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## WHO BEARS THE COST OF HEALTH SERVICES?

A Review of *Cedar Rapids Community School District v. Garret F.*

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

In 1987 four year old Garret F. severed his spinal column while riding on the back of his father's motorcycle without a helmet. While the accident left Garret paralyzed from the neck down, his cognitive abilities and his speech were not impaired. The accident resulted both in Garret being confined to a motorized wheel chair, which he operates with mouth controls, and in Garret needing the continuous use of a ventilator to breath for him.

In 1988 Garret's parents enrolled him in regular education classes in the Cedar Rapids Community School District. During his year in Kindergarten, Garret's eighteen year-old aunt came into his classroom and provided him with physical assistance that ranged from suctioning his tracheotomy tube, to helping him with his lunch, to assisting him with the catheterization he required in order to urinate. During Garret's first through fifth grade years, 1989 to 1992, Garret's parents hired a nurse to assist him with these tasks during the school day. This enabled Garret to become a successful student. Then, in 1993, Garret's parents requested that the Cedar Rapids Community School District begin to pay for Garret's nurse, arguing that it was required as a related service under the Individuals with Disabilities Education Act (IDEA) as a **school health service**. The District declined to pay for Garret's nurse stating that the nurse was not a **school health service**, but a **medical service**, which is not required under the IDEA as a related service.

Garret's parents requested a hearing officer to settle this dispute with the Cedar Rapids school district. The Administrative Law Judge (ALJ) who decided Garret's case defined **medical services** as those services that can only be provided by a licensed physician, while **school health services** were defined as those services that can be provided by a nurse or other qualified school personal.<sup>1</sup> The nursing services that Garret required in order to attend school fell, the ALJ determined, under the heading school health service and thus, the IDEA did require the Cedar Rapids Community School District to pay for Garret's nurse as an educationally related service.

The Cedar Rapids Community School District appealed this decision to Federal District Court claiming that the one-on-one nursing that Garret required was too expensive and was more than the IDEA required under **school health service**. The District Court upheld the ruling of the ALJ. The school district then appealed to the Court of Appeals. The Court of Appeals used the two pronged test devised by the Supreme Court in *Irving School District v. Tatro*.<sup>2</sup> This test was developed for use in determining whether a service requested by a parent is a related service that a school district must provide under the IDEA. The first question of this two-pronged test asks whether a service is a supportive service. Is the service in question necessary for the student to receive an education? The second question of the two-pronged test asks whether the service requested is a medical service or a school health service. The Court of Appeals ruled against the school district by determining that 1) the supportive service of a nurse/attendant was necessary, for without it Garret could not attend school; and 2) that the ALJ was correct in determining that a nurse or other qualified person, short of a

licensed physician, would be considered a **school health** service and not a **medical service**.

The Cedar Rapids Community School District appealed this decision to the United States Supreme Court. In its appeal to the Supreme Court the district argued that a new four-pronged test should be used to replace the two-pronged test set out by the Court in *Tratro*. Using the test proposed by the Cedar Rapids Community School District, a school would only be responsible for the cost of a school health service if: 1) the care required was intermittent and not continuous; 2) the care could be provided by existing school personnel; 3) the cost of the care was not prohibitive; and 4) the potential consequences of not providing the care correctly would not pose a liability concern for the district. The Supreme Court rejected the district's proposed test, stating that the four-pronged test failed to address the difference between what constitutes a medical service as opposed to what constitutes a school health service. The Court acknowledged that the district might have legitimate financial concerns in providing such care as Garret F. required, however, the Court stated that its role was to interpret the IDEA as written by Congress. Related services, as defined in the IDEA, do not have a cost definition, thus, the Court stated that if it accepted the Cedar Rapids school district's four-pronged test they would be engaging in making law, which is not their role. The Supreme Court agreed with the lower court rulings that, as Garret F. needed the requested service in order to attend school and as the service did not require the

skills of a medical doctor, the Cedar Rapids Community School District was required to provide this service for Garret, under the related services provisions of the IDEA.

### Implications for Administrators

The implication from *Garret F.* for school districts is pretty grim. The Supreme Court has been consistent in its interpretation of the related services section of the IDEA, as defined in *Tratro*. What this means for school districts is that they are required, under the current IDEA, to provide any health service, short of a physician, if a student legitimately needs the service in order to attend school. This needn't be as expensive as it sounds. In Garret F.'s case his eighteen year-old aunt provided his needed health services during his first year in school. The care he needed did not require more training than what your average teachers-aid could do, however, there are liability concerns.<sup>3</sup> If a school district does not appoint an adequately trained individual to provide health care such as catheterization, they would be financially responsible if a mishap should occur, thus, the fourth prong of the Cedar Rapids Community School District's four-pronged test. The easiest way for a school district to limit its liability in such a case as Garret F., is also the most expensive. Hire a registered nurse (RN). School districts in situations such as Cedar Rapids Community School District found itself with Garret F. are caught between the proverbial rock and a hard place. The Court has determined that a school district must provide the health services needed for a severely medically impaired child to attend its schools. On the one hand, if the district tries to reduce cost by using an appropriately trained aid or other personal, they open themselves up to future liability ex-

penses if something unfortunate should occur. If the district is cautious and hires a RN, then they must absorb this expense and make personnel cuts elsewhere. While this is an unpopular choice, the latter is recommended until such time as Congress has been persuaded to redefine related services to exclude such costly medical care. Another possible action of Congress that would assist districts with students like Garret F. would be to amend the Social Security Act to allow for either state participation in the costs of serving such children as Garret F. or for the extension of Medicaid waivers to these children.<sup>4</sup> Unfortunately, until such time as Congress takes such actions, districts are responsible for absorbing such cost on their own.

<sup>1</sup> The IDEA only requires that a district use medical services (i.e. a licensed physician) for diagnostic and evaluative reasons.

<sup>2</sup> *Irving School District v. Tatro*, 468 U.S. 883 (1984).

<sup>3</sup> In the *Garret F.* case this could not occur, as Iowa has a nurse practice act that requires districts to hire a registered nurse to deliver services such as catheterization.

<sup>4</sup> Garret F. did not qualify for Medicaid because of a trust fund related to his accident.

## **WHO IS ACTUALLY BEHIND THE POSTING OF THE TEN COMMANDMENTS IN THE PUBLIC SCHOOLS?**

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

On June 18, 1999 the United States Congress passed the Juvenile Justice Bill on a vote of 287 to 139. The bill was endorsed by the White House and contained a variety of provisions dealing with issues from the age at which a juvenile may be tried as an adult to curbing violence in the entertainment industry. Included in the bill, however, was a provision which would allow schools and government buildings to post the Ten Commandments. According to proponents of the bill, posting the Ten Commandments would be the start of bringing morality and good values, along with the Judeo-Christian God, into the public realm. According to Republican Majority Whip Tom DeLay, "The focus must be returned to God. Our nation will only be healed through a rebirth of religious conviction and moral certitude."<sup>1</sup> Christian Coalition President Pat Robertson, who spent the day meeting with Senate Republican leaders discussing family issues and the 2000 elections, described lawmakers as being courageous for stressing morality. "Allowing the Ten Commandments to be posted on a schoolhouse wall is a commonsense measure that reaffirms the traditional moral values that our nation was built upon."<sup>2</sup>

This all being said, however, it leads one to wonder what ever happened to the separation of church and state as envisioned by the founding fathers – the individuals who built the ideology of our nation? By posting the Ten Commandments, which are in actuality, nothing more than the religious tenets of certain western religions, in state owned buildings

is that not favoring one religion over another?<sup>3</sup> In the 1980 case of *Stone v Graham*<sup>4</sup> the United States Supreme Court was quite clear in its statement that posting the Ten Commandments was a violation of the Establishment Clause of the First Amendment.

### *Stone v Graham*

In 1980, in a per curiam opinion, the United States Supreme Court declared that a Kentucky statute requiring the posting of the Ten Commandments, which would be purchased by private funds rather than state tax money, on the wall of each public school classroom was unconstitutional as violating the Establishment Clause of the First Amendment to the Federal Constitution.<sup>5</sup> In other words, the Court was so convinced of the error of the Kentucky statute that it made a decision without every having input (oral arguments and legal briefs) from the parties involved.<sup>6</sup> The state trial court had upheld the statute "finding that its 'avowed purpose' was 'secular and not religious,' and that the statute would 'neither advance nor inhibit any religion or religious group' nor involve the State excessively in religious matters."<sup>7</sup> The Kentucky Supreme Court affirmed. The United States Supreme Court reversed.

In reversing the Kentucky Supreme Court, the United States Supreme Court relied on the Lemon Test. This Court has announced a three-part test for determining whether a challenged state statute is permissible under the Establishment Clause of the United States Constitution:

"First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally the statute must not

foster ‘an excessive government entanglement with religion.’” *Lemon v Kurtzman*, 403 U.S. 602, 612-613 (1971).”<sup>8</sup>

Applying this test, the Court found that it was unable to pass the first prong. “We conclude that Kentucky’s statute requiring the posting of the Ten Commandments in public school rooms has no secular legislative purpose, and is therefore unconstitutional.”<sup>9</sup>

Kentucky’s claim that the disclaimer, which was included in small print on each copy of the Ten Commandments, did not sway the Court. Relying on another landmark decision, *Abington School District v Schempp*<sup>10</sup> in which the Court did not take at face value the claim of the state that Bible reading and prayer had a secular purpose, the Court stated that “[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.”<sup>11</sup> In doing so, the Court took notice of the fact that combined with possible secular matters such as honoring one’s parents, killing or murder, adultery, stealing, false witness, and covetousness, the first part of the Ten Commandments deal exclusively with religious duties such as worshipping the Lord God alone, avoiding idolatry, not using the Lord’s name in vain, and observing the Sabbath.<sup>12</sup>

In almost every respect, the legislation found unconstitutional in *Stone* is an exact match with the legislation passed by Congress as part of the Juvenile Justice Bill. Consequently, the possibility of such legislation passing constitutional muster is marginal at best. Why, then, did Congress pass such obviously unconstitutional legislation? To understand this question and

begin to answer it, one needs to take a look at a small, but very powerful force, behind much of current day school reform. Many individuals, educators and non-educators alike are under the belief that current school reforms, especially those which have occurred since the publication of *A Nation at Risk* in the 1980s have been solely to improve education. While this has been the motive for some, for a group loosely known as the Religious Right, improving education per se has not been the name of the game.

Public school reform, which has been at the forefront of educational rhetoric and debate for several decades, was spotlighted in the 1980s during the Reagan administration after the publication of *A Nation at Risk*. Reform has come in a variety of forms including school choice, changes in the curriculum and teaching methodology, and new methods of evaluation with the purpose of increasing accountability. Throughout the United States, national organizations such as the Christian Coalition (Virginia Beach, Virginia), Citizens for Excellence in Education (Santa Ana, California), the Eagle Forum (Afton, Illinois), and Focus on the Family (Colorado Springs, Colorado), have been formed by political/religious conservatives to fight against various aspects of public school reform. These organizations often reach out to local groups of “concerned citizens” and offer financial and legal assistance in their battles with school systems at state and local levels.<sup>13</sup> For example, Mel and Norma Gabler have developed a system of opposition that aids parents and rightist groups throughout the country in their attempts to challenge educational policies and practices and to either change the content of books or have them removed from schools.<sup>14</sup>

The “Christian Right” has become an increasingly powerful movement in the United States.<sup>15</sup> Public schools are supposed to be free



of sectarian control, but Religious Right groups and their local affiliates are conducting an unrelenting campaign of harassment and intimidation against public education all over the nation; a campaign which includes repeated and costly litigation.<sup>16</sup> From their national headquarters Pat Robertson, Phyllis Schlafly, Donald Wilmon, Robert Simonds, and others manipulate an army of followers who, in turn, make life miserable for public school teachers and administrators.<sup>17</sup> Their targets include various areas of educational reform, most notably Outcome-Based Education and curricular content.<sup>18</sup>

Fundamentalists don't insist that everyone adopt their religious beliefs, as should be the goal of any evangelical religion. Instead, they seek to impose social norms or even legal ones, if possible, to make everyone behave like a "Fundamentalist"; their goal being power and control rather than conversion and salvation. It is the opinion of the Religious Right that American society used to impose the appropriate moral and social norms, but modernity and progress have pushed the nation from its rightful path. The most glaring examples of this "fallen society" in the eyes of the Religious Right are the public schools.

The battle has been brewing since the early 1980s when the Moral Majority, with Jerry Falwell at its head, vowed to bring "atheist" public education to an end, replacing it with a free enterprise, Christian school system.<sup>19</sup> The Christian Coalition has a number of allied groups dedicated to "taking over the public school system."<sup>20</sup> Curricula which provides for children from diverse backgrounds (such as the Rainbow Curriculum adopted by some sub-districts in New York City) are perceived as "pro-homosexual," promoting "New Age Religion" (an advanced stage of secular humanism), and persecuting Christians. Efforts by public schools to restruc-

ture or transform, and interests in the "whole child" infringes on the family by introducing ideas and values inconsistent with those of the family and church.<sup>21</sup>

### Who Are the "Religious Right?"

The "Religious Right" is really a blend of two different groups, with basically different political agendas, who have found common ground on which to build an alliance. One group is comprised for individuals who hold politically and socially conservative views; often referred to as either the "old" right. Conservative American ideology is comprised of three main strands of political thought: economic libertarians, anti-Communists, and social traditionalists.<sup>22</sup> The focus for economic libertarians is the protection of economic and personal liberty. Anti-Communists' major concern is to stem the growth and strength of military force in socialist and communist countries. While both of these strands are important in their own right, it is the third strand, social traditionalists, which have created the largest impact within the political right as it regards public schools.

Social traditionalists focus on the social and moral welfare of U. S. society.<sup>23</sup> Social problems arise from moral failings of individuals; "sin." For example, the existence of gender discrimination against women is because women, by going into society and challenge the power and authority of men, have failed to fulfill their "role" as defined in the Bible. People find themselves living below the poverty line, not because of economic or social circumstances but because they lack faith and have made bad moral decisions. To "correct" these moral failings (sin) social traditionalists look to historic social and cultural institutions, such as organized religion, to provide the order which they feel is lacking.<sup>24</sup>

The desire to turn to a stable social institution which facing the uncertainty of change is not a new phenomenon. Throughout history it has been very common for individuals, when faced with rapid societal fluctuation and change, to look for something to cling to so as to restore “order.” Organized religion has always provided that element; willingly filling the vacuum with arbitrarily imposed proclamations and “order.” Following that historical pattern, social traditionalists, when faced with societal change do not look at the bigger economic and political picture, nor do they depend on a strong government because state regulation is viewed as potentially tyrannical.<sup>25</sup> Instead, specific American traditions and institutions are viewed as the vehicles to ensure a just society, especially those that reflect the teachings of institutionalized Christianity.<sup>26</sup>

The second group, which combined with social traditionalists to comprise what is commonly called the “new” right, is fundamentalist Christians. The roots of fundamentalist Christianity date back to the mid-to-late nineteenth century. Between 1910 and 1915 a treatise, *The Fundamentals*, was published which contained the articles of faith for this particular sect of Christianity. The writers of *The Fundamentals* stressed personal salvation, biblical infallibility, missionary work, rejected the scientific method, and attacked both Roman Catholicism and Mormonism as heretical.<sup>27</sup> The overriding message of this work was that Fundamentalist Christians should stay out of politics.<sup>28</sup> With the exception of the 1920s and the controversy over public schools teaching evolution, most American fundamentalists steadfastly shunned political involvement.<sup>29</sup> Despite impassioned anticommunist sermons by Reverend Carl McIntire and Billy Graham in the 1950s and 1960s, the Fundamentalist mainstream, represented by the Bob Jones dynasty

in South Carolina, avoided politics and did not hesitate to criticize politically minded preachers.<sup>30</sup>

What prompted fundamentalists to shed their self-imposed isolation was the seemingly rapid change in American social roles and mores during the 1960s and 1970s.<sup>31</sup> Many Christian fundamentalists saw this rapid social change as a threat to their way of life which, in current political parlance, has been translated as a threat to “family values.” Moreover, this change also posed a threat by creating a “secular” society, which questioned the very foundations of Christianity. “Involvement with political issues and campaigns, and the larger secular world became a religious imperative.”<sup>32</sup> With the election of Jimmy Carter, a president who made frequent references to his own fundamentalist beliefs, including the mentioning that he was an evangelical and a “born-again” Christian, the entrance of fundamentalists into the political arena was legitimized.<sup>33</sup>

It was the 1973 United States Supreme Court decision on abortion, *Roe v Wade*, which was “the key event in waking Jerry Falwell and other fundamentalists from their apolitical slumbers.”<sup>34</sup> Traditionally, abortion and anti-abortion movements had been considered the domain of the Roman Catholic Church; evangelical Christians had stayed out of the fray. In June 1979, the Moral Majority, perhaps the largest and most conspicuous group of the religious right, became an official entity.<sup>35</sup> “Established after a May 1979 meeting, its founders included Robert Billups (former director of National Christian Action Coalition; a group which was particularly engaged in efforts to prevent the IRS from interfering in religious schools), Howard Phillips (Conservative Caucus), Richard Viguerie, Ed McAteer (Christian Roundtable), Paul Weyrich (Free Congress),

and, most significantly, Jerry Falwell of the Thomas Roads Baptist Church in Lynchburg, Virginia.”<sup>36</sup> Members of Falwell’s staff at the Thomas Road Baptist Church “begged him not to do it, that he would be departing from the Gospel, he’d be wandering off the path, it’d be the worst thing he could do.”<sup>37</sup>

Undaunted, Falwell forged ahead, characterizing the Moral Majority as “pro-life, pro-family, pro-moral, and pro-American.”<sup>38</sup> The agenda of the group was outlined as consisting of three parts: registration, information, and mobilization. The first thrust was to make sure that the estimated eight million evangelical Christian were registered to vote. Next, under the heading of information, would come the “grassroots” organization of these individuals to speak with one voice on issues such as the Equal Rights Amendment, school desegregation, abortion, and defense spending.<sup>39</sup> “Falwell recognized that riding into the political arena in such a visible vehicle constituted a direct challenge to fundamentalist pietism, which traditionally manifested itself not only in disciplined devotional practice and strict standards of personal morality, but also in a general stance of separation from “the world.”<sup>40</sup> “[The Moral Majority’s] political involvement was a stunning violation of one of the most stringent fundamentalist injunctions, yet many of the more ambitious preachers believed that they could find common ground with other like-minded Americans in hopes of reconstructing a Christian nation.”<sup>41</sup>

Although the Moral Majority was the most visible politicized fundamentalist group, other influential individuals and organizations had grown-up around specific social and moral issues of the time. One good example of such an individual and the group she leads is Phyllis Schlafly and the Eagle Forum, formed in Afton,

Illinois in response to the Equal Rights Amendment. “Early in 1972, Phyllis Schlafly began to oppose the [Equal Rights] amendment in her *Phyllis Schlafly Report*. In 1975, she founded the Eagle Forum, a women’s organization whose primary purpose was to fight the amendment’s ratification [in Illinois],”<sup>42</sup> Another strong voice for the politicized fundamentalist right who joined the cause during the time when the Equal Rights Amendment was being considered for ratification by the states is Beverly LaHaye, “who later founded and now heads Concerned Women for America, with a membership and budget far larger than NOW’s.”<sup>43</sup> Other such individuals include Robert Billings (one of the pioneers of the Christian Day School Movement and author of a book, *A Guide to the Christian School*, later establishing National Christian Action Coalition)<sup>44</sup>, Paul Weyrich (with monetary assistance from Joseph Coors established the Heritage Foundation, a policy analysis “think-tank”, and later established a political action committee called the Committee for the Survival of a Free Congress), religious broadcasters Pat Robertson (*The 700 Club*) and Jim Bakker (*PTL Club*), and Connaught “Connie” Marshner (a self-proclaimed government “watch-dog” who edited a newsletter, the *Family Protection Report*, the purpose being to monitor the impact of government policies on the growing “pro-family” movement as it had started calling itself in 1971).<sup>45</sup>

In late 1989, Pat Robertson with advice from Charles Stanley, D. James Kennedy, Beverly LaHaye, Marlene Elwell, James Muffett, and Lori Packer, among others, met with Ralph Reed, a heretofore politically active College Republican, to discuss how to form a grassroots coalition which could be used to influence national republican politics. The organization which rose from this meeting was the Christian

Coalition, inspired by Pat Robertson but led by Ralph Reed. The first order of business was to find members. While using the mailing lists compiled during Robertson's campaign for the presidency was a start, Reed realized that much more was going to be needed. "To generate a response, Reed relied on one of the Christian Right's most dependable ploys: outrage its constituency with sensational accounts of offenses against religion and morality committed by homosexuals, liberals, or the government."<sup>46</sup> It worked. The response was significant.

It was within the strategies used by the Christian Coalition where differences between the "old" and "new" religious right became most apparent. On some basic issues, both the "old" and "new" religious rights shared common ground. Both groups opposed communism, supported free enterprise and limited government, and respect (although they do not always practice) religion and "traditional values." "But while the Old Right continues to emphasize anti-communism and free enterprise, the New Right has learned how to emphasize themes that are more populist than conservative: the fear and resentment of the Eastern "establishment," defense of family and conventional morals, popular control over schools and churches."<sup>47</sup> Other differences appear in their methods of operation.

The "old" religious right was highly intolerant of other social traditionalists (non-fundamentalist Christians) in its rhetoric and method of operating. The "new" religious right found it expedient to "moderate both their tone and rhetoric"<sup>48</sup> when dealing with other social traditionalists who, through coalitions may be able to further the political goals of the politicized fundamentalists. For example, the Roman Catholic Church, historic foe of fundamentalist Christians, proved to be helpful allies in the religious right's crusade against abortion. Another difference is the "new" religious right's

favor of "charismatic and telegenic leaders"<sup>49</sup> who are able to soften their rhetoric such as to make their goals appear more palatable to a larger audience; individuals who are masters of "spin control."

The "new" religious right didn't hesitate to prey on any economic ills being felt by certain segments of the population. "In claiming America was being (and would be) punished for having lost its moral foundation, the Religious Right brilliantly exploited the Christian notion of sin."<sup>50</sup> "Their subsequent political strategy was tailored at redeeming their definition of lost morality in a "Christian nation," replete with a list of the "usual suspects" (secular humanists, single mothers, feminists, misguided liberals, gays and lesbians, etc.)<sup>51</sup>; all who have obviously fallen from grace. Given that many Americans were suffering from profound economic woes beginning in the mid-1970s (stagflation), the rhetoric of the religious right that "woe only befalls evildoers or those who countenance evil"<sup>52</sup> provided the answer; proclamations and "order." Regardless that the economic difficulty being experienced by these individuals was the result of global economic troubles totally outside of their sphere of influence, the religious right all but guaranteed them that, if they would support the idea of a "Christian Nation" (i.e. support both monetarily and with votes those candidates picked by the religious right) that God would reward them. The schools were a good place to start.

The visibility and political influence of the religious right has declined since the 1980s. "The politicized Evangelicals and anti-abortion Catholics who together formed the Religious Right of the eighties have now been absorbed into other groups, particularly neoconservative institutes."<sup>53</sup> The reasons for this decline have been several. The Moral

Majority has essentially collapsed. The image of the religious right was devastated by exposure of the financial misdeeds and other crimes committed by Jim Bakker and the sexual misconduct by Jimmy Swaggart.<sup>54</sup> Most importantly, however, has been the loss of autonomy of the religious right through incorporation into beltway activists and neoconservative front groups.<sup>55</sup> The fact that the religious right has weakened does not mean that it has disappeared. To the contrary, the religious right has weathered the storms and emerged as a bona fide political movement, encouraging social traditionalists at state and local levels, particularly in the area of public school policy.<sup>56</sup>

In the view of the religious right, “public schooling itself is a site of immense danger.”<sup>57</sup> “In the words of conservative activist Tim LaHaye, “Modern public education is the most dangerous force in a child’s life: religiously, sexually, economically, patriotically, and physically.”<sup>58</sup> Consequently, the religious right has taken it upon themselves to lead a “religious crusade” to return Christianity to the schools and the education of the young to their parents, specifically to the father, as they believe it is mandated by the Bible. For large numbers of parents and conservative activists, “discussions of the body, of sexuality, or politics and personal values, and of any of the social issues surrounding these topics, are a danger zone. To deal with them in any way in school is not wise. But if they are going to be dealt with, these conservative activists demand that they must be handled in the context of traditional gender relations, the nuclear family, and the “free-market” economy, and according to sacred texts like the Bible.”<sup>59</sup>

In the name of this crusade, the religious right “has become an increasingly powerful movement in the United States, one that has had major effects on educational policy delibera-

tions, curriculum, and teaching.”<sup>60</sup> “Throughout the United States, national organizations have been formed by conservatives to fight against what counts as “official knowledge” in schools.”<sup>61</sup> These national organizations provide funding, legal support, and guidance to supposed “grassroots” organization to enable “concerned citizens” to do battle with local school districts on these issues.

Coming back to the issue of the Ten Commandments, it was these “grassroots” organizations which were very successful in electing members to Congress throughout the 1990s. In turn, owing their seats to the Religious Right, these members of Congress felt compelled to “return God to the public schools.” Having been unsuccessful for several years, conservative Republicans had their backs to wall. They had to show their “grassroots” support that they were doing as they promised.

The timing of attaching the Ten Commandments issue to the Juvenile Justice Bill was not coincidence. The Christian Coalition has seen its power on Capitol Hill gradually diminishing since around the time of the departure of its original Executive Director, Ralph Reed. If it wishes to be successful in influencing local, state and federal elections, especially the election of the next President of the United States, that trend must be halted. Attempting to get a “prayer amendment” to the federal constitution has been ignored at best. Praying in school to most citizens, conservative and liberal alike, is too sensitive. While the general concept of praying in school is acceptable, fear of which denomination would end up with power over the actual prayer being said is a cause of too much concern, even for the most conservative Christian. Posting the Ten Commandments, however, is not as sensitive an issue to those supporting such a mandate.

The final piece of the puzzle fell into place with the shooting at Columbine High School in Colorado. The general public was outraged at this seemingly senseless violence in the public schools. What better public relations than to pass a juvenile justice bill which would “get tough” on those elements which certain factions of the general public feel are to blame for the “moral decline” in America. Moreover, where better to use the tried and true political trick of hiding controversial issues within a widely supported bill.<sup>62</sup> Concerns about constitutionality doubtfully were ever considered. The public relations move had already been made. Now those Congressmen in need could return in good conscious to their “grassroots” supporters and claim that they had fought the good fight but it was those lawless atheists on the Supreme Court who had kept God away from the citizens.

### Conclusion

Although a large percentage of American citizens identify themselves as being Christian, only a small percentage of that group claims to agree with the beliefs of the Religious Right and actually work to further their agenda.<sup>63</sup> The Religious Right has been overwhelming unsuccessful in front of state and federal courts; especially appellate and supreme courts. Yet, former Deputy Secretary of Education, Diane Ravich, describes this situation of cultural unrest as the “great school wars.” Public schools have started self-censoring materials, teaching methods, and activities so as not to raise the ire of the Religious Right.<sup>64</sup> The effect which the vocal minority, falling under the heading of the Religious Right, has had on school reform through their system of organizing local citizens by using anxiety producing misinformation is of greatest importance for today’s educator. When their

ideas and theories are put to the test of a courtroom, they do not fair well at all. Still, the Phyllis Schlafly’s, the Ralph Reeds, and the LaHayes continue, undaunted, to spread their propaganda about the condition of public education and the purposes behind public school reform in an attempt to gain political power and control.

The question is really not about religion but about who will decide the education of America’s youth. Thomas Jefferson was emphatic that in order to preserve the fledgling democracy for which we had fought so hard, an educated populace was crucial. Gradually states established the American system of public education; from private education, to grammar schools, to the common schools on which current elementary and secondary education is based. That system of free public education is now being threatened by a group who would not return education to its “roots” as they would have you believe, but who would institute control of both form and content of those schools so as to promote their narrow ideology of what is moral and good, regardless of whether such policy was in the best interest of the students. Politicized fundamentalists have no desire to actually proselytize and win converts. In their minds they, through their literal interpretation of the Bible, already have the divinely inspired answers. The job for the rest of society is merely to follow their lead and do what they wish; power and control, not conversion and salvation has become the ultimate goal.

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## Endnotes

<sup>1</sup> J. Jennings Moss. ABCNEWS.com. Washington, June 18, 1999.

<sup>2</sup> Id.

<sup>3</sup> Not only are the Ten Commandments tenets of only Christian and Jewish faiths, but even those faiths have recorded the commandments differently. Therefore, when the Congress speaks of posting the Ten Commandments does it mean those adhered to by Jews, Catholics, or Protestants?

<sup>4</sup> *Stone v Graham*, 499 U.S. 39 (1980).

<sup>5</sup> The statute provided in its entirety:  
“(1) It shall be the duty of the superintendent of public instruction, provided sufficient funds are available as provided in subsection (3) of this Section, to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high.

“(2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: ‘The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.’

“(3) The copies required by this Act shall be purchased with funds made available through voluntary contributions made to the state treasurer for the purpose of this Act.” 1978 Ky. Acts, ch. 436, sec. 1 (effective June 17, 1978), Ky. Rev. Stat. Sec. 158.178 (1980).

<sup>6</sup> Although the opinion was *per curiam*, it was obviously not written by Justices Blackmun,



Stewart or Rhenquist, all of whom dissented. Chief Justice Blackmun felt that the case should have been granted certiorari and given plenary consideration. (449 U.S. at 43). Justice Stewart dissented from the reversal of the Kentucky courts which, in his opinion, applied correct constitutional criteria in reaching their decisions. (449 U.S. at 43). Justice Rhenquist, the most conservative of the dissenting justices went into much greater detail in his dissent. He felt that the Court was out of line in summarily rejecting the secular purpose for the legislation which had been articulated by the courts in Kentucky. "The Court's summary rejection of a secular purpose articulated by the legislature and confirmed by the state court is without precedent in Establishment Clause jurisprudence. This Court regularly looks to legislative articulations of a statute's purpose in Establishment Clause cases and accords such pronouncements the deference they are due." (499 U.S. at 43-44). Rhenquist goes on to state, "The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin. This Court has recognized that "religion as been closely identified with our history and government," . . . I therefore dissent from what I cannot refrain from describing as a cavalier summary reversal, without benefit of oral argument or briefs on the merits, of the highest court of Kentucky." (499 U.S. at 45-47).

<sup>7</sup> 499 U.S. at 40.

<sup>8</sup> *Id.* at 40.

<sup>9</sup> *Id.* at 41.

<sup>10</sup> *Abington School District v Schempp*, 374 U.S. 203 (1963). In *Abington* the Court held unconstitutional the daily reading of Bible verses and the Lord's Prayer in the public schools

despite the school district's assertion of such secular purposes as "the promotion of moral values, the contradiction to materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." (499 U.S. 39, 41).

<sup>11</sup> 499 U.S. at 41.

<sup>12</sup> *Id.* at 42-43. Notice should also be taken of those items which the Court labeled as secular such as adultery and covetousness. An argument could be made that such items fall much closer to religious tenets than to simply moral behavior necessary for the survival of a democracy.

<sup>13</sup> Michael W. Apple, *Cultural Politics and Education*. (New York: Teachers College Press, 1996), p. 43.

<sup>14</sup> *Ibid.*, p. 43. Mel and Norma Gabler are Texans who have taken it as their mission to critique textbooks in light of their conservative religious orientation. They have had such influence in the textbook publishing industry because of the weight which their home state of Texas, which purchases textbooks on a state-wide basis, has on the volume of textbooks sold nationally.

<sup>15</sup> Joan Delfattore, *What Johnny Shouldn't Read*. (New Haven: Yale University Press, 1992).

<sup>16</sup> Richard P. Manatt, *When Right is Wrong: Fundamentalists and the Public Schools*. (Lancaster, PA: Technomic Publishing Company, 1995), p. 2.

<sup>17</sup> *Ibid.*, pp. 5-6. Pat Robertson is affiliated with the Christian Coalition, Phyllis Schlafly the Eagle Forum, Donald Wilmon the,

and Robert Simonds the Citizens for Excellence in Education.

<sup>18</sup> One curriculum which was especially attacked in repeated litigation was the *Impressions* reading series which was alleged to, among other things, attack the Christian religion and promote Satanism

<sup>19</sup> Richard P. Manatt, *When Right is Wrong: Fundamentalists and the Public Schools*. (Lancaster, PA: Technomic Publishing Company, 1995), p. 31.

<sup>20</sup> *Ibid.*, p. 36.

<sup>21</sup> *Ibid.*, p. 36.

<sup>22</sup> William L. Boyd, Catherine A. Lugg., and Gerald L. Zahorchak., "Social Traditionalists, Religious Conservatives, and the Politics of Outcome-Based Education: Pennsylvania and Beyond." *Education and Urban Society*, Vol. 28, No. 3, May 1996, p. 348. See also Catherine A. Lugg, *For God and Country: Conservatism and American School Policy*. (New York: Peter Lang, 1996); Paul Gottfried., *The Conservative Movement* (Rev. ed.). (New York: Twayne, 1993); J. L. Himmelstein. "The New Right." In R.C. Liebman & R. Wuthnow (Eds.), *The New Christian Right* (pp. 15-30). (New York: Aldine, 1983); and G. H. Nash. *The Conservative Intellectual Movement in America: Since 1945*. (New York: Basic Books, 1976).

<sup>23</sup> Boyd, p. 438.

<sup>24</sup> Boyd, p. 349.

<sup>25</sup> Boyd, p. 348-349.

<sup>26</sup> Boyd, p. 349.

<sup>27</sup> Catherine A. Lugg, *For God and Country: Conservatism and American School Policy*. (New York: Peter Lang, 1996), p. 21-22.

<sup>28</sup> Lugg, C., p. 22. See also Ralph Clark Chandler, "The Wicked Shall Not Bear Rule: The Fundamentalist Heritage of the New Christian Right," in *New Christian Politics*, David G. Bromley, Anson Shupe, eds., (Macon, GA: Mercer University Press, 1984), p. 43

<sup>29</sup> Boyd, p. 349. See also David Snowball, *Continuity and Change in the Rhetoric of the Moral Majority*, (New York: Praeger, 1991).

<sup>30</sup> Paul Gottfried, *The Conservative Movement: Revised Edition*. (New York: Twayne, 1993), p. 102.

<sup>31</sup> Lugg, C., p. 22.

<sup>32</sup> Boyd, p. 349. See also Catherine A. Lugg, *For God and Country: Conservatism and American School Policy*. (New York: Peter Lang, 1996).

<sup>33</sup> Boyd, p. 349. While Jimmy Carter was known to be a religious man, very active in the Baptist Church, he also peppered his campaign speeches with stories of his boyhood on a peanut farm in Plains, Georgia, "of the comfort and stability he had derived from always knowing where his mama and daddy were and being able to turn to them if he had a problem, . . ." [William Martin, *With God on Our Side*. (New York: Broadway Books, 1996), p. 148].

<sup>34</sup> Gottfried, p. 102.

<sup>35</sup> William Martin, *With God on Our Side*. (New York: Broadway Books, 1996), p. 200.

<sup>36</sup> Gottfried, p. 102.

<sup>37</sup> Martin, p. 200.

<sup>38</sup> Martin, p. 201. “Similar lists often added pro-Israel, a reflection of the dispensationalist premillennial view that a complete restoration of the nation of Israel, including the rebuilding of the temple, is a prerequisite to the Second Coming.” Martin, p. 201.

<sup>39</sup> It has been very difficult to some to understand how a movement can be a local, “grassroots” movement when the issues and methodology are orchestrated from a national organization.

<sup>40</sup> Martin, p. 201.

<sup>41</sup> Boyd, p. 349. This would be quite a feat considering that the United States of America, by its own admission never was a Christian nation.

<sup>42</sup> Martin, p. 162.

<sup>43</sup> Martin, p. 164.

<sup>44</sup> Martin, p. 169.

<sup>45</sup> Martin, p. 175. Not surprisingly, many of these names appeared in the formation of the Moral Majority.

<sup>46</sup> Martin, p. 303.

<sup>47</sup> Gottfried, p. 98.

<sup>48</sup> Boyd, p. 349.

<sup>49</sup> Boyd, p. 350.

<sup>50</sup> Boyd, p. 350.

<sup>51</sup> Boyd, p. 350.

<sup>52</sup> Boyd, p. 350.

<sup>53</sup> Gottfried, p. 104.

<sup>54</sup> Gottfried, p. 104.

<sup>55</sup> Gottfried, p. 104.

<sup>56</sup> Boyd, p. 350.

<sup>57</sup> Apple, p. 43.

<sup>58</sup> Apple, p. 43.

<sup>59</sup> Apple, p. 46.

<sup>60</sup> Apple, p. 43.

<sup>61</sup> Apple, p. 42-43.

<sup>62</sup> It needs to be remembered that the Juvenile Justice Bill passed overwhelming, garnering most of the Republican vote along with the votes of 80 Democrats and White House approval.

<sup>63</sup> Richard P. Manatt, *When Right is Wrong: Fundamentalists and the Public Schools*. (Lancaster, PA: Technomic Publishing Company, 1995), p. 128.

<sup>64</sup> *Ibid.*, p. 123.

## UPDATE ON STUDENT-TO-STUDENT SEXUAL HARASSMENT

*Davis, as next of friend of LaShonda D. v Monroe County Board of Education et al.*

No. 97-843. Argued January 12, 1999—Decided May 24, 1999

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

With its decision on May 24, 1999 in the case of *Davis v Monroe County Board of Education*<sup>1</sup>, the United States Supreme Court ended the controversy regarding the applicability of Title IX to student-to-student sexual harassment.

### Facts of the Case

The plaintiff in the case, LaShonda, was a fifth grade student at Hubbard Elementary School in Monroe County, Georgia. Starting in December 1992 a classmate of LaShonda's, G.F., started to sexually harass the plaintiff through vulgar and suggestive statements and gestures.<sup>2</sup> This behavior continued for several months. During this period of time LaShonda reported the behavior to her classroom teacher, her mother, the physical education teacher and another classroom teacher. LaShonda's classroom teacher assured the plaintiff's mother that the school principal had also been "informed of the incidents."<sup>3</sup> The incidents finally ceased in mid-May when G.F. was charged with, and pled guilty to, sexual misconduct.

Moreover, LaShonda was not the only girl complaining about G.F. "At one point, in fact, a group composed of LaShonda and other female students tried to speak with Principal Query about G.F.'s behavior"<sup>4</sup> but were denied access to the principal by a teacher. Because of the harassment, LaShonda's grades suffered and she had gone so far as to write a suicide note. During this time, no disciplinary action was taken against G.F. Nor was any attempt made to separate G.F. and LaShonda. "On the contrary,

notwithstanding LaShonda's frequent complaints, only after more than three months of reported harassment was she even permitted to change her classroom seat so that she was no longer seated next to G.F."<sup>5</sup>

On May 4, 1994 petitioner filed suit alleging a violation of Title IX which states, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>6</sup> It was the petitioner's allegation that the wording of Title IX would include liability for a school district's inactivity in incidents of student-to-student sexual harassment. "She emphasize[d] that the statute prohibits a student from being "subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>7</sup> The question before the Supreme Court was "whether a recipient of federal education funding may be liable for damages under Title IX under any circumstances for discrimination in the form of student-on-student sexual harassment."<sup>8</sup>

### Decision and Rationale of the Court

Relying on its decision in *Gebser v Lago Vista Independent School District*<sup>9</sup> the Court held that a private Title IX damages action may lie against a school board in cases of student-on-student harassment, but only where (1) the funding recipient is deliberately indifferent to sexual harassment, of which (2) the recipient has actual knowledge, and that (3) harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.<sup>10</sup>

In *Gebser*, an eighth-grade middle school student at Lago Vista Independent School Dis-

trict joined a high school book discussion group led by Frank Waldrop, a senior high teacher in the school district. Waldrop often made sexually suggestive comments to the students in this book discussion group. When Gebser entered high school in the fall 1991, she was assigned to courses taught by Waldrop each semester. Waldrop continued his practice of making sexually suggestive comments to the students. In the spring 1992, Waldrop took the next step and initiated actual sexual contact with Gebser.

Gebser did not report the relationship to school officials because she did not want to drop his course. Several months later, in early 1993, a police officer discovered Waldrop and Gebser engaging in sexual intercourse and arrested Waldrop. He was subsequently terminated from his position with the district and his teaching license was revoked. Throughout this entire time period the Lago Vista district had neither a grievance procedure for sexual harassment nor a formal anti-harassment policy.

In *Gebser* the Supreme Court concluded that recipients of federal funds could only be liable for damages under Title IX where “their own deliberate indifference effectively caused the discrimination.”<sup>11</sup> By imposing this high standard of “deliberate indifference to known acts of harassment” in *Gebser*, the Court limited the ability for success in a private damage suit under Title IX. In *Davis* the Court was asked to consider whether deliberate indifference to known acts of harassment “amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher.”<sup>12</sup> The Court concluded that, in limited circumstances, it did.

#### Implications for Administrators

For administrators in Illinois, the Court’s decision in *Davis* should have little impact be-

cause of the 1998 Illinois Supreme Court decision in *Doe v The University of Illinois*.<sup>13</sup> Jane Doe was a student at University High School in Urbana, Illinois. From January 1993 through early May 1994, Jane Doe was subjected to continuous verbal and physical sexual harassment from a self-styled “posse” of male students. This harassment included unwanted touching, epithets, and the deliberate exposure of one student’s genitals in front of Doe.<sup>14</sup> Doe and her parents complained on numerous occasions to officials of the high school including two successive school Principals, a counselor, the Assistant Director, and the person appointed as intake officer for sexual harassment complaints. After not receiving satisfaction, Doe and her parents complained to two Vice chancellors at the University of Illinois, two University police officials, the Ombudsperson, and the liaison person between the University and the high school. Even though University High School is a public school, the University of Illinois has responsibility for overseeing the school’s administration.

On the issue of Title IX liability, the court in *Doe* held that:

“a Title IX fund recipient may be held liable for its failure to take prompt, appropriate action in response to student-on-student sexual harassment that takes place while the students are involved in school activities or otherwise under the supervision of school employees, provided the recipient’s responsible officials actually knew that the harassment was taking place. . . The Failure promptly to take appropriate steps in response to known sexual harassment is itself intentional discrimination on the basis of sex, and so, once a plaintiff has alleged such failure, she has alleged the sort of intentional discrimination against which Title IX protects.”<sup>15</sup>

Consequently, even after *Davis*, the important factor in Illinois for administrators to remember is that whether it is student-to-student harassment or teacher to student harassment, either the school district knew about the harassment and was indifferent in its response, in which case liability would attach. Or the school district had no actual knowledge, in which case it will not be held monetarily liable for activity of which it was unaware. Because of the prior ruling in *Doe* there will be no appreciable change in the way in which districts operate in light of the *Davis* decision.<sup>16</sup>

## Endnotes

<sup>1</sup> *Davis*, as next friend of LaShonda D., v Monroe County Board of Education et al., No. 97-843 (May 24, 1999).

<sup>2</sup> According to the Court's opinion, "classmate G.F. attempted to touch LaShonda's breasts and genital area and made vulgar statements such as "I want to get in bed with you" and "I want to feel your boobs." No. 97-843 (May 24, 199) at 4. G.F. continued such behavior throughout the spring semester including putting a door stop in his pants during gym class and acting in a sexually suggestive manner, as well as rubbing up against LaShonda in the hallway.

<sup>3</sup> No. 97-843 (May 24, 1999) at 4.

<sup>4</sup> No. 97-843 (May 24, 1999) at 4.

<sup>5</sup> No. 97-843 (May 24, 1999) at 4.

<sup>6</sup> 20 U.S.C. Section 1681(a).

<sup>7</sup> No. 97-843 (May 24, 1999) at 6.

<sup>8</sup> No. 97-843 (May 24, 1999) at 6.

<sup>9</sup> *Gebser v Lago Vista Independent School District*, 524 U.S. 274 (1998).

<sup>10</sup> No. 97-843 (May 24, 1999) at 1.

<sup>11</sup> 524 U.S. at 291. (1998).

<sup>12</sup> No. 97-843 (May 24, 199) at 8.

<sup>13</sup> *Doe v University of Illinois*, 138 F.3d 653 (CA7 1998).

<sup>14</sup> 138 F.3d at 654.

<sup>15</sup> 138 F.3d at 658, 659.

<sup>16</sup> For more information on this topic See "Title IX Sexual Harassment: "Should have known" is No Longer Sufficient Proof. Two Cases Holding Actual Knowledge by the School District is Required:*Doe v University of Illinois: Student to Student Harassment; Gebser v Lago Vista Independent School District: Teacher to Student Harassment*" *Illinois State University School Law Quarterly*, Vol. 18, No. 1, Fall 1998.

## THE CHANGING DEFINITION OF EXPULSION

### Carbondale Community High School District #165 v. Herrin Community Unit School District and David W. Hindman No. 98-SC-38 (March 25, 1999)

Jason P. Klein, M.S. Ed.

#### Facts of the Case

A student (D.E.) from Herrin High School was caught possessing and using a controlled substance on school grounds during the 1996-97 school year. In June of 1997, he was expelled from school for one year, the 1997-98 school year. The following August, this student was enrolled in a residential treatment facility which was located in the Carbondale High School District. During his time in the treatment center, the Carbondale High School District provided *educational services* for D.E. After providing these services, the school district turned to D.E.'s home school district, the Herrin Unit District, for tuition reimbursement totaling \$239.84. Herrin refused to pay for the educational services provided to D.E.

In response to this, Carbondale took Herrin to small claims court where the justice decided for Carbondale. The court cited Section 10-20.12a of the Illinois School Code. "Educational services...in a residential program designed to correct alcohol or drug dependencies shall be provided...and financed as follows. The cost shall be paid by the district in which the student resides."<sup>1</sup> Herrin then appealed the case to the State Appellate Court.

#### Analysis of the Case

In appealing the case, Herrin argued that it should not have to pay for educational services to D.E. because he had been properly

expelled in June. No one contested that expulsion. Then, when August rolled around he began treatment, and at the same time, he received educational services from the Carbondale High School District. Herrin noted that this was two months after his expulsion. Herrin claimed that, in this case, D.E.'s time at the treatment center was like a transferring student. Thus, Herrin cited Section 2-3.13a of the School Code, which makes clear that an expulsion remains in tact even upon transferring schools. Specifically, "the student shall not be permitted to *attend class* in the public school into which he or she is transferring until the student has served the entire period of the suspension or expulsion imposed by the school from which the student is transferring."<sup>2</sup> (Emphasis added)

Carbondale on the other hand maintained their argument from the circuit court level. Carbondale's argument, again, was that *educational services* which are provided when a student is in a residential treatment program are the responsibility of the home district.

The court now focused its attention on expulsion and the contrast between *attending class* and receiving *educational services*. The court found that these were two altogether separate ideas. The court said that the expelled student would be kept away from "the general school populations of both" school districts. The court also defined expulsion. "The intent of the expulsion statute is to bar an offending youth from public school attendance, thereby protecting the general population of students by preventing the expelled youth from the opportunity to continue his dangerous activities, and that intent is served by the physical expulsion of the offending student."<sup>3</sup> In other words, receiving *educational services* is different from *attending class*. In line with this decision, Herrin was, of course, responsible for reimbursing the Carbondale High School District.

## Implications for School Administrators

At one time, school administrators viewed expulsion as the panacea to “problem students.” In many places, if a student was so much trouble that they could be expelled, the school believed that it was no longer responsible for that child during the expulsion. This ruling increases the school district’s responsibility for the expelled student. In this case, the court does not go so far as to state that all expelled students have a right to educational services, but it is, of course, possible that someone may argue that in a future case using this decision as support.

The court has clearly defined the intent of expulsion. It has also separated out the difference between *educational services* and *attending class*. In dealing with expulsion cases, administrators must consider what is best for the school, particularly the safety and welfare of all of the other students, in making a decision. At the same time, this case reminds school administrators that they must be equally concerned with doing what they believe will most likely help the expelled student get back on track.

### **Endnotes**

<sup>1</sup>Illinois School Code, 105 ILCS 5/10-20.12a (West 1996)

<sup>2</sup>Illinois School Code, 105 ILCS 5/2-3.13a (West 1996)

<sup>3</sup>Carbondale Community High School District #165 v. Herrin Community Unit School District #4 and David W. Hindman, No. 98-SC-38 (March 25, 1999)



## **CRIME AND APPROPRIATE PUNISHMENT**

**James Randall Willis v. Anderson Community School Corporation**

**No. IP 97-2038 (Sept. 9, 1998)**

**and**

**Shaun Dunn and Bill McCullough v. Fairfield Community High School District #225**

**No. 96-4328JLF (Oct. 15, 1998)**

**Jason P. Klein, M.S. Ed.**

Many of the legal difficulties schools find themselves mired in arise from issues with student discipline. Here are two important examples of that. Both involve high school students who have been found by their respective schools to have made decisions leading to specific and somewhat dire consequences. Though these cases present two different stories, neither story is unique to its school or situation. Additionally, the decisions of both of these cases leave behind similar implications for school administrators.

### Facts of the Cases

James Randall Willis was a high school freshman in Anderson, Indiana when he was caught fighting. He was promptly suspended from school. Upon his return to school, he was told he would have to submit to a drug test before being allowed to enter class. Willis's drug test was the result of a new school board policy designed to help find Anderson's substance abuse problems. This policy stated that students would be tested for drugs if they were suspected of drug abuse or automatically if they engaged in other problematic activities such as fighting or being truant from school. As a result of his three-day suspension for fighting, Willis would need to take a drug test. He refused and was suspended again. Following the second suspension, he would

again be required to take a drug test, and if he refused once again, the school would treat him as a substance abuse offender. Willis filed a law suit against the district citing violations of his rights under the Fourth and Fourteenth Amendments. The District Court found for the Anderson School Corporation.

In February of 1995, Shaun Dunn and Bill McCullough were seniors at Fairfield Community High School. These two young men were also guitar players in the band. As members of the band, they played in the pep band at the school's basketball games as well. During a basketball game on February 10<sup>th</sup>, both students, along with two others, performed guitar solos. This was in violation of their teacher's instructions and of a school policy that specifically did not allow guitar solos during school band performances. Fairfield High School policy also did not allow band members to stray from the "musical program" at performances. As a result of their decisions, Dunn and McCullough were removed from the band. They also received an "F" for their band grade, and this grade prevented McCullough from graduating with honors.

### Analysis of the Cases

In response to the mandatory drug tests, Willis argued that the school's right to search was not "justified at its inception." In the landmark school search and seizure case, *New Jersey v. T.L.O.*<sup>1</sup>, the court gave the school a wide berth in being able to search students based on the legal doctrine of *in loco parentis*. In other words, the school would enjoy many of the same rights as a parent would in safeguarding children by being able to search their belongings and their person. In subsequent decisions, the courts have even found that under certain circumstances, drug tests are permissible. Drug tests are, after all, the ultimate infringement on an individual's

privacy as they search the contents of a person's body.

The Anderson School Corporation argued that it had established a "causal nexus" between fighting and drug use. Its argument continued that drug abuse was so pervasive at the school that the school had reason to use drug testing liberally in the hopes of solving this problem. Additionally, the Anderson School Corporation cited all of the connections, which do exist in literature on teenage drug abuse between fighting and substance abuse. The Anderson School Corporation claimed that Willis's drug test was justified at its inception because he had been involved in a fight.

This claim began to unravel with the testimony of the Dean of Students who spoke to Willis about the suspension for fighting and the subsequent drug test. The Dean, himself, said that he saw no signs of Willis being involved in substance abuse. Nonetheless, he proceeded with the demand for a drug test because that was a clear result of the school district's policy.

In the meantime, Dunn and McCullough argued that Fairfield Community High School had violated their rights in two ways. First, they argued that their right to substantive due process had been violated, as the school's consequences were "unrelated to academic conduct and...outside the parameters and intent of the Illinois School Code."<sup>2</sup> Second, they argued that their Eighth Amendment rights had been violated. They said that the punishment, which had been meted out, was "cruel and unusual."<sup>3</sup>

In examining Dunn and McCullough's first claim, the court examined the grading policy for the band class at Fairfield High School. This policy clearly laid out the amount of available points in various categories during the course of the semester. The grading policy also laid out the expectations for students at the band perfor-

mances. The policy stated, "Performance conduct that is not of the highest standard will be dealt with severely."<sup>4</sup> The policy also was clear that possible consequences included lowering grades and dismissal from the band altogether.

During the case, the students said that their actions were in response to a move by the school to drop guitars from the band the following year. The students also said that they fully expected there to be consequences, but they did not expect such severe consequences. Nonetheless, the grading policy had been explicit. Additionally, it became apparent that the students had not only violated school rules, but in disregarding their teacher's directions they were disrespectful. The record shows that during their impromptu guitar performance, the band director screamed and yelled at the students to stop. This whole scene, of course, occurred at a basketball game in a high school gymnasium.

In deciding these cases, the U.S. 7<sup>th</sup> Circuit Appellate Court was not forgiving of either school. In the Willis case, the court found for Willis. Its decision showed that the court did not believe that the Anderson School Corporation had demonstrated "reasonable suspicion" in forcing Willis to take a drug test.<sup>5</sup> The court was very clear in its decision that the "causal nexus" between fighting and drug abuse that the district had been looking to establish was not strong enough to serve as the backbone to their argument. As the court pointed out, teenagers fight for all types of reasons, and there are a multitude of signals of drug abuse. Fighting is just one of those.

While the court was also critical of Fairfield High School, it decided in favor of the high school. The grounds of this decision were rather simple. The court threw out the substantive due process claim made by the students, and they went on to state that these conse-

quences were certainly not “cruel and unusual punishment.” “The Constitution does not guarantee these or any other students the right not to receive an ‘F’ in a course from which they were excluded because of misbehavior.”<sup>6</sup> With that said, the court was also very up front in stating that it felt the school had overreacted in the consequences doled out to these young men, but the school was well within its rights.

### Implications for School Administrators

While neither of these decisions dramatically alters the legal aspects of discipline within the school environment, these cases do serve as critical reminders to schools about the nature of students’ rights in the school building. First, it is critical that the school regularly stops to examine how it disciplines students and the policies it has to discipline students. Often times, what a school district or a classroom teacher has stated as policy becomes a loose guideline for determining consequences. When policies are not carefully followed, one can quickly find themselves in a situation that will involve procedural or substantive due process.

At the same time, it is critical that classroom teachers and building-level administrators handle students as the individuals they are. While this is clearly in line with instructional best practices, this moves into murky legal water. The best solution to this is to develop philosophies related to discipline that are based on the school’s instructional philosophies. This quickly becomes much weightier than a legal matter, but it has many benefits for students and staff. To engage in the type of dialogue which will result in sound discipline policies based on a philosophy which is shared among staff members takes a great deal of time and considerable energy. The result, though, can be a more appropriate and consistent discipline philosophy across all teachers in the building. As a great deal of research demonstrates, this consistency leads to fewer discipline

problems which not only will lead to less legal headaches but may also improve student achievement.

In examining the court’s decision in *Willis*, this also presents an opportunity to clarify the current legal standing of drug testing in school. The landmark case on drug testing as it specifically relates to school is *Veronia School District 47J v. Acton*.<sup>7</sup> The decision in *Veronia* allowed schools to drug test student-athletes. As the court demonstrated in *Willis*, this does not imply that all students can be tested, though. The reasoning goes as follows. First, all students in school have fewer rights than the population in general. This attests to the power of the aforementioned doctrine of *in loco parentis*. Students at school have similar rights to children at home, and these rights are not as strong or as pervasive as the rights of adults. In *Veronia*, the court allowed drug-testing for student-athletes, and others participating in extra-curricular activities, by noting that these students have voluntarily chosen to participate in an extracurricular activity. Thereby, they are also choosing to possibly submit to drug tests.

These cases remind schools that it is critical that schools consider the rights of students in developing policies. The decision in *Willis v. Anderson School Corporation* clearly demonstrates that drug testing cannot be schoolwide. Additionally, it has pointed out that drug testing is not simply a punishment for a student’s actions. The decision in *Dunn and McCullough v. Fairfield Community High School District #225* allows teachers to continue the age-old practice of including student behavior in determining grades, but it does so with a stern warning from the court to make sure that the punishment fits the crime. After all, schools are meant to be temples of learning rather than sites for incarcerating students until adulthood.

## Endnotes

<sup>1</sup> New Jersey v. T.L.O., 469 U.S. 325 (1985)

<sup>2</sup> Shaun Dunn and Bill McCullough v. Fairfield Community High School District #225, No. 96-4328JLF (Oct. 15, 1998) at pg. 2

<sup>3</sup> No. 96-4328JLF (Oct. 15, 1998) at pg. 3

<sup>4</sup> No. 96-4328JLF (Oct. 15, 1998) at pg. 2

<sup>5</sup> “Reasonable suspicion” is the threshold that school administrators must meet before they can begin search and seizure. A school administrator has “reasonable suspicion” if they have received information related to the concern from a teacher, a student, another credible source, or if they have, themselves, witnessed something that has caused them to reasonably suspect the student. Police, it should be noted, operate at a higher threshold called “probable cause.” In other words, a police officer must consider whether or not a judge would issue a warrant for the nature of the search the officer is conducting. The school’s lower threshold of “reasonable suspicion” derives from its position *in loco parentis*. A school is in place of the parent and has similar rights to parents.

<sup>6</sup> No. 96-4328JLF (Oct. 15, 1998) at pg. 4

<sup>7</sup> Veronia School District 47J v. Acton, 515 U.S. 646 (1995)

## **EARLY RETIREMENT INCENTIVES CAN BE EARLY—BUT THEY MUST BE LATE, TOO**

**Solon, et al. v. Gary Community School Corporation**

**No. 95 C 327 (June 14, 1999)**

**Jason P. Klein, M.S. Ed.**

### Facts of the Case

In response to a dramatic decline in an enrollment, the Gary Community School Corporation offered an early retirement incentive starting in 1984. They continued to offer the incentive into the late 1990's. This package was for teachers aged 58 to 61. Teachers could choose to retire at any point during that time and receive monthly payments until their 62nd birthday. If a teacher retired on his 58th birthday, he would receive 48 months of incentive payments. If a teacher retired on his 61st birthday, he would receive only 12 months of incentive payments. If a teacher retires on his 65th birthday, he would receive no benefits from the early retirement incentive plan.

The plaintiffs argued that this plan was discriminatory in that the older one was at retirement, the less that individual benefited from this program. The District Court agreed that this plan was discriminatory as it stated that "Gary schools' plans expressly dole out benefits based on age, with younger workers receiving better benefits."<sup>1</sup> The court found for the plaintiffs and awarded damages. The Gary Community School Corporation appealed the case to the U.S. 7th Circuit Court of Appeals.

### Analysis of the Case

In examining the case, the Appellate Court cited statute and common law in noting that

there is no law that says an employer must offer an early retirement plan, but once an employer makes the decision to offer such a plan, it must offer a plan that is nondiscriminatory. The plaintiffs in this case were all individuals who retired after age 58. The Gary Community School Corporation argued that these plaintiffs had no basis for their complaint. After all, they chose not to retire at age 58. The Gary Community School Corporation noted that it was not as if this plan was not available to these teachers, for it was.

The plaintiffs argued back that the choice was not as simple and independent as the Gary Community School Corporation would have it seem. The plaintiffs noted that they must work a minimum number of years to be fully vested in the pension system, and this limited their choice in terms of when they could retire. It is possible, for example, that a 58 year-old teacher and a 70 year-old teacher would have the same pension benefits based on the number of years which they had worked. The 70 year-old teacher would not benefit though from the early retirement plan even though retiring at age 70 may have been *early* for the seventy year-old.

The court stated that an employer can certainly put a minimum age requirement on an early retirement plan, but once a maximum age requirement has also been placed on that plan, it is discriminatory towards the older worker. The plan is based on age, which in this case is arbitrary, rather than on the employee's years of service to the employer. The court also acknowledges in this decision that retirement is a matter of more than age. The court notes a list of other *real life* factors that play into this decision, such as health, savings, and the aforementioned years of service to an employer.

The court does point out that the Older Workers Benefit Protection Act of 1990<sup>2</sup>, which amended the ADEA, does allow employers to

offer early incentive plans that terminate payments at a maximum age, but those payments must meet several demands laid forth by the law. One of these is that the payments cannot exceed what the employee will be paid when receiving social security. In this case, the Gary Community School Corporation's early retirement plan showed no connection between social security benefits and the school's early retirement plan.

In upholding the District Court's position and finding for the plaintiffs, the court makes it clear in this case, that early retirement plans are perfectly legal, but they must not benefit certain employees only.

#### Implications for School Administrators

There has been a great deal of attention focused on trends in educational employment over the next five to ten years in both the media and the world of education. With tremendous numbers of teachers retiring in upcoming years, it is critical that school districts are familiar with the Older Workers Benefit Protection Act of 1990. Early retirement plans should be set up in accordance with the guidelines in that law.

This is also an opportune time to review the district's retirement policies, particularly those laid out in collective bargaining agreements. As new collective bargaining agreements are negotiated, both administrators and teachers should insist that retirement policies are not discriminatory. As the diverse group that is the baby boomers begins to retire the *real life* factors that the court pointed out will become critically important in a wide variety of combinations for individuals choosing to retire in school districts throughout the country.

#### **Endnotes**

<sup>1</sup> Solon, et al. v. Gary Community School Corporation, No. 95 C 327 (June 14, 1999) at pg. 2

<sup>2</sup> Older Workers Benefit Protection Act of 1990, PL 101-433, 104 stat 978

## EMPLOYEE OR CONTRACTOR? A CRITICAL QUESTION

**Equal Employment Opportunity Commission (EEOC) v. North Knox School Corporation, et al.**

**No. 94 C 208 (September 8, 1998)**

**Jason P. Klein, M.S. Ed.**

### Facts of the Case

Like school district's across the country, Indiana's North Knox School Corporation has long been faced with the often conflicting realities of finances and transportation needs. Indiana law allows school districts three options for employing drivers and buses. North Knox filled most of its routes by choosing the "transportation contract" option. This option means that the district enters into a contract with an individual who supplies a bus and a driver.<sup>1</sup> Additionally, the bus's owner is responsible for insurance, maintenance, and fuel.

In this instance, two drivers claimed that they were victims of age discrimination under the Age Discrimination Employment Act.<sup>2</sup> The drivers, aged 70 and 72 respectively had both previously had contracts with the district. One worked for eight years, and the other drove for the district for twenty-eight years. In the requisite bidding, each of the plaintiffs was the low bidder on one or more bus routes. As a result, they would have been offered contracts, but the school board had also adopted a policy not to have drivers aged 70 or older. As a result, each individual's bid was rejected. After filing a complaint with the EEOC, the EEOC filed suit on behalf of the men. The District Court found that these men were not employees of the district and were independent contractors. Independent contractors are not covered by the ADEA.

### Analysis of the Case

In determining that the bus owners/drivers were independent contractors and not school district employees, the court used a test called the *Economic Realities Test*. This test is used to determine if someone is a school district employee or an independent contractor. As such, it is often the preliminary tool before determining liability in a range of possible cases.

The components of the *Economic Realities Test*, which is a result of a 1991 case, *Knight v. United Farm Bureau Mut. Ins. Co.*,<sup>3</sup> are as follows:

- 1) What is the extent of the employer's control and supervision over the worker, including directions on scheduling and work performance?
- 2) What is the occupation and nature of the skills required, including whether the skills are obtained in the work place?
- 3) Who is responsible for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance operations?
- 4) What is the method and form of payment and benefits?
- 5) What is the length of the job commitment and/or expectations?

In testing this case with the *Economic Realities Test*, the court found that, for the most part, district policy did not govern the relationship between the bus drivers and the school district. Rather, state law set forth the parameters. In those instances where school district policy did answer one of the questions of the *Economic Realities Test*, the answer squarely placed responsibility, as defined by the questions, on the bus drivers. Thus, the 7th Circuit Appellate Court held that the bus drivers were independent contractors and not guaranteed the rights afforded by the ADEA.

## Implications for School Administrators

In this era, of creative solutions to funding problems, many school districts have reached out to private businesses and organizations to provide everything from transportation to social work services. In doing so, it is critical that school districts identify which of these employees are school district employees and which are independent contractors. For example, if the cafeteria worker, who works for a major food corporation, is charged with sexual harassment, will the school district be liable in this situation? The first step in such a case would be to determine whether she works for the school district or the major food corporation. This is done with the *Economic Realities Test*. Be prepared by knowing who this test deems a school district employee and who it does not. If employees seem to be school district employees according to this test, hold them accountable to the same training and standards as all other employees.

### **Endnotes**

<sup>1</sup> Indiana Code, 20-9.1-4

<sup>2</sup> ADEA, 29 USC sec. 621-34

<sup>3</sup> Knight v. United Farm Bureau Mut. Ins. Co., 950 F. 2d 377, 378-379 (7th Cir. 1991)



## A CLOUDY QUESTION OF LIABILITY

### **Henrich v. Libertyville High School No. 84094 (May 18, 1998)**

**Jason P. Klein, M.S. Ed.**

#### Facts of the Case

Joshua Henrich was a 17 year-old student at Libertyville High School in Chicago's Northern Suburbs in February of 1995. One year earlier, Henrich had undergone surgery for a back condition. One of the results of this surgery was that Henrich was under instructions from his doctor not to participate in contact sports. The school was notified of the condition, but interestingly the court record shows that it was only one week prior to the incident in question.

The incident is Henrich's participation in a game of *water basketball*, a sport played in physical education that involves a high risk of rough contact with other players. While the school knew of Henrich's back problem, and the limitations which resulted, his regular P.E. teacher was not in class that day. There was, of course, a substitute teacher. According to the record, this teacher "required" Henrich to play. During this game of water basketball, Henrich was "severely and permanently injured."

Henrich brought three counts against the district, and another student, in a personal injury suit. The first count accused the district of willful and wanton misconduct, this phrase signifying extreme negligence in the Illinois School Code, for allowing Henrich to participate in the game in the first place. Count II held that the district was also negligent for assigning an improperly trained substitute teacher for the P.E. class. The third count alleged that the other student was negligent. This student filed a counterclaim against the school district.

In response, Libertyville High School sought to dismiss counts I and II claiming immunity because of the Tort Immunity Act.<sup>1</sup> The court found in the district's favor and dismissed claims I and II as the court agreed that section 3-108(a) of the Tort Immunity Act does immunize the district against Henrich's claims. Count III was left untouched by the court and was still pending. The case was consequently appealed by Henrich up to the Illinois Supreme Court.

#### Rationale of the Court

The Illinois Supreme Court was faced with the tricky situation of determining when a school district could claim immunity and when it was liable for damages incurred as a result of negligence. The conflict in this case centered around two different laws which both refer to school district immunity. One appears in the School Code<sup>2</sup>, and Henrich cites this in claiming that the school district is not immune in this case. The other is the aforementioned section of the Tort immunity Act which immunizes not only school districts, but other governmental agencies as well. In reaching an interpretation about how these two statutes relate to one another, the court decided that justice was best served with an examination of the legislative intent of each law. In other words, the court asked, when creating and debating each of these laws in the General Assembly, what did the legislators intend for the laws to mean?

Section 3-108(a) of the Tort Immunity Act reads as follows, "...neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property."<sup>3</sup> The court noted that the phrase *willful and wanton misconduct* did not appear in this law, and as a result, the court stated that the Tort Immunity Act even immunizes against willful and wanton misconduct.

Section 24-24 of the School Code is the very important section of Illinois Law, which places teachers *in loco parentis*, in place of parents. This section places the immunity rights of parents on teachers, but at the same time it holds teachers accountable at the same level as parents are in dealing with their children. The common law currently states that parents, and teachers, are immune from *ordinary negligence* but not from *willful and wanton misconduct*.

In the initial proceedings of this case, the court did find that there was willful and wanton misconduct. The Tort Immunity Act, using the arguments the court has accepted here, immunizes against even this. The School Code, to the contrary, does not protect against this. The decision became one of which law would take precedence.

In turning to the legislative record for a decision, the court found that these two acts were passed within two days of one another. Legal precedent in *People ex rel. Vaughan v. Thompson*,<sup>4</sup> tells the court to interpret the statutes “with reference to each other.”<sup>5</sup> This vague instruction allowed the court to decide that the intent of the legislature by passing these two acts in June of 1965 was to discourage Tort cases. As a result, the court would decide to discourage Tort cases by upholding the decision of the lower courts to throw out all but Count III of this case, thereby finding that, even for school districts, the Tort Immunity Act takes precedent over the school code. In short, schools are immune even from “willful and wanton misconduct.”

### Implications for School Administrators

This case presents two implications for school districts and their personnel. One is much more favorable than the other. The more explicit result of this case is that the Illinois Supreme Court has now disregarded the previous inter-

pretation of the school code in favor of the Tort Immunity Act. Based on this decision, then, schools are no longer liable for willful and wanton misconduct. It should be noted that Justice Heiple, in his dissent, clearly disagreed with the court’s decision, and regardless of the future legal twists and turns tort immunity may take, it is, of course, wise for schools to prevent any negligence, particularly willful and wanton misconduct. For example, the situation would have been much better for everyone had it not occurred in the first place. A simple note on the lesson plans for the substitute teacher likely would have prevented this altogether. While this decision is favorable to schools in that they are now *more* immune from tort liability it is still critical that administrators remain vigilant to avoid such situations altogether.

The more implicit result of this case is that laws not contained in the School Code may prove more important than those laws in the School Code. This is a troubling position for already overburdened administrators. School administrators primary role in Illinois is to support teachers and students in improving instruction. It comes as no news to administrators though that they are responsible for the hundreds of pages that make up the Illinois School Code in addition to the monumental task of constant school improvement. With the court’s decision that section 3-108(a) of the Tort Immunity Act overrides section 24-24 of the School Code, administrators are now in the position of conceivably needing to know all of the laws in Illinois. This is not possible, and administrators should fulfill their primary duties as instructional leaders, but it is an important development, which must be watched by school districts throughout Illinois.

## Endnotes

<sup>1</sup> Tort Immunity Act, 745 ILCS 10/1-101 *et seq.* (West 1994)

<sup>2</sup> Illinois School Code, 105 ILCS 5/24-24 (West 1994)

<sup>3</sup> 745 ILCS 10/3-108(a) *et seq.* (West 1994)

<sup>4</sup> People ex rel. Vaughan v. Thompson, 311 Ill. 244, 249 (1941)

<sup>5</sup> 311 Ill. 244, 249