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A PRIMER ON ILLINOIS SCHOOL BOUNDARIES AND DISTRICT REORGANIZATION

by Matthew Cate, Margaret A. Noe, and Wm. Bradley Colwell

With the enactment of Illinois' most recent educational reform package in 1997 (HB 452)[1] and the Property Tax Extension Limitation Law (PTELL or Tax Caps) in 1995,[2] the General Assembly sent a strong message that Illinois schools must be more fiscally responsible. As Illinois school districts consider their educational mission into the 21st century, a top priority for most Illinois districts will be the issue of adequate school funding. One major source of funding for Illinois school districts will continue to be local property taxation. Therefore, the future viability of these districts depends upon a stable, yet vibrant, property tax base. If this is not possible, a potential result for some districts could be the consideration of district reorganization (*e.g.*, consolidation or annexation/detachment) to best meet students' educational needs. This article provides a synopsis of the sections of the School Code that refer to school district reorganization options and the requisite procedures involved to accomplish these changes.[3]

I. Boundary Change

A school district may elect or be forced to alter its geographical boundaries. Boundary changes, or configurations, are typically the result of modifications in economic conditions and population shifts. Specifically, increasing costs, declining enrollment, decreasing local tax base, deteriorating school plant facilities, and collective bargaining likely contribute to consideration of district boundary changes. In order to understand the various options for boundary configurations, it is necessary to have a fundamental knowledge of the organizational types of Illinois school districts.

Types of School Districts

Illinois is unique because school districts are organized in different ways. The difference in names and terminology reflect the terms in use at the time the districts were organized (*i.e.*, com-

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munity, consolidated). There are some school districts, however, which do have important legal distinctions:

CharterA charter district, like the Chicago Public Schools, is created by a charter granted by the state and is governed by special sections of the School Code.[4]

Unit A unit district is one that provides educational services for children in pre-kindergarten or kindergarten through grade 12.[5]

Dual A dual district structure is created by the existence of a separate elementary (k-8) and secondary or high school district (grades 9-12).[6] Each district has its own board of education and superintendent and is governed independently including setting tax rates. The school districts' boundaries need not be coterminous.

Types of District Boundary Configuration

Once a district decides to change its boundaries, it must choose between a variety of methods to accomplish its goal. The Illinois School Code provides four distinct methods by which a school district may configure its boundaries: detachment, annexation, division,[7] dissolution, or any combination of the previous four procedures.[8]

Annexation: The formal act of attaching or adding detached territory to another school district; generally the connection of a smaller, subordinate territory to another adjacent territory. [9]

Detachment: The formal act of separation of territory from a school district .

Dissolution: The formal act of terminating a district's legal existence and attaching that territory to one or more neighboring districts.[10]

The petition may be initiated through a resolution of the respective boards of education or by the citizens at large. Each method may have its own unique requirements for time lines; petitions; maps; dates; compensation; hearings; notice; elections, if applicable; and review.

Annexation & Detachment

Whether the school district to be reorganized is in one educational service region or two, the process is basically the same.[11] School district boundaries lying entirely within one educational service region[12] may be changed through school board action or by the citizens initiating the petition process. Petitions for boundary changes require signatures from a majority of voters in each affected district, except in the case of annexation or detachment, where the requirement for signatures is two-thirds of the registered voters.[13] The petition shall contain the request of the petition, dates, name of witness/circulator, and names and addresses of signatories, as filed on the current official voting record.[14] The petition is then submitted to the regional board of school trustees.[15] The regional board of school trustees must conduct a hearing to consider the sufficiency of the petition, the evidence as to the school district's needs, and the ability of the districts to meet Illinois State Board of Education standards. Sufficient opportunities are available for testimony and redress during the hearing, order, rehearing, and appeal process.

Dissolution

The dissolution process of a school district is, in most cases, the same as for petitions for annexation, detachment — the petitions can be initiated by either the boards of education or the residents of the district. However, only petitioners from the dissolving district need file a petition, which must specify the district(s) that will annex the dissolved territory.[16]

There is one exception. Applicable only to smaller school districts, section 5/7-2a (b) of the School Code provides for the dissolution of a school district without a full hearing on the merits. This statute was intended to facilitate the inevitable demise of a school district, which was financially bankrupt or one which could no longer provide quality educational programs.

According to the statute, the size of the school district is based on population, not student enrollment. "Any school district with a population

of less than 5,000 residents shall be dissolved and its territory annexed. . . by the regional board of school trustees upon the filing . . . of a petition adopted by resolution of the board or a petition signed by a majority of the registered voters of the district seeking such dissolution."[17] Consequently, every superintendent needs to be acutely aware of district's resident population.

Requirements for this type of district dissolution are significantly less stringent than for boundary changes by annexation or detachment. The dissolution process provides a majority of voters can dissolve a school district by petition or a majority of the board of education by resolution. The regional board of school trustees does not conduct a hearing on the merits; it need only conduct a hearing to determine the sufficiency of the petition.[18]

Most people view a petition as a request, [19] not a final action. In this case, however, the single act of signing the petition could result in dissolution of a district, if the petition was sufficient (*i.e.*, it contained the requisite signatures of a majority of registered voters in the district).

> The regional board of school trustees shall have no authority to deny dissolution requested in a proper petition for dissolution filed under this subsection (b).[20]

Noticing these possible draconian consequences, the law was amended to provide that petitioners cannot circulate petitions nor can a board of education adopt a resolution for dissolution without a public meeting. The statute now requires that the school board or the petitioners give

> at least 10 days' notice to be published once in a newspaper . . . and shall have conducted a public informational meeting to inform the residents of the district of the proposed dissolution and to answer questions concerning the proposed dissolution.[21]

After a district has been dissolved, the regional board shall exercise its discretion regarding the annexation of the dissolved territory in accordance with Section 7-11 of the School Code.[22] The regional board must give proper

notice of a hearing that shall be held within 50-70 days after the dissolution to determine how the dissolved territory should be divided.[23] The regional board may give consideration to, but is not bound by, the residents' wishes of the various school districts affected by the annexation.[24] The dissolved district can be annexed to a neighboring district or divided up among neighboring districts.

The tenured teachers in the dissolved district do not lose their tenure when they transfer to an annexing district(s). This has an impact upon the tenured faculty in the receiving district. If the territory is added to two or more districts, then the tenured teachers are transferred to those receiving districts in proportion to the pupils transferring and according to the annexing districts staffing needs. Transfer of tenured teachers are based upon requests by teachers in order of seniority in the dissolving district.[25]

Requirements for Granting Boundary Change Petitions

The School Code mandates that several stipulations be met before granting a petition to reconfigure the boundaries of a unit or dual school districts. First, there cannot be any non-high school territory that will result from the granting of the petition. Next, the district created must have a population of at least 2,000, an equalized assessed valuation of at least $6,000,000, and the area must be compact and contiguous.[26] The compactness and contiguousness of the territory are often points of contention, but the territory need not be rectangular or square, nor must it have regular boundary lines for it to pass this requirement.[27]

In addition, if there will be a school district without a school building because of a detachment, that action may be set aside by the county board of school trustees. Moreover, it is possible to set the detachment aside if there is a petition by two-thirds of the eligible voters of the district after the detachment. Then, the county board of school trustees will hold a hearing upon the petition.[28]

Petition Filing

A petition must be filed, which

will be followed by proper notice of the petition. A hearing will then be held concerning the petitioners' request, and a decision will be given soon after. This might not sound exceptionally difficult, and it often takes place without any complication. Yet, it is over this part of the process that considerable litigation has taken place, with over 85 lawsuits filed over this portion of the process alone. The best way to avoid such problems is to ensure compliance with the School Code.

The petition should be filed with the secretary of the regional board of school trustees. The secretary will then provide copies of the petition to those districts involved and will give a single notice of the petition in a newspaper of general circulation.[29] When the petition has more than 10 signatures, then the petition will designate 10 of the petitioners to serve as the "committee of ten." This committee will act in the place of all the petitioners to try to get the petition passed. Any seven of the ten may make binding stipulations on behalf of all the petitioners. Thus, the committee can make an agreement concerning the petition or answer a question concerning the petition that will be for all petitioners. They will make stipulations regarding any questions at the hearing concerning the petition, the hearing, or over the financial accountings between districts.[30]

The committee members will serve in their capacity until the petition is decided. If a vacancy arises during this time, the remaining members will appoint another petitioner to fill the vacancy. This will be done by a simple majority vote of the committee of ten.[31] If a member of the committee of ten fails to sign the petition, then the petition is void, and it cannot be later corrected. Although the School Code does allow for any seven members to make binding stipulations on behalf of all petitioners, it does not permit less than ten members to serve on the committee.[32] Prior to the hearing, the petition may be amended to withdraw up to 10 percent of the territory involved, as long as the petition remains in compliance with the signature requirements. [33]

Notice

The petitioners will pay for the publishing of the notice and for any transcripts that are required.[34] The notice has several requirements that must be fulfilled for it to be proper. It must state when the petition was filed, describe the territory involved, what the petitioners are requesting, and when the hearing is to be held. A hearing must be held within 10 to 15 days after the notice is published.[35] Prior to the hearing, the secretary of the regional board of school trustees will give the regional board information essential to the success or demise of the petitioners' request, including maps of the districts involved, a written report of the financial and educational status of the districts involved, and a statement of the probable effect of the proposed boundary change.[36]

Hearing

The regional board of school trustees will hear evidence at the hearing about the school's needs and the conditions of the territory. They will also accept evidence of the district's ability to meet the State Board of Education's standards of recognition, and they will take into account the financial status after the changes would be made.[37] The board reviews a number of other factors in making their decision. Two such concepts often used are the "benefit-detriment" test and the "financial injury" test. Under the benefit-detriment test, the regional board looks to see if the overall benefit to the annexing school district clearly outweighs the resulting detriment to the losing school district.[38] Under the financial injury test, the board can look at the financial harm that would result to the losing district, and if the financial loss is great enough, it can then deny the petition on this basis.[39] Ultimately, the regional board of school trustees will decide if it is in the best interest of the schools involved and the educational welfare of the students for the boundary change to take place.[40] During the hearing, any resident of the territory described in the petition or affected by the change may appear in person, or by an attorney, to support or op-

pose the boundary change that is proposed. They may also give evidence in support of their views.[41]

Decision

Within 30 days after the conclusion of the hearing, the regional superintendent of schools, as a member of the regional board of school trustees, will enter the order either granting or denying the petitioners' request.[42] Although the law specifically provides 30 days after the conclusion of the hearing, the court has not held technically to this rule, and a slightly longer period of time has been allowed when it will not be to the detriment to those involved.[43] A certified copy of the decision will be provided to the committee of 10 and all residents who filed their appearance in writing at the hearing.[44]

Alternative Filing

The decision to approve or deny the petition, an order entering this decision, and distributing copies of the decision to the parties involved must be completed within nine months.[45] This usually all occurs within the time frame; but if it does not, then the petitioners may still have their petition decided. They can submit their petition directly to the state superintendent of education for a decision. All other records that have accumulated to this point are to be submitted along with the petition. These would include such items as a copy of the notice and any evidence from the hearing. The party who submits the request directly to the state superintendent must give notice to the regional board of school trustees and the secretary of that board. The cost of submission to the state superintendent will be paid by the party submitting it. All jurisdiction over the petition is transferred from the regional board of school trustees to the state superintendent of education. The state superintendent will not be required to repeat any steps that have already been completed, and the regional board of school trustees must provide any maps or written reports they have that concern the petition. The state superintendent will then render a decision upon the petition and notify the parties of such.[46]

Joint Hearing

If school district boundaries include two or more counties or educational service regions, the regional boards of each school district affected must be present. The secretary with whom the petition was filed will provide copies to the regional board of school trustees of each affected district. If the secretary fails to provide the notice within 30 days, then the secretary of any regional board affected may give the proper notice.[47]

In addition, if a joint hearing is required, the affected regional boards of school trustees must meet and make a decision upon the petition.[48] If the boards fail to render a decision on the petition, then the regional superintendent of the educational service region where the hearing was held will enter an order denying the petition and provide notice of the decision. Thus, it is important for the boards to render a decision, otherwise it is automatically denied. If they do render a decision within 30 days, they will provide notice of its decision to those who filed the petition and to those who filed their appearance in writing at the hearing.[49]

Request for Rehearing

Within 10 days of being served a copy of the decision from the single or joint hearing from either the regional or state superintendent, any party may request a rehearing on the decision, which may be granted if there is sufficient cause. The filing of a petition for rehearing will operate as a stay on any decision that was given.[50] Action on the petition will then await the final order of the rehearing. A rehearing is typically not granted unless there is sufficient reason shown that a different result could now occur, such as a change in circumstances.

Contesting the Final Decision

The final decision[51] is classified as an administrative decision. This decision is now under the rules of administrative review law and is subject to judicial review by the local circuit court. The reviewing court is not to make find-

ings of fact, but is to ensure that proper procedures were followed and there is a supportable decision.[52]

Any resident who appeared at the hearing, any petitioner, or any board of education the decision affects can file a complaint within 35 days with the circuit court to review the decision. This will also act as a stay upon the final decision until the court resolves the matter.[53] Thus, if the decision upon the petition is under review by the court, then all school district boundaries remain unchanged, and no move forward may be taken on the petitioners' request regardless of the regional board of school trustees' decision.[54]

The boundary change caused by the annexation of territory or by the creation of a new district may be contested only if it is done so within two years.[55] This is two years from the order commanding the change, two years from the election of the change if no proceedings were started to contest the change, or two years from the date of final disposition if the election was contested.[56] The difficult part is to determine when the two-year period actually begins, but it basically starts when there is a final decision upon the matter.

Petitioners that filed an unsuccessful petition for annexation or detachment may not file another petition two years from the date of the final decision. There are two ways to circumvent this rule: (1) if the new petition is substantially different from the one previously filed, and (2) if the school district involved is placed on the academic or financial watch list.[57] In determining if a petition is substantially different than an earlier petition, several criteria are considered — the geographic area involved, the identity of the petitioners, similarity of supporting evidence, and length of time between filings.[58]

Effective Date of Change

In case a petition is filed for a boundary change after August 1 and the petition is granted, the election for a new school board will take place after the time for appeal has passed. Yet, the change in administration of the schools will take effect the following July 1 after the petition was granted, and the school districts will operate as before.

If the petition was granted and the decision is now final, either through not seeking administrative review or by a decision of the court, then the change in boundaries will immediately take place. Yet, this is also deceiving, because if the petition is final between September 1 and June 30, then the administration and attendance at the school districts involved will not be affected until the following July 1. These rules are in place to ensure that students will not be forced to change districts in the middle of the school year, and to ease the administrative changes that will take place.[59] If a new district has been created, then the regional superintendent for that area will order elections to be held for the election of school board members.[60]

Next, if the boundaries of a school district have changed and the decision is final, then the regional superintendent has 30 days to submit a map of the changes to the county clerk. This might not seem important, but if it is not done, then the county clerk will be unable to extend taxes to the correct properties, which could result in the school district getting less money than it is entitled.[61] Yet, a failure to file the map will not affect the validity of the boundary changes that were made.[62]

When the current school year has ended for an annexed school district, the terms for school board members and school directors end at this same time. The annexing school board will now perform all the operations and duties for the annexed area, as well as receive all the assets and assume all the obligations and bonded indebtedness of the annexed district. Thus, it is essential to calculate all the liabilities against the prospective district to be annexed.[63]

Economic Matters

New financial accountings will only be required if a new district was created, but not when only a district's boundaries have changed. Yet, the district that is losing territory from the boundary change will not count the average daily attendance of its pupils in its territory for reimbursement purposes the year before the effective date of change. The annexing district should count the average daily attendance for that territory, during that same year for its reimbursement purposes for the

school year following the effective date of change.[64]

Lastly, when the county collectors have possession of school funds that have accumulated after a district reorganization, and these funds have not been distributed for three years, then the funds will be distributed to each reorganized district which lies in whole or in part of such a county. This is done by dividing the number of students of that county enrolled in the reorganized district by the total number of students from that county enrolled in the schools. This is not very common, for most funds will be distributed before three years. Yet, it can occur, especially when the boundary change was contested.[65]

II. District Reorganization

In addition to boundary changes, the Illinois School Code affords school districts the opportunity to form into a new or different district. These provisions will result in larger and more consolidated school districts if recent history is a guide. For instance, the number of school children enrolled in Illinois elementary, middle, and high schools has nearly doubled from 1,159,164 in 1945 to a current enrollment of approximately 1,995,300 in the 1997-98 school year.[66] Yet, over those same years, the number of school districts has plummeted from 11,784 to a current number just under 900. [67]

This dramatic decrease in the number of districts has taken place through unit school district formations, combinations, and conversions. The reasoning is largely economic. In today's schools there is an increasing need for more teachers, more programs, and increased technological resources. Today, districts are better able to provide these educational benefits by joining resources and making larger districts; thus, the day of the one room school house is long gone. This trend is likely to continue, especially in light of the recent passage of HB 452, which makes it financially conducive for school districts to consolidate. Even though the number of school districts has greatly decreased in recent history, it is a trend likely to continue into the future. Therefore, it is only prudent to review the three types of district consolidation provided in the School Code: unit school district forma-

tion, district combination, and district conversion.

Unit School District Formation

For a unit school district to be formed, the territory for the proposed district must have an equalized assessed value of at least $12,000,000, and a population between 4,000 and 500,000.[68] This community unit school district must have a territory that is compact and contiguous. The new district may come from several sources: (1) territory that is not currently part of any unit district; (2) territory that is currently a part of two or more entire unit school districts that are compact and contiguous to each other; or (3) territory that is from one or more unit school districts that are contiguous to each other, plus an area compact and contiguous, but that is not currently a part of any unit school district. Also, a unit district may be divided into two or more parts, which will then become part of two or more community unit school districts.[69]

A community unit school district may be formed which does not meet the population or valuation requirements. Yet, the regional or state superintendent will only approve the new district if a number of requirements are met — there must be a compelling reason to grant the petition, the territory involved cannot be part of another possible formation which does meet the requirements, the new district will not hinder the ultimate formation into a district which meets the requirements, the new district is in the best interest of the pupils, and it is financially beneficial to the affected school districts.[70]

School District Combination

A combined school district is any district that results from combining two or more elementary school districts or two or more high school districts.[71] The new district must be contiguous, have an equalized assessed valuation of at least $5,000,000, and have a population between 1,500 and 500,000.[72] The state superintendent of education may approve any petition, which has been approved at an election. The petition originally comes from the boards of education of the affected school districts or comes from ten per-

cent of the legal voters residing in each district. The petition must be filed with regional superintendent of the district with the greater equalized assessed valuation.[73]

School District Conversion

A school district conversion takes place when two or more contiguous unit school districts, or when one or more unit school districts and one or more high school districts, which are all contiguous, dissolve. Then, they form a single new high school district and new elementary school districts, which are based entirely within the dissolved districts' boundaries. This is only possible for districts with less than 600 pupils enrolled in grades 9 through 12, unless a waiver is obtained from the state superintendent of education. A waiver may be granted when it will greatly increase the educational benefits to the affected pupils.[74] Also, if a unit school district has less then 250 students enrolled in grades 9 through 12, then it is possible for the unit school district to be dissolved, and an elementary school district to be formed from this, with the annexation of this entire area to an existing contiguous high school district.[75]

Summary

In this current economic climate, boundary change and district reorganization is a likely possibility for many Illinois school districts. Consequently, it is imperative that all school administrators be prepared to respond should this occur. This includes understanding the potential types of boundary change and district reorganization as well as the detailed procedures required to accomplish them. Even though the Illinois School Code is cumbersome when it comes to providing clear procedures to implement these boundary and district alternatives, the prudent school administrator should have the knowledge to respond appropriately because of the tremendous impact that a boundary or district change could ultimately have on the district.

Note

This article is not meant as a substitute for the requirements specified in the statute. A local school attorney is the

best source of legal advice regarding the specific situation of a particular school district.

References

[1] Public Act 90-548. One major provision of this law eliminated the weighting formula for high school districts (105 ILCS 18-8).

[2] 35 ILCS 200/18-190 - 18/245.

[3] 105 ILCS 5/7, 5/7A, 11/A, 11/B, & 11/D.

[4] 105 ILCS 5/32-1 – 5/32-7.3.

[5] Braun, B. A. (1998). Illinois School Law Survey (5th ed.). Springfield: Illinois Association of School Boards.

[6] *Id.*

[7] For purposes of this article, the rarely utilized boundary change enacted by division will not be discussed.

[8] 105 ILCS 5/7-04.

[9] Black's Law Dictionary, 88 (6th ed. 1990).

[10] 105 ILCS 5/7-11.

[11] 105 ILCS 5/7-1, 5/7-2 .

[12] An educational service region is a county or a group of counties administered for educational purposes by a regional superintendent of schools and the regional board of school trustees.

[13] 105 ILCS 5/7-1.

[14] *Id.*

[15] The regional board of school trustees is an elected membership from their respective county(s), with no more than one person elected from the same township.

[16] 105 ILCS 5/7-2a(a).

[17] 105 ILCS 5/7-2a(b).

[18] *Id.*

[19] A petition is "a formal written application to a court [decision making body]

requesting judicial [official] action on a certain matter." Black's Law Dictionary, 1145 (6th ed. 1990).

[20] 105 ILCS 5/7-2a(b).

[21] *Id.* Amended by P.A. 87-1215, eff. Nov. 23, 1992.

[22] 105 ILCS 5/7-11.

[23] *Id.*

[24] 105 ILCS 5/7-2a(b).

[25] *Id.*

[26] 105 ILCS 5/7-4.

[27] *Streator Tp. High School Dist. No. 40 of La Salle and Livingston Counties v. County Bd. Of School Trustees of Livingston County*, 14 Ill.App.2d 251, 144 N.E.2d 531 (2d Dist. 1957).

[28] 105 ILCS 5/7-5.

[29] 105 ILCS 5/7-6(a).

[30] 105 ILCS 5/7-6(c).

[31] *Id.*

[32] *Betts v. Regional Bd. of School Trustees of DuPage County*, 151 Ill.App.3d 465, 502 N.E.2d 787 (2d Dist. 1986).

[33] 105 ILCS 5/7-6(d).

[34] 105 ILCS 5/7-6(e).

[35] 105 ILCS 5/7-6(f).

[36] 105 ILCS 5/7-6(h).

[37] 105 ILCS 5/7-6(i).

[38] *Board of Educ. of Community Unit School Dist. No 337 v. Board of Educ. Of Community Unit School Dist. No. 338*, 269 Ill.App.3d 1020, 647 N.E.2d 1019 (3d Dist. 1995), *reh'g denied*, 657 N.E.2d 616 (1995).

[39] *Helmig v. Regional Bd. of School Trustees of the La Salle County Educational Service Region*, 286 Ill.App.3d 220, 675 N.E.2d 966 (3d Dist. 1997).

[40] 105 ILCS 5/7-6(i).

[41] 105 ILCS 5/7-6(j).

[42] 105 ILCS 5/7-6(k).

[43] *Board of Ed. of Gardener School Dist. No. 112, Peoria County v. County Bd. of School Trustees of Peoria County*, 83 Ill.App.2d 422, 227 N.E.2d 778 (3d Dist. 1967).

[44] 105 ILCS 5/7-6(k).

[45] 105 ILCS 5/7-6(l).

[46] *Id*.

[47] 105 ILCS 5/7-6(b).

[48] 105 ILCS 5/7-2 .

[49] 105 ILCS 5/7-6(m).

[50] 105 ILCS 5/7-6(n).

[51] The final decision is the decision rendered by either the Regional Superintendent of the Educational Service Region, or the State Superintendent of Education or the decision after a rehearing was held.

[52] *Utica Grade School Dist. No. 135 v. Skolek*, 232 Ill.App.3d 278, 597 N.E2d 919 (3d Dist. 1993).

[53] 105 ILCS 5/7-7.

[54] *Board of Ed. of Golf School Dist. No.*
67 v. Regional Bd. Of School Trustees of Cook County, 89 Ill.2d 392, 433 N.E.2d 240 (1982).

[55] 105 ILCS 5/7-29.

[56] *Id*.

[57] 105 ILCS 5/7-8.

[58] *Helmig* , 286 Ill.App.3d 220, 675 N.E.2d 966 (3d Dist. 1997).

[59] 105 ILCS 5/7-9.

[60] 105 ILCS 5/7-13.

[61] 105 ILCS 5/7-10.

[62] *School Directors of Union School Dist. No. 4 v. School Directors of New Union School Dist. No. 2*, 135 Ill. 464, 28 N.E. 49 (1891).

[63] 105 ILCS 5/7-12

[64] 105 ILCS 5/7-14A.

[65] 105 ILCS 5/7-30.

[66] Illinois State Board of Education (1998). This does not include four state-operated school districts.

[67] *Id.*

[68] 105 ILCS 5/11A-2

[69] *Id.*

[70] *Id.*

[71] 105 ILCS 5/11B-1

[72] 105 ILCS 5/11B-2

[73] *Id.*

[74] 105 ILCS 5/11D-1

[75] 105 ILCS 5/7A-1

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DUE PROCESS

By: Thomas M. Melody, J.D.

In_____ *v. Rich Township High School District No. 227,* No. 1-97-2563 (1st District 1998), the Illinois Appellate Court issued a decision that will alter the procedure often followed in student expulsions. The Court determined that a student being expelled for an incident involving an altercation and allegedly a gun at school had a constitutional right to confront and cross-examine the student-witnesses who had provided information about the incident.

The Board of Education of Rich Township High School District No. 227 expelled the student for three semesters on January 14, 1997. The Board's action was based on a 36-page hearing officer's report, which, pursuant to 105 ILCS 5/10-22.6, detailed all of the evidence and testimony presented by both the school administration and the student at the six-hour expulsion hearing.

The expulsion hearing took place on January 9, 1997. The student was represented by his attorney at the hearing. The hearing was not transcribed by a court reporter. At the hearing, the school principal testified that he interviewed three students regarding the incident that had occurred on December 11, 1996. The three students were not present at the hearing, but their written statements were admitted as evidence over the objection of the student's attorney. The statements described an altercation in which the student allegedly displayed a gun and threatened to kill the three students. Two teachers testified that there was an altercation and that the student threatened the three boys, but they did not testify that they actually saw a gun. Nor were any teachers present at the very inception of the incident. The assistant principal also testified that during her follow-up investigation she interviewed a fourth student-witness, whose written statement was also admitted as evidence. The assistant principal testified that this student was credible and unbiased, and that he was afraid to testify for fear of retaliation. This student-witness stated that the accused student pointed a gun at the other three students and then ran out of the school. The accused student was allowed to cross-examine all of the witnesses who appeared at the hearing.

At the conclusion of the

administration's evidence, the student was allowed to present four witnesses and to testify himself. Basically, the student and his witnesses testified that there was an argument, but that it was instigated by the three students who had submitted statements. The student denied having a gun and denied making any threats. His testimony was that the three boys who gave the written statement started the argument and threatened him. The Board expelled him.

The student challenged his expulsion on three grounds: (1) the School Code was unconstitutional because it did not require the verbatim transcription of the expulsion hearing; (2) he was denied the right of confrontation and cross-examination and in violation of his due process rights; and (3) the Board's decision to expel him was not supported by the evidence. The Circuit Court of Cook County entered a preliminary injunction staying the expulsion, and found that the absence of a verbatim transcript denied the student "fundamental due process." The Circuit Court reversed the Board's expulsion decision; the Board appealed.

On appeal, the Appellate Court noted that a student's entitlement to a public education is a property interest which is protected by due process guarantees. The Appellate Court concluded that the student's due process rights were not violated by the lack of a verbatim transcript at the hearing, mainly because the 36-page hearing officer's report was quite detailed and obviously impartial and sufficed as an adequate record of the hearing. Also, the student was unable to present any evidence that the report was in any way inaccurate or incomplete or that the hearing officer was biased. The case suggests that if the hearing officer's report had not been as detailed and unbiased as it was, the Court may have found that the absence of a verbatim transcript was a denial of due process.

The Appellate Court also found, however, that the student's right to due process was violated by his inability to confront and cross-examine the student-witnesses who had offered written statements about the incident for which he was expelled. The Court noted that no witness present at the hearing testified that he or she actually saw a gun. The Court stated that in this situation the op-

portunity for cross-examination was imperative. Since the student could not cross-examine the written statements, the use of those statements violated his constitutional rights.

The Appellate Court rejected, in conclusory fashion, the school district's argument that the value of cross-examination was muted by the fact that the veracity of the student accounts of the accused's misconduct were initially assessed by a school administrator who has a particular knowledge of the students' trustworthiness. This initial reliability determination has been relied on by most school districts which have confronted this situation. It is a common sense idea that had found some support in the Courts: school officials are in the best position to know when a student is being truthful, and they can be trusted to act appropriately when they receive this type of information. This notion was squarely rejected by the Court. In fact, the Court noted that the testimony of the school administrator that one of the students who gave a written statement was "reliable", which bolstered the credibility of the hearing, resulted in "a particularly egregious departure from the adversarial standard."

The Appellate Court also rejected the district's argument that having the students testify in person at the hearing would subject them to retaliation. The Court stated that risk of retaliation might justify a school board's reliance on written witness statements in some expulsion hearings, but that the risk does not warrant dependence on reports in all cases or in cases where there is no showing of a significant risk of harm. Accordingly, the Court held that the student should have been allowed to confront and cross-examine the students who testified against him.

The Board also argued that it had no subpoena power and could not compel witnesses to testify. The Court rejected this very sensible argument with virtually no analysis. The Court did not give any indication of what a school district is supposed to do when a student refuses to testify, or when the student's parents refuse to allow the student to testify, against a violent offender at an expulsion hearing.

The Appellate Court affirmed the reversal of the Board's expulsion decision, and remanded the case to the Board for further proceedings consistent

with its opinion.

Based on the decision, school districts are advised to proceed carefully when students demand procedural rights in an expulsion hearing. Districts should consider making a record of the hearing by use of a court reporter or electronically, or in the alternative should require their hearing officers to provide detailed, fact-specific reports that contain no hint of bias in favor of the District. In addition, if student witnesses refuse to testify for fear of retaliation, the administrators should make a careful record that these fears exist and that they are well-founded. (although it is unclear how this could be done without using inadmissible hearsay). The bottom line is that written statements of student witnesses are "hearsay" and, absent extreme circumstances, are not admissible in a student expulsion hearing. If the only evidence of a student's misconduct is the written statement(s) of others who do not testify at the hearing and subject themselves to cross examination, there will not be sufficient evidence to sustain the expulsion of the student from school.

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AN ANALYSIS OF RECENT CASE LAW REGARDING ACADEMIC FREEDOM IN HIGHER EDUCATION

by: R. Craig Wood and Luke M. Cornelius

Introduction

This paper identifies and analyzes significant cases and trends in recent First Amendment decisions regarding Academic Freedom within Higher Education. Recent court decisions regarding academic freedom have raised new issues regarding the application of the First Amendment in higher education. Other cases have affirmed, enhanced, and modified our understanding of academic freedom. Some of this case law appears to more narrowly limit the protections of academic freedom and allow university administrators greater latitude in regulating the speech of non-teaching employees. Other decisions, however, have demonstrated the inherent conflict between academic freedom and efforts to regulate certain types of speech, such as hate speech and sexual harassment, and have even questioned the legitimacy of such regulations.

Jeffries and Waters

Two closely related cases are Jeffries v. Harleston (1994) and Waters v. Churchill (1994). These cases have proven to have an enormous effect on emerging academic freedom case law. They provide a redefinition of the applicability of the standards first established in Connick v. Myers (1983), which sought to balance the right to public employees of free speech with the need of the government to operate efficient agencies. Jeffries v. Harelston, in particular, extends this principle directly to the university and redefines the procedures necessary for administrators to pursue this balance.

Leonard Jeffries had been employed by City University of New York (CUNY) since 1972 as professor and chairman of the Department of Black

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Studies. In 1991, just after being reappointed to another three year term as department chair, Jeffries became involved in a series of controversial incidents that resulted in his eventual removal as chair. The most notorious of these involved an incident in which, while attending a conference, Jeffries made numerous anti-Semitic comments. After considerable public outcry and political protests in New York, CUNY began an investigation of Professor Jeffries conduct. This eventually led to another series of incidents, the most of serious of which involved Jeffries physically threatening a reporter's life. At the conclusion of the 1991-92 school year, CUNY removed Jeffries as chair, though it took no action against him in his position as a tenured faculty member.

Following the action of CUNY, Jeffries commenced a civil rights suit against several administrators and board members responsible for his removal as chair. His central allegation was that the defendants had unconstitutionally demoted him for exercising his rights to free speech and academic freedom. Jeffries position was that all of the incidents which had occurred during the school year had been the result of the scrutiny applied by the college following his 1991 speech. The case was submitted to a jury which found the defendants individually liable for their actions and concluded that Jeffries had been unconstitutionally punished for exercising his academic freedom. The trial court also ordered Jeffries be reinstated as department chair for the remainder of his three year term. The ruling of the trial judge and jury was substantially upheld by the Circuit Court on appeal (Jeffries v. Harelston, 1994).

CUNY appealed the case to the U.S. Supreme Court in 1994. The defendants sought to use the high court's recent ruling in Waters v. Churchill (1994) to overturn the rulings of the lower courts. The Supreme Court accepted the case and vacated the decisions of the trial and circuit courts (Harleston v. Jeffries, 1994). The case was remanded to the circuit court for review.

Waters v. Churchill (1994) dealt with the issue of free speech at a public hospital. An employee was fired after criticizing certain procedures and superiors in her department. Arguing that these criticisms dealt with a matter of "public concern," the employee claimed

a violation of her First Amendment rights. In ruling against Churchill, the Supreme Court not only applied the standard rules of Connick v. Myers (1983), but it further expanded the rights of employers in disciplining employees for disruptive speech. Determining that Churchill did not have a property interest in her employment, which would invoke the strict protections of due process under the Fourteenth Amendment, the court ruled that public employers may terminate employees based upon a reasonable investigation. This lower standard allows a public employer to discipline or dismiss an employee based upon reasonable information, including hearsay, without the requirement of a formal hearing or complete evidence gathering process. The court found it unreasonable to impose the burden of conducting a thorough investigation, such as strict legal due process might require, upon the normal employment decisions of a public employer. The court further upheld the right to take this action based upon this reasonable standard test, even if some of the information later proved erroneous. Also, the court found the employer could take action against specific parts of a speech, such as the employee's personally disparaging remarks concerning their superiors, even if the remainder of the speech were protected under the First Amendment.

In Waters v. Churchill (1994) the court also established that, in balancing an employee's free speech rights against the employer's need for efficient operations, the employer could take action based upon its reasonable expectation that the speech would cause disruption. The employer may take action against an employee based on the belief the speech would cause disruption, whether the speech does actually cause any disruption. This is an important extension of the original Connick v. Myers (1983), principles.

When applied to Jeffries v. Harleston (1993/1994), the Waters v. Churchill (1994) precedent clearly affects the application of academic freedom toward certain employees in higher education. Following the Waters v. Churchill (1994) decision this meant that Jeffries' position as department chair was subject to the same standard of review as Ms. Waters. Thus, CUNY was justified in its actions if it had a reasonable belief the speech

would disrupt the operations of the college, in such areas as fundraising or cooperation among department chairs, regardless if such a disruption actually occurred. Furthermore, as was established in Waters v. Churchill (1994), CUNY was justified in taking action against Jeffries based on a far lower standard of the "reasonable" test than the due process afforded to a property right position.

Even if the speech were a subject of public concern, the right of the government as employer allowed CUNY to take action against Jeffries as department chair. It is important to note here that the Circuit Court did draw a distinction between Jeffries as chair and as professor. Had CUNY taken action against Jeffries in his academic role he would have been fully entitled to protection under both the First Amendment's guarantee of academic freedom and the Fourteenth Amendment's guarantee of due process.

In summary, Jeffries v. Harleston (1993/1994) helps to clarify the limits of academic freedom protection for administrative and support staff employees in higher education. The employer, including public institutions, has the right to terminate at-will employees for speech which may potentially be disruptive to the employer's efficient operation of their college or university. This standard is considerably lower than the protection afforded tenured faculty. Furthermore, the employer is allowed to take this action based upon a less thorough fact-finding process than required under the Fourteenth Amendment. As both Waters v. Churchill (1994) and Jeffries v. Harleston (1994) demonstrate, an employer may take action based upon the reasonable belief of what was said, even if a more thorough investigation would have revealed different facts.

This standard may be applied against faculty members who occupy other positions of trust and prestige in an institution, even when their speech would be protected in their role as a faculty member. At the same time, it is important to remember that when sanctioning such faculty members for potentially disruptive speech, different procedures and safeguards must be applied to any action taken against the individual as a faculty member, as the following examples will highlight.

Academic Freedom and Sexual Harassment

Recent cases, such as Harris v. Forklift Sys., Inc. (1993) and Franklin v. Gwinnett County Public Schools (1992), have revealed to educators the importance of taking precautions to prevent the sexual harassment of both employees and students. At the same time, the tradition of academic freedom makes promulgating any regulation of speech and expression in higher education problematic. To be certain, the law regarding simple sexual harassment involving college personnel is no different from that affecting other situations. When a college professor engages in sexual harassment, in or out of the classroom, they are subject to the same administrative, civil, and even criminal penalties as any other employee or person. However, when college rules prohibiting sexual harassment come into conflict with classroom academic freedom, the law is far more complex. Two recent cases in particular demonstrate this problem.

In Silva v. New Hampshire (1994) the University of New Hampshire attempted to discipline a professor for classroom speech which violated the university's sexual harassment policy. Donald Silva was a speech professor who used numerous explicit sexual metaphors in the course of teaching a speech class. Silva argued that his methods were an attempt to relate technical speech topics to everyday subjects to which the students could relate. Following the complaints of six female students, "shadow" sections of the course were set up by the university for students who wished to transfer out of Silva's course. Following an informal disciplinary process Silva was given a letter of reprimand and eventually suspended without pay.

After attempting an unsuccessful grievance process against the university, a formal sexual harassment procedure was initiated. The outcome of this process was a decision to suspend Silva without pay for a year and require him to undergo counseling at his own expense regarding his sexual harassment. Silva then appealed to the federal courts alleging violations of his First and Fourteenth Amendment rights. The court agreed that the university had violated Silva's right to academic free-

dom. It noted that simply because Silva chose language and examples that some adult students found offensive, this did not constitute unprotected speech. The court further determined that the speech, since it was intended to serve a pedagogical purpose, was a matter of public concern and deserved absolute constitutional protection. Silva was subsequently ordered reinstated and allowed to pursue civil damages against the university.

A similar case is that of Cohen v. San Bernardino Valley College (1996). Dean Cohen taught English courses at the college and, by his own admission, uses a confrontational "Devil's Advocate" method of teaching. Among the courses taught by Cohen were courses in remedial English. Cohen admitted to using sexually graphic language and materials in his course, among other controversial topics, and also to using profanities and vulgar language in class. Cohen justified his methods claiming they helped him keep the attention of poorly motivated students.

Following a complaint by a student, the college initiated formal sexual harassment charges against Professor Cohen. The final decision of the college's board of trustees was that Cohen had violated the college's sexual harassment policy and should be required to undergo training in both diversity sensitivity and sexual harassment. Cohen would also be required to provide detailed a syllabus to his department chair before each semester outlining his teaching methods and the course content. The purpose of this requirement was not to limit Cohen's speech but instead to allow the department to warn prospective students of the course's content prior to enrolling.

Despite the fact that the college had not attempted to directly curtail Cohen's speech, Cohen sued alleging violations of his First Amendment rights. The district court agreed with the college that their interest in providing an education to a diverse student body outweighed Cohen's objections to the restrictions imposed by the college. Applying several balancing tests in light of the Waters v. Churchill (1994) decision, the court determined that the college had legitimate interests in both educating a diverse student population and in avoiding sexual harassment litigation.

On appeal the circuit court reversed the district court's ruling regarding Cohen v. San Bernardino Valley College (1996). The Ninth Circuit declined to discuss whether Cohen's use of controversial material was protected under the First Amendment and the doctrine of academic freedom. Instead, the court found the college's policy was unconstitutionally vague and arbitrarily applied to Cohen. In making this ruling the court found the college's sexual harassment policy was too vague to serve as adequate notice to Cohen that his teaching methods, which he had used for years, were inappropriate. The court noted that since codes designed to regulate certain types of speech can have a chilling effect on free expression, they must be both narrowly tailored to achieve some legitimate governmental purpose and specific enough to provide adequate notice to employees and avoid *ad hoc* or subjective application. Finding that the college's policy failed to meet these criteria the court enjoined any actions against Cohen.

Cases directly implicating the First Amendment right to academic freedom and sexual harassment policies are relatively new. Cohen v. San Bernardino Valley College (1996) represents the first to receive considerable appellate review. It should be noted that in other cases courts have refused to recognize any legitimate public or pedagogical purpose to justify speech that is determined to create a hostile sexual climate in the classroom. Nonetheless, these cases raise several important issues. Cohen v. San Bernardino Valley College (1996) clearly demonstrated that when a sexual harassment policy is implemented it needs to be tailored to achieve a narrow purpose. It also needs to be explicit in its regulation of classroom speech. As will be again discussed with hate speech, policies that may limit academic freedom can expect to receive intensive legal scrutiny and are likely to be rejected if they are too broad or too vague, even when addressing a matter of legitimate concern.

However, as Silva v. New Hampshire (1994) demonstrates, even when a policy is explicit it may fail under legal scrutiny. It was determined that Silva's legitimate pedagogical goals and right to academic freedom outweighed any interest the university had in preventing sexual harassment.

Under this logic it can be argued that sexual harassment law may not be applicable when, as opposed to a more personal confrontation, the harassing speech is directed at a general audience for, ostensibly, some academic purpose rather than intentional harassment.

Hate Speech and Academic Freedom

In seeking to promote ethnic and racial diversity on campus, many schools have attempted to regulate "hate speech" which might target specific racial and ethnic groups on campus. Often these regulations are combined with gender and sexual harassment related policies. Some of the best legal tests of such policies have involved students rather than faculty and the legal success of such policies has been mixed. In similar cases involving faculty members, the success of administrators in regulating personally offensive speech or expression has also been mixed.

Burnham v. Ianni (1995) involved a controversial photo display at the University of Minnesota at Duluth (UMD). A photo display had been created by several students showing the history department faculty posing with props indicative of their areas academic interest. Two professors were depicted posing with weapons. At the same time, UMD was experiencing a wave of violent threats against certain female faculty members and administrators. After the display was presented the university received numerous complaints, including one from another history professor who had been targeted by the threats, regarding the two photos depicting weapons. Eventually the university chancellor ordered the removal of the photographs.

The district court, while ruling the display case was a non-public forum, nonetheless determined that the removal of the photographs was in violation of the First Amendment (Burnham v. Ianni, 1995). Simply because the display offended some viewers did not provide adequate justification for suppressing the free expression of the faculty members and students. On appeal, however, the circuit court found that the speech in question was not protected under the First Amendment (Burnham v. Ianni, 1996). Applying the tests of Waters v. Churchill (1994), Connick v. Myers (1983), the appeals

court found that UMD, as an employer, had a right to balance any protected speech interest of the plaintiffs against the possible disruption the display might cause to the university given the climate of the campus.

The case was then reviewed *en banc* by the Eighth Circuit Court of Appeals (Burnham v. Ianni 1997). The full circuit court reversed the earlier appellate ruling and found that UMD had impermissibly violated the plaintiffs' rights by removing the photos from the exhibit. The court disagreed with the application of the Connick v. Myers (1983) standard since there was no issue of terminating or disciplining an employee. Instead the court found that balancing employee speech also required the employer to demonstrate the likelihood of disruption that might be potentially caused. Here the court, while citing Jeffries v. Harleston (1993/1994) and Waters v. Churchill (1994), found that UMD had failed to prove the likelihood of any disruption based upon the display. In short, the university's efforts to regulate the speech in question were doomed by its own inability to establish any rational basis for alleging the photographs would impede the efficiency or effectiveness of the university's educational mission. While Waters v. Churchill (1994) may have expanded the ability of college officials to regulate potentially disruptive speech, that power is still far from absolute.

Another example of the difficulty involved in regulating the speech of college staff is the case of Dambrot v. Central Michigan University (1993). This case brings into focus the particular difficulties of creating and enforcing codes regulating "hate" speech on college campuses. The plaintiff in this case was a college basketball coach who, in the locker room, used an ethnic slur in an alleged attempt to motivate his players. Once word of this incident became public the university faced numerous complaints and demonstrations and decided to take formal action against Dambrot for violating its "discriminatory harassment policy." Following a formal investigation, the university decided to not renew the coach's contract for the following year. The coach then initiated a lawsuit alleging a violation of his academic freedom rights.

The court considered several issues in Dambrot v. Central Michigan

University (1993). The two of greatest interest here are the question of Dambrot's First Amendment rights and the viability of the university's harassment policy. The court found that the policy was both overbroad and vague. The court also noted that the policy amounted to viewpoint discrimination and, due to the vagueness issue, was too subjective in its application. The court declared the entire policy unconstitutional and rendered it inoperable.

With regard, however, to Dambrot's academic freedom claims, the court found the actual speech was not a matter of public concern, under Pickering v. Board of Education (1968) and Connick v. Myers (1983), entitled to First Amendment protection. As such, by ruling the speech was merely a matter of private concern, the court found there was no need to evaluate the forum in which the speech occurred or balance the public interest of the speech against the employer's rights. In noting that Dambrot, as an at-will employee like Waters, had no property interest in his reappointment, the court found that the university was within its rights in ending Dambrot's employment. This was determined despite the invalidity of the policy originally used to reach that decision. In reviewing the decision the circuit court fully agreed with these findings (Dambrot v. Central Michigan University 1995). Since no academic freedom issue was implicated, Dambrot did not return as head coach. At the same time, Central Michigan University found it could no longer operate and enforce its discriminatory harassment policy.

This distinction may be made clearer by examining the case of Levin v. Harleston (1992). This case is also instructive since, like Jeffries v. Harleston (1993/1994), it involved a faculty member at CUNY. Though decided prior to Jeffries v. Harleston (1993/1994) and Waters v. Churchill (1994), it may serve to clarify the distinction between attempts to discipline tenured faculty and those directed toward administrative personnel. Michael Levin was a professor at CUNY. His academic viewpoints, expressed in three separate writings, were ultimately deemed by both students and administrators as racially demeaning to African-Americans. Following several years of such activities, CUNY began to experience considerable unrest. In violation

of college rules, demonstrations occurred outside of Levin's classroom and his classes were frequently disrupted. Levin's office was subjected to arson. Levin's attempts to receive relief and enforce college discipline were only partially successful, especially as the president and faculty senate both condemned Levin's speech.

Eventually CUNY took action against Levin, predicated solely upon his academic speech. Believing that his stated professional opinions might make some students uncomfortable or affect their academic progress, the college created "shadow sections" of Levin's courses and allowed students to transfer into them. The President of CUNY also created an *ad hoc* committee to review whether Levin's views affected his teaching ability. In creating the committee, the President of the university made it clear that the status of Levin's tenure was at issue. While recommending no action against Levin, the committee did establish guidelines that might, in the future, be utilized to discipline Levin for his speech.

Levin filed suit seeking injunctive relief. He claimed the "shadow sessions" had the effect of punishing him for protected speech activities and also deprived him without due process of his liberty interest in his academic reputation. The suit also objected to the chilling effect of the *ad hoc* committee's report. It was noted in the record that Levin had declined at least twenty opportunities to speak or write on his views while under the committee's scrutiny. The court found the "shadow sessions" violated Levin's First and Fourteenth Amendment rights. It also ruled that the actions of President Harleston and his *ad hoc* committee had an impermissibly chilling effect on Levin's academic freedom and speech. The court further noted that CUNY's actions were facially invalid since they were undeniably taken solely in reaction to Levin's protected academic speech. The court then enjoined CUNY from further action against Levin and required the college to enforce its rules preventing the disruption of Levin's classes and other disciplinary infractions of Levin's critics. On appeal, the circuit court essentially upheld the lower court's rulings (Levin v. Harleston, 1992).

In analyzing this case it is important to realize that CUNY was attempting to take action against Levin in

his role as a tenured professor, unlike Jeffries who was only disciplined in his role as an administrator. Nonetheless, given the fact that Levin's speech activities *did* create considerable disruption on campus, this ruling stands as a major defense of the concept of academic freedom, even when the speech activities clearly were offensive on the basis of racial implications. The focus was purely on the effects of his articles and not on their academic content or validity. The cumulative effect of these rulings is to demonstrate the inherent difficulty of controlling faculty speech within the academic realm. The purpose of academic freedom is to protect controversial thoughts and ideas. It is not difficult to see that many of these thoughts and ideas, when viewed in a personal light, will no doubt be offensive to some individuals.

Religion and Academic Freedom

Several recent cases have attempted to utilize the doctrine of academic freedom to permit the free expression of religious beliefs in the college classroom. Though this is an area of well settled law in the realm of primary and secondary education, these cases present new challenges in higher education. In some areas of higher education, courts have recently been more receptive to accommodating religious activities and viewpoints in the realm of higher education. However, in the realm of faculty academic freedom, the courts continue to be reluctant to extend their support to religious expression in the classroom.

Bishop v. Aronov (1990) is perhaps the best recent example of this principle. It also clearly demonstrates the conflict between the free expression protected under academic freedom and the limits of the establishment clause of the First Amendment. Bishop taught exercise physiology at the University of Alabama. During his lectures he would make occasional references to his own religious beliefs. He did not conduct any direct religious instruction or prayer in class. Eventually, Bishop also organized optional after-class meetings with students to discuss religious aspects of human physiology. Though the timing of the first of these sessions was close to exams, attendance was optional and did not affect students' grades. After several students

complained concerning these activities, the university sent Bishop a memorandum instructing him to cease these activities on the grounds they created the image of the state's endorsement of religion. As a public employee, Bishop was enjoined from advocating religious beliefs in the course of his public duties. Though he petitioned the university for the right to resume his activities, Bishop abided by the terms of the memorandum and discontinued his in-class and after-class religious activities.

Following his unsuccessful attempts to appeal the administration's memorandum within the university, Bishop took his complaint to the federal district court, alleging violations of his First Amendment rights of free exercise of religion and academic freedom. The court agreed with Bishop that his academic freedom had been restricted by the university. The court ruled that the university's restrictions were overbroad and vague. Ultimately, the court found the occasional interjection of Bishop's religious views into class discussions, and his holding of optional after-class discussions, did not violate the establishment clause while the university's attempt to ban these activities did violate Bishop's right to academic freedom.

However, the circuit court, on appeal, disagreed with this finding (Bishop v. Aronov, 1991). The circuit court found that the university classroom was not an open forum and that the university, given its power to control the curriculum, was within its rights in controlling the course content. The court disagreed that the memorandum had been vague and overbroad, noting that it was narrowly limited to those establishment clause concerns enumerated by the university. Instead, the court found that the university's restrictions were not directed toward Bishop's free exercise of religion, but rather at his teaching. The appellate court determined that the university had acted correctly, under the test proposed in Lemon (1971), in attempting to avoid the appearance that the state, through its employee, was endorsing certain religious beliefs. The court did not bar Bishop from organizing discussions of his beliefs totally outside of his role as professor. Rather, it found that his classroom comments and organization of after-class sessions, in his role as professor, did violate the Establishment

Clause and the university was well within its rights in curtailing these activities.

An even more difficult issue is raised by the assertion of academic freedom rights within private sectarian colleges and universities. In Killinger v. Samford University (1996), a federal court was asked by a professor to intervene in a case where a sectarian university limited his academic freedom as a member of the university's divinity school. Professor Killinger had claimed that he had been hired to promote liberality and diversity in Samford's divinity school. He noted that the will of the school's main benefactor had created the condition that the faculty represent a broad diversity of viewpoints within the "Protestant tradition." Despite these assertions, Samford had not allowed Killinger teaching assignments he was entitled to because his beliefs did not conform with the university's theological and philosophical positions.

The court concurred that academic freedom was a First Amendment right, normally enforceable under civil rights laws. However, the court noted that Congress, in passing various amendments to the civil rights acts, had created exceptions so that the government was not in the position of dictating the doctrines of sectarian institutions. As such, Killinger's right to academic freedom did not outweigh the legitimate First Amendment and statutory concerns of Samford University in upholding its sectarian mission and beliefs. The court left any remaining contractual issues to the jurisdiction of the state courts. The circuit court upheld this ruling noting that Congress, in passing Title VII, clearly intended federal courts to give "wide-berth" concerning what beliefs ". . .should or should not be taught in theology schools. . ." (Killinger v. Samford University, 1997).

Conclusions

Several conclusions may be drawn from the cases in this discussion. It is clearly easier to regulate the speech of certain public employees than others. While the full effects of the Waters decision remain to be seen, clearly academic freedom does not extend nearly so far with administrators and other at-will employees as it does with tenured faculty members. Under Waters, it is clear that the courts will continue to balance the First Amendment rights of such

employees with the need of employers to avoid disruption in the performance of their institutional functions. It is also clear that, when making such decisions, the government as employer is free to act without the full restraints of due process that might be accorded tenured employees. In particular, the employer is now free to act on what it perceives was said and on its reasonable expectations of disruption caused by the speech. At the same time, as Burnham v. Ianni clearly illustrates, even this doctrine is subject to limits.

When attempting to control the speech of tenured college faculty, administrators and policy makers must exercise extreme care. Generally, courts will refuse to accept any policies, regulations, or codes designed to limit First Amendment rights of speech and expression that are overly broad or vague. Likewise, the courts have resisted such policies if their enforcement is overly subjective in nature.

Even when such policies are clearly enumerated, there is no guarantee they will be upheld by the federal courts. Policies designed to protect certain individuals and groups from offensive speech, by their nature, create a conflict between desirable policy goals on the one hand and long-held constitutional rights on the other. As these recent cases demonstrate, courts are extremely hesitant to allow restrictions on speech if that speech can be demonstrated to have any academic merit. The courts, again, are reluctant to act as the tribunal of academic ideas and doctrines. Nor do they function to determine which methods represent the best approach to expressing these ideas.

The concept of academic freedom exists to encourage the discussion of controversial ideas and concepts. Given the increasing diversity of American society, which is reflected on the modern college campus, it is inevitable that many of these controversial ideas will cause offense to some segment of the campus population. Often times such speech will implicate issues of race, gender, ethnicity, or religion. It may well be that the best response to such objectionable speech is not to sanction the source of the speech but instead to join in the free debate which academic freedom engenders.

On the pragmatic side, when making efforts to control legitimate areas of concern, such as sexual harassment, policies should differentiate between harassing speech and expression that is of academic concern. Similar approaches should be applied toward