pressure made it obligatory.

It would appear that the *Lee* decision has finally ended the debate on prayer at graduation. At the very least, the Court in *Lee* made it very clear that to have a member of the clergy deliver an invocation or benediction at a public school graduation is unconstitutional. And yet, many school districts across the state of Illinois continue exactly such a practice; subjecting the graduating students to the coercive pressure described by the Court in *Lee*. Moreover, many school districts in Illinois continue to sponsor, or be involved in some manner, with Baccalaureate, a pre-graduation cer-

emony with no secular purpose whatsoever. Some districts, relying on a 1992 federal court case out of the 5th Circuit in Texas, have decided that if the students “voluntarily” choose to have prayer at graduation then such a practice does not run afoul of the *Lee* decision.⁸

Such reliance is flawed in three respects. First, the decision is from the 5th Circuit (Texas) therefore of no binding precedent to courts in the 7th Circuit where Illinois is located. In non-legal terms this means that the courts which can tell school districts in Illinois what is allowed and what is not allowed, are in no way compelled to listen to the opinion of a federal court out of Texas. Secondly, in letting the students know that they have this option, it is very likely that the school district will also provide policy guidance to the students who are chosen by their peers to deliver the prayers. If the school district did decide to take a totally hands off approach, then there would be no way to censor or disallow a prayer which was openly racist, sexist, demeaning to other religions, or even praying to Satan or some other devil or demon. Finally, even with student led

prayer, the graduation ceremony as a whole is still being sponsored by the school district. The ceremony itself still carries with it the reality that it is not voluntary; that no one should be compelled to stay away because of activities which will occur at the ceremony. Therefore, any objecting student still faces the “coercion” talked about in *Lee* thereby making the prayer unconstitutional.

Implications for Administrators

What, then, is a local school district administrator to do? What is and is not permissible? First and foremost, it is always totally legal to have a dignified, solemn, and meaningful ceremony with absolutely no religious element included. The opening and closing remarks can be just that, remarks which are meant to inspire, congratulate, and encourage the graduates without trying to slip in religious phrases and without ending with “Amen.” If it is extremely important to a student or a group of students to have a religious celebration in connection with their graduation, nothing prevents those students from enjoy-

ing just such a celebration within their families, their churches, or their social groups. To force everyone in the public school to put a particular religious meaning, or any religious meaning at all, to graduation, is exactly the type of religious pressure and persecution which the Founding Fathers fought to forbid under the Constitution which they drafted.

Second, it is definitely unconstitutional to have an individual representing a religious group of any type deliver and invocation or benediction. It is immaterial as to whether the prayer is supposedly “non-sectarian” or overtly sectarian. To have the state openly sponsor one religion over another, or the concept of religion over no religion, is decidedly illegal. This ban would extend to school district sponsorship of prayer at any school event. Coaches should not be leading pre- or post-game prayers with their players. Prayers sponsored or led by school officials at assemblies are also unconstitutional.

Returning specifically to graduations, school district sponsorship of Baccalaureate is unconstitutional. Because such a ceremony serves no secular pur-

pose, it cannot even clear the first hurdle of the Lemon Test.⁹ Sponsorship would include active participation by school administrators in the planning of the ceremony or even including the invitation to the Baccalaureate on the same printed invitation which is provided to every senior by the school for the regular graduation ceremony. What is permissible for the school district to do is to notify the local religious leaders that the school district is no longer able to sponsor Baccalaureate. If any or all of the local religious leaders wish to sponsor the ceremony they are invited to do so. It is totally legal for the local school district to allow the religious leaders to use the school auditorium or gymnasium for the Baccalaureate if such use is allowed by district policy for any community group. Cooperation with local religious leaders by coordinating when caps and gowns are handed out, or release time for rehearsal is also acceptable.

A good benchmark for determining whether prayers at school events such as graduation are likely to violate the Constitution, the following questions can be asked:

1. Do school officials direct the performance of prayers, either in a general or a specific sense?
2. In reality, is student attendance at the event obligatory?
3. Is there a justifiable, non-religious reason, for having this prayer – a reason which cannot be reasonably or satisfactorily fulfilled in a secular way?

It is always a potentially volatile situation whenever the topic of religion is broached. This is true regardless of the size of the community. It is very important for a district administrator to know and understand the viewpoints of his or her community. At the same time, however, it is also the duty of that administrator to ensure that he or she is in compliance with state and federal law and is doing what is best for the children of the district. Just because something is popular within the community does not mean that it is necessarily legal or in the best interest of all of the students.

Endnotes

¹ Lee v Weisman, 505 U.S. 577 (1992).

² School principals in the public school system of the city of Providence, Rhode Island, are permitted to invite members of the clergy to offer invocations and benediction prayers as part of the formal graduation ceremonies for middle school and for high schools. 505 U.S. at 581.

³ Query: How can a prayer be non-sectarian, especially when it refers to a specific religion's writings. The definition of a prayer is inherently religious. Rabbi Gutterman's prayers were as follows: INVOCATION: "God of the Free, Hope of the Brave: For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it. For the liberty of America, we thank You. May these new graduates grow up to guard it. For the political process of America in which all its citizens may participate, for its court system where all may seek justice, we thank You. May

those we honor this morning always turn to it in trust. For the destiny of America, we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it. May our aspirations for our country and for these young people, who are our hope for the future be richly fulfilled. Amen." BENEDICTION: "O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement. Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them. The graduates now need strength and guidance for the future; help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: to do justly, to love mercy, to walk humbly. We give thanks to You, Lord, for keeping us alive, sustaining us, and allowing us to reach this special, happy occasion. Amen." And this is not religious?

⁴ At this point it should be remem-

bered that prior US Supreme Court cases had ruled that it was a violation of the Establishment Clause to advance or inhibit one religion over other religions, or over no religion at all.

⁵ 505 U.S. at 578.

⁶ 505 U.S. at 593, 594.

⁷ 505 U.S. at 596.

⁸ The case is *Jones v Clear Creek Indep. School Dist.*, 930 F.2d 416 (5th Cir. 1991), vacated, 112 S.Ct. 3020 (1992). The case was decided by the 5th Circuit just prior to the Supreme Court's decision in *Lee v Weisman*. The court in *Jones* upheld student led prayer at graduation. Upon reaching the Supreme Court, the Court vacated and remanded the *Jones* decision for reconsideration in light of *Lee*. Upon reconsideration the 5th Circuit distinguished the decision in *Lee*, stating that *Lee* only applied if there was direct district involvement, such as occurred in *Lee*. Student initiated and student led prayer at graduation was acceptable in the eyes of the Texas federal

court.

⁹ The Lemon Test is the three-part test to determine whether there is a violation of the Establishment Clause. The test was developed by the Supreme Court in a case, *Lemon v Kurtzman*, 403 U.S. 602 (1971). The three parts are (1) that there must be a secular purpose; (2) that the effect must neither advance nor inhibit religion; and (3) that it must not create excessive entanglement of the state with the religious organization. In the case of *Baccalaureate*, no secular purpose is present therefore it fails the first prong of the Lemon Test.

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