**An Analysis of the Legal Rights and Responsibilities**

**of Indiana Public School Educators**

by

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(ABSTRACT)

The purpose of this study was to identify, examine and analyze judicial decisions, legislation, and agency regulations, state and federal, for those principles of law that govern the legal rights and responsibilities of Indiana public school educators. The study delineated legal principles and the process of legal reasoning in the following primary areas: (1) Tort liability of school districts and personnel; (2) Legal responsibilities regarding students; (3) Education of children with disabilities; (4) Terms and conditions of teacher employment.

Three primary research methods were used in this study: The "descriptive word" or "words and phrases" approach, the topical approach, and the case method. The computer-assisted legal research service, WestLaw was used extensively in this study.

The study produced the following selected general conclusions:

(1) Indiana educators possess very limited protection under the doctrine of sovereign immunity and may be held personally liable for their own tortious acts. Educators are only immune from acts that constitute significant policy and political decisions generally attributable to the essence of governing. Indiana educators are personally protected from monetary loss by a "save harmless" statute. Indiana public school corporations are not protected by the doctrine of governmental immunity. School author-

ities may be found liable in their individual capacities for a constitutional tort if they personally violate clearly established constitutional rights of individuals.

(2) Persons of school age are obligated under Indiana compulsory education laws to attend school or receive instruction equivalent to that given in the public schools. The judiciary uniformly recognizes the right and duty of school boards and school authorities to maintain order and control in the classroom and in the public schools. Students who violate school rules and regulations may be suspended or expelled from school but not without procedural due process. Students are entitled to other constitutional rights with respect to the first, fourth and fourteenth amendments.

(3) The Individuals with Disabilities Act requires that children with disabilities be provided a free appropriate public education in the least restrictive environment. The right to a free appropriate education is undergirded by complex and comprehensive procedural rights afforded to parents under the IDEA. Indiana law expands procedural due process protections for children with disabilities beyond that provided by federal statute. A disabled child may be expelled from school where the misconduct is not handicap-related but educational services cannot be completely terminated.

(4) Every teacher in Indiana employed by a school corporation must hold a license issued by the state and make a written teaching contract with the local governing body. A tenured teacher may be dismissed or suspended with cause but must be afforded due process in connection with the cancellation of an indefinite contract. School boards and school officials are granted broad discretion in matters relating to the method of teaching, decisions regarding the curriculum, and the selection of books to be used in the public schools. Indiana educators enjoy a liberty interest in their employment as well as other constitutional rights which are balanced by the state's interest in controlling and furthering the education mission of the public schools.

# Dedication

To Karen

With a song

On her wings.

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# Chapter 1

## *Introduction*

Most public school educators are aware that courts and lawmakers, over the last several decades, have played a significant role in establishing educational policy and practice. Decisions in such areas as school desegregation; prayer and Bible reading; sex discrimination; treatment of children with disabilities; racial discrimination; tensions among the interests of the state, the family and the child; and the transmission of values; among others attest to the extent and pervasiveness of judicial influence. Nonetheless, there is overwhelming evidence that educators who must daily translate court decisions into policy and practice have relatively incomplete knowledge and understanding of court decisions affecting education. As a result, many teachers and administrators are uncertain about the legality of their conduct, and decisions they must make in the daily administration of public schools.

The Supreme Court has held that school officials can be held liable if they knew, or reasonably should have known, that their actions would impair an individual's protected rights.[1]

Educational leaders need to know and understand: ". . . the legal principles underlying education law to appreciate the consequences of educational decisions and to know when a lawyer's services are required. Educators should know enough about

education laws to determine whether such laws promote or retard the development of sound educational policies and practices."[2]

The degree to which schools can teach and safeguard democracy and administrators can exercise leadership within constitutional mandates will be determined by the extent to which educators are legally competent.[3]

## Statement of the Problem

The purpose of this study was to identify, examine and analyze judicial decisions and legislation, state and federal, for those principles of law that govern the legal rights and responsibilities of Indiana public school educators. The study identified and clarified pertinent constitutional and statutory law and judicial interpretations derived from a synthesis of cases and statutes, in order to extrapolate principles of law, which have significance to school personnel. Specifically, the study delineated legal principles and identify the process of legal reasoning in the following areas:

1. Legal Responsibilities Regarding Students.
2. Terms and Conditions of Teacher Employment.
3. Tort Liability of School Districts and Personnel.
4. Education of the Disabled.

The major findings of the study are summarized and provide a guide to Indiana educators to assist them in making decisions consistent with case law and statutes. This study will assist educators in relating judicial decisions to specific factual contexts.

## Need for the Study

The need for this study rises out of the expansion of litigation and legislation in education over the past four decades and the concomitant need of educators to know, understand, and carry out their legal responsibilities in the educational process. During the past forty years, educators have become concerned and dismayed with the amount of education-related litigation, and the prominent role courts have played in shaping American educational policy and practice. According to Alexander and Alexander, "During the last generation Americans have witnessed an explosion of litigation affecting education. Courts have become much more actively involved in aspects of education which were heretofore left entirely to the discretion of school administrators and school boards."[4] Valente, in the preface to Law in the Schools (1987), states that "anyone interested in school law must be impressed, if not overwhelmed, by the flood of new court decisions that constantly affect the operation of the schools."[5] Lieberman (1981) concluded that "no other single institution has been the defendant in so many diverse lawsuits as the public school."[6]

The increased role of the courts in education has drawn much comment from educational legal scholars. Alexander and Alexander warn that educators may misunderstand basic legal principles leading to uncertainty as to how to maintain an orderly school learning environment.[7] The fear of potential litigation may have a "chilling" affect on appropriate control of student behavior. Kirp and Jensen, in School Days, Rule Days, refer to the substantial involvement of the judiciary in shaping school affairs as the "legalization" of education.[8] Tyack, James, and Benavot, in Law and the Shaping of Public Education, document the dramatic increase in education litigation and the

heavy reliance on the courts in shaping American educational policy since World War II.[9]

Imber and Gayler report between 1960 and 1986, education-related litigation frequencies increased in 72 percent of states, remained constant in 18 percent, and decreased in 10 percent.[10] In Indiana, between 1960-1986 litigation frequencies increased at the rate of 1.3 per five years (multiplied by 1.3 per five years), from 1979-1986 litigation frequencies increased at the rate of 1.75 per five years (multiplied by 1.75 per five years). Only six states showed greater increases in litigation frequencies between 1979-1986 than Indiana."[11]

In a major study of the volume of education litigation in the U.S. court system, Hogan found, between 1966-1976 that, 8,112 cases were decided in both state and federal courts and between 1976-1984 (eight years) that 7,640 cases were decided in state and federal courts.[12] Benavot[13] provided a more recent update of education-related cases litigated in both state and federal courts:

| Ten Year Interval | Total |
|---|---|
| 1947-1956 | 4,638 |
| 1957-1966 | 5,330 |
| 1967-1976 | 10,503 |
| 1977-1986 | 11,491 |

Zirkel studied the number of United States Supreme Court decisions affecting public school education and found that decisions doubled (compared to the previous decade) in the 1950s and 1960s and almost tripled in the 1970s and leveled off to about the 1970s level in the decade of the 1980s.[14]

As a result of the expansion in education-related litigation, the corpus of school law has become increasingly diverse, ambiguous and complex.

In Wood v. Strickland, 420 U.S. 308, 43 L.Ed.2d 214, 95 S.Ct. 992 (1975), the court admonished educators that they had a duty to appreciate school law: ". . . an act violating a student's constitutional rights can be no more justified by ignorance of disregard of settled indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice."

Despite the increased intervention of the courts in education, and the growing awareness of educators of the impact of court decisions on their professional lives, educators have relatively incomplete knowledge and understanding of school law. Several studies have focused on educators knowledge of education law issues. In a national survey of secondary school principals, Stephens (1983) found serious deficiencies in their knowledge of issues relating to sex discrimination, teacher tenure and bilingual or E.S.L. requirements.[15] In a national sample of educators belonging to Phi Delta Kappa in 1978, Zirkel obtained a mean score of slightly above 50% on a test of Supreme Court decisions affecting education.[16] In 1983 Menacker and Pascarrella also concluded that administrators and teachers overall knowledge of education-related Supreme Court decisions was seriously inadequate. In 1985, Caldwell found several areas of weakness in school law knowledge in her study of Virginia public school principals. She reported that the respondents did not have a thorough knowledge of their legal duties and liability in the areas of tort liability, corporal punishment (which was legal in Virginia at the time of the study) and teacher contract-dismissal issues.[17] In 1987, Schmidt conducted a study to determine the knowledge level of Illinois school administrators concerning federal legislation, and case law pertaining to procedural due process rights for handicapped children. She found that Illinois superintendents and principals had poor or inadequate knowledge of procedural due process rights of disabled children.[18] In 1989, Dumminger conducted a study of over 300 Virginia teachers who had an average length of teaching experience of 12.5 years. Dumminger obtained an average total score of 41% on a test

assessing the level of school law knowledge. He found the mean for subareas measured as follows: tort liability was 24.7%, teacher rights was 43.7%, and legal responsibilities of teachers was 54.8%.[19]

In an interview study conducted in Indiana in 1985, Hillman found that principals, counselors and teachers demonstrated deficiencies in their knowledge level of school law, particularly with respect to education-related Supreme Court decisions.[20] Werling studied school law knowledge of secondary teachers in Indiana in 1985. He used a 30 item true-false test assessing the areas of teacher tenure, school discipline, and tort liability. Werling concluded that the percentage of teachers who possessed a fair or better level of knowledge of Indiana school law (a score of 80% or better) was only between seven and fifteen percent.[21]

In summary, empirical studies regarding educators knowledge of school law quite convincingly show an incomplete knowledge and understanding of court decisions affecting education. This study then is needed to provide an available synthesis of legal principles to Indiana educators. Bolmeier suggests, since the constitutional and statutory laws governing education differ among states, that it would be a contribution to the literature on public school education to produce studies determining the legal status of teachers or students for each of the fifty states.[22] No such recent or current study exists in Indiana. This study will provide a clear source of information to assist Indiana educators to translate court decisions into legally defensible educational policy and practice.

## Structure of the Court System

In the United States each state has established its own court system. The United States Constitution has created the federal judiciary as a separate branch of the federal government.

The United States Supreme Court is the highest court of federal judicial authority in the United States. It is the court of "last resort" meaning that there is no appeal beyond the U.S. Supreme Court. Most requests for a case to be heard by the Supreme Court come in the form of a petition for certiorari which the court may accept for review or reject.

The United States Courts of Appeals constitute the intermediate level of the federal judicial system. There are thirteen federal circuit courts which primarily review the decisions of the federal district courts. The circuit courts (with the exception of the federal circuit court which has national jurisdiction) comprise specific geographical areas. Indiana is included in the Seventh Circuit, along with Illinois and Wisconsin.

The federal district courts are the courts of original jurisdiction in the federal court system.

Indiana educators are legally bound by the judicial decisions of the United States Supreme Court, the Seventh Circuit Court of Appeals and the Indiana federal district courts. Decisions of the Federal Courts of Appeal may be persuasive for other courts but are bonding authority only on those states within the circuit.

The Indiana judicial system emulates the federal system in that it establishes three increasingly authoritative levels of courts.

Article VII, Section One of the Indiana Constitution established the Indiana Supreme Court, Court of Appeals, Circuit Courts and grants the legislature authority to establish other courts.

The Indiana Supreme Court, which consists of five justices, is the highest level court in Indiana.

Indiana has established five courts of appeals (two have jurisdiction over the entire state) that represent the intermediate appellate level of the Indiana judicial system.

The state is divided into ninety-two judicial circuits, and a judge for each circuit court is elected by the voters of the circuit. The circuit court is the court of original jurisdiction in the Indiana court system. In addition, many counties in Indiana have established superior courts that are likewise courts of original jurisdiction.

Indiana educators are bound by the decisions of the Indiana Supreme Court and appellate courts of the State. The parties to a lawsuit are bound by the decisions of the trial courts (courts of original jurisdiction).

## Delimitations of the Study

This study is delimited in several different ways. Specifically, the study deals with public schools, grades K-12, and excludes higher education and non-public schools except when appropriate to the study of Indiana public school education. The study specifically concerns Indiana case law and statutes, and analyzes federal court decisions and law that directly affect or bind educational policy and practice in Indiana. In this respect, the study is not intended to be a comprehensive general or national study of school law.

Finally, this study is restricted to court decisions and legislation enacted prior to July, 1991.

## Procedures of the Study

Legal research is to a large extent a matter of mechanics and technique, involving a detailed familiarity with the materials available in this connection and their use.[23] Legal research recognizes the value of subjective synthesis of judicial decisions and reasoning by analogy. Political scientists refer to a framework in which judicial opinions are synthesized and principles of law are extrapolated as a "traditionalist model" in order to distinguish this model from the behavioral models which have dominated the social sciences.[24]

The aim of this study was to use legal research in an effort to identify legal principles and the process of legal reasoning used by judges to reach their decisions. The research process provides for clarification of principles of law, elucidation of legal doctrines, and assists in determining the relationship between rules of law and their application to a particular context.

Primary sources for the study are Indiana and federal judicial opinions and Indiana and federal legislation. The legal research process usually involves the use of secondary sources (finding-tools of legal research) to begin the process of locating cases and statutes. Three research methods have been selected for this study: the fact or descriptive word approach, the topical approach, and the case method.[25] Secondary sources such as the descriptive word index published by West, the digests and legal encyclopedias provide access to the chronologically arranged primary sources of the law. A digest to judicial decisions superimposes a subject classification upon chronologically

published cases. The digests of the West Publishing Company constitute the most comprehensive words and phrases and topical approach to case law. Cohen suggests that the most efficient procedure for case finding in the digests is through use of specific factual catch words or "words and phrases" derived from an analysis of the problem in question.[26] The topical approach will also be used in this study, although sparingly, it calls for the selection of the legal topic used in the West digests and detailed inspection of the table of contents that follows the topic. Finally, if a case in point is known by name it can be located by using the Table of Cases volume or volumes for the appropriate unit of the West digest system. This approach is known as the case method.

The widely-marketed computer-assisted legal research service, WestLaw was used extensively in this study. WestLaw allows retrieval of cases by searching for words and combinations of words thought to be in the document. This way of searching is known as Key Word Searching.

In summary, the research method will proceed as follows: (1) Utilize secondary sources such as digests, legal encyclopedias, legal indexes, law reviews, and computer databases; (2) Select cases to be used in the study that directly affect or bind Indiana educators; (3) Brief the cases and identify relationships to the topic under study; (4) Extract principles of law and major concepts; (5) Synthesize relevant similar cases for legal standards and guiding concepts; (6) Read and analyze related statutes and administrative regulations; (7) Shepardize the cases and statutes to determine their current status and precedential value; (8) Review any interpretative relevant secondary sources; and (9) Determine the strength and weight of judicial opinion in accordance with level of the reviewing court and later citations.

## Outline of the Chapters

The scope of the study has already been defined and the organization of the study will demonstrate the architectonic through which the rights and responsibilities of Indiana educators will be analyzed in this study. Chapter Two addresses the extent, if any, of educator and school district liability for damages as a result of their official action or inaction. In Chapter Two, the liability of educators for both civil and constitutional torts will be analyzed. Chapter Three addresses the educators responsibilities regarding students. It specifically deals with issues concerning compulsory attendance, curriculum requirements, competency testing, first amendment rights of students associated with speech, press, expression, and religious protections. Also, Chapter Three entails an analysis of student discipline, search and seizure, corporal punishment, academic sanctions, student records, and a discussion of legal principles governing student classifications based on race, sex, marriage, and academic ability. Chapter Four deals with the rights of disabled children with respect to the requirements of IDEA and Section 504 of the Rehabilitation Act of 1973. Chapter Five will focus on the terms of teacher employment, addressing the issues of teacher certification, contracts, collective bargaining, tenure, dismissal, and remedies for illegally dismissed teachers and the rights and responsibilities emanating from these employment issues. Chapter Five also deals with the substantive constitutional rights of educators, focusing on the implications of the first, fifth and fourteenth amendments in relation to freedom of expression and association, academic freedom, due process, equal protection, personal privacy, loyalty oaths, and marital status. Chapter Six summarizes the major findings of the study and includes recommendations resulting from the study.

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# Chapter 2

## *Tort Liability*

A tort is a civil wrong, also known as a private wrong, not involving a breach of contract, for which damages may be recovered in a court of law. A tort action is a civil proceeding seeking relief for the party injured in person or property. The concept of a civil wrong refers to violations of duties fixed and imposed upon the parties by the law, common or statutory, as well as intentional wrongs. A tort is not a crime. In an action based in tort the injured party is seeking a judgment by the court holding the tortfeasor or negligent actor responsible for the consequences of his or her wrongdoing and seeking compensation for the harm sustained.[1]

The law of torts can be traced to English common law. As common law, in this country the law of torts presents fifty separate lines or bodies of state tort law. With tort law by its nature always evolving doctrinally, and presenting significant areas of uncertainty, each state may be said to be evolving its own common law of torts. Although states borrow freely from each other's case law, it is noteworthy that each state's body of tort law is different. Indiana has passed legislation called the Indiana Tort Claims Act which must be complied with as a prerequisite to recovery by anyone claiming an injury as a result of governmental negligence.[2]

Educators have a duty to care for students in their charge. Tort law provides students and their parents, and in some instances school employees, an opportunity to

obtain compensation for injuries or harm they have sustained in school, usually in the form of monetary damages. By allowing compensation for injuries sustained by students in school, tort law requires schools to take appropriate steps to provide for a safe and orderly environment.

Three theories of redress or categories of tort actions provide the framework for constructing a comprehensive basis of liability for tortious acts: (1) negligence, (2) intentional torts, (3) strict liability.

The most common tort with which educators become involved is negligence. Negligence is conduct falling below an established standard that results in injury. Negligence encompasses all human behavior. Generally speaking, the standard by which an educator's conduct is judged is defined as that of the reasonably prudent teacher. The skills and knowledge expected of a qualified teacher or school administrator are factors considered in establishing the hypothetical reasonably prudent teacher. The reasonably prudent teacher standard constitutes a higher degree of care than the usual standard of care of the reasonably prudent man. Courts consider the standard of care owed to students to be flexible and it varies according to such factors as the age of the student, the student's intelligence, the experience of the student, and the environment and circumstances under which an injury took place. The standard of care required by courts of school authorities increases with the immaturity, lack of mental capacity or inexperience of students.[3]

A second category of tort involves intentional torts. Intentional torts include assault, battery, trespass and false imprisonment. The most frequently litigated intentional tort relating to educators has historically been assault and battery.

A subcategory of intentional torts is the tort of defamation which encompasses libel and slander actions. It is a hybrid subcategory of intentional torts because at

common law, an individual may be liable for a defamatory statement whether made intentionally or negligently.

The third area for actions sounding in tort is strict liability. Strict liability arises from an activity or thing that creates an unusual or ultrahazardous situation and an injury occurs as a result of the hazardous situation. The person injured may maintain an action against a defendant who has created or caused the hazard or unusual danger to exist and need not establish that the injury was intentionally or negligently caused. Strict liability has only marginal application to public school law but nevertheless the possibility of legal action against schools based on strict liability exists. Allegations of strict liability against school districts and school personnel for hazards relating to laboratory experiments, vocational education and athletic equipment have appeared in education related cases.

The most prevalent tort action involving public schools and educators is based on liability rising from allegations of negligent acts. As a consequence, we begin our analysis of the principles of law relating to torts used in deciding specific cases affecting Indiana educators with those pertaining to allegations of negligence.

## Negligence

The commonly employed test used by courts to determine negligence is grounded in the nature of a formula created by the courts. The courts have created a hypothetical person who "has never existed on land or sea: the reasonable man of ordinary prudence."[4] The reasonable man conducts himself in an ideal manner, he is a community standard. Although the reasonable man operates as a community model his conduct varies appropriately with the circumstances under which he acts. Alexander and

Alexander describe the characteristics of the reasonable man "a man of ordinary sense using ordinary care . . . [having] 1) the physical attributes of the defendant himself, 2) normal intelligence, 3) normal perception and memory with a minimum level of information and experience common to the community, and 4) such superior skill and knowledge as the actor has or holds himself out to the public as having."[5] In a negligence action these factors are applied to the question of foreseeability; that is, should the reasonable ordinary prudent man have been expected to foresee and, consequently, have taken action to prevent the harm that occurred? Negligence, it must be emphasized "necessarily involves a foreseeable risk, a threatened danger of injury, and conduct unreasonable in proportion to the danger."[6]

As indicated, the generally accepted standard of care by which an educator's conduct is judged is that standard of care expected of the reasonably prudent teacher. Thus, the reasonably prudent teacher manifests the superior skill and knowledge expected of a qualified and trained teacher. This standard of care constitutes a higher degree of care than the usual standard of care of the reasonably prudent man.

Indiana courts have not adopted the reasonably prudent teacher standard of care. Indiana courts hold teachers to a slightly lesser degree of care, but recognize a special relationship between educator and student in the school setting.

In Miller v. Griesell, 308 N.E.2d 701 (1974), the Indiana Supreme Court expressly stated that Indiana educators have a duty to exercise reasonable care and supervision for the safety of the children under their control. The court held that the traditional standard of care in negligence actions would apply in negligence cases involving teachers, principals, school boards and other school personnel. The standard to be applied is "whether the defendants exercised their duty with the level of care that an ordinary prudent person would under the circumstances."[7] However, the court invoked the notion of a special relationship existing between students and school personnel and

said: ". . . the relationship of school pupils and school authorities should call into play the well recognized duty in tort law that persons entrusted with children, or others whose characteristics make it likely that they may do somewhat unreasonable things, have a special responsibility recognized by the common law to supervise their charges."[8] The court went on to say: "It is not a harsh burden to require school authorities in some instances to anticipate and guard against conduct of children by which they may harm themselves."[9] Thus, the Supreme Court of Indiana has imposed a duty of care on Indiana educators that does not fully incorporate the training, skill, experience and knowledge of the reasonably prudent teacher standard, but recognizes a duty to be aware and take appropriate precautions when supervising children.

In Norman v. Turkey Run Community School Corporation, 411 N.E.2d 614 (1980), the Indiana Supreme Court reiterated that the "common law" of Indiana recognizes a duty on the part of school personnel to "exercise ordinary and reasonable care for the safety of the children under the authority . . . with the level of care that an ordinary prudent person would under the circumstances."[10] The court noted that children may do "somewhat unreasonable things"[11] and consequently school authorities have a "special responsibility"[12] to be on guard against such unreasonable actions by students.

The classic elements of a cause of action for negligence contain four elements: (1) A duty on the part of the actor to protect others, (2) a failure to exercise an appropriate standard of care, (3) a causal connection between the act and the resultant injury, usually referred to as proximate cause, and (4) actual loss or damage as a result of the injury.

In Indiana the tort of negligence is comprised of three elements: (1) a duty on the part of the defendant in relation to the plaintiff; (2) failure on the part of the defendant to conform his conduct to the requisite standard of care required by the relationship; and (3) an injury to the plaintiff resulting from that failure.[13]

Indiana courts reciting the elements of negligence consistently omit the prerequisite of proximate cause and collapse this element of negligence into the third prong of the Indiana test for negligence. But Indiana courts require juries to weigh the element of "proximate cause" and typically give a jury instruction on proximate cause. A representative jury instruction regarding proximate cause given by an Indiana trial court is found in Scott Country School District 1 v. Asher, 312 N.E.2d 131 (1974): "That the negligent acts or omissions of the defendants were the proximate cause of the injury to the plaintiff." A causal relationship between the negligence and the injury must be shown. Medsker v. Etchison, 101 Ind.App. 369, 199 N.E. 429 (1936).

For liability to be proven, the educators act or failure to act must be shown to have a close causal connection to the students injury. Liability may be mitigated or extinguished if it can be demonstrated that the cause of the injury was the result of an intervening or superseding act or responsibility can be transferred to a more culpable party. An Indiana case is often cited as illustrating the principle of an intervening act. In Bush v. Smith, 154 Ind.App. 382, 289 N.E.2d 800 (1973), the intervening act of a thirteen year old student who threw a bamboo high-jump crossbar which struck another student in the eye after school hours was the sole intervening, proximate cause of the injury to the student. The injured student had argued that high-jumping equipment should be held to be "inherently dangerous" thus imposing a duty on the part of the school or gym teacher to supervise even during nonschool hours.

Indiana courts have repeatedly indicated that they do not intend to place an undue burden on Indiana educators while they supervise the safety of students. Indiana follows the generally accepted rule that the law does not require schools to act as insurers of the safety of their students, nor subject them to liability for accidental harm that could not have been avoided by the exercise of reasonable care.[14]

With respect to the issue of appellate review of jury verdicts in negligence cases, Indiana courts will not overturn a verdict unless it is legally or logically inconsistent, contradictory or repugnant.[15] The courts indulge every reasonable presumption in favor of the legality of the jury's verdict.[16] Further, Indiana juries have broad discretion in determining damage awards.[17] Indiana appellate courts will not reverse an award of damages as being excessive or inadequate unless the damages appear so unreasonable as to convince the reviewing court that the jury was motivated by prejudice, passion, partiality or corruption.[18]

A representative case involving an allegation of an excessive damages award to an injured student is Scott v. Asher, supra, in which a jury awarded $95,000 in compensatory damages to a high school student who suffered a severe cut on his hand while using a bench saw in a shop class. The Court of Appeals for Indiana, First District, observed that the jury heard testimony that the defendant's hand "was a claw like deformity; that he had undergone nine operations on the hand; that the hand tingles at all times . . .; that he had to give up high school and vocational training courses requiring the use of the right hand . . .; that the injury is permanent and that he has a life expectancy of 54.91 years."[19] In view of this evidence the court could not say, as a matter of law, that the damages were excessive.

## *Duties of Supervision*

The extent of reasonable supervision required by Indiana courts for the care and supervision of the safety of students will depend on the ages and physical and psychological condition of the students involved, as well as the type of activity and conditions under which the activity took place.

In Norman v. Turkey Run Community School Corporation, 411 N.E.2d 614 (1980), a seven year old second grade student was injured on the first day of school when she collided with a six year old first grade student during the school's morning recess. Both students were running across the playground, and were not looking where they were running at the time they collided. Seven teachers were present and assigned to the general supervision of the playground. These teachers were supervising one hundred eighty-eight children. One teacher testified that she saw the two school children collide but she had no time or opportunity to warn them. The Indiana Supreme Court held that the school district could not be held liable for the injuries since children running on the playground did not present a dangerous or unusual condition that might rise to a duty on any of the teachers to pay particular attention to a particular student who was running. Since the collision took place suddenly, there was no duty on the teachers to warn of possible injury. The court emphasized that schools are not intended to be insurers of the safety of their students, and they are not to be held strictly liable for any and all injuries sustained by students. The court concluded that the school authorities had exercised ordinary and reasonable care for the safety of the children under their authority.

In Driscol v. Delphi Community School Corp., 290 N.E.2d 769, 155 Ind.App. 56 (1972), the Indiana Court of Appeals considered an action by a student and father against a gym teacher and school district for injuries sustained when the student fell while running, as she was required to do, to shower and dress after a physical education class. The Court of Appeals commented: "We . . . doubt that there is any unreasonable risk of injury involved in requiring high school gymnasium students to run to their dressing rooms, whatever may be the reason for the requirement, so long as there are no unusual conditions present."[20]

The Indiana Supreme Court discussed the meaning of ordinary and reasonable care in the context of adequate supervision in Miller v. Griesel. That case involved a

fifth grade student who brought an action alleging negligence against his teacher, the principal of his school, and the school corporation, for injuries sustained during a recess period, when his teacher was absent from the room. Ten students had remained in the classroom while the rest of the class went to the playground during the recess. The students who remained in the room were working on a class social science project. One of the students remaining in the class had a detonator cap which exploded when it was touched to two wires attached to batteries. The student suffered permanent damage to his eyes.

In Miller v. Griesel, the court said: "Of course what constitutes due care and supervision depends largely upon the circumstances surrounding the incident such as the number and age of the students left in the classroom, the activity in which they were engaged, the duration of the period in which they were left without supervision, the ease of providing some alternative means of supervision, and the extent to which the school board has provided and implemented guidelines and resources to insure adequate supervision."[21] The court noted that the activity in which the students were engaged was not particularly hazardous, nor were any of the students left in the room known as troublesome or mischievous. The court did not find that the teacher, principal or school corporation had acted other than as ordinary prudent individuals would under the circumstances.

Other courts have held that school personnel are not liable for negligent supervision when the incident could not have been foreseen by school authorities or when the act of the student causing the injury could not have been prevented even if supervision had been more vigilant. A Pennsylvania court held that a teacher was not liable for negligent supervision when during her momentary absence from class a fifth grade student's eye was injured by a pencil that had been propelled from the hand of a classmate when he tripped. The teacher could not have anticipated this occurrence regarding stu-

dents who were not known as troublesome, and as the court noted, the students involved had been instructed to remain in their seats.[22] In a case where a pencil was deliberately thrown by a student, a New York court ruled in favor of the teacher who was briefly absent from her classroom.[23] In another case, a Louisiana Appeals Court found that a school board was not liable for injuries to a student sustained by a rock thrown on school property. The court ruled that adequate supervision had been provided and that reasonable supervision did not demand constant supervision of every student on the playground.[24]

Courts are more likely to find educators liable for inadequate supervision if the occurrence leading to a student's injury is foreseeable and the accident is of the sort that could have been avoided if appropriate steps had been taken by school personnel. Courts examine the facts of each individual case searching for factors that tend to suggest that a reasonable person would have foreseen the occurrence of an accident. Two major indicators of foreseeability are unreasonably dangerous conditions or situations, and past behavior patterns of students, such as known violent propensities. Given these factors, liability is more likely to be found if a teacher leaves a classroom or does not provide reasonable supervision.

In a California Supreme Court case the court ruled that school personnel were negligent in supervision provided during a noon recess. Two boys had been slap boxing (with open hands) for five to ten minutes in front of thirty students when one boy, after being hit, fell backwards on the asphalt playground resulting in the death of the student. The court found that the school's informal manner of supervision which left the person in the physical education department office in charge of playground supervision during the noon recess, to be insufficient. The court noted that high school students are not adults and they should not be expected to act with the discretion and maturity of adults. The court concluded that school personnel were negligent by not providing a compre-

hensive schedule of supervising assignments and proper instructions pertaining to playground supervision.[25]

A Louisiana appeals court upheld a $350,000 jury award against a school teacher for personal injuries sustained by a student who was struck in the eye by an eraser thrown by another student while attending classes. The court contended that the teacher, who at the time of the accident had temporarily stepped out of the classroom, failed to provide adequate supervision. The teacher was aware of rowdy and disruptive behavior which regularly took place when the teacher left the class.[26] In another case, where students threw rocks at each other during recess for approximately ten minutes, unabated, before a student sustained an injury, the court held the supervising teacher liable for negligent supervision. The court found the injury to be reasonably foreseeable as a result of failing to supervise the students involved in the accident.[27]

### *Duties Regarding Instruction and School Buildings and Grounds*

Educators run a serious risk of being held liable for inadequate or incompetent instruction and teaching that leads to student injury. A leading case in this realm of negligence is a 1982 Indiana Court of Appeals decision. In Dibortolo v. Metropolitan School District of Washington Township, 440 N.E.2d 506 (Ind. App. 1982), a sixth grade student sued the school district for negligence to recover for injuries sustained when her mouth hit a concrete wall as she attempted a vertical jump during physical education class. The court found that the physical education teacher had not properly instructed her students before the vertical jumping exercise was attempted. At trial, it was adduced that the physical education teacher had not demonstrated the exercise nor warned the class about any dangers associated with the exercise. Additionally, the teacher had explicitly instructed her students to run toward the wall in order to acceler-

ate before executing the vertical jump. An expert witness testified that to instruct students to run or take a "leap step" toward the wall was improper instruction and created an unreasonable risk of harm. Although there was conflicting evidence as to the precise instructions provided by the teacher, the court maintained that proper instruction could have prevented the injury.

The greatest risk of liability in connection with negligent instruction seems to arise with respect to physical education, shop and laboratory classes. The level of the appropriate standard of care will vary with the degree of danger associated with the activity. In an action by a student against his shop teacher and the school district, a Tennessee court found a shop teacher negligent in failing to provide adequate instruction and supervision of his students when a drill bit struck a student while the student was helping another student operate a drill press. The court found that the shop teacher never instructed his students in the proper techniques for assisting others operating shop machinery, nor did he instruct his students on the ways a drill press could cause injury if not used properly.[28] Similarly, in another case, an eighth grader was seriously injured as he landed on his head, performing a gymnastic exercise known as a "headspring over a rolled matt," as a required activity in his physical education class. The first year teacher was found negligent in failing to instruct the class in the necessary progressions which were designed to lead up to the headspring. The principal was also liable for failing to exercise reasonable care in supervising the development, planning and administration of the school's physical education curriculum.[29]

In an unusual 1987 Indiana case involving a high school varsity baseball practice, a coach was found to have breached his duty to exercise reasonable care and supervision when he deviated from his written instructions concerning who would catch fly balls. A student-player was injured as a result of the deviation. On the day of the accident, the wind was blowing at a speed which made coaching commands difficult to hear, and the

baseball coach, knowing that his written instructions to his ballplayers was that outfielders would have preference over infielders with regard to fly balls, changed his mind and verbally asked that the cut-off man (infielder) catch the ball. The injured player, an outfielder, responded to the fly ball in accordance with the written instructions, not hearing the verbal instructions, and collided with the infielder, sustaining a broken jaw. The Supreme Court of Indiana found that the school district and coaching staff breached their duty to exercise ordinary and reasonable care under the circumstances. However, the court upheld the trial court's finding of summary judgment against the student, ruling the student incurred the risk as a matter of law.[30]

School personnel have a duty to maintain school buildings, school grounds and equipment in proper condition. The Indiana Supreme Court held that a school and school personnel breached their duty of reasonable care to a student using a bench saw in shop class when the school and/or the shop teacher did not purchase, install or use a saw blade guard device on the bench saw. The high school student who suffered a severe cut on his hand while using the bench saw in shop class was awarded $95,000 in 1974.[31]

In an Illinois case a school division was charged with negligence for allowing a twelve-foot slide on an asphalt playground without protective padding or protective railings. A student was injured when he fell from the slide at school. The court ruled that a slide on a school playground without guardrails constituted disregard for the safety of students, and consequently held the school district liable for the injuries.[32] Similarly, an Idaho junior high school student was injured when he fell over sprinkler pipes while playing football on the school's football field before school. Evidence introduced at the trial showed that the school principal was aware of the football game. The court ruled that the student was legally under the supervision of the school and the school breached its duty of reasonable care for the child's safety.[33]

Schools must be vigilant in maintaining the school premises. A Louisiana case points out the meticulous duty that is often required of school districts with regard to proper maintenance of the school grounds. A twelve-year old female student was injured when she stepped in a hole, which was close to a large tree surrounded by roots and covered by grass. She was awarded damages, and the school district held accountable even though the hole was not easily discoverable nor known to the school.[34] Courts require greater supervision or care where a dangerous condition exists, and the school knows of the dangerous situation, or should have known of its existence.

### *Field Trips, School Related Activities and Transportation*

Schools owe a duty of care regarding field trips and other school sponsored activities. When schools provide transportation en route to and from school, liability may be found for negligent operation of the bus, inadequate supervision of students on the bus, negligent supervision of students at bus stops and for unsafe equipment.[35] Schools may be liable for the off-campus injuries of a student who leaves school without school or parental permission if his leaving was a result of negligent supervision.[36]

In 1989 an Indiana appeals court visited the issue of adequate supervision with regard to school field trips. In that case a special education student and her parents filed an action against the teacher, the principal, the school district and the parents of her male classmates for damages stemming from an alleged sexual abuse incident which occurred during a school field trip. The incident took place when the female student and three male classmates were permitted to leave the supervised picnic area temporarily to use the park restroom facilities. The teacher remained with other class members at the picnic area. The court viewed the teacher's action as an exercise of professional judgment, not as a policy decision which would be immune from liability. The court imposed

a duty on the school personnel to "exercise reasonable supervision over their students" on field trips.[37] The court declined to find a breach of that duty and left the possibility of such a finding of unreasonable supervision for the trial court.[38]

School personnel should take special precautions and exercise greater care when field trips entail unusual activities or unfamiliar places. In an Oregon case a teacher was found liable for damages sustained by a student on a beach during a school field trip. The court ruled that the unusual waves from the Pacific Ocean along the Oregon coast posed a known hazard and that the teacher did not take reasonable safety precautions to guard against the hazard.[39]

School liability for bus transportation en route to and from school is a heavily litigated area in school law. In an Indiana case, School City of Gary v. Claudio, 413 N.E.2d 628 (1980), a student and his father were awarded $125,000 and $41,000, respectively, for damages sustained as a result of the student being run over by a school bus. In this case a ten year old boy was struck by a school bus as he and other school children were waiting to board the bus. The Indiana Appellate Court said, "The boarding of a bus by young children does . . . involve a dangerous condition and accidents such as the one in the present case are not of doubtful foreseeability. A school, therefore, does have a duty to maintain some level of supervision over students under its control while they are waiting for, and boarding, buses. A total lack of supervision constitutes negligence."[40] While the evidence was conflicting as to exactly how the accident occurred and how many, if any, teachers were present at the time of the accident, the appeals court upheld the jury's verdict against the school. The court focused on the injured student's age, his limited experience with buses (this was the first year of busing students to this school), lack of instructions by the school regarding busing procedures, lack of teachers present at the time of the accident, and the natural tendencies of ten year olds to run and play.

In Indiana, as in all other jurisdictions, schools must provide adequate supervision over students under its control while they are waiting for, boarding, on board, and leaving a school bus or courts may fix liability for negligence.

Providing a safe school environment free from violence and harm is a major responsibility of school personnel. A California constitutional provision enacted by a vote of the people of California in 1982 gives students and teachers an "inalienable right to attend schools which are safe, secure and peaceful."[41] While Indiana has not enacted such a sweeping state law, it is clear that Indiana school authorities have a duty to provide for the safety of students and school personnel against injuries from both insiders and outsiders. If assaults on students or teachers are reasonably foreseeable, then school personnel should take appropriate precautionary measures, including warning students and teachers and increasing patrol.

In an action for sexual assault committed on an emotionally disabled student by another student whose propensity to engage in sexually aggressive behavior was known to school officials, an appellate court in Florida reversed a trial court's verdict in favor of the school district. The court maintained that certain misbehavior is foreseeable and therefore is not an intervening cause which will relieve principals or teachers from liability for failure to supervise.[42] Conversely, in a Georgia case, a school district was held not negligent for injuries to a student who was stabbed in a fight by another student in a courtyard that was a particularly dangerous location, where the school provided periodic patrol and had no prior knowledge of the perpetrators propensity for violence.[43]

The legal reasoning applied in school violence cases appears to be grounded in whether or not a school could reasonably have foreseen the misconduct and prevented the injury under all the circumstances of the case.

## *Defenses*

**Contributory Negligence:** Educators who must defend against allegations of negligence have several traditional defenses available to them. Contributory negligence is perhaps the most often used defense by educators seeking to avoid liability for an allegedly negligent act. School personnel raising this defense must show that the injury resulted from the injured person's own neglect or failure to exercise the required degree of care necessary to ensure safety. This defense does not easily apply in situations involving negligent actions against educators brought by or on behalf of children. Courts recognize that the applicability standard of care expected of children varies from case to case and is established by the jury in each case according to the unique circumstances of the case. In School City of Gary v. Claudio, supra, an Indiana appeals court considered the sliding scale of care with respect to children: "In fixing that standard the jury must consider the degree of care that would ordinarily be exercised by children of like age, knowledge, judgment and experience under similar circumstances."[44]

Indiana has joined the majority of jurisdictions that allow the defense of comparative negligence which permits damages to be apportioned according to the assessed degrees of fault of all parties. However, for all practical purposes in the educational setting, this defense is not available, rather the defense of contributory negligence remains in place pursuant to statute, namely I.C. 34-4-33-8. Indiana specifies that all claims against governmental entities or public employees must be brought under the Indiana Torts Claims Act, I.C. 34-4-16.5. The comparative fault provision of the Indiana Code does not apply in any manner to tort claims brought pursuant to the Indiana Tort Claims Act.[45]

**Assumption of the Risk-Incurred Risk:** The defense of assumption of the risk which is known as incurred risk in Indiana has been repeatedly recognized by Indiana courts. An Indiana appeals court provides a definition of the doctrine of incurred risk: "It involves a mental state of venturousness on the part of the actor, and demands a subjective analysis into the actors actual knowledge and voluntary acceptance of the risk. By definition . . . the very essence of incurred risk is conscious, deliberate and intentional embarkation upon the course of conduct with knowledge of the circumstances. It requires much more than the general awareness of a potential for mishap. Incurred risk contemplates acceptance of a specific risk of which the plaintiff has actual knowledge."[46] (emphasis in the original).

The doctrine of incurred risk or assumption of the risk has been used frequently in the sport injury arena. In the Beckett v. Clinton Prairie School Corp, supra, case involving injuries to a student sustained when he collided with an infielder in baseball practice, the Indiana school district won the case on the issue of incurred risk. The court believed that even high school baseball players appreciate the inherent risks of the game.[47]

**Notice of Claim:** The common law defense of governmental immunity, abolished in Indiana by judicial decree, in the case of Campbell v. State, 248 N.E.2d 733 (1972), was in part replaced by the Indiana Tort Claims Act by the Indiana General Assembly.[48] Plaintiffs seeking recovery against a government entity or a government employee, including school districts and school employees must comply with statutory notice requirements of the Indiana Tort Claims Act. Failure to give timely notice to a governmental entity is a jurisdictional bar to maintaining a tort action against the entity.[49]

In a highly unusual fact pattern in Rodgers v. Martinsville School Corporation, 521 N.E.2d 1322 (Ind. App. 1 Dist. 1988), a swimming team member brought an action against a school corporation to recover for injuries she received as a result of an incident which occurred at school. The injured female student was changing clothes in the girls' locker room following swimming team practice when a male student and member of the school's wrestling team, while committing an act of voyeurism ("Peeping tom") fell through a false ceiling, landing on the female student injuring her shoulder. The injured student failed to file a notice of claim within 180 days of her eighteenth birthday as required by the Tort Claims Act and consequently the appeals court upheld the trial court's judgment in favor of the school corporation. In this case, the plaintiff also contended that the school district's purchase of liability insurance prohibited it from asserting the defense of noncompliance with the notice provisions of the act. The court rejected this contention.

However, in a 1989 Indiana case the Indiana Supreme Court reversed a court of appeals decision regarding the Indiana Tort Claims Act, holding that the 180 day notice of claim requirement did not apply to a teacher's civil rights claim, although it sounded in tort, under section 1983.[50] (See section on Constitutional Torts for discussion of Section 1983 later in this chapter.)

### *School District Tort Immunity*

In the United States the prevailing doctrine is that both the state and the federal government is immune for torts committed by its officers and employees unless it consents to such liability. Governmental immunity in America is based largely on English common law which can be traced back to the status of the King in medieval times. The ancient maxim that "the King can do no wrong" was identified with the concept of sov-

ereignty in the sixteenth and seventeenth centuries. The English judiciary took the position that the government of England was not liable for its tortious acts, and consequently, for damages caused by the government or its employees. The English courts simply adhered to the notion that the sovereign was incapable of doing wrong.[51]

The doctrine of sovereign immunity with its genesis, in feudalism, and the divine rights of kings, was curiously transplanted to America. Precisely how the doctrine of governmental immunity made its way to the new republic is not known, but regardless of its origins in America, the doctrine was employed by a Massachusetts court in Mower v. The Inhabitants of Leicester in 1812.[52]

In 1821 Chief Justice Marshall of the U.S. Supreme Court declared that without its consent, no lawsuit could be brought against the United States.[53] Following this decision the sovereign immunity doctrine became firmly entrenched with respect to suing the federal government.

Governmental immunity has been defended on the following grounds according to Prosser: (1) public funds devoted to public purposes should not be diverted to compensate for private injuries; (2) that liability would involve inconvenience and embarrassment; (3) immunity is grounded in public policy; and (4) the idea that an entire people acting as a government could commit and be responsible for a wrong is absurd.[54] In a widely quoted dictum Justice Holmes explained the rationale for sovereign immunity "[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[55]

The doctrine of sovereign immunity was traditionally extended to school districts in most states for injuries to individuals which were caused by the negligent acts of governmental employees. However, today in more than half of the states the doctrine of governmental immunity for torts has been eliminated or substantially eroded by leg-

islative or judicial actions.[56] In some states the doctrine of governmental immunity has been curtailed or eliminated by statutes enacted by the state legislature, in other states immunity has been abolished or sharply limited by judicial decree. The doctrine is criticized for often leaving injured parties without any means for compensation for losses caused by the state.

Indiana adopted the common law doctrine of sovereign immunity, and in 1895 the Indiana Supreme Court extended the doctrine to cover the state's school districts.[57] Following that case Indiana courts made inroads to limit the doctrine. During the 1960s Indiana courts abrogated immunity for all counties and municipalities in Indiana. In 1972 in Campbell v. State, supra, the Indiana Supreme Court found "no basis for the continuation of the doctrine of immunity as applicable to the state any more than it is applicable to municipal corporations and counties."[58] Thus, regardless of whether an Indiana school district is considered a unit of state government, municipal government, or a county unit of government, the defense of governmental immunity is not available to Indiana public schools.[59] Simply put, Indiana public schools have not been protected by the doctrine of governmental immunity since 1972.

Indiana has passed legislation which limits the amount of damages that injured parties may recover as compensation for losses as a result of governmental negligence. The aggregate liability of all government agencies for cases involving a single recovering plaintiff is $300,000 and a total possible award of $5,000,000 in suits involving multiple plaintiffs.[60]

Indiana school districts are allowed to purchase liability insurance which covers the school district and its employees from being held personally liable for damage awards.[61]

Indiana has established a statutory scheme which must be complied with as a prerequisite to recovery by anyone claiming an injury as a result of governmental

negligence. The statute is called the Indiana Tort Claims Act. The Tort Claims Act requires that relief must be requested through the agency which the claim is against by filing a claim with that governmental unit within one hundred eighty days after the loss occurs.[62] This means that a school district has a right to receive notice of a claim and act on it before a cause of action in court can proceed against the school district.

### *Tort Immunity Policy for School Employees*

Educators protection against personal liability varies among the states. Traditionally, states have made a distinction for tort liability purposes, between whether the educator was performing a ministerial function or a discretionary function. States would permit immunity for torts committed while performing discretionary (decision making functions) acts, but hold school personnel responsible for their ministerial actions.

The Indiana Tort Claims Act at I.C. 34-4-16.5-3661 provides "a governmental entity or employee acting within the scope of his employment is not liable if a loss results from the performance of a discretionary function." Indiana courts have defined and distinguished ministerial and discretionary acts in an effort to ascertain if certain conduct is covered by the immunity provision. An Indiana appeals court defined a ministerial act as "one which a person performs in a given state of facts in a prescribed manner, in obedience to the mandate of legal authority without regard to, or the exercise of, his own judgment upon the propriety of the act being done."[63] In a 1983 case, a court of appeals quoted the language of a 1919 Indiana case to define a discretionary act covered by immunity "a duty is discretionary when it involves on the part of the [employee] to determine whether or not he should perform a certain act, and if so, in what particular way . . ."[64]

However, the Indiana Supreme Court in a highly significant case for educators, Peavler v. Board of Commissioners, 528 N.E.2d 40 (1988), expressly rejected the ministerial-discretionary standard for purposes of immunity under the Tort Claims Act. The court adopted the planning-operational test used by the United States Supreme Court in determining discretionary-act based immunity under the Federal Tort Claims Act. The planning-operational test substantially erodes the parameters of immunity that were available to Indiana educators before 1988.

In Peavler v. Board of Commissioners, supra, the Indiana Supreme Court criticized the ministerial-discretionary standard as not providing clear guidelines to distinguish immune from unprotected governmental acts. The court asserted: "If discretionary functions included every act which involves any element of choice, judgment or ability to make responsible decisions, every act would fall under the exception."[65] The court went on to explain the planning-operational test: "the discretionary function exception insulates only those significant policy and political decisions which cannot be assessed by customary tort standards . . . the type of discretion that may be immunized from tort liability is generally that attributable to the essence of governing."[66]

In Borne v. Northwest Allen County School Corporation (1989), supra, an Indiana court of appeals by a 2-1 vote expressly extended the planning-operational test to the educational setting in a case involving a tort action against a teacher, principal, and a school district. The court relied on the Peavler decision, and held that professional judgments will not be immune from legal challenge under the Tort Claims Act "unless they can be properly characterized as policy decisions that have resulted from a conscious balancing of risks and benefits and/or weighing of priorities."[67] The court contended that "the crucial judicial inquiry associated with the planning-operational test is not merely whether judgment was exercised but whether the nature of the judgment called for policy considerations."[68]

The facts in the Borne case involved allegations against a teacher and a school district for not providing adequate supervision during a field trip where a disabled student was sexually abused by her classmates after the teacher gave the students permission to leave a supervised area to go to the bathroom. The school corporation and the teacher responded that they were immune from liability because their actions were discretionary exercises of professional judgment. In particular, the teacher argued that her decision to grant the students request to go to the bathroom in a nature center unsupervised was a matter of professional discretionary judgment, based on her knowledge of the students and her training in special education. However, the court applied the planning-operational test and held it could not characterize her decision as a policy decision. The court noted that the teacher "did not attempt to establish general guidelines for student hygiene or student behavior on field trips, nor did she try to set a standard for the degree of control a teacher should exercise over pupils on such trips."[69] In other words, the court held that although the teacher might have generally been acting as a leader, she was not acting in a governing role formulating basic policy decisions.

In terms of protection against liability for negligent acts, Indiana educators have lost most of their qualified immunity protection because of the judicial decrees in Peavler and Borne. Most acts by school personnel that take place in the day-to-day operation of the public schools do not rise to the level of exercising political power or making significant policy decisions now necessary for immunity from tort liability.

In 1990 the Indiana Supreme Court denied transfer (review) of the Borne case and thus affirmed the decision of the appeals court. Justice Pivarnik dissenting to the denial of transfer said: "The broadening application of the rules established in Peavler v. Monroe City Board of Commissioners . . . places standards on conduct of persons such as teacher Ellen West here that are impossible to meet."[70]

While the courts may have sharply limited the doctrine of immunity for Indiana educators, they maintain the legislatively created safety net provided by the Indiana General Assembly's "save harmless" statute. Indiana is one of the growing number of states that have enacted "save harmless" or indemnification legislation, which require school districts to pay the legal expenses or damage claims assessed against employees. The cardinal rule of all "save harmless" statutes is that educators will be indemnified for monetary losses as long as the tortious acts occurred within the scope of the educator's employment.

The Indiana Code provides that school districts shall pay for monetary losses against employees, including legal fees and all costs incurred by or on behalf of the employee in defense of a claim or suit, as long as the negligent conduct occurred within the scope of the employee's employment.[71] In addition, a judgment against or a settlement by a school district bars any further claim or lawsuit against the school employee whose conduct gave rise to the claim resulting in the judgment or settlement.[72]

### *Educational Malpractice*

The term educational malpractice is used in the context of common law tort. During the late 1970s and early 1980s courts entertained a flurry of litigation alleging educational malpractice. Many professions such as law, medicine, and engineering had been subject to suits based on professional malpractice for years. Practitioners of these professions are held to a higher standard of conduct with respect to their duty owed clients than would be the situation for lay persons. Attempts to apply the professional malpractice standard to the field of education have not to date been successful. Generally speaking, plaintiffs alleging educational malpractice allege that school districts, administrators and teachers have been negligent in instruction and negligent in issuing

certificates or diplomas where students receiving diplomas do not perform at or near grade level and do not even possess basic academic skills.

In a California case, one of the first of its kind, the court dismissed the case and ruled that failure of educational achievement is not cognizable under tort law. In Peter W. v. San Francisco Unified School District, 60 Cal.App.3d 814, 131 Cal.Rptr. 854 (Ct. of App. 1976), the court discussed why it concluded that such an action should not be recognized: "Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury . . . the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the teaching process, and beyond the control of its ministers."[73] The court worried about a possible educational malpractice explosion and said: "To hold them to an actionable 'duty of care,' in the discharge of their academic functions, would expose them to the tort claims--real or imagined--of disaffected students and parents in countless numbers. . . . The ultimate consequences, in terms of public time and money, would burden them--and society--beyond calculation."[74]

A New York Court of Appeals reached a similar conclusion in a 1979 educational malpractice suit and maintained that public schools were never intended to be held to a common law tort duty to ensure students a minimum level of education.[75]

Courts have thus far been deferential to educational institutions in their decision making and they have not ventured into an arena of second-guessing educational practices.

In 1982 the Court of Appeals of Maryland heard its first educational malpractice suit in Hunter v. Board of Education of Montgomery County, 292 Md.481, 439 A.2d 582 (1982). In this case, a student acting through his parents contended that the school district, elementary school principal and teacher negligently evaluated the student's

ability and incorrectly required him to repeat first grade materials for a second year while physically being in the second grade. The court maintained that it was in agreement with the reasoning employed by other courts faced with educational malpractice claims and ruled that monetary damages were an inappropriate remedy for mistakes made in the day-to-day operation of the educational process.

In another well known educational malpractice case in New York, Hoffman v. Board of Education, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979), the issue of malpractice involved an inappropriate identification and placement of a special education student. Upon entering Kindergarten the student scored a 74 on a verbal I.Q. test. He was placed in a class with mentally retarded children even though he missed the cutoff score by one point. The psychologist who examined the student recommended that he be reevaluated within two years, but retesting never took place. Eleven years later, at his mother's request, the student was retested and was found to be of normal intelligence. At trial, a jury found the school system negligent and awarded him $750,000. The appellate division affirmed, although the award was reduced to $500,000. The finding of liability was premised on the school district's failure to reevaluate the student as the examining psychologist had recommended. However, upon appeal to the state's highest court the decision of the trial court finding educational malpractice was reversed in a 4-3 decision. The court said: "The courts of this state may not substitute their judgment . . . for the professional judgment of educators and government officials actually engaged in the complex and often delicate process of educating . . ."[76] The court ruled that a cause of action based on educational malpractice does not exist in New York.

The fate of educational malpractice did get a boost in a 1982 Montana case where a child had been improperly placed in a program for the educable mentally retarded. The court distinguished that educational malpractice case from others on the basis of a misplacement rather than a misdiagnosis, where school officials possessed

scores showing the placement improper. The school's knowledge of the student's ability scores, according to the court, was different than a misdiagnosis of a disability such as in the Hoffman case. The court also noted that school personnel violated mandatory statutes concerning appropriate placements of special education students.[77]

Claims for educational malpractice, with the exception of the Montana case, have been considered and rejected in six states, California, New York, Alaska, Florida and Maryland, and in 1990, Kentucky.[78] In the Kentucky case, an appeals court simply held that a cause of action for educational malpractice is not recognized, regardless of whether the action is brought against a public or private school in Kentucky.[79]

Indiana courts have only entertained the issue of educational malpractice once, and that case involved a suit against a community college. The 1990 case was brought in federal district court by a former community college student who alleged that she received an inferior educational experience and charged the school was guilty of educational malpractice. She complained that educational malpractice is a constitutional deprivation under Section 1983. (See section on Constitutional Torts in this chapter.) The court held that educational malpractice is not a cognizable theory in a Section 1983 action. It is interesting to note that this federal court asserted that not only is educational malpractice not a deprivation of a plaintiff's constitutional rights under a tort theory, it likewise is not a constitutional deprivation under Section 1983 if characterized as a breach of contract.[80]

## Intentional Torts

### *Defamation*

Defamation consists of the twin torts of libel and slander. Slander is spoken defamation, and libel is written defamation. Defamation is generally defined as an injury to a person's character, fame or reputation by a false, malicious statement. Alexander and Alexander[81] note that educators are particularly susceptible to charges of defamation because they are constantly involved in an "information flow" concerning students, and are often communicating information about students. School administrators face additional complex problems because they communicate information concerning teacher evaluation and performance "to other administrators and school board members."[82]

Various defenses are available to school personnel who are sued for defamation. In Indiana, the defense of truth, which is a complete defense in cases involving defamation, is guaranteed by the Indiana Constitution.[83] However, educators must have made the alleged defamatory statement with good motives.

Other defenses, such as absolute or qualified privilege, may also be available to educators. An absolute privilege completely excuses the defamatory statement. It is usually accorded speech made in legislative, judicial or executive proceedings. Such statements are protected if made in the performance of legitimate public duties. In an early Indiana case which has never been overturned, an appeals court accorded written communications concerning a school employee exchanged among school board members absolute privilege. In extending the privilege the court maintained that the communi-

cation was absolutely privileged because it was communicated in the school board's quasi-judicial capacity.[84]

A qualified privilege also excuses defamatory speech and it has been used extensively by educators. There is a common law privilege, a qualified privilege, as to communications between parties sharing an interest or duty, including school personnel. In a Louisiana case, a principal recommended to the school board that a teacher not be rehired, calling the teacher a "nut." The court concluded that the recommendation was not defamatory, but even if it was: "A good faith communication between parties sharing an interest or duty enjoys a privilege against suit for defamation . . ."[85]

Cases involving alleged defamatory communication between parents, school authorities and other parents, concerning school matters have been the subject of defamation suits. In one 1982 case, parents of several high school females became concerned for the welfare of their children when they received information indicating that two male teachers were having sexual relations with female students attending the same high school. The parents took up the matter with the principal of the high school. When the parents felt that the principal was taking no action, they visited homes of other high school students and discussed the matter. The teachers filed a defamation action against the parents. The appeals court upheld the verdict of the jury favoring the parents. The court held that the parents' communication was covered by a qualified privilege, even if false, because the parents shared an interest or duty to protect the welfare of their children at school and to provide good teachers in the public schools.[86]

Teachers often fear defamation liability regarding statements they make pertaining to students. A 1990 Kentucky appeals court holding might alleviate some of that fear. A high school student brought a defamation action against his school for statements made by teachers, both written and oral, that characterized the student's poor academic performance as a result of his laziness or irresponsibility. The student was

denied admission to a private school, in part, based on these statements. The student argued that his learning problems stemmed from a disability (attention deficit disorder) and not from any perceived laziness or irresponsibility attributed to him by his teachers. The court ruled "under the facts of this case, if a teacher is describing to his pupil what his problem is, or writes a comment on the pupil's report card for his parents' benefit and guidance, or discusses with the parents of a female student her conduct with a male student, the statements are qualifiedly privileged."[87]

It is commonly assumed that an individual's opinion as opposed to a factual assertion is accorded constitutional protection from defamatory civil prosecution. However, in a 1990 U.S. Supreme Court decision,[88] the court defined the boundaries of the law of defamation with respect to any distinction between expressions of opinion and assertions of objective fact. The court contended that it has never recognized a wholesale defamation exemption for statements that might be called "opinion." The court cited the Restatement of Torts (Second) explaining that "an expression of opinion could be defamatory if the expression was sufficiently derogatory of another as to cause harm to his reputation."[89] The court noted that at common law even the privilege of fair comment did not cover false statements of fact, even if couched in terms of an opinion. The thrust of the opinion is that "expressions of opinion that imply an assertion of objective fact" are actionable as defamatory statements.[90]

### *Assault and Battery*

We have discussed educators liability arising out of negligent or unintentional acts. Educators may also be liable for intentional torts such as assault and battery. An assault is placing another in immediate apprehension of bodily harm. An assault occurs even though an actual or harmful contact does not take place. A battery is committed

when physical contact actually occurs. As indicated, the most prevalent intentional tort with which school personnel become involved is assault and battery. The alleged tort of assault and battery usually occurs in the context of allegations of excessive corporal punishment inflicted on students. Under the doctrine of in loco parentis, school authorities in thirty-one states[91] have the right to administer disciplinary corporal punishment in the same manner and the same extent as parents. An Indiana appeals court recently reiterated its support for the doctrine of in loco parentis with respect to the use of reasonable corporal punishment by school authorities.[92] However, when the use of corporal punishment is excessive, immoderate or unreasonable, the educator is subject to a civil suit based on assault and battery or even criminal action for child abuse.

Generally speaking, under the doctrine of in loco parentis educators may use physical force which is reasonable under the circumstances; but may not use force which goes beyond that reasonably necessary to effectuate a legitimate educational purpose.[93]

In a very early Indiana case a teacher hit a student in the head with his fist and wore out two whips on him for incorrectly spelling a word and refusing to try again. The court found that the teacher was not justified in beating the student, and had exceeded his right to inflict corporal punishment.[94]

More recently, an Illinois court upheld the dismissal of a tenured teacher for giving a sixth grade student four licks with a paddle, and paddling the child twenty minutes later five more times after the boy shrugged and smiled after the first paddling.[95] The school board contended that the teacher's unreasonable use of corporal punishment essentially constituted a battery.

In an Oklahoma case, a school superintendent was subject to tort liability for "spanking and beating with unnecessary and excessive force"[96] a ten year old student. The school official was allegedly in an intoxicated state and was found to have acted outside of the scope of his employment. Not only did the court find the superintendent

subject to a civil suit for assault and battery, it also mentioned the possibility of criminal action.[97]

In a Louisiana case, a court found a teacher liable for assault and battery when a teacher broke a student's arm while attempting to discipline the student. The teacher shook the pupil against the bleachers in the school gym and he fell and broke his arm. The court assessed monetary damages against the teacher.[98]

However, in a 1989 Georgia case in which a student was paddled three times with a wooden paddle, approximately twenty-four inches long, six inches wide, and one inch thick, causing physical and psychological injuries, the court held for the school principal, teacher, superintendent, and school district. The court ruled that the corporal punishment was not excessive in violation of state law.[99]

The main defense of educators against the intentional tort of assault and battery is the educator's in loco parentis disciplinary authority established by common law privilege. While the doctrine of in loco parentis has been eroded in many states, Indiana continues to support its vitality. Courts uniformly recognize school authorities' right and duty to maintain control and order in the public schools. But courts will not permit unreasonable or excessive force in the imposition of school discipline. What constitutes excessive force as opposed to reasonable force is fact-specific, varying with the circumstances of each case. It is clear that courts consider the gravity of the offense, the students' prior disciplinary record, the students' age, sex and physical condition, the method and material used to administer punishment, and the state of mind of the school official administering the punishment in determining the reasonableness of the use of physical force against a student.

Corporal punishment is discussed in more detail in the chapter pertaining to the rights of students under the topic of discipline.

## Constitutional Torts

A constitutional tort is a separate tort from a common law civil tort. While the law of common law torts can be traced to England, the genesis of the constitutional tort is found in the Civil Rights Act of 1871, codified as Title 42 of the United States Code. Congress passed the legislation during the Reconstruction period in order to protect the rights of blacks.[100] Congress intended that awards under Section 1983 would deter the deprivation of the constitutional rights of newly freed black citizens.

Common law tort actions may be distinguished from constitutional tort suits on many grounds. Common tort actions are brought in state courts. However, Section 1983 actions may be brought in either federal or state court. The great preponderance of lawsuits brought under Section 1983 are filed in the federal courts. A plaintiff may recover actual damages (compensatory damages) and punitive damages (to punish the tortfeasor) in a common law tort action.[101] In a constitutional tort case a plaintiff must demonstrate an actual injury in order to recover monetary damages. Only in very rare cases are school officials held liable for punitive damages. One other major area of difference between common law torts and constitutional torts involves attorney's fees. Plaintiffs' attorneys in common law tort cases are often retained on a contingency fee basis. Under this fee arrangement, an attorney agrees to be paid a percentage of any monetary award only if the plaintiff wins the case. In a Section 1983 case (and other civil rights lawsuits), attorneys' fees may be recovered pursuant to statute in federal court (and generally in state court) to a plaintiff who prevails in the lawsuit. Otherwise the parties pay their own attorneys (usually on an hourly fee basis) in Section 1983 actions.

Many injured parties seek redress in federal court under 42 U.S.C. § 1983 (Section 1983) against school districts and school personnel. This cause of action is commonly referred to as a constitutional tort. Section 1983 of the Civil Rights Act of 1871 provides for liability if a person acting under the color of state law violates another individual's civil rights. Section 1983 reads in part: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or Territory . . . subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law . . ."[102] School districts and other governmental entities were not considered "persons" within the meaning of Section 1983 and subject to liability until 1978. In Monell v. Department of Social Services of the City of New York, 98 S.Ct. 2018, 436 U.S. 658 (1978), the United States Supreme Court overruled its position taken in Monroe v. Pape,[103] a 1961 decision, by stating, "Our analysis of the Civil Rights Act of 1871 compels a conclusion that Congress did intend municipalities and other government units to be included among those 'persons' to whom § 1983 applies."[104] However, the Supreme Court held that governmental units cannot be held liable under § 1983 on a respondent superior theory whereby employers are liable for the acts of their employees. This means that a civil rights violation under § 1983 must have been directly caused through the execution of a policy or custom that can be attributed to the governmental entity. Therefore governmental units are liable under § 1983 for a constitutional wrong committed by an employee only when the actions are taken representing well established custom or official policy of the governmental entity.

School districts are not exposed to liability under Section 1983 for the negligent deprivation of a person's life, liberty or property (emphasis added). In 1986, the U.S. Supreme Court in two cases decided on the same day held that intentional, outrageous

or egregious actions by state officials would trigger Section 1983 recovery for constitutional torts.[105] The court in effect overruled previous decisions which allowed for negligence actions under Section 1983.[106] It should be noted that actions for damages against a party in his or her official capacity operate as claims against the governmental entity itself.[107]

The Seventh Circuit Court of Appeals addressed the issue of whether or not reckless conduct could give rise to a constitutional tort. This issue had been left open by the 1986 cases. The court maintained that in order to proceed under Section 1983 it must be demonstrated that a governmental official "knowingly, willfully or at least recklessly caused the alleged deprivation by his action or his failure to act."[108] The Supreme Court ruled in 1980 that governmental units cannot claim qualified immunity based on their agents acting in good faith.

In summary, in order for a plaintiff to prevail in Indiana in a Section 1983 action against a school's governing body the plaintiff must prove he or she has suffered a deprivation of a constitutional right through an act of a school official or employee, who was directly implementing a policy or custom of the school's governing body. Secondly, to establish a claim, the plaintiff must demonstrate that the school official or employee knowingly, willfully or recklessly caused the constitutional deprivation by his or her action or failure to act.

### *Liability of Individuals Under Section 1983*

Prior to 1975 school board members and other educators were considered immune from liability for constitutional torts. In Wood v. Strickland, 420 U.S. 308 (1975), a student discipline case, the Supreme Court reduced this protection to a "good faith" qualified immunity. The divided court by a 5-4 decision held that a school board mem-

ber could be liable for damages if "he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected . . ."[109]

Federal courts attempted to interpret the meaning of good faith immunity for several years after the Wood v. Strickland decision. The courts used both an objective and subjective test to determine liability of individuals under Section 1983. The subjective test involved the factual question of whether governmental employees acted with malice or with the knowledge the official might be violating the law. In a 1982 decision, Harlow v. Fitzgerald[110] the Supreme Court abolished the subjective standard in favor of an objective good faith standard: "governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[111] As a result, school employees are not liable in their individual capacities unless they personally violate clearly established constitutional rights of individuals. The Seventh Circuit Court of Appeals has defined "clearly established" constitutional rights in terms of a "clearly established legal norm"[112] which is "sufficiently particularized to put potential defendants on notice that their conduct probably is unlawful."[113]

With respect to monetary damages collectable under Section 1983, the Supreme Court in Carey v. Piphus, 435 U.S. 247 (1978), placed effective limits on the amount recoverable as fair compensation for injuries caused by the deprivation of a constitutional right. In Carey v. Piphus the Supreme Court held that students who had been denied procedural due process in disciplinary proceedings were entitled to only nominal damages "not to exceed one dollar" unless they could prove actual injury. Costly punitive or compensatory damages are not recoverable under Section 1983 unless the plaintiff establishes that the constitutional deprivation resulted in actual injury.

Under certain circumstances, school authorities have been liable for punitive damages. In order to prevail on the issue of punitive damages, a plaintiff must show that an educator's conduct is willful, wanton, or in complete reckless disregard of another's constitutional rights.[114]

## Summary

A tort is a civil wrong, not involving a breach of contract, for which damages may be recovered in a court of law. The law of torts can be traced to English common law. By allowing compensation for injuries sustained by students in school, tort law requires schools to take appropriate steps to provide for a safe and orderly environment.

Three categories of tort actions provide the basis of liability for tortious acts: (1) negligence, (2) intentional torts, and (3) strict liability.

The most common tort with which educators become involved is negligence. Negligence is conduct falling below an established standard that results in injury. The generally accepted standard of care by which an educator's conduct is judged is that standard of care expected of the reasonably prudent teacher. Indiana courts hold teachers to a slightly lesser degree of care, but recognize a special relationship between educator and student in the school environment. Indiana teachers, principals, school boards and other school personnel are held to the standard of whether they exercised their duty with the level of care that an ordinary prudent person would under the circumstances. In exercising ordinary and reasonable care for the students under their authority Indiana educators are legally charged with a special responsibility to be on guard against unreasonable actions frequently attributed to children. This means that educators should consider and be aware of the degree of care that would ordinarily be

exercised by children of like age, knowledge, judgment and experience who are under their supervision.

The extent of reasonable supervision required by Indiana courts for the care and supervision of students will depend on the ages and physical and psychological condition of the students involved, as well as the type of activity and conditions under which the activity took place. The standard of care required by courts of school authorities increases with the immaturity, lack of mental capacity or inexperience of students.

Educators are likely to be found liable for inadequate supervision if the occurrence leading to a student's injury is foreseeable and the accident is of the sort that could have been avoided if appropriate steps had been taken by school personnel.

Educators run a serious risk of being held liable for student injuries that are a result of inadequate or incompetent instruction and teaching. The greatest risk of liability in connection with negligent instruction seems to arise most often with respect to physical education, vocational education and laboratory classes.

School personnel have a duty to maintain school buildings, school grounds and equipment in proper condition. Courts require greater supervision or care where a dangerous condition exists, and the school knows of the condition, or should have known of its existence with reasonable diligence.

Schools owe a duty of care regarding field trips and other school sponsored activities. School personnel should take special precautions and exercise greater care when field trips entail unusual activities or unfamiliar places.

School liability for bus transportation to and from school is a heavily litigated area in school law cases. Supervision should be provided at bus stops and on the bus and the equipment should be checked constantly for safety.

Providing a safe school environment free from violence and harm is a major responsibility of school personnel. If assaults on students or teachers are reasonably

foreseeable under the circumstances of a situation, then school authorities should take appropriate precautionary measures.

Educators who must defend against allegations of negligence have several traditional defenses available to them. Contributory negligence is the most often used defense. The defense of assumption of the risk, which is called incurred risk in Indiana, is recognized by Indiana courts.

The doctrine of sovereign immunity which can be traced back to the status of the English King in medieval times was transplanted to America. The doctrine of sovereign immunity makes states and the federal government immune for torts committed by its officers and employees. However, Indiana public schools have not been protected by the doctrine of governmental immunity since 1972. The Indiana Supreme Court abolished immunity for the public schools.

Indiana has passed legislation, called the Indiana Tort Claims Act, which provides procedures that must be complied with as a prerequisite to recovery by anyone claiming an injury as a result of governmental negligence. Indiana school districts are permitted to purchase liability insurance covering the school district and employees.

Prior to 1988 Indiana educators enjoyed wholesale protection against personal liability for torts committed while performing discretionary acts. While school personnel continue to be protected under the doctrine of immunity for discretionary acts pursuant to the Tort Claims Act, the Indiana Supreme Court has sharply limited that immunity by redefining discretionary acts. The court adopted the planning-operational test for use in determining discretionary-act immunity. Educators are only immune from acts that constitute significant policy and political decisions generally attributable to the essence of governing. The issue is not whether judgment was exercised but whether the nature of the judgment was political or policy oriented. Most acts by school authorities that occur in the day-to-day operation of the public schools do not meet the test.

Indiana educators are personally protected from monetary loss by a "save harmless" statute which requires school districts to pay legal expenses or damage claims assessed against employees for their negligent conduct, as long as the conduct occurred within the scope of their employment.

During the 1970s and 1980s the judiciary entertained numerous suits against school districts alleging educational malpractice. Claims for educational malpractice with the exception of one case have been rejected in six states. An Indiana federal district court would not recognize educational malpractice as a legal cause of action in a case involving a community college.

Defamation consists of the twin torts of libel and slander. The Indiana Constitution recognizes truth as a complete defense in cases involving defamation. Indiana school boards are granted absolute immunity for communications exchanged among members concerning school employees. Educators are generally extended a qualified privilege against liability for defamation as to communications with parents regarding their children, and communications with other teachers with a legitimate educational interest in the student. Educators should be aware that an expression of an opinion which is false or malicious that implies an assertion of objective fact is actionable as defamation.

Educators may also be liable for intentional torts such as assault and battery. Most instances of allegations of assault and battery against school authorities occur in the context of the use of excessive corporal punishment. Indiana school personnel may use the defense of in loco parentis against charges of assault and battery. However, educators may not use force which goes beyond that reasonably necessary to effectuate a legitimate educational purpose.

Many injured parties seek redress in federal court for violations of their constitutional rights under Section 1983 of the Civil Rights Act of 1871. This cause of action

is commonly called a constitutional tort. In Indiana, in a Section 1983 action against a school governing body, a plaintiff must prove he or she has suffered a deprivation of a constitutional right through the act of a school official or employee who was directly implementing a policy or custom of the school's governing body. Secondly, the plaintiff must show that the school official or employee knowingly, willfully or at least recklessly caused the constitutional deprivation by his or her action or failure to act.

School authorities will not be found liable in their individual capacities under Section 1983 unless they personally violate clearly established constitutional rights of individuals. Neither compensatory nor punitive damages are recoverable under Section 1983, unless the constitutional deprivation resulted in actual harm.

## Footnotes

1. See, generally, Page Keeton, Daniel Dobbs, Robert Keeton, and David Owen, Prosser and Keeton on Law of Torts, 5th ed. (Minnesota: West Publishing Co., 1984).

2. I.C. 34-4-16.5 et. seq.

3. See, e.g., Miller v. Griesell, 308 N.E.2d 701 (1974); Barbin v. State of Louisiana, 506 So.2d 888 (La. App. 1987); Rodriguez v. Board of Education, 480 N.Y.S.2d 901 (N.Y. 1984).

4. Page Keeton, Daniel Dobbs, Robert Keeton, and David Owen, Prosser and Keeton on Law of Torts, 5th ed. (Minnesota: West Publishing Co., 1984), p. 174.

5. Kern Alexander and M. David Alexander, American Public School Law, 2nd ed. (St. Paul, Minnesota: West Publishing Co., 1985), p. 457.

6. P. Keeton, D. Dobbs, R. Keeton, and D. Owen, Prosser and Keeton on Law of Torts, p. 288.

7. Miller v. Griesell, supra, p. 706.

8. Ibid., p. 706.

9. Ibid.

10. Norman v. Turkey Run Community School Corporation, supra, p. 617.

11. Ibid., p. 616.

12. Ibid.

13. Ibid.

14. William D. Valente, Education Law: Public and Private, Vol. 2 (St. Paul, Minnesota: West Publishing Co., 1985), p. 198.

15. Emerson v. Markle, 539 N.E.2d 35 (1989).

16. Illinois Central Gulf Co. v. Parks, 390 N.E.2d 1073 (1979).

17. Peak v. Campbell, 563 N.E.2d 648 (1990).

18. Wilson v. Kaufman, 563 N.E.2d 610 (1990).

19. Scott v. Asher, supra, p. 137.

20. Driscol v. Delphi Community School Corp., supra, p. 774.

21. Miller v. Griesel, supra, p. 707.

22. Simonetti v. School District of Philadelphia, 454 A.2d 1038 (1982).

23 Ohman v. Bd. of Education, 93 N.E.2d 927 (1950).

24. Hampton v. Orleans Parish School Board, 422 So.2d 202 (La. Ct. App. 1982).

25. Dailey v. Los Angeles Unified School District, 470 P.2d 360 (1970).

26. Alferoff v. Casa Grande, 504 N.Y.S.2d 719 (1986).

27. Sheeham v. Saint Peter's Catholic School Board, 188 N.W.2d 868 (1971).

28. Roberts v. Robertson County Board of Education, 692 S.W.2d 863 (Tenn. App. 1985).

29. Larson v. Independent School District No. 314, 289 N.W.2d 112 (Minn. 1979).

30. Beckett v. Clinton Prairie School Corporation, 504 N.E.2d 552 (1987).

31. Scott County Schools v. Asher, 312 N.E.2d 9 (1974).

32. Kirby v. Macon Public School District No. 5, 523 N.E.2d 643 (Ill. App. 1988).

33. Bauer v. Minidoka School District No. 331, 778 P.2d 336 (1989).

34. Levie v. Orleans Parish School Board, 537 So.2d 351 (1988).

35. See generally, 34 A.L.R.3d 1210 (1970( and (1990 Supplement).

36. Hoyem v. Manhattan Beach City School District, 585 P.2d 851 (1978).

37. Borne v. N. W. Allen County School Corp., 532 N.E.2d 1196 (Ind. App. 3 Dist. 1989).

38. Ibid.

39. Morris v. Douglas Co. School Dist. No. 9, 403 P.2d 775 (1965).

40. School City of Gary v. Claudio, supra, p. 632.

41. Article I, Section 28(c), California Constitution.

42. Collins v. School Board, 471 So.2d 560, 491 So.2d 280, mandamus denied (1985).

43. Cooper v. Baldwin Co. School District, 386 S.E.2d 896 (1989).

44. School City of Gary v. Claudio, supra, p. 633.

45. I.C. 34-4-33-8.

46. Power v. Brodie, 460 N.E.2d 1241 (Ind. App. 1984), p. 1247.

47. Beckett v. Clinton Prairie School Corporation, supra.

48. I.C. 34-4-16.5 et. seq.

49. I.C. 34-4-16.5-7.

50. Werblo v. Hamilton Heights School Corp., 537 N.E.2d 499 (1989).

51. See generally, Kern Alexander and M. David Alexander, American Public School Law, pp. 484-486.

52. Ibid., p. 485.

53. Cohens v. Virginia, 19 U.S. 264, 5 L.Ed. 257 (1821).

54. William Prosser, The Law of Torts, 4th ed. (St. Paul, Minnesota: West Publishing Co., 1971), p. 1001.

55. Kawananakoa v. Polyblank, 27 S.Ct. 526, 527, 205 U.S. 349, 353 (1907).

56. William Valente, Education Law: Public and Private, p. 224.

57. Freel v. School City of Crawfordsville 41 N.E. 312 (1895).

58. Campbell v. State, supra., p. 736.

59. Scott County School District v. Asher, supra.

60. I.C. 34-4-16.5-4.

61. I.C. 34-4-16.5-18, I.C. 20-5-2-2.

62. I.C. 34-4-16.5-7.

63. State Department of Mental Health v. Allen, 427 N.E.2d 2 (1981), p. 4.

64. City of Hammond v. Citaldi, 449 N.E.2d 1184 (1983), p. 1187.

65. Peavler v. Board of Commissioners of Monroe Co., supra, p. 43.

66. Ibid., p. 46.

67. Borne v. Northwest Allen County School Corporation, supra, p. 1200.

68. Ibid., p. 1202.

69. Ibid., p. 1202.

70. Borne v. Northwest Allen County School Corporation, 558 N.E.2d 828 (1990), p. 828.

71. I.C. 34-4-16.5(b)(c).

72. I.C. 34-4-16.5(a).

73. Peter W. v. San Francisco Unified School District, supra, p. 824.

74. Ibid., p. 825.

75. Donohue v. Copiague Union Free School District, 391 N.E.2d 1352 (1979).

76. Hoffman v. Board of Education, 424 N.Y.S. 376 (1979), p. 379.

77. B. M. v. State, 649 P.2d 425 (1982), 698 P.2d 399 (1985).

78. Rich for Rich v. Kentucky Country Day, Inc., 793 S.W.2d 832 (1990).

79. Ibid.

80. Bishop v. Indiana Technical Vocational College, 742 F.Supp. 524 (N.D. Ind. 1990).

81. Kern Alexander and M. David Alexander, American Public School Law, p. 499.

82. Ibid.

83. Indiana Constitution, Article I, Section 10.

84. Henry v. Moberly, 51 N.E. 497 (Ind. App. 1886).

85. McGowen v. Prentice, 341 So.2d 55 (La. App. 1976), p. 57.

86. Desselle v. Guillary, 407 So.2d 79 (La. App. 1982).

87. Rich v. Kentucky Country Day Inc., 793 S.W.2d 832 (Ky. App. 1990).

88. Milkovich v. Lorain Journal Co., 110 S.Ct. 2695 (1990).

89. Ibid., p. 2705.

90. Ibid., p. 2702.

91. Irwin A. Hyman, Reading, Writing and the Hickory Stick, Lexington, Mass.: Lexington Books, 1990), p. 228.

92. Dayton v. State, 501 N.E.2d 482 (Ind. App. 2 Dist. 1986).

93. See William Prosser, Law of Torts, p. 137.

94. Gardner v. State, 4 Ind. 632 (1853).

95. Welch v. Bd. of Educ. of Bement, 358 N.E.2d 1364 (1977).

96. Holman by and through Holman v. Wheeler, 677 P.2d 645 (1983), p. 646.

97. Ibid.

98. Frank v. Orleans Parish School Board, 195 So.2d 451 (La. App. 1967).

99. Mathis v. Berrian Co. Sch. District, 378 S.E.2d 505 (1989).

100. Kern Alexander and David Alexander, American Public School Law, supra.

101. Ibid.

102. 42 U.S.C. § 1983.

103. Monroe v. Pape, 81 S.Ct. 473, 365 U.S. 167 (1961).

104. Monell v. Department of Social Services of the City of New York, supra, 98 S.Ct. p. 2035.

105. Daniels v. Williams, 106 S.Ct. 662, 474 U.S. 327 (1986); Davidson v. Cannon, 106 S.Ct. 668, 474 U.S. 344 (1986).

106. Parrott v. Taylor, 101 S.Ct. 1908, 451 U.S. 527 (1981).

107. Monell v. Department of Social Services of the City of New York, supra, p. 2035, n. 55.

108. Rascon v. Hardiman, 803 F.2d 269 (1986).

109. Wood v. Strickland, supra, p. 322.

110. Harlow v. Fitzgerald, 102 S.Ct. 2727, 457 U.S. 800 (1982).

111. Ibid., p. 818.

112. Landstrom v. Ill. Dept. of Children and Family Services, (7th Cir. 1990), p. 678.

113. Ibid., p. 676.

114. Fishman v. Clancy, 763 F.2d 485 (1st Cir. 1985).

# Chapter 3

## *Legal Responsibilities Regarding Students*

### Compulsory Attendance

Article VIII, Section 1, of the Indiana Constitution requires the Indiana General Assembly to provide for a general and uniform system of schools. It reads as follows: "Common schools--Knowledge and Learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all."[1]

The Indiana General Assembly passed legislation as early as 1865 providing for compulsory education.[2] Indiana was one of twenty-eight states passing compulsory education laws in the years surrounding and following the Civil War. A number of state courts were required to review statutes and state constitutional provisions regarding compulsory education laws in the early 1900s. In a 1901 Indiana case parents asked that the state's compulsory attendance law be struck down as an unconstitutional invasion of their natural right to govern and control their own children.[3] The Indiana Supreme Court held that it was within the province of the state legislature to compel parents to

perform the natural duty of education owed to children. The same court affirmed the decision in a 1919 ruling finding the state had a valid interest in ensuring an educated citizenry through minimal educational requirements.[4] More recently an Indiana appeals court found the "fundamental legislative purpose of the Compulsory School Attendance Act was to prevent parents from denying their children certain minimal education."[5]

Every child in Indiana ages seven to sixteen must attend either a public school or some other school which is taught in the English language.[6] A student may withdraw from school during his sixteenth year with the written consent of a parent or guardian.[7]

Throughout the history of the development of compulsory attendance laws in America, those laws have been the subject of criticism. However, the authority of the state to require some kind of educational experience has never been successfully challenged. Every state has established and designed its own system of public schools. In most states parents have the option of selecting one of three different types of educational experience for their children in order to meet the states' compulsory education laws: public school, private school, or, in a slight majority of states, some other equivalent educational program to that provided by the public school.[8]

Courts have been asked by parents claiming exceptions to state compulsory attendance laws to interpret the meaning of compulsory education statutes, and to determine the legality and permissibility of alternative learning arrangements. Since near the turn of the century Indiana has recognized home study, subject to certain conditions, as an alternative to public school attendance. In State v. Peterman, 70 N.E. 550 (1904), the court found that parents who employed a licensed teacher to teach their children in their home fully complied with Indiana's compulsory education law. In this early case the court had no alternative or "equivalency" legislation on which to rest its decision, but nonetheless ruled that the parents private arrangement with a certified teacher met the state's interest in providing education for all of its children.

Indiana law requires parents to send their children to school "unless the child is being provided instruction equivalent to that given in the public schools."[9] The statute provides in relevant part: "It is unlawful for a parent to fail, neglect, or refuse to send his child to a public school for the full term as required under this chapter unless the child is being provided with instruction equivalent to that given in the public schools."[10]

The meaning of this statute was the subject of litigation during the 1980s in a case that was not completed for five years.[11] The plaintiffs in the case were Jehovah's Witnesses who maintained that they would "educate their children at home in order to shield them from the secular and immoral atmosphere of the public schools."[12] They brought an action in federal court under 42 U.S.C. Section 1983 against the school district, the superintendent, the school board and other school officials claiming that Indiana's compulsory-schooling statute was unconstitutionally vague and that its execution infringed on their religious freedom. When the plaintiffs did not send their three children to public school, opting to teach their children at home, using state mandated curricula with religious and moral instruction, criminal action was brought against them. They were charged with violating the state's compulsory school attendance law, a Class B misdemeanor. The parents argued that their home instruction was "equivalent to that given in the public school"[14] and accordingly they were in compliance with the compulsory-schooling law. The school district argued to the federal district court that the mother, who was providing most of the instruction was not a licensed teacher (the mother did not have a high school education); that the other person providing instruction was the oldest child; and that the number of days and amount of time spent on academic work was not equivalent to the public schools. The court, after hearing evidence in a three-day trial, found the home instruction "equivalent to that given in the public schools." The court held it did not "have any difficulty in concurring with those courts that have found within the ambit of the free exercise clause a constitutional right

to educate one's children in an educationally proper home environment, understanding that the state retains a legitimate interest in the fulfillment of certain minimal requirements as established legislatively and administratively as a matter of public policy. This court is aware of and concurs in the decisional line which honors the good faith efforts of parents to educate their children at home."[14] The court followed the judgment of the Seventh Circuit in which the court found that the Indiana compulsory-schooling statute was not vague and, therefore, constitutional. Lastly, the district court determined that neither the language of the compulsory attendance statute nor the manner in which it was implemented violated the free exercise clause of the First Amendment. The Seventh Circuit Court of Appeals affirmed the decision in 1986.[15]

Following closure of this long litigated case, it is fair to say that the Indiana compulsory education statute does provide for home schooling, private schooling and other non-school arrangements as long as they constitute "instruction equivalent to that given in the public schools."

Indiana requires that accurate daily records of attendance be kept by every public school and private school in the state.[16] The Indiana Code requires principals and teachers to maintain lists of all children attending their school.[17] If a parent does not send a child to school because of the child's illness or mental or physical incapacity, the parent is subject to furnishing a certificate of illness from a physician. the document indicating the child's incapacity must be produced for an attendance officer within six days after it is requested.[18] Indiana educators are under a statutory duty to ensure that students attend school.[19] Before proceedings are commenced against a parent for violating the compulsory attendance laws school authorities must give the parents personal notice of the violation.[20] Indiana has adopted a "habitual truancy" statute; an Indiana court defined habitual truancy" as "the willful refusal to attend school in defiance of parental authority."[21] Indiana provides for statutory penalties for school age students

who refuse to attend school. Among the penalties imposed on habitual truants pursuant to an 1989 amendment calling for cooperation between school boards and the bureau of motor vehicles, is a prohibition on the issuance of driver's licenses and learner's permits to persons identified as habitual truants.[22] In addition, the superintendent must report habitual truants to the juvenile court for court proceedings.[23]

Under certain conditions, absence from school may be excused for religious reasons. In 1972, the Supreme Court in Wisconsin v. Yoder[24] granted a partial exemption to Amish children from compulsory attendance laws in Wisconsin. The Amish argued successfully that requiring their children to attend the last two years of high school would directly conflict with their fundamental religious beliefs deeply rooted in their way of life. The United States Supreme Court agreed, but in a narrowly drawn decision. The Court held that the state's interest in compulsory education was not so compelling that the religious practices of the Amish had to fall. The Court carefully documented the long standing and deeply held religious beliefs of the Amish. The Court discussed the child rearing practices of the Amish and determined that the Amish produced self-supporting citizens. While the Court rendered a restrictive holding in Yoder seemingly tailored to the unique Amish experience, other groups have claimed religious exemptions under the Yoder partial exemption to compulsory education.

Although the Indiana Constitution provides for a system of free public schools, the Indiana Code permits schools to charge students textbook rental fees.[25] Indiana courts have upheld this provision in 1974 and 1990.[26]

## School Discipline

### *Authority to Enforce Reasonable Rules*

The judiciary uniformly recognizes the right and duty of school boards and school authorities to maintain order and control in the classroom and in the public schools. School boards are accorded wide discretion in making and enforcing rules that govern school operations. The particular rule must bear a reasonable relation to the educational process and must not be discriminatory in operation toward a student or a class of students, or violate students' constitutional rights.[27] Indiana courts have held that it is the duty of school administrators to enforce reasonable rules and regulations for the proper conduct of a school system, students and the educational process in general.[28]

The Indiana General Assembly calls for student supervision and discipline in carrying out the educational function to e a shared responsibility by students, parents, teachers and other school personnel.[29] By statute, teachers are granted the authority to take any reasonable measures which are necessary to effectuate school purposes.[30] While teachers may not suspend students unilaterally, they may remove a student from a classroom or other school related activity which they are directly supervising for a period not to exceed one day without gaining permission from the school principal.[31]

School principals are given the primary responsibility of carrying out and preventing interference with the educational process at their schools.[32]

A 1990 amendment to the Indiana Code[33] provides that school boards shall ensure that written disciplinary policies be distributed to each student and parent or legal guardian of each student. Parents of students in grades seven through twelve are re-

quested to acknowledge in writing that they have reviewed the disciplinary policy. Likewise, students are requested to sign forms indicating they have read the policy. However, failure to sign the acknowledgement form will have no effect on the enforcement of the disciplinary policy if the school district has made a good faith effort to disseminate the rules.

Principals, teachers and other school personnel are authorized to take reasonable action in regard to student behavior to help students adapt their behavior in a manner which is conducive to providing for an effective orderly learning environment. An Indiana statute mentions several measures, including counseling individually or in groups, parent conferences, assigning students additional work, changing class schedules, restricting extracurricular activities, and requiring students to stay after school in study halls.[34] Other disciplinary measures are not prohibited by the statute.

## Corporal Punishment

The use of corporal punishment in America as a method of discipline in its schools can be traced to the colonial period. The United States Supreme Court upheld the use of corporal punishment in Ingraham v. Wright[35] by a 5-4 vote in 1977. The Supreme Court rejected the plaintiffs claim that the Eighth Amendment's ban on cruel and unusual punishment applies to disciplinary corporal punishment of public school children. The court refused to extend the cruel and unusual clause to ban the paddling of school children. The court observed that the Eighth Amendment's protections were, by original intent of the framers of the constitution and past decisions of the Supreme Court, reserved solely for persons convicted of criminal offenses. The majority in Ingraham pointed to the common law tradition governing the use of corporal punish-

ment in public schools, which permits teachers to impose reasonable but not excessive force to discipline school children. The court indicated that teachers and administrators are properly constrained from using excessive force because educators are subject to civil and criminal liability if they exceed the use of moderate corporal punishment. Justice Powell writing the majority opinion called for judicial restraint noting that control of the educational process properly lies in the hands of school authorities who are supervised by the community. The court said "that corporal punishment serves important educational interests" which should be left to the "normal process of community debate and legislative action."[36]

The Supreme Court also held in Ingraham that the due process clause of the Fourteenth Amendment does not require procedural safeguards, including notice and a hearing, prior to the imposition of corporal punishment since the practice is authorized and limited by the common law.

While at least nineteen states (as of late 1989) have banned corporal punishment in the public schools, the state of Indiana authorizes the use of moderate or reasonable corporal punishment.[37] In an early Indiana case, the Indiana Supreme Court found that a teacher had a right and duty to administer reasonable corporal punishment apportioned to the gravity of the student offense "in a kind and reasonable spirit."[38]

In Indiana State Personnel Bd. v. Jackson, 192 N.E.2d 740 (1963) the Supreme Court of Indiana held that public school teachers, in appropriate cases, have the same rights of parents with respect to using corporal punishment. The court employed the common law doctrine of in loco parentis which literally means "in place of the parent" in ruling that educators have a right to administer corporal punishment when it is appropriate. School officials actions in regard to inflicting corporal punishment must meet the same standards and requirements as fixed and established for parents under the in loco parentis doctrine.

In a 1986 Indiana federal district court decision, Cole by Cole v. Greenfield-Central Comm. Schools, 657 F.Supp. 56 (S.D.Ind. 1986), the court was required to consider whether disciplinary corporal punishment is within Indiana's common law privilege. The court relying on Ingraham said, "as long as disciplinary corporal punishment is within the limits of the common law privilege, its use does not constitute a violation of Due Process."[39] The court held that both Indiana common and statutory law grants school authorities the right to impose corporal punishment on students. It is interesting to note that the Indiana Code does not expressly mention corporal punishment but clearly the court found the use of corporal punishment implied in the language and intent of I.C. 20-8.1-5.2.

One of the major points to emerge from the Cole decision for Indiana educators, in terms of precedential guidance, is a judicial inquiry set forth to determine whether particular instances of corporal punishment fall within the common law privilege. The test contains four elements: "1) The teacher must have the general authority to inflict corporal punishment on the pupil; 2) the rule violated must be within the scope of the educational function; 3) the violator of the rule must be the one punished; and 4) the punishment inflicted must be in proportion to the gravity of the offense."[40]

In determining whether the rule violated furthered the educational function, school personnel should consider the need to maintain order in the classroom as well as the safety and protection of other students.

Educators who use excessive corporal punishment are subject to civil suit for assault and battery. In addition, the Fourth Circuit Court of Appeals ruled in Hall v. Tawney, 621 F.2d 607 (1980), that students who have been subjected to abusive corporal punishment may make a valid substantive due process claim upon which relief could be granted under the Civil Rights Act of 1971, 42 U.S.C. Section 1983. In this post-Ingraham case the court held that corporal punishment, which is "so brutal, de-

meaning, and harmful as literally to shock the conscience of a court" is subject to redress in federal court.[41]

Two years later, the West Virginia Supreme Court of Appeals held, in partial reliance on Goss v. Lopez, that a student is entitled to minimal procedural due process, consisting of an opportunity to explain the student's version of the wrongdoing and the presence of another adult, before moderate corporal punishment may be administered.[42]

Local school boards promulgating corporal punishment regulations would be well advised to draft rules consistent with the standards set forth in this West Virginia decision and to incorporate the judicial inquiry set forth in the Cole case into their regulations.

## Suspension and Expulsion

Suspension and expulsion constitute two of the most drastic disciplinary actions available to school authorities. During the 1960s courts began to recognize that students had a right to procedural due process in connection with school suspensions and expulsions.[43] The Fourteenth Amendment to the U.S. Constitution prohibits states from depriving "any person of life, liberty, or property without due process of law." Although the federal courts agreed that students had a right to due process for long term expulsions, there was conflict among the federal courts on the form and necessity of procedural due process for short-term suspensions.

In 1975 the U.S. Supreme Court took up the question of what constitutional standards would apply to disciplinary action taken by public school officials. In Goss v. Lopez, 419 US. 565, 95 S.Ct. 729 (1975), the court asserted that students have constitutional rights which they do not "shed . . . at the schoolhouse door"[44] and that sus-

pension from school without due process violates both liberty and property interests possessed by public school students. The court specifically found that "due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."[45] The court added that there need be no delay between the giving of notice and the time of the hearing. Thus, the court concluded that even a short-term suspension of 10 days or less would deprive a student of two protected constitutional interests. The court noted that for suspensions exceeding 10 days more formal requirements would be required.

Following the Goss decision, the Indiana legislature amended the law with respect to short-term suspensions so that it now contains the requirements set out by the Supreme Court in Goss.[46] Before students may be removed from school, they must receive (1) notice of the charges facing them, written or verbal; (2) if he or she denies the charges, a summary of the evidence against him; and (3) an informal opportunity to explain his conduct.[47] A principal may suspend a student for up to five school days after the hearing is conducted, unless the nature of the misconduct demands immediate removal of the student from the school. In this situation, procedural due process must be carried out as soon as reasonably practical after the suspension.[48]

The Indiana Code defines an expulsion as a separation "from school attendance for a period in excess of five days . . . [or] for the balance of the then current semester or current year unless a student is permitted to complete required examinations in order to receive credit for courses taken in the then current semester or current year . . ."[49] An expulsion does not include situations where a student is assigned home-bound instruction, or removed from athletics or school sponsored bus transportation.

The grounds for expulsion and suspension of Indiana public school children are specifically set forth by statute which provides that:

a. on school grounds immediately before, during, and immediately after school hours and at any other time when the school is being used by a school group;

b. off school grounds at a school activity, function, or event; or

c. traveling to or from school or a school activity, function, or event.

d. The following types of student conduct constitute grounds for expulsion or suspension:

(1) Using violence, force, noise, coercion, threat, intimidation, fear, passive resistance, or other comparable conduct constituting an interference with school purposes, or urging other students to engage in such conduct;

(2) Causing or attempting to cause substantial damage to school property, stealing or attempting to steal school property of substantial value, or repeatedly damaging or stealing school property of small value;

(3) Intentionally causing or attempting to cause substantial damage to valuable private property, stealing or attempting to steal valuable private property, or repeatedly damaging or stealing private property;

(4) Intentionally causing or attempting to cause physical injury or intentionally behaving in such a way as could reasonably cause physical injury to any person. Self-defense or reasonable action undertaken on the reasonable belief that it was necessary to protect some other person does not, however, constitute a violation of this provision;

(5) Threatening or intimidating any student for the purpose of, or with the intent of, obtaining money or anything of value from the student;

(6) Knowingly possessing, handling, or transmitting a knife or any other object that can reasonably be considered a weapon;

(7) Knowingly possessing, using, transmitting, or being under the influence of any narcotic drug, hallucinogenic drug, amphetamine, barbiturate, marijuana, alcoholic beverage, or intoxicant of any kind. Use of a drug authorized by a medical prescription from a physician is not a violation of this provision;

(8) Engaging in the unlawful selling of a controlled substance or engaging in a criminal law violation that constitutes a danger to other students or constitutes an interference with school purposes or an educational function;

(9) Failing in a substantial number of instances to comply with directions of teachers or other school personnel during any period of time when the student is properly under their supervision, where the failure constitutes an interference with school purposes or an educational function;

(10) Engaging in any activity forbidden by the laws of Indiana that constitutes an interference with school purposes or an educational function;

(11) Violating or repeatedly violating any rules that are reasonably necessary in carrying out school purposes or an educational function and are validly adopted by the school;

(12) In addition to these grounds for expulsion or suspension, a student may be expelled or suspended for engaging in unlawful activity on or off school grounds if the unlawful activity may reasonably be considered to be an interference with school purposes or an educational function.[50]

Further, any student may be excluded from school subject to procedural due process (a) if the student's immediate removal is necessary to restore order or to protect persons on school corporation property; and conduct off school property if the student's presence in school would constitute an interference with an educational function or school purpose; (b) if the student's legal residence is not in the school district's attendance area and no transfer has been granted by the school corporation.[51]

Indiana has established an elaborate and complex procedural scheme to be used for expulsions and exclusions.[52] The comprehensive set of procedures must be utilized once a principal or other school official determines that grounds exist to expel or exclude

a student. The first step necessitates that a written charge be filed by the principal with the superintendent. If the superintendent decides that there are reasonable grounds for investigation or that it is desirable to pursue an investigation, he is required to appoint a hearing examiner within one school day after the charge has been submitted to him. The hearing officer must be on the school district's administrative staff, or be its attorney, or it can be the superintendent himself. The hearing examiner must not be involved in any manner with the charge.[53] The hearing examiner must, within two school days after his appointment, send a statement to the student and his or her parents explaining the procedure for initiating a hearing and advising them of the rule or standard of conduct allegedly violated and the acts constituting the violation. The statement should also contain a summary of the evidence to be presented against the student, the penalty, if any, requested by the principal, a description of the hearing procedures, and the student's substantive rights to representation, including counsel, discovery of records and witnesses and his or her right to a hearing. It is critical that the hearing examiner's statement specify that a hearing must specifically be requested in writing within ten calendar days following receipt of the statement, or all rights to contest and appeal the punishment are deemed waived.

If the student requests a hearing, a record must be kept of the proceedings and the student is entitled to a report of the hearing examiners findings and recommendations which will be reviewed by the school superintendent. The superintendent may accept, change or revoke the hearing officers recommendation concerning an appropriate sanction for the student's misconduct. The superintendent may not impose a more severe penalty than that recommended by the hearing examiner.

The hearing is conducted in a formal manner although the hearing examiner is not bound by the rules of evidence or courtroom procedure. The student is accorded considerable rights and protections at the hearing. All testimony is taken under oath,

the hearing officer may issue subpoenas, and the student, the principal and the hearing examiner have the right to cross-examine any witness. In addition, the charged student may choose not to testify and cannot be threatened or punished for refusing to testify.[54]

The decision of the superintendent (based on the hearing examiner's findings) may be appealed to the school board. A parent or student may, within thirty calendar days following a hearing, appeal the superintendent's determination by a written request. The school board will make its determination based on the record, but may take additional evidence. The school board may deliberate in private with the assistance of legal counsel. The governing body may alter the superintendent's decision by reducing the sanction, but it may not increase the penalty beyond that imposed by the superintendent.[55]

Any time within thirty days of the governing body's decision, the student or his or her parent may appeal the determination to the county circuit or superior court. The trial of the appeal is conducted in the same manner as any other civil action.[56]

Indiana school authorities are not required to consider the "good standing" of a student in school, before expelling the student for conduct constituting grounds for expulsion under the Indiana Code. In Forest v. School City of Hobart, 498 N.E.2d 14 (1986) a student was expelled for admitted use of marijuana on the school premises. The student argued that the school should have considered his academic standing and general good character before expelling him for the remainder of the school year. The court rejected the argument. The court did, however, note that the hearing examiner investigated possible alternative punishments and reviewed the academic and attendance record of the student. The court also held that the school's disciplinary action, expulsion, fit the violation of smoking marijuana at school.

One other important issue was raised in the Forrest case. Schools are not permitted to engage in differential treatment of students in regard to disciplinary action

unless they can show a principled basis for the difference in penalty. School personnel should be vigilant in treating students equally for violations of the same rule unless sound reasons can be given for treating them differently.

### *Academic Sanctions*

Some schools impose academic sanctions on students for misconduct or truancy. This practice has been the subject of litigation, although neither the Seventh Circuit Court of Appeals nor any Indiana court has entertained this contentious issue at this time. Academic sanctions may conflict with state's compulsory attendance laws. They may also be viewed as arbitrary and unrelated to disciplinary purposes. Yet other challenges have been based on substantive and procedural due process claims.

A New York court ruled against a school board policy that excluded students from class for poor attendance. The court found the local school regulation in conflict with the state's compulsory education statute.[57]

An Illinois appeals court ruled that a grade reduction for truant behavior was an arbitrary and unreasonable policy.[58]

In a 1984 Pennsylvania case[59] a high school honor student was disciplined for drinking wine on a field trip. She was suspended for five days, expelled from the cheerleading squad and later permanently expelled from the National Honor Society. At issue before the court was the school district's disciplinary policy of reducing grades in all classes by two percentage points for each day of suspension. The court ruled that the school board's policy imposing academic sanctions as a disciplinary tool was unreasonable and improper. The court maintained that it was the state legislature's implied intent to allow students suspended to make up work missed.

A Kentucky school division's policy of imposing a five percentage point reduction for each day of disciplinary suspension was found to be an illegal imposition of an additional punishment not contemplated by the Kentucky statute authorizing school suspensions.[60]

## Search and Seizure

The Fourth Amendment to the U.S. Constitution provides: "The rights of the people to be secure in their persons, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . ." Litigation related to student protection against unreasonable searches and related privacy rights did not appear until the 1960s when the Fourth Amendment restrictions were extended to state governments in Mapp v. Ohio.[61] Prior to the 1960s educators were viewed as possessing the right to search students based on the common law doctrine of in loco parentis. During the late 1960s and 1970s search and seizure issues arising in public schools were extensively litigated in the lower courts. The courts were in conflict over how to characterize the role of school authorities in the context of conducting searches, and the applicability of the Fourth Amendment to public school officials. Some courts concluded that school authorities acted as private citizens and consequently were not bound by the Fourth Amendment. Other courts adhered to the doctrine of in loco parentis and allowed warrantless searches of students. A small number of court decisions in the 1970s characterized school officials as state agents subject to the probable cause and warrant requirement of the Fourth Amendment.

On January 15, 1985, the United States Supreme Court in New Jersey v. TLO[62] by a six-to-three vote rendered its first decision on a search and seizure issue involving

the public schools. The Supreme Court held that the Fourth Amendment applies to searches and seizures conducted by public school authorities but that the probable cause standard is not required of public school officials. Instead, the constitutional requirement for public schools is that the search must be reasonable. In other words, school officials must have reasonable cause, rather than probable cause to justify a search of a student. The court ruled that reasonableness is to be determined by a "twofold inquiry: first, whether the . . . action was justified at its inception and second whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place."[63] The court also found that the warrant requirement of the Fourth Amendment did not apply to school authorities.

The TLO standard requires educators to act in a reasonable manner considering all the circumstances that lead up to the search and cause the educator to continue the search. The court said a warrantless search is permissible if the official "has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order."[64] Justice White, writing for the majority, also mentioned other factors that should be considered in determining the reasonableness of any student search. Justice White asserted that the measures adopted in conducting the search must be reasonably related to the objectives of the search and not excessively intrusive considering the age, sex and nature of the misconduct of the student. The court pointed out in reaching its conclusions that it was balancing a student's interest in privacy with the equally legitimate need to maintain an environment in which learning could take place.

A 1990 Indiana court of appeals decision illustrates how the lower courts have interpreted the reasonable suspension standard and treated TLO as a precedent. In Berry v. Indiana, 561 N.E.2d 823 (Ind. App. 1 Dist. 1990), a high school student argued that a principal's search of his jacket which contained eight marijuana cigarettes was

unreasonable. A teacher had heard the defendant (student) arguing with another student in a restroom over whether the defendant had any marijuana to sell. The teacher separated the two and took them to the principal's office. The principal was told by the student that the defendant had marijuana in his possession. The teacher informed the principal what he had heard the students arguing about. The principal found the marijuana inside a tape cassette case in the defendant's pocket. As a result, the defendant was convicted of attempted dealing in marijuana on school property, a felony in Indiana. The court found the search was reasonable at its inception because the teacher had reported a possible rule violation, which was confirmed by the other student involved. The court held that simply because another student reports an infraction does not necessarily make the search unreasonable. Additionally, the defendant initially denied possession. Relying on TLO, the court ruled a denial is one factor justifying a search to confirm or refute the denial. Finally, the court found the search reasonable in its scope because the principal searched the jacket, a likely place to find marijuana if the defendant possessed it, and once the principal found the marijuana, he ceased the search.

Educators welcomed the Supreme Court's decision in TLO after years of silence from the high court on the issue of school-related searches. However, the court's decision left many search issues unresolved. Prominent among these unresolved issues is whether individualized suspicion is needed before school authorities find reasonable cause to search. In a closely watched Indiana federal district court decision involving the use of urine tests to detect drug use among student athletes wishing to participate in interscholastic sports, the court departed from the individualized suspicion standard.[65] While the individualized suspicion requirement had been used in previous drug testing cases, the court distinguished the case, concluding that the test was valid since it was used only to determine athletic eligibility for student participation in sports. The Seventh Circuit in 1988 affirmed the decision.[66]

The high incidence of drug abuse across the country has brought heightened awareness and determination on the part of educators to combat the problem. Thus, we will look more closely at the Seventh Circuit's decision. The essential facts in Schaill by Kross v. Tippecanoe County School Corp., 864 F.2d 1309 (1988), are that in the spring of 1986 Tippecanoe County School Corporation responded to information concerning possible drug use by athletes by ordering the baseball team to provide urine samples. Five students out of sixteen produced positive results. Based on those results and other reports of drug use in the athletic program, the school system decided to institute a random urine testing program for interscholastic athletes and cheerleaders. Students challenged the program claiming their Fourth Amendment rights were violated absent individualized cause to search. The Seventh Circuit determined that urine testing constitutes a search under the Fourth Amendment. However, the court found the school district's random urine testing program reasonable (without individualized suspicion) for the following reasons: (1) the procedure did not require direct visual observation of the act of urination; (2) it was implemented solely with regard to participants in interscholastic athletics; (3) it did not result in suspension or expulsion of students producing positive results; (4) it required students to sign consent forms that spelled out the procedures; (5) it allowed students procedural due process to challenge positive urinalysis test; and (6) it was provided at no cost to students.

A Texas district court considered a similar drug testing program in 1989 and concluded the random drug testing program violated the Fourth Amendment.[67] Although the procedures to be used and the school district's intent was similar to that in Schaill, the Texas program would have involved greater numbers of students because it required urine tests of all participants in any extracurricular activity. However, the law governing Indiana continues to permit random drug testing of athletes in the manner endorsed by the Seventh Circuit Court of Appeals.

Generally, courts have upheld the warrantless search of lockers without a student's permission. Courts have differentiated between locker searches and student searches holding that the locker is school property. The court's reasoning is that students' expectation of privacy is lessened, where they jointly possess the locker with the school. This issue was discussed in a Kansas Supreme Court case where the court held that school personnel have a legitimate interest in protecting the school's educational function and to prevent the use of lockers in any illicit manner.[68] Although school officials authority to inspect lockers is broad, the courts have been reluctant to allow school personnel to single out lockers for search purposes without reasonable suspicion that specific illicit materials will be found in the locker. Students are viewed by the judiciary as maintaining some legitimate expectation of privacy in their lockers.

Locker searches in Indiana are governed by a statute which became law in 1980. It provides that students have no expectation of privacy in their school locker or its contents. A principal or a designated member of the administrative staff may search a student's locker at any time, but where possible, the search should be conducted in the presence of the student. This does not apply to a general search of lockers of all students which may be conducted without students present.

Some school districts have conducted searches for drugs by using drug detecting dogs to discover students hiding drugs on their persons, in their lockers, and in their cars.

A well-known Indiana case, Doe v. Renfrow, 475 F.Supp. 1012 (1979), 635 F.2d 582 (7 Cir. 1980), cert. denied 451 U.S. 1022 (1981), involved the use of drug detecting dogs that were introduced unannounced for five minutes at a time into junior and senior high school classrooms. When a dog alerted the handler to the odor of an illegal substance, the student was ordered by a police officer to empty the contents of his or her pockets or purse onto the desk under the supervision of the school administrator. A continued alert by the canine resulted in a nude search. At issue was the search aspect

of the Fourth Amendment and whether this type of search was reasonable. The federal district court found that the use of canines based on general information of drug use by students to detect drugs (sniffing students) on school premises was not a search contemplated by the Fourth Amendment, rather it was a justifiable measure taken in accordance with the in loco parentis doctrine. The court did observe that searches of students' pockets and purses was a search within the Fourth Amendment, but the alert by the trained dog constituted reasonable cause to believe the student was concealing narcotics. However, the district court did rule the strip search unreasonable based solely on the dog's alert. The Seventh Circuit Court of Appeals affirmed the district court's decision in all respects, although there were two strong dissents.

The Seventh Circuit was concerned about school administrator's flexibility and held for the school district. However, the Fifth Circuit Court of Appeals specifically held that schools may use dogs to sniff a student only when there is individualized, reasonable suspicion that the student possesses contraband.[70] However, the court upheld the use of canines to sniff student's lockers and cars free from the restrictions of the Fourth Amendment.

Indiana educators are bound by Doe and, accordingly, school authorities may use trained dogs to detect drugs in the public schools based on general information that a serious drug problem exists in the school.

With respect to strip searches, because of its intrusiveness, courts have required probable cause and substantial evidence. The Seventh Circuit described the extent of the intrusiveness this way, "it does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that it is a violation of any known principle of human decency."[71]

As a general rule, in determining the permissible extent or intrusiveness of a search, courts balance the severity of the alleged misconduct with the student's age, sex and record in school. The school's interest in maintaining a safe, orderly environment conducive to learning is weighed against the student's right to privacy and the Fourth Amendment's prohibition against unreasonable search and seizure. The Seventh Circuit Court of Appeals, Indiana courts, and Indiana statutory law give Indiana educators greater freedom to search students than educators possess in other jurisdictions.

## Student Records

In 1974 Congress passed the Family Educational Rights and Privacy Act (FERPA) also known as the Buckley Amendment which provides protection for the privacy interests of students and their parents in connection with school records.[72] FERPA provides students and their parents with a right of access to the education records of the student. Students are given the same rights as parents under the act upon reaching age eighteen. Requests for files by parents must be honored within forty-five days, and those making the request have the right to make copies of the file, at their own expense. If an eligible student or parent wishes to amend a record because it is inaccurate or misleading, the act provides a process for such challenges.[73] A parent or student has a right to a hearing if school officials do not alter the file upon the parents initial request. The hearing may be conducted by an employee of the school district who does not have an interest in the proceeding. The hearing officer must render a written decision explaining his or her findings and conclusions. Complaints may be filed with the Department of Education alleging violations of FERPA. Violators of the act may lose federal funding.

FERPA also prohibits the release of any personally identifiable information without the expressed written consent from the parent or eligible student except to certain specified government agencies and officials.

However, FERPA does not prohibit disclosure to the public of general information concerning students, such as a student's name, address, telephone number, date and place of birth, field of study, degrees, awards received and participation in school activities. In addition, school-wide information regarding student achievement, graduation rates, etc., can be disclosed to the public without consent of parents, as long as the information does not personally identify students.

Indiana has enacted legislation dealing with state agencies, including public schools, that collect and maintain personal information systems.[74] The law prohibits the collection of personal information concerning political or religious beliefs. It provides that records to the maximum extent possible must be accurate, complete, timely and relevant to the needs of the school. A list of all persons or organizations having regular access to personal information contained in the school files must be kept. The statute also requires furnishing prior notice to an individual before personal information regarding the individual is provided to any person under compulsory legal process. Moreover, the law requires schools to refrain from providing lists of the names and addresses of individuals for commercial or even charitable solicitation purposes.

## First Amendment Responsibilities

### *Freedom of Speech*

The hallmark of civil liberties in the United States is the First Amendment. The First Amendment states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Justice Cardoza said of freedom of speech, it is "the matrix, the indispensable condition, of nearly every other form of freedom."[75]

The major issue that arises in the public educational setting is what are the limits of student expression that are entitled to constitutional protection under the First Amendment. To what extent are school officials permitted to impose limits on student expression? Prior to the 1970s, school authorities assumed virtually unrestricted control over students via the common law principle of in loco parentis. As long as teachers and administrators acted in a reasonable manner they were accorded wide discretion, enjoying the same rights of parents in controlling their children.

The privilege doctrine pertaining to control of student expression enjoyed by school authorities changed in the landmark student expression decision of Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733 (1969). In a statement that has been cited often in subsequent student expression cases, Justice Fortas seemed to capture the philosophy that would guide student expression jurisprudence for nearly two decades, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.

It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[76] The court viewed the public schools as marketplaces of ideas, which to school authorities and lower courts seemed to emphasize student first amendment rights of expression over school authorities control of students.

In Tinker the court considered whether high school students had the right to wear black armbands in school as a protest against the Vietnam War. The school administration had prohibited the wearing of black armbands as a silent protest against the war. The court reversed the school officials' suspension of the students who wore black armbands in class. The court ruled that students were protected by the First Amendment and they had the right to engage in symbolic speech as an extension of free speech for purposes of the First Amendment. The court concluded that school authorities may not discipline students for exercising their free speech rights unless they can establish that there were facts that reasonably led them to forecast substantial disruption of or material interference with school activities or unless school officials prove that the activity did in fact materially and substantially disrupt the school. The court also held that student expression could be regulated if the speech "collided with the rights of others."[77] However, any reason given by school officials to restrict students' right of free speech must be premised on other than "undifferentiated fear or apprehension of a disturbance."[78] The court emphasized that unpopular views that might cause discomfort among faculty and students could not be curtailed simply to avoid an unpleasant situation.

Many legal commentators saw the Tinker decision as a substantial victory for student rights in the public schools. Of course, the decision came at the height of the civil rights era and the protest movement against the Vietnam War. The progeny of Tinker greatly expanded the free expression rights of students. However, many educa-

tors were critical of a loss of control over the public schools. In a strong dissent in Tinker, Justice Black expressed many educators concern over the consequence of the majority opinion, "After the court's holding today some students . . . will be ready able and willing to defy their teachers on practically all orders . . . it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools."[79]

However, Indiana educators are not required to wait for a disruption of the educational system to take place before they are permitted to limit speech activity. In an Indiana district court case, Dodd v. Rambis, 535 F.Supp. 23 (1981), the court discussed the "reasonable forecast" rule and emphasized that in determining whether a student's First Amendment rights have been violated, a court must consider all of the circumstances confronting the school authorities which might reasonably forecast a disruption of the educational process. In Dodd, five students who had been suspended or expelled for distributing leaflets which advocated a "walk out" from high school classes and informing students of the "walk out" brought an action against the principal, the superintendent and members of the school board for infringing on their free speech rights. The court found that the students conduct fell within the protective umbrella of the First Amendment. The school district presented evidence that twenty-four hours before the students distributed the leaflets, a walkout had occurred at the school. The walkout resulted in the physical disruption of classes. School authorities testified that on the day of the walkout the general atmosphere of the school was noisy and rowdy. The school officials claimed that the disruption of the leaflets calling for a second walkout would have resulted in a substantial disruption of or material interference with the activities of the school unless appropriate action was taken. The court ruled that the principal and school officials were proper in their actions, although only four students actually

walked out. The court also expressed its reluctance to substitute its judgment for that of school officials where there is a substantial and reasonable basis for action taken.

Decisions of the United States Supreme Court during the late 1980s indicate the court's willingness to give educators more school control over students and tend to de-emphasize student's right of free expression. In 1986 in Bethel School District v. Fraser, 106 S.Ct. 3159, the Supreme Court handed down its second major ruling on student expression in the public schools. The case involved a nominating speech given by a high school senior who referred to his candidate, according to Justice Burger, in terms of "an elaborate, graphic and explicit sexual metaphor."[80] Approximately 600 members of the student body attended the "school-sponsored educational" assembly. The student had been warned not to give the speech by two teachers. The court found that school officials have broad authority to punish students for using sexually suggestive speech, even if it does not threaten substantial or material disorder.

Justice Burger wrote the majority opinion in Bethel and took up the issue of the proper role of school officials in their control of the educational process. Justice Burger explained that the public schools have the responsibility to "inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and nation."[81] The court ruled that school authorities may determine what manner of speech in the classroom or in school assembly is inappropriate. The court stressed the point that vulgar and lewd speech actually undermines the school's basic educational mission of transmitting "the shared values of a civilized social order."[82] The court also affirmed that school authorities continue to operate in accordance with the in loco parentis doctrine especially with respect to a "captive audience."[83]

While the court upheld the Tinker decision in the Bethel case with respect to continuing First Amendment protection for political, personal, or religious speech, it

made it clear that student expressive rights are not co-extensive with those of adults. The court did not protect speech which it deemed to intrude upon the work of the school. The court made it clear that vulgar and indecent speech can be punished and prohibited in classrooms, assemblies and other school sponsored educational activities. The decision also provides school administrators and teachers wide discretion in determining what constitutes lewd, indecent or inappropriate speech. It leaves open the question of whether students may be punished for vulgar and offensive language that occurs on school premises, outside of the classroom or in a school assembly which is not part of a required school activity.

The area of symbolic speech rights was litigated in Indiana in Banks v. Muncie Community Schools, 433 F.2d 292 (1970). A lawsuit was commenced to enjoin the school from using symbols related to the Confederacy, such as the school nickname, rebels, and the school's flag, a Confederate flag. Black students who were upset by the use of the symbols argued that they were offensive to the black students and discouraged them from participating in extracurricular activities. Although the court agreed that the symbols were offensive and should have been removed through school policy, the court found no constitutional violation. The court emphasized that such a decision should be left to school officials and not judges.

### *Freedom of Press*

Most public schools support several publications such as the student newspaper. The issue of the extent of First Amendment protection accorded to student newspapers and concomitantly the permissible degree of control which school authorities may exercise over student publications was the subject of considerable litigation in the 1970s and 1980s. The litigation resulted in conflicting rulings among the federal circuit courts and

a confusing body of law. Thus, the landmark Supreme Court decision, in Hazelwood School District v. Kuhlmeier[84] coming in 1988 erased much of the uncertainty as to the constitutional rights of students with respect to student publications. The court by a vote of 5-3, granted educators broad editorial control over curricular publications; thus, substantially restricting student freedom of the press in school sponsored publications.

The Hazelwood case involved a high school principal's decision to excise six student written articles from the school newspaper. One article dealt with the personal experiences of three students who became pregnant and the other articles discussed the effects of divorce or children, teenage pregnancy, and runaways. All of the students working on the school newspaper were enrolled in a journalism class responsible for writing and distributing the newspaper. The court held that "a school need not tolerate student speech that is inconsistent with its basic educational mission"[85] leaving the definition of what is appropriate speech to school authorities. The court held that school authorities may "exercise editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[86]

The court held that a curricular related student newspaper is not a public forum for student expression. Accordingly, in a nonpublic, closed forum school officials are entitled to make and enforce regulations that are related to legitimate pedagogical concerns. The court distinguished Tinker, supra, where a student expressed personal views on the school premises from school created and school sponsored expression. A school may set standards even "high standards"[87] for speech associated with the curriculum. The court defined curriculum in rather sweeping terms, as activities "whether or not they offer in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[88] The key issue in Hazelwood in terms of school control over student pub-

lications centers around the school-sponsored curriculum notion. School authorities retain control over student publications (and the court noted theatrical productions) when the publication is school sponsored or related to the curriculum as long as the schools' actions have a valid educational purpose.

However, the Supreme Court decision in Hazelwood does not permit school authorities to censor student publications that are not school sponsored, such as unofficial underground newspapers. The Tinker doctrine applies to underground newspapers, thus school officials must show that the newspaper materially disrupted school activities before punishing students for distributing the newspaper.[89]

School authorities can establish reasonable regulations with respect to the time, place, and manner of distribution of non-school sponsored student publications.

Some school districts condition the distribution of nonschool-sponsored, student written publications on approval by school officials. This policy raises the First Amendment issue of prior restraint. The court in Hazelwood specifically did not rule on school policies requiring students to submit unofficial newspaper materials they wish to distribute on school grounds to school officials for prior approval. However, the court cited approvingly cases that permit properly designed and procedurally fair systems of prior review.

The Seventh Circuit Court of Appeals in Fujishima v. Board of Education, 460 F.2d 1355 (1972), upheld a school district's authority to promulgate reasonable, specific regulations regarding the time, manner and place of distributing nonschool-sponsored student publications. However, the court concluded that requiring prior approval of publications before distribution was unconstitutional as a prior restraint in violation of the First Amendment.

Indiana educators, then, may regulate the time, manner, and place in which distribution of written underground materials may occur. However, school officials cannot

"require a student to obtain administrative approval of the time, manner and place"[90] of the distribution of the written material. Additionally, school authorities cannot require students to submit publications for review in advance of distribution. The Tinker forecast rule (substantial disruption), as discussed above, is the formula to be used in determining whether a student may be punished for exercising his or her free speech rights.

School officials are free to establish rules and discipline students who publish and distribute on school premises obscene or libelous material.

A 1989 Ninth Circuit Court of Appeals decision[91] supported school officials who refused to allow the printing of an advertisement submitted by Planned Parenthood for publication in the school's newspapers, yearbooks, and athletic programs. The court's decision relied heavily on Hazelwood, supra, and rejected the argument that the school district had established an open forum in any of its publications. The court noted that the school district had promulgated written guidelines regarding publications which governed high school principals. The advertisement listed some of the services that Planned Parenthood offered such as birth control methods, gynecological exams and pregnancy counseling and referral. The school district argued that it did not reject the advertisements because it disagreed with the philosophy of the message, but based its refusal on legitimate educational reasons. The school district won the case arguing that the public might erroneously believe that the school was endorsing Planned Parenthood; that the ad might distract from the legitimate educational process by causing controversy among parents and students and that the school did not want to open their publications to other groups that might have opposing views.

## *Freedom of Religion*

The relationship between religion and the public schools has been a perennial controversial issue in the United States. The religion clauses of the First Amendment of the United States Constitution provide that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." These apparently straightforward clauses have been the cause of considerable confusion, controversy and litigation during the past forty years. James Madison, who along with Thomas Jefferson are generally acknowledged to be the authors of the First Amendment, predicted the continuing controversy over the meaning and application of the First Amendment when he said, "it may not be easy, in every possible case, to trace the line of separation, between the rights of the religious and the civil authority, with such distinctness, as to avoid all collisions and doubts on unessential points."[92]

John Adams noted that the First Amendment would mean that "Congress will never meddle in religion."[93] Thomas Jefferson coined the metaphor "wall of separation between Church and state" to express his lifelong view of the proper relationship between Church and state.

Indeed, members of the Supreme Court have interpreted the meaning of the First Amendment repeatedly and frequently recognized the difficulty in balancing the Establishment and Free Exercise Clauses of the First Amendment. In the landmark Establishment Clause decision, Everson v. Board of Education,[94] the court analyzed and incorporated the history of the First Amendment into its opinion. In Everson, parents were reimbursed for bus fares paid to send their children to parochial schools. The court upheld public funding of transportation for parochial school students, finding the transportation program analogous to providing public safety services such as police and fire protection.

Justice Hugo Black wrote the majority opinion in Everson in which he analyzed the meaning of the First Amendment:

> The establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities for institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice-versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state.[95]

Although four justices dissented in Everson, all nine justices seemed to embrace Thomas Jefferson's notion of a "wall of separation" between church and state. The "wall of separation" concept became firmly established as a cornerstone watchword for subsequent first amendment analysis. From the perspective of future First Amendment problems related to education, Justice Rutledge, speaking for the dissenters in Everson, provided this striking prognosis: "Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools, the other, to obtain public funds for the aid and support of various private religious schools."[96]

Since Everson the United States Supreme Court has adhered to one constitutional principle in a consistent manner with respect to separation of church and state. The court has maintained that neutrality is what is required of states. The state must confine itself to secular objectives, and neither advance nor impede religious activity.[97] The Supreme Court has fastened onto the idea of governmental neutrality as the central theme for regulating church-state relations.[98]

In 1971 the Supreme Court developed a three criteria test to determine state neutrality in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2015 (1971). The Supreme Court has relied on the three-prong test of Lemon in every case involving the relation-

ship between government and religion in education since 1971. The three tests articulated by Lemon are as follows: 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." The test is commonly referred to as the Lemon test or the tripartite test.

## Religious Activities

### *Prayer and Bible Reading*

On the last decision day of 1961, the Supreme Court in Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261 (1962), ruled that the Regents' prayer prescribed by the school authorities of the State of New York could not constitutionally be made a part of the state's public education program. The prayer read: "Almighty God, we acknowledge our dependence on Thee, and we beg Thy blessings upon us, our parents, teachers, and our Country."[99] The court ruled that the state sponsored prayer violated the Establishment Clause of the First Amendment.

In 1963 the Supreme Court extended its position on school sponsored prayer in the companion cases of School District of Abingdon Township v. Schempp and Murray v. Curlett, 374 U.S. 203, 83 S.Ct. 1560 (1963). These cases challenged Pennsylvania and Maryland statutes that allowed prayers and Bible reading at the opening of each school day. Children were excused from the exercise upon parental request. However, the court ruled that the religious practices and the statutes requiring them, violated the establishment clause.

At the time of the court's 1963 decision, thirty-seven states allowed such exercises. Thirteen of the states mandated them.[100]

Reaction to the school prayer decisions since the 1960s has been strong, and some legislatures have passed legislation that variously authorizes silent prayer, meditation, voluntary prayer, or moments of silence during the public school day. In fact, twenty years after the Engel and Schempp decisions, nearly half of the states had enacted laws permitting a moment of silence, including prayer, in their public schools.[101]

The Supreme Court rendered a decision in 1985 dealing with the issue of state imposed silent meditation or voluntary prayer. In Wallace v. Jaffree, 472 U.S. 38, 105 S.Ct. 2479 (1985), a majority held that an Alabama statute authorizing a one-minute period of silence in public schools "for meditation or voluntary prayer" was unconstitutional because it violated the Establishment Clause of the First Amendment. Justice John Paul Stevens, writing for the majority, emphasized that the legislative purpose in passing the statute was improper because it constituted an effort to endorse religion. The court devoted much of its decision to an inquiry into the intent of the statute. If the intent is to promote religious purposes, as the court found in Wallace, or to emphasize voluntary prayer over meditation then the court will find an establishment clause violation.

The court left open the possibility that statutes permitting a moment of silence, meditation or prayer might be constitutional. Justice O'Connor, in her concurring opinion, rejected the Lemon test as applied, and suggested her own test to determine whether the statute's purpose is valid. She asks "whether the government's purpose is to endorse religion . . . the crucial question is whether the state has conveyed or attempted to convey the message that children should use the moment of silence for prayer."[102]

Indiana law provides for meditation or silent prayer:

> Voluntary Religious Observance - Silent Period. In each public school classroom, at the opening of each school day the teacher in charge may or, if directed by his governing body, shall conduct a brief period of silent prayer or meditation with the participation of all students assembled. This silent prayer or meditation is not a religious service or exercise and may not be conducted as one, but is an opportunity for silent prayer or meditation on a religious theme for those so inclined or a moment of silent reflection on the anticipated activities of the day.[103]

Whether the Indiana statute is constitutional would turn on the courts' interpretation of the legislative history and intent of the law.

Another volatile issue involving school prayer is prayer at graduation ceremonies. The majority of courts have ruled that prayers at graduation ceremonies are inconsistent with the Lemon test and consequently violate the Establishment Clause.[104] The First Circuit Court of Appeals in a 1990 decision, upheld a district court's ruling that the practice of having a benediction and invocation delivered at public school graduation ceremonies has the unconstitutional effect of advancing religion.[105] the United States Supreme Court has granted certiorari of this case, and it will be heard during the fall term of 1991.

In 1989 the Eleventh Circuit Court of Appeals ruled that pre-game invocations at public school athletic events violate the First Amendment.[106] The Supreme Court refused to review the decision.

The Supreme Court in Stone v. Graham, 449 U.S. 39, 101 S.Ct. 192 (1980), struck down a Kentucky statute requiring the posting of the Ten Commandments in all public school classrooms. The court found that the statute violated the establishment clause. Indiana educators should be aware that no court has ever declared that a voluntary private prayer uttered at school by a student is impermissible (as long as it does not interfere with the educational process). To the contrary, in Wallace, Justice O'Connor said "Nothing in the United States Constitution as interpreted by this court . . . prohibits public school students from voluntarily praying at any time before, during, or after the school day."[107]

Additionally, the Supreme Court has not precluded the study of religion or the Bible in the public schools. In School District of Abingdon Township, supra., the court explained, "It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistently with the First Amendment."[108] Thus, public schools may use the Bible or other religious literature in studying history, government, culture, civilization or ethics but not to promote religion. Educators must be sensitive and careful not to use the Bible or studies about religion from a proselytizing Christian orientation or approach. Rather, classes must be taught in an objective manner.[109]

### *Equal Access Act and Voluntary Student Religious Meetings*

In 1984 Congress adopted the Equal Access Act. The Equal Access Act makes it unlawful for public secondary schools that receive federal financial assistance and that have created a "limited open forum" to deny equal access or fair opportunity to, or discriminate against, any "student initiated" non-curriculum-related groups on the basis of the religious, political, or philosophical content of their speech.[110] A "limited open forum" exists, according to the Act, and the equal access requirements are triggered, whenever a public school "grants an offering to or opportunity for one or more non-curriculum related student groups to meet on school premises during noninstructional time."[111]

For the first time in Board of Education of Westside Community Schools v. Mergens, the Supreme Court ruled on the legality and constitutionality of student initiated voluntary religious activities on public school premises.[112] School authorities refused to grant official recognition to a Bible study group that had been meeting on

school premises after school. A student, Bridget Mergens, claimed that the high school officials discriminated against the religious group in not providing a faculty sponsor. A faculty sponsor was necessary under school rules for full school recognition which accordingly provided for access to the school newspaper, bulletin board, the public address system and annual Club Fair.

By an eight to one vote, the Supreme Court held that the Equal Access Act does not violate the Establishment Clause of the First Amendment. Second, the court held that the school had violated the student's rights under the Equal Access Act.

The court's interpretation of the Act is very significant to educators because the court defined and analyzed the meaning of "limited open forum." Once a limited open forum is created by a public school, school authorities cannot discriminate against students who want to conduct a meeting within that forum on the basis of religious, political, philosophical or other content of the speech at such meetings. The court concluded that a limited open forum is created when a school permits one or more noncurriculum related student groups to meet. A noncurriculum related student group, according to the majority in Mergens, is any student group that does not directly relate to the body of courses offered by the school. Justice O'Connor then set forth five characteristics of student groups, any one of which would allow a group to qualify as a curriculum-related group. The five distinguishing characteristics are: (1) A student group directly relates to a school's curriculum if the subject matter of the group is actually taught; (2) or will soon be taught, in a regularly offered course; (3) if the subject matter of the group concerns the body of courses as a whole; (4) if participation in the group is required for a particular course; (5) or if participation in the group results in academic credit. Any group meeting at least out of these characteristics will not trigger the Act's requirements. Therefore, whether a student group is noncurriculum related, triggering the Act, will depend on the school's individual curriculum.

If a public high school has at least one "noncurriculum related student group" then Mergens holds that it must recognize a wide array of groups (if they apply for recognition) regardless of the philosophical, political, religious, or other content of their members' speech. This may be a troublesome prospect for some school districts that do not wish to relinquish control of the school facility to potentially divisive groups such as the Ku Klux Klan or other hate groups. Groups that form along racial or even religious lines may cause strife among students and ruin a positive school climate. School authorities do possess the legal authority to determine whether they will be subject to the Equal Access Act. The Act does not apply to schools that permit only student groups directly related to the curriculum to meet on school premises. In Mergens the court provided several definitions of groups that directly relate to the curriculum. In light of the Mergens decision, the easiest way to conform to the requirements of maintaining a closed forum is to award credit for participation in all school approved clubs. The important point for school authorities desiring to avoid conflict and difficulty caused by divisive student groups is simply to recognize only those clubs "directly related" to the school curriculum.

### *Release Time for Religious Instruction*

Two important United States Supreme Court decisions address the issue of public school accommodation regarding student released time for religious instruction. In 1948 in McCollum v. Board of Education[113] the Supreme Court invalidated a public school program that excused students from regular class activities so they could attend private religious instruction classes, at their parents request, in the public school facility. Students who did not participate continued to study secular subjects. The court struck

down the practice as a violation of the Establishment Clause because the program aided religion.

In Zorach v. Clausen,[114] a Supreme Court case decided by a six to three vote, a mere four years after McCollum, the court upheld dismissal of students from school, during the school day, to permit them to pursue religious instruction off the school premises. The court distinguished Zorach from McCollum on the basis of where the religious instruction took place. In Zorach religious instruction did not occur on public school property. Another release-time issue surfaced in 1981 before a tenth circuit court of appeals. The court invalidated Utah state policy which allowed public-school credit for religion courses taken at parochial schools during "release time."[115]

Indiana provides for release time permitting a child to attend a school for religious instruction, upon parental request, for a period or periods not to exceed one hundred and twenty (120) minutes in the aggregate in any week.[116] The Indiana Code allows for voluntary religious observance on school premises during the regular school day, but it must be in addition to the regular six and one-half hour school day.[117] School employees cannot encourage student attendance at these observances and schools must notify all students and their parents in writing of any religious observance. Students may elect not to participate. Any religious group which does not accept the religious observance is entitled to the use of the school building during the time set for religious observances.[118] The statute does not explain who supervises or conducts the observance. It also does not mention whether religious instruction, which would clearly be unconstitutional, is contemplated at a religious observance.

## Equal Protection and Student Classification

The equal protection clause of the Fourteenth Amendment provides that ". . . No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The equal protection clause is discussed in detail with respect to the rights of teachers in Chapter Five. The guarantees of the Fourteenth Amendment extend to students.

In Brown v. Board of Education[119] the Supreme Court explained the meaning and intent of the Fourteenth Amendment's equal protection clause in this passage:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him to adjust normally to his environment. In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[120]

Once a state decides to provide education (and all states by statute or constitution do provide education), it must be provided to all on an equal basis. The United States Constitution does not contain any language referring to education. While most people believed that the Brown decision stood for the proposition that every child had a constitutionally protected right to attend school, the Supreme Court has ruled that education is not a fundamental right. In San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278 (1973) and in Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382 (1983) the Supreme Court stated that "Public education is not a right granted to individuals by the Constitution."[121] However, as the court so forcefully stated in Brown, all students have the right to have the opportunity of an education, which must be made available on equal terms to them, once a state chooses to provide a system of schooling.

In addition to the protections from discrimination that students derive from the equal protection clause, discrimination on the basis of race, sex, national origin, age, religion and alienage, is also variously prohibited by federal and state legislation. Congress has passed major pieces of legislation that create rights against discrimination. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in any program receiving federal financial assistance.[122] A program that does discriminate may lose its federal assistance. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of gender in programs receiving federal assistance.[123] The Equal Educational Opportunity Act provides that "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex or national origin.[124] In addition, Section 504 of the Rehabilitation Act of 1973 and the Education for All Handicapped Children Act renamed in 1990 as Individuals with Disabilities Education Act (IDEA) prohibit discrimination against individuals based on their disabilities (Section 504 and IDEA are dealt with extensively in Chapter 4).

Indiana statutory law specifically prohibits any public school from segregating, separating or discriminating against any of its students on the basis of race, creed, color or national origin.[125] In addition the Indiana General Assembly established an equal educational opportunity policy of the state in 1973. It provides that the state will

> . . . provide, furnish and make available equal, non-segregated, non-discriminatory educational opportunities and facilities for all regardless of race, creed, national origin, color or sex; [and] provide and furnish public schools and common schools equally open to all and prohibited and denied to none because of race, creed, color or national origin . . .[126]

## Classification of Married and Pregnant Students

The courts have divided over the question of how much control the school may exercise over married students. Early cases on the subject, in the 1950s and 1960s, generally upheld the right of school authorities to prohibit married students from attending school or participating in any extracurricular activities. In support of such restrictions, school officials argued that such rules discouraged student marriages and assisted those who had chosen marriage by avoiding time-consuming activities.[127]

However, more recently courts have held that married students cannot be prevented from attending school or participating in either interscholastic sports or other school-related activities. In Davis v. Meek, an Ohio federal court stated that to justify such a rule the school must demonstrate some compelling interest in restricting married students from such activities.[128] An Indiana court of appeals ruled that a school district and athletic association rule prohibiting married high school students from participating in athletic and extracurricular activities denied the students equal protection of the laws under the Fourteenth Amendment.[129]

School authorities also have less regulatory control than in the past, with respect to pregnant students. Title IX regulations prohibit the exclusion of pregnant students or students who have had an abortion. Separate schools or educational programs for pregnant students are permissible, but participation must be voluntary for the student.[130]

### *Classifications Based on Sex*

Title IX of the Education Amendments of 1972 Act provides that no person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance on the basis of sex.[131]

Title IX generally prohibits excluding a male or female from a class solely because of sex or offering separate courses for boys and girls. However, sex education classes may be taught separately. Physical education instructors may classify students by physical ability and separate males and females for participation in contact sports.[132]

With respect to extracurricular sports participation, Title IX allows schools to establish separate teams when team selection is based on competitive skill or the activity is a contact sport. Courts generally hold that noncontact sports must be open equally to both sexes where only one team is supported by the school.[133] In Haas v. South Bend Community School Corp., 259 N.E.2d 495 (1972) the Indiana Supreme Court invalidated an Indiana High School Athletic Association rule prohibiting "mixed" participation in noncontact sports where there were no comparable girls' programs. However, an Indiana court held that when a comparable girls team is available, then requests by females to be permitted to try out for a place on the boys team may be constitutionally denied.[134]

We turn now to the issue of participation by both sexes in contact sports. The courts are split on whether girls have the right to play on boys teams in contact sports. However, girls have won a substantial number of victories to try out for boys teams in competitive contact sports.

The United States Circuit Court of Appeals for the Ninth Circuit recently held in Clark v. Arizona Interscholastic Association, 886 F.2d 1191 (1989), that a rule pro-

hibiting boys from playing on girls' volleyball teams does not deny the boys equal protection even where there are no separate boys volleyball teams. Other courts have reached similar conclusions with respect to excluding boys from girls teams.

## Curriculum

The philosopher Reinhold Niebuhr is quoted as saying, "Give me the serenity to implement the curriculum when I must, the courage to improve the curriculum where I can, and the wisdom to know one from the other."[135] Niebuhr is eloquently depicting the difficulties that educators encounter in the decision making context of curriculum development and implementation. Ralph Tyler identified three major sources of the curriculum: society, learners, and knowledge.[136] Curriculum makers must consider information, beliefs and values from each source. Curriculum decision makers operate in a broad social and cultural environment that imposes many constraints. Parents and interest groups of all kinds attempt to influence the curriculum, experiences and information provided in public schools. The curriculum of a school reflects the consensus of pressures and interests brought to bear on the school by parents and organized groups. Though the final curriculum is created by professional educators and adopted by school boards and state educational agencies, the influence and efforts of special pressure groups and organizations cannot be underestimated. Major educational problems may result from clashes among interest groups, parents, teachers, politicians, and school officials in the making of curriculum decisions. As a consequence of these conflicts, individuals and groups have looked to the judiciary to decide matters related to the public school curriculum.

Virtually every court that has commented on the matter has acknowledged a grant of broad discretion in school authorities in matters relating to the method of teaching, decisions regarding the curriculum, and the selection of books to be used in the public schools. However, the discretion lodged in school officials is not completely unfettered by constitutional considerations of the rights of students and teachers. The United States Supreme Court said: "by and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."[137]

Most state legislatures have granted primary responsibility for public school education in local school boards, which generally have considerable power to regulate the instructional program. Indiana, by statute, has specifically lodged the governance of public school education to local school boards.[138] Local school authorities have broad powers concerning curriculum, textbooks, and other educational matters. Although the state board of education adopts textbooks for recommendation to school superintendents and their advisory committees, school boards may elect a waiver from adoption requirements.[139] The state department of education may recommend to school corporations as many as seven textbooks for each subject. The state board of education must grant a waiver to the adoption requirements if the request from the local school board is reasonable.[140]

An Indiana federal district court has stated that it is generally permissible and appropriate for local school boards to make educational decisions based on their personal, social, political and moral views.[141]

The Indiana Supreme Court in a very early case, State Ex Rel. Andrew v. Webber, 8 N.E. 708, 108 Ind. 31 (1886), arising out of a dispute between a parent and the school district of Laporte, Indiana, was asked to pass judgment on a school curric-

ulum matter. As part of the school curriculum, students were required to study and practice music. A parent objected to music classes arguing it was not in the best interest of his son to attend music class. He asked that his son be excused from music classes. The court held that the regulation requiring high school students to study and practice music was a valid and reasonable exercise of the discretionary power granted by law to school authorities. The court determined that "the branches of learning to be taught and the course of instruction therein" should be left to the discretion of the school board.[142]

However, the extent to which the state can control the education of children, including subjects taught, over the objections of parents was the issue in the landmark Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923) case. The State of Nebraska attempted to outline the teaching of foreign languages to students who had not completed the eighth grade in public, parochial or private schools. Meyer, a parochial elementary teacher who taught German, challenged the constitutionality of the law on the grounds that it violated his liberty interest protected by the due process clause of the Fourteenth Amendment. The court struck down the law as unconstitutional ruling that the authority of the state was limited when it violated the liberty interests of the teacher, parent and student. The court gave the liberty right under the Fourteenth Amendment an expansive reading saying that the teachers "right to teach and the rights of parents to engage him so to instruct their children, we think, are within the liberty of the Fourteenth Amendment."[143] In upholding the liberty rights of teachers and students, however, the Court emphasized that even those rights are subject to reasonable regulation by the state, given the states interest in every child's education. The court put it this way: "The authority of the state to compel attendance at some school and to make reasonable regulations for all schools . . . is not questioned. Nor has challenge been made of the state's power to prescribe curriculum for institutions which it supports."[144]

The removal of educational material from the curriculum and the censorship of library books are controversial issues that present recurrent problems for educators. In Zykan v. Warsaw Community School Corporation, 631 F.2d 1300 (1980), the Seventh Circuit Court of Appeals heard an Indiana case alleging that students' First and Fourteenth Amendment rights were violated by members of the local school board and school officials when books were removed from English courses and the library of the high school, and certain courses were eliminated from the English curriculum. The books removed from the courses and the school library were Values Clarification, Growing Up Female in America, Go Ask Alice, The Bell Jar, and The Stepford Wives. The students asserted that the decisions made by the school officials were arbitrary and capricious. They argued that the decisions were based on particular words in the books that offended school officials' social, political and moral tastes and not grounded in educational criteria. The court responded by contending that nothing in the Constitution prohibits the application of social, political, and moral tastes to educational decisions nor causes such criteria to be irrelevant to the legitimate exercise of educational choice. The court noted that it was not its place to "interfere with local educational discretion until school officials begin to substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute."[145]

The United States Supreme Court addressed the issue of library censorship two years later in Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 102 S.Ct. 2799 (1982). In this case the school board ordered the principal of the high school to remove nine books from the school library. Justice Brennan, writing for a five to four majority, found that if the removal of books from a school library is motivated by an intent to suppress or deny access to ideas with which school board members disagree, then the removal is unconstitutional. However, the court ruled that a school board could remove books if prompted by the "pervasive

vulgarity of the book," or its "educational unsuitability," "bad taste," "irrelevance," or inappropriateness for the pupils age and grade level.

The court ruled against the school board because it found that the books were removed simply to appease a conservative group. But the court stressed the school board's authority and duty to inculcate community values promoting respect for authority and traditional social, moral and political values in its youth. It is significant to note the court did observe a student's right to receive ideas and extended First Amendment protection to the removal of books from the school library. The court avoided the broader issue of school board power to remove books from the general curriculum.

In 1989, the Eleventh Circuit Court of Appeals[146] used the Hazelwood, supra, decision which granted school administrators increased control over school-sponsored activities, to uphold a school board's decision to ban a humanities textbook from the school's curriculum. The humanities textbook contained the English translation of Lysistratra and The Millers Tale. Parents objected to these selections because of their sexual explicitness. While the court mentioned Island Trees for the notion of the importance of "inculcating fundamental values," the court relied on Hazelwood, supra, for its decision. The court noted that Hazelwood established a "lenient test for regulation of expression which may be fairly characterized as part of the school curriculum." Such regulation is permissible "if it is reasonably related to the legitimate pedagogical concerns."[147] The court concluded that the board decision to ban the textbook was a curricular decision. Further, the Court found a legitimate educational concern in taking into account the emotional maturity of the intended audience with respect to sensitive topics (citing Hazelwood again). Thus, the Supreme Court in rendering its Hazelwood decision may have sent a signal to lower courts which appears to loom larger than the decision's original application to school publications.

## *Creation Science and Evolution*

The "Scopes Monkey Trial" of Dayton, Tennessee drew widespread public attention to the teaching of Darwin's theory of evolution in the public schools. The case matched the wit and intelligence of the premier politician William Jennings Bryan and the brilliant lawyer, Clarence Darrow. Scopes was convicted of teaching evolution but his conviction was reversed on a technicality. It was not until 1968 in an Arkansas case that the issue was litigated again. In Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266 (1968) the Supreme Court by a six to three majority vote struck down a statute that prohibited public schools from teaching the Darwinian theory of the evolution of man. The court found that the purpose of the law was to eliminate any subject that was in conflict with a Christian fundamentalist interpretation of the Bible. Thus, the statute was not neutral toward religion and violated the Establishment Clause.

During the 1970s fundamentalist religious groups attempted to establish the Biblical account of creation as a scientific theory in the same sense that Darwin's theory of evolution is scientific. Louisiana enacted a statute that required the public schools teach creation science if evolution were taught (or vice versa). Moreover, the legislation provided that each school board prepare curriculum guides for creation science and make available research services for creation science but not for evolution. The United States Supreme Court, by a seven to two decision, in Edwards v. Aguillard, 107 S.Ct. 2573 (1987), ruled that the statutes primary purpose was to foster a particular religious viewpoint and consequently violated the First Amendment. However, the Court noted that schools may teach a variety of scientific theories about the origins of man as long as it is accomplished "with the clear intent of enhancing the effectiveness of science instruction."[148]

**Secular Humanism and Religious Objections to the Curriculum:** Another controversial area with respect to the public school curriculum is the alleged use of textbooks and materials that promote secular humanism or offend religious beliefs and values. Two cases decided in the late 1980s illustrate these religiously motivated challenges to the public school instructional program.

In Mozert v. Hawkins County Board of Education, 827 F.2d 1058 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988), the Sixth Circuit Court of Appeals reversed a lower court judgment that ordered several children excused from a reading program because parents objected to the use of the Holt, Rinehart and Winston basic reading series. The parents contended that the books contained stories dealing with subjects they found objectionable on religious grounds. In reversing the Tennessee federal district court's decision the Sixth Circuit Court noted that mere exposure to religiously objectionable material does not constitute an unconstitutional burden under the Free Exercise Clause on students. The court recognized school officials difficulties in excusing students "If the school district were required to accommodate exceptions and permit other students to opt-out of the reading program and other core courses with materials others found objectionable, this would result in a public school system impossible to administer."[149]

The other case under consideration involves a challenge to the school curriculum for promoting the alleged religion of secular humanism. The first issue is whether there is a religion of secular humanism, and if so can schools promote it in violation of the establishment clause through the use of textbooks in the curriculum. In Smith v. Board of School Commissioners of Mobile County, 827 F.2d 684 (11th Cir. 1987), parents claimed that history, social studies and home economics books used by an Alabama public school district violated the establishment clause by advancing the religion of secular humanism. The trial court concluded that secular humanism is a religion and subject to the establishment clause. The court determined that forty-four textbooks on the

Alabama list of approved books violated the establishment clause. The Eleventh Circuit Court of Appeals reversed the district court. The Court found that the banned textbooks had a nonreligious purpose and did not endorse secular humanism or any religion. The court noted that the books were not hostile to religion but simply conveyed a message of religious neutrality. Moreover, the court acknowledged school officials broad discretion in making curriculum decisions. The Court said: "Indeed one of the major objectives of public education is the inculcation of fundamental values necessary to the maintenance of a democratic political system."[150] In saying this, the court agreed with the public school position that the books promoted such values as independent thought, self respect, tolerance of diverse views, and self-reliance.

## Other Legal Responsibilities Toward Students' Right of Expression

### *Hair Length and Dress*

During the 1960s and 1970s dress and grooming policies created an arena for a substantial amount of litigation. The Seventh Circuit Court of Appeals has ruled three times on the question of whether a student has the constitutional right to choose the length and style of his hair. In Breen v. Kahl, 419 F.2d 1034, 1036 (1969), Crews v. Clencs, 432 F.2d 1259, 1263 (1970) and Arnold v. Carpenter, 459 F.2d 939, 941 (1972), the circuit court decided that "the right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution," and that to limit or curtail that right, the state bore a "substantial burden of justification." In Breen, the Court held that since the students' long hair did not create a disturbance of the efficient operation of the school, the state did not bear its burden of

justification. In Crews, the court ruled that the disturbance shown was insufficient justification and it also rejected as insufficient the school board's reliance for justification upon health and safety reasons. In Arnold, a case appealed from an Indiana district court decision, the Seventh Circuit rejected a school corporation's argument that its hair regulation was different from those struck down in Breen and Crews. The dress code which contained provisions regulating the length and style of hair for male students was adopted by a majority vote of the student body. Nevertheless, the court concluded that the democratic process used in adopting the hair regulations did not justify the denial of the constitutional right to wear hair as a person chooses. It is interesting to note that then future Supreme Court Justice John Paul Stevens wrote a dissenting opinion in Arnold.

Indiana educators are, of course, bound by these Seventh Circuit decisions. However, the circuit courts are divided as to the constitutional right of a student to choose his hairstyle. Five circuits have upheld hair length regulations, four circuits (including the Seventh) have rejected such regulations. The Supreme Court has not issued an opinion on hairstyle or dress regulations.

In general, courts have upheld dress code regulations that prohibit immodest or excessively tight skirts and pants and dress that would create a distraction from the educational function. In addition, clothes that are dirty, contain vulgar language, and clothes disruptive of the educational process may be prohibited. Generally, less justification is required to sustain a dress regulation than to sustain hair regulation. The dress code must bear some rational relationship to the orderly conduct of the school.

### *Flag Salute and Pledge of Allegiance*

On June 14, 1943, a day set aside by Americans to pay tribute to the American flag--flag day--the United States Supreme Court ruled that a state could not command students, who were required to attend school by a compulsory education law, to salute the American flag. In this landmark case, West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), the court held that a flag salute regulation infringed upon the free exercise of speech guaranteed by the First Amendment.

Justice Robert Jackson, writing for the six man majority, wrote the following often cited instructive and eloquent passage:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.
>
> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.[151]

The Court noted that students' nonparticipation in the flag ceremony did not interfere with or deny the rights of others, and did not disrupt the classroom.

A Florida court held that in addition to the right not to participate, the student cannot be forced to stand quietly during the pledge ceremony.[152]

### *Extracurricular Activities*

Courts have generally held that extracurricular activities may be regulated and controlled by school authorities to a greater extent than the regular educational process because students do not have a constitutionally protected property interest in extracurricular activities. The Indiana Supreme Court held in State Ex Rel. Indiana High School Athletic Association v. Lawrence Circuit Court, 162 N.E.2d 250 (1959), that the state created right to an education did not carry with it the same right to engage in re-

lated extracurricular activities. Schools may require certain conditions be met in order for students to participate in extracurricular programs. Schools may premise participation in sports, for example, on skill and may require students to engage in competition to determine who will be selected. Indiana courts recognize that students have no constitutional rights to participate in interscholastic athletics.[153] However, an Indiana federal district court asserted in 1988 that a student cannot be arbitrarily denied the "opportunity to qualify" to participate in interscholastic athletic competition.[154] The court distinguished between a student having no constitutional right to participate, and the right to have an opportunity to qualify. In other words, a student cannot arbitrarily be denied the chance to "try out" for a team but he or she does not have the right to be chosen.

Most states have voluntary athletic organizations that regulate high school athletic programs. Indiana interscholastic athletic programs are administered by the Indiana High School Athletic Association (IHSAA). The IHSAA has strict residency requirements as conditions of participation in interscholastic sports. The Indiana transfer rules are aimed at deterring individuals (coaches and alumni) who would seek to recruit student athletes to attend a particular school for the purpose of building athletic strength. In Sturrup v. Mahan, 305 N.E.2d 877 (1974), the Indiana Supreme Court ruled that the "IHSAA transfer bylaws were unreasonably broad because they automatically denied participation to student athletes who wished to transfer for academic, religious or other legitimate reasons. After the Sturrup decision, the IHSAA changed some of its rules to conform to the court's verdict.

However, a 1988 Indiana case involving the IHSAA's transfer rules substantially boosts the IHSAA's authority to administer high school athletics in Indiana. At issue again in Anderson by Anderson v. Indiana High School Athletic Association, 699 F.Supp. 719 (S.D. Ind. 1988), was an Indiana transfer rule that automatically prevented

a transfer student from participating in competitive athletics for one year after her transfer. The student sought an injunction from the federal district court under Section 1983 of the Civil Rights Act of 1871. The court was first asked to decide whether the IHSAA acts as a private organization immune from Section 1983 claims, or whether its private conduct constitutes "state action." If state action exists, courts allow litigation under Section 1983. The Court analyzed the degree of state control and state involvement in the operations of IHSAA by relying on recent precedent from the United States Supreme Court. The federal district court used the Supreme Court cases dealing primarily with colleges and the National Collegiate Athletic Association (NCAA) and found the reasoning of the cases applicable to the IHSAA. The Court found that the conduct of the IHSAA was not state action. The Court granted summary judgment in favor of the IHSAA. Although the Court said it considered the transfer rule unfair and insensitive, it shut the door on any relief to student athletes by ruling that the IHSAA is not a "state actor" as would entitle a student to injunctive relief under Section 1983.

The Third Circuit Court of Appeals found that a student who was suspended from school for ten days and the football team for sixty days did not have a property right implicated by his removal from the football team.[155]

## Competency Testing and Classifications Based on Academic Ability

The vast majority of states have adopted a minimum competency testing (MCT) program for the public schools. States vary with respect to the use of standardized testing programs. States may use MCT programs to evaluate students for purposes of placing them in programs, for promotion purposes, or to determine if they will be awarded a high school diploma. Many of these testing schemes for students have come

under legal attack. The grounds for legally challenging MCTs have been numerous. The major legal challenge is based on evidence that MCT programs usually create racially discriminatory effects because of the testing instruments used. Those discriminatory effects give rise to Fourteenth Amendment equal protection actions. Schools have had difficulties in validating the tests and demonstrating that the tests are curriculum aligned.[156] In other words, the issue becomes do MCTs accurately reflect what students are taught in school.

Indiana has adopted an extensive MCT program called the Indiana statewide testing for educational progress program. In 1987 the Indiana General Assembly enacted legislation creating the ISTEP program.[157] This piece of legislation effectively dismantled Indiana's previous MCT program which was not legislatively mandated, but developed in the 1970s by the Indiana State Board of Education. ISTEP, by statute, is used for promotion purposes. Students in grades one through eight who receive scores on mathematics and English/Arts ISTEP tests that are below the state achievement standard must attend summer remediation programs. School corporations must retain a student who, after summer remediation, receives a total score on the ISTEP test in mathematics and English arts below the state achievement standard. The statute only provides for rare exceptions to the retention rule and then only after careful diagnosis and documentation as to the best interests of the child.[158] The regulations implementing ISTEP provide that "mentally handicapped, learning disabled and emotionally handicapped students may but are not required to participate in the program."[159] If a child with any of those disabilities chooses to participate in the ISTEP, it must be accomplished through the development of his Individualized Education Program (IEP).

The Indiana State Department of Education has been delegated the authority to administer the ISTEP program.[160] According to their regulations, school corporations may use ISTEP test scores for a local graduation requirement.[161] Thus, each school

corporation is permitted to use ISTEP scores in determining a student's eligibility for a high school diploma. The issue of withholding a diploma from a student based on the results of competency tests was litigated in a well known Florida case. In Debra P. v. Turlington, the plaintiffs challenged the use of competency tests for determining eligibility for a high school diploma.[162] The Fifth Circuit Court of Appeals found that the state had violated students' due process rights by only providing one year's notice that successful completion of the test was a condition of receiving a high school diploma. The circuit court also required that the state prove "curricular validity" for its test (the test must cover what students are actually taught in school). In addition, the court demanded the trial court examine the possibility of an equal protection clause violation, because of the disproportionate number of black students who failed the exam. At trial, the state convinced the federal district court that the MCT had curricular validity. Moreover, the court concluded that there were no remaining effects of de jure segregation that caused the disproportionate number of black students to fail the test. The court ruled that the State of Florida could use minimum competency tests to determine eligibility for high school graduation, as long as the tests were administered in a fair manner.

The use of ability or achievement grouping is an accepted, although controversial pedagogical practice. There is evidence that ability grouping results in improved class manageability, and student motivation. Conversely, there is evidence that indicates that achievement grouping leads to undesirable stigmatization of students and promotes disproportionate lower achievement by minority students.[163]

In Hobson v. Hansen a federal district court found that the District of Columbia school system violated the equal protection rights of its black students in connection with its student assignment practices and its track system. The court said this about ability grouping (the track system) "Even in concept, the track system is undemocratic

and discriminatory . . . it is designed to prepare some children for white collar, and other children for blue collar jobs."[164]

In a more recent case involving the issue of ability grouping Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403 (Eleventh Cir. 1985), plaintiffs claimed that the tracking schemes manifested a disproportionate racial impact and violated the equal protection clause of the Fourteenth Amendment (as well as Title VI, Section 504 and E.H.A.). The court held that it is well established that ability grouping is not per se unconstitutional even when it results in racial disparity in classrooms. The court concluded that achievement grouping is per se educationally desirable, and in this case found that black students had made significant academic progress since achievement groups was instituted.

Ability grouping is legal and some experts believe desirable. However, school districts must offer sufficient nondiscriminatory justification for such practices, and demonstrate that their programs are educationally necessary to advance the academic needs of its students.

Other issues related to discrimination in testing are discussed in Chapter 4.

## Summary

The Indiana Constitution and state statutes provide for the state of Indiana to establish and maintain public free schools. Indiana compulsory education laws are aimed at preventing parents from denying their children a minimal education. Indiana law allows home schooling, private schooling and other non-school arrangements as long as they constitute instruction equivalent to that given in the public schools. Under certain conditions, absence from school may be excused for religious reasons. Although

the Indiana Constitution provides for a system of free public schools, Indiana statutory law permits schools to charge students textbook rental fees.

The judiciary uniformly recognizes the right and duty of school boards and school authorities to maintain order and control in the classroom and in the public schools. School principals are given the primary responsibility of carrying out and preventing interference with the educational process at their schools. Principals, teachers and other school personnel are authorized to take reasonable action in regard to student behavior in order to assist students adapt their behavior in a manner which is conducive to providing for an effective orderly learning environment.

Indiana common and statutory law grants school authorities the right to impose corporal punishment on students. Where students violate school rules and regulations school authorities may suspend or expel them from attending school. Students have a right to procedural due process in connection with school suspensions and expulsions. The Fourteenth Amendment guarantees students procedural due process with respect to their property and liberty rights vested in their education. Short term suspensions of ten days or less require minimal due process consisting of notice, reasons, and an opportunity for a hearing. Suspensions or expulsions require more formal procedures. Indiana has established an elaborate, comprehensive and complex procedural scheme to be used for expulsions and exclusions.

Litigation related to student protection against unreasonable searches and related privacy rights is extensive. The Fourth Amendment applies to searches and seizures conducted by public school authorities but the probable cause standard is not required of school officials. School officials must have reasonable cause to justify a search of a student. As a general rule, in determining the permissible extent or intrusiveness of a search, courts balance the severity of the alleged misconduct with the student's age, sex and record in school. The school's interest in maintaining a safe, orderly environment

conducive to learning is weighed against the student's right to privacy and the Fourth Amendment's prohibition against unreasonable search and seizure. The Seventh Circuit Court of Appeals, Indiana courts, and statutory law give Indiana educators greater freedom to search students than educators possess in most other jurisdictions.

The Family and Educational Rights and Privacy Act (FERPA) provides protection for the privacy interests of students and their parents in connection with school records. Indiana has enacted its own privacy law which extends its coverage to the public schools.

The hallmark of civil liberties in the United States is the First Amendment. To what extent are school officials permitted to impose limits on student expression? While students are entitled to First Amendment protections in the educational setting, this protection is not coextensive with that of adults. Students individual political, personal or religious speech is protected by the First Amendment and cannot be limited unless it causes substantial disruption, or may be reasonably forecasted to cause substantial disruption of the educational process or interferes with the rights of others. Speech which is vulgar or offensive can be punished and prohibited in classrooms, assemblies and other school sponsored educational activities. The Supreme Court has emphasized that the public schools have the responsibility and indeed it is their educational mission to transmit the shared values of a civilized social order.

Most public schools support a student newspaper and other publications. School officials may exercise editorial control over the style and content of student speech in school sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. A curricular related student newspaper is not a public forum for student expression.

Indiana educators may not require prior approval of non-school sponsored student written publications before publication. School administrators may regulate the

time, manner and place of distribution. School officials can prohibit and discipline students who publish and distribute obscene or libelous material on school premises.

The relationship between religion and the public schools has been a perennial controversial issue in the United States. The Supreme Court has consistently maintained that a state must confine itself to secular objectives and remain neutral with respect to religious activity. School sponsored prayer is impermissible in the public schools even if participation is voluntary. A voluntary private prayer said by a student is permissible so long as the school does not sanction and advance the silent devotional activity. Public schools may use the Bible or other religious literature in studying history, government, culture, civilization or ethics but not to promote religion.

The Equal Access Act makes it unlawful for public schools that have created a limited open forum to deny access or discriminate against student initiated non-curriculum groups on the basis of the religious, political, or philosophical content of their speech. School authorities possess the legal authority to determine whether they will be subject to the Act. The Act will not apply to schools that permit only student groups directly related to the curriculum to meet on school premises.

Indiana provides for "release time" permitting a child to attend a school for religious instruction, upon parental request, for a period(s) not to exceed one hundred and twenty minutes in any week.

Once a state decides to provide education (and all do) it must be provided to all on an equal basis. Students derive protections from discrimination from the Fourteenth Amendment's equal protection clause. State and federal law also protect students from discrimination on the basis of race, sex, national origin, age, religion, alienage and disabilities.

Married students must be allowed to participate in athletic and extracurricular activities. Title IX allows schools to establish separate teams when team selection is

based on competitive skills or the activity is a contact sport. Generally, in Indiana noncontact sports must be open equally to both sexes unless a comparable girls team is available.

Major educational problems may result from conflicts arising over curriculum decisions. School officials are granted broad discretion in matters relating to the method of teaching, decisions regarding the curriculum, and the selection of books to be used in the public schools.

In Indiana students may wear their hair at any length and style as an ingredient of their personal freedom. However, dress code regulations that prohibit immodest, dirty or clothes disruptive of the educational process may be prohibited.

Schools may not command students to salute the American flag or recite the pledge of allegiance.

Courts have generally held that extracurricular activities may be regulated and controlled by school authorities to a greater extent than the regular educational process because students do not have a constitutionally protected property interest in extracurricular activities. In Indiana a student may not be arbitrarily denied the opportunity to qualify to participate in interscholastic athletics but he or she does not have the right to be chosen. The IHSAA which administers high school athletics in Indiana is not considered an arm of the state for purposes of allowing student's injunctive relief under Section 1983.

Indiana has adopted an extensive minimum competency testing (MCT) program called ISTEP. It is used for student promotion purposes and may be used at the option of local school boards to determine eligibility for high school graduation.

The use of ability or achievement grouping is an accepted, although controversial pedagogical practice. Ability grouping is legal and some experts believe desirable. However, school districts must offer sufficient nondiscriminatory justification for such

practices, and demonstrate that their programs are educationally necessary to advance the academic needs of its students.

## Footnotes

1. Indiana Constitution, Article 8, Section 1.
2. See Salem Community School Corporation v. Easterly, 275 N.E.2d 317 (1971).
3. State v. Bailey, 61 N.E. 730 (1901).
4. State v. O'Dell, 118 N.E.2d 529 (1919).
5. Salem Community School Corporation v. Easterly, supra.
6. I.C. 20-8.1-3-17.
7. Ibid.
8. See, generally, Lawrence Kotin and William Aikman, Legal Foundations of Compulsory School Attendance, (Port Washington, N.Y., Kennikat Press, 1980).
9. I.C. 20-8.1-3-34.
10. Ibid.
11. Mazanec v. North Judson-San Pierre School Corporation, 763 F.2d 845 (7th Cir., 1985).
12. Ibid., p. 846.
13. Ibid.
14. Mazanec v. North Judson-San Pierre School Corporation, 614 F.Supp. 1152 (D.C. Ind. 1985).
15. Mazanec v. North Judson-San Pierre School Corporation, 798 F.2d 230 (1986).
16. I.C. 20-8.1-3-23.
17. I.C. 20-8.1-3-24.
18. I.C. 20-8.1-3-20.
19. I.C. 20-8.1-3-36.
20. I.C. 20-8.1-3.32.
21. Simmons v. State, 371 N.E.2d 1316 (1978), p. 1322.

22. I.C. 20-8.1-3-17.2.

23. I.C. 20-8.1-3.31.1.

24. Wisconsin v. Yoder, 406 U.S. 205 (1972).

25. 20-10.1-10-1.

26. Chandler v. South Bend Community School Corp., 312 N.E.2d 915 (1974); Gohn v. Akron School, 562 N.E.2d 1291 (Ind. App. 3 Dist. 1990).

27. I.C. 20-8.1-5-3.

28. Bouse v. Hipes, 319 F.Supp. 515 (1970).

29. I.C. 20-8.1-5-1.

30. I.C. 20-8.1-5-2.

31. Ibid.

32. I.C. 20-8.1-5-2(b).

33. I.C. 20-8.1-5-3.

34. I.C. 20-8.1-5-7.

35. Ingraham v. Wright, 97 S.Ct. 1401, 430 U.S. 651 (1977).

36. Ibid., p. 1417.

37. Education Week, October 18, 1989, p. 2.

38. Vanvactor v. State, 15 N.E. 341 (1888).

39. Cole by Cole v. Greenfield-Central Comm. Schools, supra, p. 59.

40. Ibid., p. 60.

41. Hall v. Tawney, supra, p. 613.

42. Smith v. West Virginia State Board of Education, 295 S.E.2d 680 (1982).

43. Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir., 1961), cert. denied 368 U.S. 930 (1961) and Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967).

44. Goss v. Lopez, supra, p. 574.

45. Ibid., p. 581.

46. I.C. 20-8.1-5-6.

47. Ibid.

48. I.C. 20-8.1-5-6(b)(c).

49. I.C. 20-8.1-1-10.

50. I.C. 20-8.1-5-4.

51. I.C. 20-8.1-5-11.

52. I.C. 20-8.1-5-8.

53. I.C. 20-8.1-5-9.

54. I.C. 20-8.1-5-10.

55. I.C. 20-8.1-5-11.

56. Ibid.

57. Blackman v. Brown, 419 N.Y.S.2d 796 (1978).

58. Hamer v. Board of Education, 383 N.E.2d 231 (Ill. App. 1978).

59. Katzman v. Cumberland Valley School District, 479 A.2d 671 (1984).

60. Dorsey v. Bale, 521 S.W.2d (1975).

61. Mapp v. Ohio, 367 U.S. 643 (1961).

62. New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985).

63. Ibid., p. 742.

64. Ibid., p. 743.

65. Schaill v. Tippecanoe County School Corp., 679 F.Supp. 833 (N.D. Ind. 1988).

66. Schaill by Kross v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988).

67. Brooks v. East Chambers Cons. Independent School District, 730 F.Supp. 759 (S.D. Tex. 1989).

68. State v. Stein, 456 P.2d 1 (1969), cert. denied 397 U.S. 947 (1970).

69. 20-8.1-5-17.

70. Horton v. Goose Creek Ind. School District, 490 F.2d 524 (1982), cert. denied 103 S.Ct. 3536 (1983).

71. Doe v. Renfrow, supra, pp. 92, 93.

72. 20 U.S.C. 1232 et. seq.

73. 34 C.F.R. § 99.11.

74. I.C. 4-1-6-2.

75. Palko v. Connecticut, 302 U.S. 319 (1937), p. 327.

76. Tinker v. Des Moines Independent Community School District, supra, p. 736.

77. Ibid., p. 740.

78. Ibid., p. 736.

79. Ibid., p. 746.

80. Bethel v. Fraser, supra, p. 3162.

81. Ibid., p. 3164.

82. Ibid., p. 3165.

83. Ibid.

84. Hazelwood School District v. Kuhlmeier, 108 S.Ct. 562 (1988).

85. Ibid., p. 567.

86. Ibid., p. 571.

87. Ibid., p. 570.

88. Ibid., p. 570.

89. See Bystrom v. Fridley High School, 822 F.2d 747 (8th Cir., 1986).

90. Fujishima v. Board of Education, supra. p. 1359.

91. Planned Parenthood v. Clarke County School District, 887 F.2d 935 (9th Cir. 1989).

92. Adrienne Koch, Madison's Advice to My Country, (Princeton, N.J.: Princeton University Press, 1966), p. 43.

93. Kern Alexander and David Alexander, The Law of Schools, Students and Teachers, p. 99.

94. Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504 (1947).

95. Ibid., pp. 15-16, pp. 511-512.

96. Ibid., p. 63, p. 534.

97. Roemer v. Maryland Public Works Bd., 426 U.S. 736, 96 S.Ct. 2337 (1979).

98. See, e.g., Wallace v. Jaffree, 472 U.S. 38, 105 S.Ct. 2479 (1985); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 107 S.Ct. 2862 (1987).

99. Engel v. Vitale, supra, p. 425.

100. Thomas Hunt, "Moral Education and Public Schools: A Tale of Tempest," Religion and Public Education, No. 2 (1986).

101. See Justice O'Connor's dissent, Wallace v. Jaffree, 472 U.S. 38 (1985), pp. 70-71.

102. Ibid., p. 73.

103. I.C. 10.1-7-11.

104. See, e.g., Bennett v. Livermore, 238 Cal.Rpt. 819 (Ct. App. 1987); Grahm v. Central Comm. Schools, 608 F.Supp. 431 (1985).

105. Weisman v. Lee, 908 F.2d 1090 (1st Cir., 1990).

106. Jager v. Douglas County School District, 862 F.2d 824 (11th Cir. 1989).

107. Wallace v. Jaffree, supra, p. 67.

108. School District of Abingdon Township v. Schempp, supra, p. 225.

109. See Hall v. Board of School Commissioners, 656 F.2d 999 (5th Cir. 1981), modified, 707 F.2d 464 (1983).

110. 20 U.S.C. 4071.

111. Ibid., 4071(b).

112. Board of Education of Westside Community Schools v. Mergens, 110 S.Ct. 2356 (1990).

113. McCollum v. Board of Education School District No. 71, 333 U.S. 203 (1948).

114. Zorach v. Clauson, 343 U.S. 306 (1952).

115. Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981).

116. I.C. 20-8.1-3-22.

117. I.C. 20-10.1-7-9.

118. Ibid.

119. Brown v. Board of Education, 347 U.S. 483 (1954).

120. Ibid., p. 493.

121. Plyler v. Doe, 457 U.S. 202 (1983), p. 221.

122. 42 U.S.C. § 2000 et. seq.

123. 20 U.S.C. § 1618 et. seq.

124. 20 U.S.C. § 1703.

125. I.C. 20-8.1-2.4.

126. I.C. 20-8.1-2-5.

127. See, e.g., Board of Directors v. Green, 147 N.W.2d 854 (1967); Kissick v. Garland Ind. School District, 330 S.W.2d 708 (1959).

128. Davis v. Meek.

129. Indiana High School Athletic Assn. v. Railke, 329 N.E.2d 66 (1975).

130. 20 U.S.C. § 1681.

131. Ibid.

132. 45 C.F.R. Part 86.

133. See, i.e., Brendon v. Independent School District, 477 F.2d 1292 (8th Cir. 1973).

134. Ruman v. Eskew, 333 N.E.2d 138 (1975).

135. Donald Orlosky, Lloyd McClearly, Arthur Shapiro, and L. Dean Webb, Educational Administration Today (Columbus, Ohio: Merrill Pub. Co., 1984), p. 145.

136. Ralph Tyler, Basic Principles of Curriculum and Instruction (Chicago: University of Chicago Press, 1949).

137. Epperson v. Arkansas, 393 U.S. 97 (1968), p. 104; 89 S.Ct. 266 (1968), p. 270.

138. I.C. 20-5-2-1 et. seq.

139. I.C. 20-10.1-9-1.

140. I.C. 20-10.1-9-22.

141. Zykan v. Warsaw Community School Corporation, 631 F.2d 1300 (1980).

142. State Ex Rel. Andrew v. Webber, supra, p. 710.

143. Meyer v. Nebraska, supra, p. 400.

144. Ibid., p. 402.

145. Zyken v. Warsaw Community School Corporation, supra, p. 1306.

146. Virgil v. School Board of Columbia County, Florida, 862 F.2d 1517 (11th Cir. 1989), p. 1521.

147. Ibid.

148. Edwards v. Aguillard, supra, p. 2583.

149. Mozert v. Hawkins County Board of Education, supra, pp. 1072-1073.

150. Smith v. Board of School Commissioners of Mobile County, supra, p. 692.

151. West Virginia State Board of Education v. Barnette, supra, p. 642.

152. Board of Public Instruction, 314 F.Supp. 285 (S.D. Fla. 1970).

153. See, i.e., Haas v. South Bend Community School Corp., supra.

154. Anderson v. Indiana High School Athletic Association, 699 F.Supp. 719 (S.D. Ind. 1988).

155. Palmer v. Merluzzi, 868 F.2d 90 (3d Cir. 1989).

156. Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981).

157. I.C. 20-10.1-17-1.

158. I.C. 20-10.1-17-8.

159. Administrative Rules of Indiana State Board of Education, 511 IAC 6-2-1.

160. I.C. 20-10.1-16.4.

161. 511-IAC 6-2-1; 511-IAC 6-7-2.

162. Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981).

163. See Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985).

164. Hobson v. Hanson, 269 F.Supp. 401 (1967), p. 515, aff'd, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

# Chapter 4

## *The Legal Responsibilities Toward Individuals with Disabilities*

### Historical Legal Perspective

Genuine equality of educational opportunity has evolved very slowly in this country for disabled children. Throughout most of the history of formal compulsory education in the United States, children with disabilities have either been partially or completely excluded from access to basic schooling. Only in the past two and a half decades has the issue of providing access and equal educational opportunity for children with disabilities been a dominant theme in discourse about education. Education for individuals with disabilities has been dealt with largely through judicial and legislative means to break down the barriers and to provide new means of access and support for disabled children.

Only three states had enacted special education laws prior to the 1960s.[1] Indiana was one of seven states passing special education legislation in the 1960s, and then not until 1969.[2] Indiana established its compliance deadline date for 1973. Handicapped children between the ages of six through seventeen were originally covered under the

1969 Indiana Special Education Act. By 1973, thirty-four states and the District of Columbia had passed laws aimed at meeting the needs of children with disabilities.[3] Despite the passage of these laws requiring educational programs for handicapped children, states and local school districts failed to adequately meet the needs of half of all the handicapped children in the country. Congressional findings in 1975 indicated that 1,750,000 handicapped individuals of school age were not receiving any educational services. They were totally excluded from the public schools. Another 2,200,000 handicapped students were receiving inappropriate and inadequate schooling not suited for their educational needs. Congress found that there were more than eight million handicapped children in the United States in 1975.[4]

Many states, including Indiana, did not even comply with their own special education laws. Although Indiana had enacted the 1969 Special Education Act which mandated that counties provide special education services to all handicapped children by 1973, 128 of the state's 305 school districts had no special education programs for learning disabled students as of the 1976-1977 school year.[5] This meant that only twenty-eight percent of all learning disabled children were receiving special education programs suited for their needs in 1976. This figure only increased to thirty-three percent being appropriately served the following year.[6] Eleven states continued to completely exclude certain categories of handicapped children as of 1975, including most notably, the severely mentally retarded and emotionally handicapped.[7] As late as 1969 the state of North Carolina prohibited by criminal statute (a misdemeanor) requests by parents for placement of handicapped children in public schools.[8]

The judiciary's record on improving the lot of individuals with disabilities was as dismal as the state's efforts until the 1970s. In an early case near the turn of the century, a Massachusetts court held that local school districts could expel students for disorderly conduct that was a result of "imbecility."[9] In Beattie v. Board of Education of City of

Antigo, 169 Wis. 231, 172 N.W. 153 (1919), the Wisconsin Supreme Court heard a case which involved a cerebral palsied child who drooled uncontrollably, spoke slowly and could not control his facial expressions. The child was academically able to progress in the school. The court ruled that the student could be excluded from school because he had a depressing and nauseating effect on the teachers and other children attending school. The court couched its decision in terms of deciding what was in the best interests of the entire school. Thus, the child's rights, according to the court, had to be subordinated to the general welfare.

The judicial turning point for children with disabilities did not come in a case involving disabilities, rather it came in Brown v. Board of Education, the landmark racial desegregation case.[10] The Supreme Court said in Brown v. Board of Education, that if a state has provided an opportunity for a public education, the right to an education becomes "a right which must be made available to all on equal terms."[11] The court held that "separate but equal" educational facilities were inherently unequal. The language and concepts of the decision became persuasive on courts considering discrimination against children with disabilities. The rationale behind the courts decision is articulated in this famous passage from the decision:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[12]

The Brown decision propounded the notion that educating black children separately was inherently unequal because of the stigma and detrimental educational consequences that flow from being educated separately. The Brown decision created a favorable atmosphere for a change in thinking about integration.

The Brown decision also made it clear that once a state undertakes to provide an educational system, it binds itself to make educational opportunities available to all on "equal terms."[13] This concept of the equal protection clause of the Fourteenth Amendment was the forerunner and became the core basis of Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania, 343 F.Supp. 279 (E.D. Pa. 1972), 334 F.Supp. 1257 (E.D. Pa. 1971), and Mills v. Board of Education, 348 F.Supp. 866 (D.D.C. 1972), cases that established that children with disabilities have a federal constitutional right to a publicly funded education. In PARC, the plaintiffs, mentally retarded children and a parent advocate group, claimed that the state's education laws violated the equal protection and due process guarantees of the Fourteenth Amendment. The Pennsylvania compulsory education statute permitted the exclusion of children who were uneducable, untrainable, or could not benefit from public schooling. The court held that there were "serious doubts . . . as to the existence of a rational basis for the state to provide public education programs for some children while denying the same to others because of handicaps."[14]

In Mills, the court declared that all children, regardless of any handicapping condition, had a right to a publicly funded education. The court found that the District of Columbia school system had excluded children with disabilities without any provision for adequate and timely alternative procedures and had denied handicapped students due process and equal protection of the law. District Judge Waddy dismissed the school system's argument that it did not have adequate financial resources to provide appropriate educational services to disabled children. The court said:

> if sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.[15]

The Mills case set out much of the basic procedural due process framework which was later incorporated into the Education for All Handicapped Children Act of 1975.[16] The Mills decision called for procedural safeguards relating to labeling, placement, and the exclusionary stages of decision-making with respect to disabled students.

The Mills case also demonstrated the preference for integrating handicapped pupils in the regular classroom, the court stated:

> Each member of the plaintiff class is to be provided with a publicly-supported educational program suited to his needs, within the context of a presumption that among the alternative programs of education, placement in a regular public school class with appropriate ancillary services is preferable to placement in a special school class.[17]

After PARC and Mills at least thirty states had suits filed against them to enforce the right of children with disabilities to a public education, and several courts began to follow the precedent of PARC and Mills.[18]

Congress manifested its recognition of the right of children with disabilities to have a free appropriate public education by enacting P.L. 94-142, the Education for All Handicapped Children Act (EAHCA) on November 29, 1975. It took more than three years for the legislation to be developed. Its purpose was stated this way:

> . . . to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the right of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.[19]

The passage of EAHCA was the result of several forces coalescing together, among the most significant were: the civil rights movement's creation of a favorable climate for integration; the extraordinary work of parent advocacy groups and professional organizations (Council on Exceptional Children and National Association for Retarded Children); and last but not least the method of funding which provided money for each congressional district.[20]

In 1990 the Education for All Handicapped Children Act was renamed as the Individuals with Disabilities Education Act (IDEA). The name change simply reflects

a preference for the use of the term "disabled" over "handicapped." Under IDEA and the Act's implementing regulations, state educational agencies are charged with the responsibility of assuring that all eligible children within the state are provided with a free appropriate public education. This duty is carried out by allocating federal funds to state educational agencies which in turn apportion the funds to local educational agencies to assure all disabled children the right to a free appropriate education.

IDEA requires that children with disabilities between the ages of three and twenty-one and in need of special education are to be identified, located and evaluated.[21] Recipients of federal financial assistance under IDEA must provide these disabled children a free appropriate public education, which includes special education and related services;[22] the education must be "provided in conformity with an individualized education program."[23] During the 1987-1988 school year, 4,235,263 children were served under IDEA (EAHCA).[24]

Shortly after the decisions in the PARC and Mills cases, and even before passage of EAHCA, Senator Humphrey of Minnesota and Congressman Vanik of Ohio proposed a nondiscrimination bill which became Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. Section 504 did not provide financial assistance to the states to provide special education. However, recipients of federal funds are prohibited by Section 504 of the Rehabilitation Act of 1973 from discriminating against qualified individuals with handicaps. Section 504 of the Rehabilitation Act states in part:

> No otherwise qualified individual with handicaps in the United States as defined in Section 706(7) of this Title, shall solely by reason of his handicap, be excluded from participation and be denied the benefits of, or be subjected to, discrimination under any program or activity receiving federal financial assistance.[25]

Section 504's anti-discrimination mandate can be seen to prohibit three specific types of conduct: exclusion, denial of benefits, and discrimination. In operating educational programs for handicapped students under Section 504, Indiana must meet two major obligations. One, Indiana cannot deny students with disabilities the opportunity

to participate in or benefit from a program.[26] Second, Indiana must provide a free appropriate education to all handicapped students in publicly funded placements.[27]

Section 504 requires that all elementary or secondary education programs that receive federal financial assistance provide a free appropriate public education to each qualified handicapped student.[28] Section 504 must be viewed as an overlapping federal statute with the Individuals With Disabilities Education Act (IDEA). When IDEA and Section 504 are read together, a complementary set of standards emerges to determine the appropriate education (and educational setting) for disabled students. As stated above, Section 504 is a general anti-discrimination statute. IDEA is a more specific statute, it provides the mandates and parameters of educating disabled children between the ages of 3-21. The intersection between IDEA and Section 504 is the requirement that students in publicly funded placements receive a free appropriate public education (FAPE). The regulations implementing Section 504 require that: "A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature of severity of the person's handicap."[29]

The substantive education requirement under Section 504 is the provision of a free appropriate education. Although the Section 504 regulations delineate these requirements, since 1984 these substantive requirements have been found to be carried out through compliance with the substantive education portion of IDEA, 20 U.S.C. 1401, for all eligible children. Smith v. Robinson, 468 U.S. 992 (1984). Thus, in order to be in compliance with Section 504, eligible handicapped students have a right to a free appropriate public education.[30]

The Office of Civil Rights (OCR) is the agency within the United States Department of Education which has the responsibility to enforce the provisions of Section 504. Any person with a grievance against a federally funded program or entity can file

a complaint with the Department of Education. The complaint must be filed within 180 days of the alleged transgression.[31]

One other recently enacted federal statute aimed at eliminating discrimination against individuals with disabilities should be mentioned. On July 27, 1990, Congress passed the Americans With Disabilities Act (ADA) which prohibits discrimination against individuals with disabilities in employment, governmental programs and services, public accommodations and services including retail stores, and other public facilities and telecommunications.[32] The ADA requires employers to make reasonable accommodations, which are not an undue hardship on the employer in order that any qualified individual with a disability (broadly defined) can perform the essential functions of a job.[33]

The most important educational legislation for children with disabilities is the IDEA. The IDEA requires that children with disabilities be provided an education in the least restrictive environment.[34] It also mandates that education is to be individualized and appropriate.[35] Indiana has created the Division of Special Education to supervise and implement the requirements of the IDEA.[36] Indiana, by statute, accepts all of the provisions and benefits of IDEA and Section 504.[37]

The Indiana Code defines a "handicapped child" as "any child who is at least three years of age but less than twenty-two (22) years of age and who because of physical or mental disability is incapable of being educated properly and efficiently through normal classroom instruction, but who with the advantage of a special educational program may be expected to benefit from instruction in surroundings designed to further the educational, social, or economic status of the child."[38] The IDEA provides the same age eligibility requirements.[39] However, Indiana law allows school corporations the option of providing special education to handicapped children who are 3, 4, 5, 19, 20, and 21 years of age.[40] This is consistent with the IDEA but only in certain situations. For

example, once education is provided to all children in a certain age and disability category, then all disabled children in that age range are entitled to education under the IDEA.[41] Another situation in which special education must be provided is where children within the age range of 3 to 5 year olds and 19 to 21 year olds. In those situations a proportionate number of handicapped children are entitled to special education under the IDEA.[42]

Indiana statute defines special education as:

> instruction specially designed to meet the unique needs of a handicapped child. It includes transportation, developmental, corrective, and other support services and training only when required to assist a handicapped child to benefit from the instruction itself.[43]

A child's need for special education is an extremely critical determination, because a child is not deemed handicapped or disabled, within the meaning of the IDEA or Indiana statutory law unless he or she needs special education and the entitlement to related services is also dependent on the need for special education.

The regulations implementing Indiana's Special Education Act (as amended), define related services in the same manner as the IDEA:

> Transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, school social work services, and parent counseling and training in order to provide the parent with information about child development and assist the parent in understanding the special needs of the child.[44]

The 1990 amendments to IDEA expand the definition of related services to include rehabilitative counseling and social work services (Indiana already provided for social work services).[45] Another 1990 amendment to IDEA calls for "transition services," aimed at assisting disabled children in making the transition from school to outside employment or further schooling. A program of transition services must be included in a student's IEP by the time the student reaches age 16.[46]

The development of a program to ensure an appropriate education for each disabled child is accomplished through the use of the individualized education program

(IEP). In Indiana the IEP is prepared at a meeting of the "case conference committee."[47] The case conference committee (which is the equivalent to the IEP Committee under the IDEA) is composed of the following people: a representative of the school corporation or public agency responsible for educating the child; the child's teacher; the child's parent, guardian or custodian; if appropriate, the child; and if services are contemplated for a seriously emotionally handicapped child, a mental health professional provided by the community mental health center serving the community in which the child resides.[48] A member of the evaluation team is required when the child has been evaluated for the first time.[49] The provision requiring a mental health professional when a seriously emotionally handicapped child is considered is unique to Indiana.

In Howey v. Tippecanoe School Corporation, 734 F.Supp. 1485 (N.D. Ind. 1990), an Indiana federal district court ordered that all school personnel who instructed a handicapped child must participate in all case conferences and all must have input in writing the child's IEP. The court ruled that a "tentative IEP" as a work sheet, prepared by the school and made available to all members of the case conference committee (including the parents) is permissible. However, a final IEP must be drafted and agreed upon by all members of the case conference meeting (including parents). Additionally, the court concluded that parents must be informed that they have a right, and indeed should write their dissent (if they wish to dissent) on the IEP before it leaves the case conference committee. The court said: "This is one of the rights that should be included in any notice of rights."[50] Notice of this right is not required under the IDEA.

The IEP, according to Indiana regulations and the IDEA, must include:

> (a) a statement of the child's present levels of educational performance; (b) a statement of the annual goals and short term instructional objectives; (c) a statement of specific special education and related services and extent of participation in regular education; (d) projected dates for initiation and anticipated duration of services, and (e) the appropriate objective criteria, evaluation procedures and schedules for review of placement on an annual basis.[51]

The annual goals and short term objectives serve the purpose of providing a vehicle for determining whether the special education program is appropriate to the unique individual needs of the disabled child. It is critical that the IEP goals are written to describe what can reasonably be expected of the individual child and not written "as the school goals."[52]

### *Procedural Due Process*

The substantive due process right to a free appropriate education is undergirded by the comprehensive procedural rights, rules, and requirements mandated by the IDEA. At the core of procedural due process is notice. Notice is essentially information, advice, or warning intended to apprise parents (and students) of some action in which their interests are involved. The IDEA and Indiana regulations requires written notice before a school "1) proposes to initiate or change, or 2) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of an appropriate public education . . ."[53] A basic underlying theme of the IDEA is that parents should be involved in the education of their disabled child as one means of protecting the child's rights.

Indiana requires adequate notice to the parent in his or her native language, of the date, time and place of case conference meetings. The notice must include general information about the case conference committee including: (1) the purpose of the meeting, (2) a listing of the expected participants and notice that the parent may request the participation of and/or be accompanied by any other individual of the parents' choosing, and (3) a listing of the collected data to be discussed.[54]

The case conference committee's report must be forwarded to the school superintendent or his designee within ten school days of the case conference committee

meeting. Within ten school days of the superintendents receipt of the case conference committee's report, the superintendent must provide written notice of his proposal to the parents. The written notice must:

> (1) Include a description of all evaluation procedures, test records or reports used as a basis for the programs; dissenting opinions, if any; and a placement recommendation; (2) Explain the reason for the placement recommendation including a description of any options considering and the reasons why those options were rejected; (3) Describe any alternative educational opportunities available on a permanent or temporary basis; (4) Describe any other factors relevant to the proposed placement; (5) Inform the parents of the opportunity to meet with the superintendent or his/her designee and/or the local Board of Education to attempt to resolve any objections; (6) Inform the parents of the right to object to their proposed action at a hearing before an independent hearing officer, and of the manner in which to request such a hearing; (7) Inform the parents that the parents may obtain an independent educational evaluation; (8) Inform the parents of any organizations providing assistance with respect to placement questions; (9) Inform the parents of the right to be represented at the hearing by legal counsel; to present evidence, including expert medical, psychological, and educational testimony; and to confront, cross examine, and compel the attendance of witnesses who may have evidence upon which the proposed action is based; (10) Inform the parents of the right to examine and copy child's school records at any time during regular office hours, including all tests and reports with respect to identification, evaluation, and educational placement and provision of a free appropriate public education; (11) Inform the parents of the right to have access at the local level to all federal and state laws and rules pertaining to special education; and (12) Inform the parents of all the procedural safe guards available regarding protection in evaluation procedures, least restrictive environment, confidentiality of information, and all other due process procedures.[55]

Under the IDEA parents must provide their written consent before certain action can take place. Consent is required whenever the "educational agency wants to conduct a preplacement evaluation" or make an initial placement in a special education program.[56]

Indiana regulations expand the areas where written consent of the parents must be obtained before action may be taken. The written consent of the parent must be obtained before any educational evaluation is administered.[57] Educational evaluations refer to procedures used selectively to determine the nature and extent of special education and related services that a disabled child needs.[58] It does not include basic tests administered to, or procedures used with all children in a school, grade or class.[59] Indiana school corporations must conduct, if at all possible, in addition to written notice, a personal interview with the parent of a child referred for any educational evaluation for the purpose of informing the parent of the reasons for the referral and the

proposed assessment techniques to be utilized. Additionally, the parents must be informed of his or her full panoply of rights, including all those rights enumerated above.[60]

Referral of any child for an educational evaluation may be made by the child, parent, teacher(s), school administrator(s), and/or specialists.[61]

The rules implementing Indiana's Special Education Act also require written consent of the parent before action is taken "regarding a child's special education placement or transfer."[62] If a parent disagrees with the school corporation's proposed change and does not provide written consent, and requests a hearing, the proposed change or action may not occur until the resolution of the dispute, unless both parties agree otherwise.[63] The school corporations change or proposed change can only take place after due process proceedings to override a lack of parental consent.[64] Indiana, unlike other states, does not provide any waivers of parental consent under any circumstances. According to IDEA and Indiana special education regulations during the pendency of any administrative or judicial proceedings, unless the department of public instruction or the school and the parent of a disabled child agree otherwise, the child shall remain in his or her then current educational placement.[65]

If a parent (or school district) requests a hearing, it must be conducted by an impartial hearing officer at a time and place convenient to the parent.[66] Hearings may be requested by either the school corporation or the parents to resolve matters relating to the initiation, change, or denial of identification, evaluation or educational placement of the child or the provision of a free appropriate public education.[67]

In Indiana the request for a hearing must be in writing and filed with the local superintendent, with a copy filed simultaneously with the state superintendent of public instruction. It must contain the reasons for the request for a hearing.[68]

Within twenty days of the request, the state superintendent of public instruction must select the independent hearing officer and inform the parties by letter of the ap-

pointment. Parents must be informed of their procedural rights including availability of low cost legal assistance. The hearing must be recorded and there is a right to request a copy of the record, at the school's expense. The parent and the school district have the right to compel witnesses and cross-examine any witness.[69]

While IDEA is silent as to which party bears the burden of proof, Indiana regulations place the burden squarely on the school as to all facts pertaining to the appropriateness of any placement, denial of placement, or transfer. Indiana also bars the introduction of any evidence that has not been disclosed to both parties at least five days before the hearing.[70]

The hearing officer must issue a written decision within fifteen days following the hearing. The decision becomes final and implemented twenty days after the decision unless the case is appealed.[71]

Either party may appeal the hearing officer's decision within twenty school days from the date of filing with the board of appeals of the hearing officer's findings, conclusions and decision. Indiana regulations provide that the state superintendent of public instruction appoint a three member panel to constitute the Board of Special Education Appeals. The Board conducts an impartial review of the hearing conducted by the hearing officer. The Board examines the record for compliance with procedures at the local level. The Board may receive oral argument. The Board must render a written decision within twenty school days from the filing of the petition for review. Any party aggrieved by the decision of the Board may bring an action in state or federal court.[72]

### *Litigation*

Special education-related litigation frequencies increased steadily over the decade of the 1980s. The nationwide number of administrative hearings scheduled because of

educational disputes between parents and schools increased twenty-nine percent between fiscal years 1984 (2,649 administrative hearings scheduled) and 1988 (3,426 administrative hearings scheduled).[73] Overall, there was a four percent increase in the number of administrative decisions issued by hearing officers during the five-year period. This suggests that school districts and parents increasingly have resolved disputes informally but only after due process hearings have been invoked.

The average number of district court decisions issued during the five year period (1984-1988) was sixty per year. School districts were the successful parties in about fifty-seven (57) percent of all complaints in administrative hearings and civil actions over the five year period. When parents were represented by counsel in administrative hearings they prevailed fifty-nine (59) percent of the time. The most frequent subject of complaints between parents and school districts involved disagreements over a disabled child's educational placement. This category of complaints deals with issues involving the least restrictive environment, public or private school, residential or day programs, and changes in the child's educational setting. Disputes over educational placement accounted for about thirty- eight percent of all complaints in both administrative hearings and court cases. Questions concerning eligibility and appropriateness of education were also the subject of hundreds of disputes during the five year period.[74]

In Indiana, the average number of administrative hearings scheduled during the three year period of 1986-1988 was forty seven (47) per year. The average number of decisions rendered by hearing officers during this same period was twenty-five per year. Four special education related decisions were rendered by district courts during this period.[75]

## *Zero Reject*

One question that educators have asked since the enactment of EAHCA in 1975 has been whether the legislation contemplates serving all disabled children, regardless of disability. Proponents of the "zero reject" concept maintain that Congress intended that all children, regardless of whether they could benefit from special education and related services are covered under the statute. Opponents of the "zero reject" concept argue that some children are simply uneducable, and Congress never intended to extend IDEA to those so severely disabled who cannot benefit from public education.

In Timothy W. v. Rochester, New Hampshire School District, 875 F.2d 954 (1st Cir. 1989), cert. denied, 110 S.Ct. 519 (1990), the First Circuit Court of Appeals heard a case involving the concept of zero reject. The student, Timothy W. had multiple disabilities, including profound mental retardation, cerebral palsy, brain damage, respiratory difficulties, blindness and deafness, spastic convulsions, and quadriplegia which made him non-ambulatory. One expert, a developmental pediatrician testified that Timothy probably did not have the capacity to learn educational skills and activities. Evidence indicated he was incapable of learning such rudimentary skills as turning his head to respond to noise or light. The district court agreed with the school district that Timothy's handicaps were so severe that he was incapable of benefitting from education and not entitled to receive special education under the EAHCA. The First Circuit reversed the decision of the trial court and held, as a matter of law, that no handicapped child in need of special education could be denied special education regardless of the severity of the handicap. The court found that the zero reject policy was incorporated into the EAHCA.

However, in a 1985 case, Parks v. Pavkovic, 753 F.2d 1397, cert. denied 106 S.Ct. 246, the Seventh Circuit Court of Appeals was asked to determine if a school district

could require the parents of an autistic and severely mentally retarded child to pay any part of the living expenses (room and board, clothing and other noninstructional expenses) of the child who had been placed in a private facility on the ground of a developmental disability rather than an educational need. The court first ruled that a developmental disability was a subcategory of handicaps covered under EAHCA. The court concluded that the parents could not be charged for living expenses because the child was institutionalized for educational reasons. However, in reaching this conclusion, the court hypothetically addressed the issue of a "completely uneducable" child who "could not benefit from special education" such as a child in a coma.[76] The court asserted under these circumstances, a disabled child's living expenses would not be chargeable to the state because his living expenses would not be related to his education.

### *Free Appropriate Public Education*

Prior to 1982 courts struggled to develop a substantive definition of the meaning of appropriate education. The EAHCA mandates that states must have a policy "that assures all handicapped children the right to a free appropriate public education."[77] However, Congress did not provide a precise definition of "appropriate" education. The federal courts were divided on the meaning of "appropriate" education and several standards of appropriateness were suggested prior to 1982. In Kruelle v. Biggs, 489 F.Supp. 169 (D. Del. 1980), the court suggested that appropriate education for handicapped children meant a maximization of their learning potential. Other courts simply held that appropriateness had to be determined on an individual basis and attempts to assist handicapped children to become self sufficient individuals would meet the definition of providing an adequate and appropriate education.[78]

On June 28, 1982, the United States Supreme Court handed down its first decision interpreting the Education for All Handicapped Children Act. In this landmark case for special education, Board of Education of Hendrick Hudson School District v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982), the court heard the case of Amy Rowley, a prelingually deaf student. The parents of Amy Rowley had requested that the school district provide her with a sign language interpreter throughout most of the instructional school day. The school district claimed that an interpreter was not necessary because Amy was achieving educationally, academically, and socially without such assistance. The school district noted that it was providing special education services such as speech therapy, a tutor for one hour a day and the use of an FM hearing aid. The trial court determined that there was a disparity between her achievement and her potential development without the handicap and ruled that she was not receiving a free appropriate public education. The trail court established its standard of appropriateness as "an opportunity to achieve full potential commensurate with the opportunity provided to other children."[79]

Justice Rehnquist, writing for a six to three majority, held for the school district and defined an "appropriate" education establishing the acceptable minimum standard. The court fixed the standard as follows:

> the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefits to the handicapped child.[80]

In reversing the lower court's opinion, the court found that the EAHCA does not require maximum educational services but a basic floor of opportunity. The court concluded that Congress had focused on providing access and procedural protections for attaining an education, and had not intended to establish a substantive standard prescribing a level of education to be accorded to handicapped students. The court said:

> in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. .

. . Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.[81]

In Rowley, the court also held that the individualized education plan should be developed in such a manner to enable a handicapped child to benefit from the education. But the divided court said that questions of educational methodology to formulate the education plan most suitable to the child's needs is to be determined by the state and local educational systems in cooperation with the parents.

Another very significant aspect of the Rowley opinion is the appropriate review standard that the court established for lower courts and administrative hearing officers to follow in deciding special education cases. The review standard consists of a two-step inquiry: "First, has the state completed with the procedures set forth in the act? Second, is the individualized educational program (IEP) developed through the proper procedures, reasonably calculated to enable the child to receive educational benefits."[82]

Since the Rowley decision the judicial trend has been to give deference to school district decisions with respect to educational methodology in cases involving the question of appropriateness of a disabled child's education. The judiciary has "wholeheartedly endorsed the standard set forth [in Rowley] and, moreover, their limited role in determining when programs meet that standard."[83]

One volatile issue with respect to what constitutes an "appropriate" education involves the length of the school year for the handicapped child. Neither the IDEA nor Indiana law specifically address the issue of an extended school year (ESY) for children with disabilities. The great majority of cases have held that disabled children are entitled to an educational program in excess of 180 days per year to prevent substantial regression caused by an interruption in educational programming. However, the courts have struggled to determine a standard by which to measure regression of progress to the extent necessary to entitle a disabled child to an extended school year. In Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153 (5th

Cir. 1986) the court of appeals held that if a handicapped child experiences severe or substantial regression during the summer months in the absence of a summer school program, the child is entitled to year-round services. The court said: "The issue is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months."[84] But in Bucks County Public Schools v. Commonwealth, 529 A.2d 1201 (Pa. Comm. 1987) the court held that a disabled child would need to show more than regression of progress made during the regular school year to qualify for ESY. The court said that where a student's lack of recoupment capacity makes it impossible or unlikely that a student will attain the level of self-sufficiency that the student would have been expected to attain without summer school, then the student is entitled to ESY. This test has become known as the "regression-recoupment" analysis. The "regression-recoupment" analysis focuses on the amount of regression suffered by a child during the summer months together with the amount of time required to recoup the skills lost during the Fall semester of school.

In a 1990 decision, Johnson v. Independent School District No. 4 of Bixby, 921 F.2d 1022 (10th Cir. 1990), the appeals court not only used the regression-recoupment analysis but said the test to determine the need for ESY "should include predictive data, based on the opinion of professionals in consultation with the child's parents as well as circumstantial considerations of the child's individual situation at home and in his or her neighborhood and community."[85]

### *Related Services*

One aspect of IDEA which has been the subject of much litigation and debate is the breadth of services that must be provided children with disabilities as related ser-

vices pursuant to the IDEA. Although the IDEA does expressly define which related services are to be provided disabled children, questions concerning health services, transportation and counseling are frequently raised.

In 1984 the Supreme Court in Irving Independent School District v. Tatro, 468 U.S. 883, 104 S.Ct. 3371 (1984) rendered a decision in a case involving a child with spina bifida who suffered from a neurogenic bladder that required clean intermittent catheterization (CIC) in order to attend school. The parents of the child brought an action against a Texas school district after the school district refused to provide catheterization for the child while she attended school. The Supreme Court identified two central issues in the case: (a) Is catheterization a supportive service required to assist a handicapped child to benefit from special education? (b) Is catheterization excluded from the definition of a related service because it is a medical service? Medical services are generally excluded from related services under IDEA unless the services are for diagnostic or evaluative purposes. The court ruled that clean intermittent catheterization is a related service not subject to the "medical service" exclusion of the Act. The court distinguished between health and medical services. The court defined school health services as those services provided by a school nurse or other qualified person. Medical services, according to the court, are provided by a licensed physician. If nonmedical health services are necessary to allow a disabled child to benefit from special education, then they must be provided as a related service under IDEA.

In Tatro the court set forth four criteria to determine whether a school district is obligated to provide health services that relate to a disabled child's education. First, to be entitled to related services, a child must be handicapped so as to require special education. Second, only those services necessary to aid a handicapped child to benefit from special education must be provided, regardless of how easily a school nurse or lay person could furnish them. Third, the regulations under the EAHCA state that school

nursing services must be provided only if they can be performed by a nurse or other qualified person, not if they must be performed by a physician. Fourth, the school district is only obligated to provide the services of a qualified person, not the equipment.

Tracheotomy cleaning and reinsertion have been found to be related services.[86] However, in Bevin H. v. Wright, 666 F.Supp. 71 (W.D. Pa. 1987), the court found that a school district did not have to pay for nursing and related health services that were varied, intensive and costly as to make them more in the nature of medical services than support services. In Bevin, the disabled child was profoundly mentally retarded and blind. The child breathed through a tracheostomy tube and was fed and medicated through a gastrostomy tube. A nurse was needed constantly to perform various time consuming and life threatening services.

The judicial trend in the area of medical or health-related services seems to indicate that service which constitutes a reasonable extension of the school nurse's traditional function is likely to be considered a related service. However, if a service is expensive and more like a hospital-based service, courts will not generally find the service to be a related service.[87]

In Indiana, the Office of Civil Rights held that the Tippecanoe School Corporation violated Section 504 by not implementing a requirement of a child's IEP by training the student's classroom teacher and the classroom aide in properly transferring the student from her wheelchair to a toilet. Transferring the fragile student from a wheelchair to a toilet was deemed a related service.[88]

Psychological services are included in the definition of related services in the IDEA. However, the Act does not define psychological services, thus the courts have been left with the responsibility of determining what services are psychological services under the IDEA. Generally, courts have held that psychological counseling, including psychotherapy (from a psychiatrist), is a related service if it is an integral and necessary

part of the child's special education. If psychological counseling is necessary for a child to benefit from special education, school districts are obligated to pay for the services.[89] However, this is not the case where a child is placed in a psychiatric facility primarily for medical reasons.[90]

### *Transportation*

IDEA requires school districts to furnish transportation if a child needs it in order to benefit from special education.[91] The provision of transportation services to disabled children has been viewed by the courts as part of a free appropriate education. The implementing regulations of the Indiana Special Education Act defines transportation to include: "(1) Travel to and from school and between schools; (2) Travel to and from related services as required for/by the child's IEP; (3) Travel in and around school buildings; and (4) Specialized equipment (such as special or adapted buses, lifts and ramps) if required to provide special transportation for a handicapped child."[92] The regulations only allow one round trip each day the disabled child is in school.[93]

The regulations implementing Section 504 require school districts to provide transportation services to disabled students that are "as effective as those provided nondisabled students similarly situated."[94] When school districts do not provide appropriate transportation arrangements, the result is often a shortened school day for the disabled child. This causes a child to be denied an appropriate public education that meets their needs as adequately as other students are met. Unless school districts can substantiate a medical or educational justification, they must provide the disabled students with school days of equivalent length to the school days provided to nondisabled students.

In 1990, the Office of Civil Rights found that the Lafayette Indiana School Corporation, two other Indiana school districts, and an intermediate unit violated the transportation regulations of Section 504.[95] OCR determined that of those disabled students who required transportation, twenty percent had a one-way bus ride of over an hour in the morning, afternoon, or both. Students on regular buses rode for no more than thirty- seven minutes. Additionally, nearly one-third of the disabled students who required special transportation had shorter days by as much as forty minutes because of their bus transportation.

Generally, the courts and administrative ruling regarding transportation indicate that when transportation is furnished, if disabled children cannot walk to the established bus stop, then services must be door to door or at least to the curbside of the child's home.[96]

### *Least Restrictive Environment and Integration*

The IDEA requires school districts to provide disabled children with an appropriate education in the least restrictive environment.[97] Section 1412(5)(B) of the IDEA requires that states provide procedures to ensure that disabled children are educated "to the maximum extent appropriate" with nondisabled children in regular classes. Beyond the classroom, the IDEA requires that disabled children be afforded an equal opportunity to participate in nonacademic and extracurricular services and activities, including meals, recess periods, sports and student organizations with non-disabled children to the maximum extent appropriate to the needs of the disabled child.[98]

When school officials are developing an IEP for a disabled child, they have an obligation to select a placement that is the least restrictive of all reasonable alternatives. The IEP must provide a placement that includes a sufficient amount of academic ser-

vices to ensure the student with an appropriate education. On the other hand, school authorities must weigh the philosophical and social reasons behind the idea of integrating (mainstreaming) the disabled child with non-disabled children. Almost no one disagrees with the notion that separation in education is inherently stigmatizing. There is tremendous value in peer interaction both to disabled students and non-disabled students. The disabled child learns to socialize and learns to model appropriate language and acceptable behavior.

The courts have struggled with maintaining a balance between providing an appropriate level of special education services and integrating the disabled child at the same time.

In Daniel R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989), the court explained the difficulties inherent in finding a balance:

> By creating a statutory preference for mainstreaming, Congress also created a tension between two provisions of the Act. School districts must both seek to mainstream the handicapped children and, at the same time, must tailor each child's educational placement and program to his special needs.[99]

Although the IDEA creates a presumption in favor of mainstreaming, the majority of courts have found that the least restrictive environment provision is secondary to the provision of an appropriate level of special education and related services. The courts have stressed that for some disabled children only special education can address the unique needs that their disability presents and mainstreaming will not provide an education which will meet those needs. If those unique needs are not met, the child will not be afforded an appropriate education as called for in the IDEA.

In Daniel R. a six year old child with Down's syndrome was placed in a half day kindergarten class with non-disabled children and one-half day in a pre-school special education class. While the parents of the disabled child were pleased that he was mainstreamed, the child failed to keep up with the class and received hardly any educational benefit. The school district suggested a change of placement to a class in which only

special education students attended. The parents disagreed with the recommendation and filed for an administrative hearing. The Fifth Circuit Court of Appeals found that the child could not be educated satisfactorily in the regular education classroom. The court ruled that interaction with non-disabled students wasn't a sufficient justification for mainstreaming the child. The court noted that school districts do not have to modify the classroom curriculum beyond recognition to accommodate the needs of a disabled child. In other words, educational impact on other students can be a consideration with respect to the placement of a disabled child.

In cases involving the issue of integrating children with disabilities, the courts are asked to consider and decide questions of educational methodology. Courts are reluctant to inquire into questions of educational methodology and policy and traditionally have left such choices to school officials.

In Lachman v. Illinois State Board of Education, 852 F.2d 290 (1988), the Seventh Circuit Court of Appeals faced the issue of balancing an appropriate education with the interests of integrating a profoundly deaf child with non-disabled children. The parents of the child preferred mainstreaming the child to the more restrictive educational program that the school district offered. The court held for the school district because the school offered a proven and appropriate educational method to educate the child, even if it was more restrictive. The court concluded that issues pertaining to educational methodology must be left to the schools and not to the judiciary. The court clearly indicated that the mainstreaming goal of the IDEA is secondary to the "principal goal of ensuring that the public schools provide handicapped children with a free appropriate education."[100]

Indiana school districts have been the subject of numerous complaints alleging mainstreaming violations filed with the Office of Civil Rights. In a 1990 case,[101] OCR held that the Hamilton-Boone-Madison Special Education Cooperative and its constit-

uent school districts violated regulation 34 C.F.R. 104.34 when it often placed students with moderate mental disabilities at a segregated facility based primarily on parental preference. OCR also ruled that the cooperative and its constituent school districts violated the same regulation by categorically denying regular education placement to students with severe mental disabilities. Moreover, OCR found that students with moderate or severe mental disabilities were not participating to the maximum extent appropriate with non-disabled students.

In another 1990 OCR investigation, the agency found the cooperative which serves Salem, East Washington and West Washington school districts in violation of regulations 34 C.F.R. 104.34, 104.4 and 104.33 for failing to assess each disabled student's need for nonacademic and extracurricular interaction with nondisabled students and as a consequence failing to ensure adequate interaction opportunities.[102] In addition, the school districts provided a significantly shorter school day without sound educational reasons to disabled students at the districts segregated school.

The least restrictive environment concept supports the principle of placing special education classes (and facilities) in the integrated environment of a school building. Classrooms for special education should be comparable in size, sanitation, ventilation, noise level and furnishings as a school's regular classroom. In Hendricks v. Gilhool[103] a federal district court held that a school district violated the rights of children with disabilities by failing to provide facilities comparable to those enjoyed by non-disabled students.

The regulations implementing Indiana's special education statute mandate that disabled children should be placed, as closely as possible, with children of the same chronological age. Indiana has adopted specific age-span requirements for classrooms. The requirements are: (a) pre-kindergarten, ages 3-5; (b) kindergarten, ages 5-7; (c) pri-

mary, ages 6-10; (d) intermediate, ages 9-13; (e) middle/junior high, ages 11-16; and (f) senior, ages 14-21.[104]

### *Discipline*

One of the most controversial issues in special education law involves the issue of discipline. Arnold refers to the issue of discipline disabled children as "perhaps the most troublesome area of the law relating to handicapped students . . ."[105] Questions regarding the suspension and expulsion of disabled children in the context of their rights under IDEA have been raised repeatedly in court since shortly after the passage of P.L. 94-142. Two of the most important issues before the judiciary have been: (1) whether a long term suspension or exclusion constitutes a "change in placement" triggering the notice and due process requirements of IDEA, and (2) whether school districts must determine if a causal relationship between the misconduct and the disability exists before expelling or suspending a disabled child on a long term basis.

Those issues have been resolved for Indiana educators. The Supreme Court ruled in 1988 that an exclusion from school for more than ten days is equivalent to a change in placement and therefore procedural protections under IDEA must be followed.[106] In Doe v. Koger, 480 F.Supp. 225 (1979), an Indiana federal district court concluded that before a school district imposes a long term suspension or expels a disabled child, it must determine whether there is a causal relationship between the disruptive behavior and the disability. The court ruled that handicapped children cannot be expelled if their handicap caused them to be disruptive. The court said, "The school is allowed only to transfer the disruptive student to an appropriate, more restrictive, environment."[107] A similar ruling had been made in Stuart v. Nappi, 443 F.Supp. 1235 (D. Conn. 1978). However, the court in Doe, asserted that an expulsion of a handicapped child is per-

missible where the misconduct is not handicap-related and the educational placement is not inappropriate. The court said "If the reason is not the handicap, the child can be expelled."[108] However, on this issue the question becomes whether a school system can ever completely terminate educational services to a disabled child. In S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981), cert. denied, 454 U.S. 1230, 102 S.Ct. 566 (1981), the Fifth Circuit expressly ruled that although handicapped students could be expelled from attending school a complete cessation of educational services was not permissible under EAHCA and Section 504. More importantly for Indiana educators is the position taken by the Office of Special Education and Rehabilitative Services (OSERS) of the U.S. Department of Education. OSERS policy was made clear in 1989 in a policy letter which stated "all states and school districts . . . are required by the EHA-B to ensure that special education services are provided to children with handicaps during periods of long-term suspension or expulsion, regardless of whether the child's misconduct is a manifestation of the handicapping condition."[109] Thus, school corporations are obligated to provide educational services to an expelled disabled child. Of course the question arises, if special education services must be provided, is the child really expelled? School districts are apparently free to choose the method by which they will provide the services. This will often take the form of home instruction. The Office of Civil Rights held in 1990 that a school district cannot condition the provision of in-home services after an expulsion on the parent's guarantee of being present during the instruction or providing other security measures.[110]

Without question, the most important case decided on the issue of disciplinary disabled children came in 1988 with the Supreme Court's decision in Honig v. Doe, 108 S.Ct. 592, 484 U.S. 305 (1988). This was a case where San Francisco school authorities attempted to expel two emotionally disturbed children. Both student's IEPs indicated that they had low thresholds for frustration and were prone to explosive acts. One of

the students responded to taunts from fellow students by choking one of them to an extent that caused abrasions on the child's neck. The other student was expelled for stealing and extorting money and for making sexually aggressive remarks to other students. The students were expelled for more than ten days. At issue was the "stay put" provision of EAHCA. The "stay put" provision is Section 1415(e)(3), and it provides in part:

> During the pendency of any proceedings pursuant to Section 1415, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child.[111]

The school district asked the court to read a "dangerousness" exception into the stay put provision. The court found no dangerousness exception in the stay-put rule. The court said: "The language of Section 1415(e)(3) is unequivocal . . . Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school."[112] This means that school officials cannot change a child's placement during the pendency of any complaint proceeding unless parents agree to an interim placement. The disabled child must remain in his or her current placement until due process proceedings are completed. The court said that when a child presents an immediate threat to other students, school authorities may temporarily suspend him or her for up to ten days. The court also suggested other normal disciplinary procedures for dealing with dangerous students including "study carrels, time outs, detention, or the restriction of privileges."[113] In addition, the court provided that school officials can, in the case of a truly dangerous student, invoke the assistance of the courts and seek an injunction enjoining the student from attending school until the matter is resolved or for an interim placement where parents refuse to permit any change in placement.

One difficult question that often arises is whether a series of suspensions totalling more than ten days in one school year is the same as a ten day suspension triggering the

due process requirements of IDEA. According to OCR policy as enunciated in a 1990 OCR opinion, "a series of suspensions, including emergency suspensions, which are each of ten days or fewer in duration may create a pattern of exclusion constituting a 'significant change in placement." The factors to be considered in determining whether such a series of suspensions constitute a 'significant change of placement' are the length of each suspension, the proximity of the suspensions to one another and the total amount of time the student is suspended."[114] Thus, before initiating such exclusions (after suspending a child cumulatively for ten days) school districts must first conduct a reevaluation of the student.[115] In addition, the student is entitled the due process protection.[116]

The Indiana regulations regarding special education specifically address the issue of suspension and expulsion of handicapped students. The regulation provides in part:

> Any handicapped child enrolled in special education programs or classes may be denied the right to attend school or to take part in any school function through suspension, expulsion or exclusion procedures as outlined in the statue regarding due process in student discipline, IC 20-8.1-5, provided however, that due process procedures shall also be observed in denying transportation and other related services. The expulsion or exclusion of any handicapped child in special education programs or classes shall be considered a change in the child's placement and shall be preceded by a meeting of the case conference committee.
>
> The case conference committee shall meet as soon after the misconduct as possible. The parent shall be given adequate notice, in his/her native language, of the date, time and place of the meeting (and all other procedural rights) . . .
>
> The case conference committee meeting shall be chaired by the director of special education or his/her designee.
>
> Pending the outcome of the case conference committee meeting and further expulsion or exclusion proceedings, the child shall not be removed from school unless he/she presents a danger to himself/herself or others. If such a danger exists and the child is removed from school, the child shall be given homebound instruction. If the child's presence is a substantial disruption, he/she may be placed in a more restrictive environment within the school. Both homebound instruction and more restrictive placement can be initiated by the building principal on an emergency basis at the time of the misconduct, but must be approved or disapproved by the case conference committee when it convenes to consider the cause of the misconduct. Disapproval will result in a return of the child to the placement he/she had at the time of the misconduct. Emergency homebound instruction or placement in a more restrictive environment within the school may not exceed a period of forty-five (45) calendar days, at which time the case conference committee must reconvene to consider the extension of such placement pending the outcome of the proceedings.
>
> The purpose of the case conference committee meeting shall be to determine whether or not there is a causal relationship between the child's misconduct and his/her handicap. If a causual [sic.] relationship is determined by the case conference committee, the child may not be expelled or excluded, and the committee shall examine the child's current individualized education program in order to determine whether a change in that program might help prevent a reoccurrence of the misconduct. . . .
>
> If the case conference committee finds no causal relationship between the child's misconduct and his/her handicap, the committee shall make a written report of its findings to the superintendent of the corporation in which the child is in attendance for his/her final determination. The superintendent shall send a final report to the parent. . . .

> The report to the parent shall be accompanied by a written notice informing the parent of the right to object to the case conference committee's findings before an independent hearing officer, the manner in which to request such a hearing, the right to obtain an independent educational evaluation and all other rights. . . .
>
> Upon receipt of the report, the parent may exercise one of the following options: (1) Request, within ten (10) calendar days, the appointment of an independent hearing officer to review the report of the case conference committee. This request and the hearing shall follow the procedures outlined in subsection (g). (2) Take no action regarding the case conference committee's report and thereby waive the right to object to it.[117]

Two significant points of departure from disciplinary practice in other jurisdictions are set forth in the regulations. One, disabled child must be afforded due process procedures before he or she is denied transportation and related services. Second, school authorities may place a disabled child who poses a substantial disruption to the school on emergency homebound instruction or in a more restrictive environment within the school for up to forty-five calendar days without invoking due process procedures. This is a questionable practice in that moving a disabled child to a substantially more restrictive setting, especially for such a long period of time probably constitutes a change in placement, so as to require notice and the triggering of the procedural safeguards. In addition, the change in placement is made without a reevaluation which violates 34 C.F.R. 104.35.[118] In order to avoid this highly dubious practice Indiana educators should make every effort to secure parental approval for this type of change in placement.

### *Tuition Reimbursement and Compensatory Education*

There have been a number of court decisions involving tuition reimbursement and compensatory educational services as a means of relief for school district violations of the rights of disabled children.

In Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996 (1985), the United States Supreme Court held that parents

who unilaterally change the placement of their child during the pendency of any due process proceeding, may nonetheless receive tuition reimbursement from the school corporations if the IEP offered by the school is later found to be inappropriate. However, if a court ultimately determines that the IEP proposed by the school is appropriate, the parents will not be entitled to tuition reimbursement. The court noted that reimbursement is not the same as awarding monetary damages. Courts are not willing to award damages under the IDEA.

In addition to tuition reimbursement the courts have ordered compensatory education for disabled students where they have not received educational benefits in the past as intended under the IDEA. According to Zirkel, during the 1980s courts have increasingly awarded compensatory education even beyond the statutory age limit of twenty-one.[119]

However, to the contrary, the Seventh Circuit Court of Appeals held that compensatory education cannot be recovered under EAHCA. The court concluded that compensatory education may not be awarded for a past erroneous IEP determination.[120]

### *Attorney's Fees*

Prior to 1986 there was no provision in the EAHCA for attorney's fees. In Smith v. Robinson, 468 U.S. 992, 104 S.Ct. 3457 (1984), the Supreme Court held that attorneys fees for special education actions were simply not available under EAHCA. To remedy this situation Congress passed the Handicapped Children's Protection Act of 1986 which specifically provided for attorney's fees to a prevailing parent in a special education action or proceeding. All of the Circuit Courts are now in agreement that attorney's fees are recoverable to parents who prevail at the administrative level. In

addition, courts have awarded attorney's fees for legal work prior to a due process hearing if counsel has been instrumental in securing a favorable settlement.[121] However, an Indiana federal district court held the amount of attorney's fees are subject to substantial reduction if litigation is protracted and expanded after parents have achieved the substantial results they desire with respect to an appropriate education for their child.[122]

## *AIDS*

The judiciary has generally ruled that students with AIDS are handicapped and must be permitted to attend public schools if their attendance does not pose a health risk to the school community. In Doe v. Bolten, 694 F.Supp. 440, the court quoted a report of the U.S. Surgeon General:

> None of the identified cases of AIDS in the United States are known or are suspected to have been transmitted from one child to another in school, day care or foster care settings. Transmission would necessitate exposure of open cuts to the blood or other body fluids of the infected child, a highly unlikely occurrence. Even then, routine safety procedures for handling blood or other body fluids . . . would be effective in preventing transmission from children with AIDS to other children in school. . . . Casual social contact between children and persons infected with AIDS virus is not dangerous.[123]

Courts have concluded that AIDS is a handicapping condition under Section 504, but generally not a handicapping condition under the IDEA.[124] In determining that AIDS (HIV virus) is covered under Section 504 the courts have relied on the Supreme Court's decision in School Board of Nassau County v. Arline, 480 U.S. 273, 107 S.Ct. 1123 (1987). In Arline, the Supreme Court found that tuberculosis (and other contagious diseases) is a handicap under Section 504 of the Rehabilitation Act of 1973 as long as the person suffers a physical impairment caused by the disease. Thus, a student with a contagious disease or AIDS cannot be excluded from a public school solely on the basis of the disease if they are otherwise qualified to attend class. A student

would be "otherwise qualified" if he or she did not pose a health danger to the school community.

## Summary

Genuine equality of educational opportunity has evolved very slowly in this country for disabled children. Indiana enacted its initial special education legislation in 1969. However, Indiana did not reach compliance with its own special education laws until the 1980s.

The courts record on improving equality of educational opportunity for children with disabilities was as dismal as most states efforts until the 1970s. The judicial turning point came in Brown v. Board of Education, the landmark racial desegregation case. The Brown decision made it clear that once a state undertakes to provide an educational system, it binds itself to make educational opportunities available to all on equal terms. This concept of the equal protection clause of the Fourteenth Amendment was the precursor to the PARC and Mills cases that established that children with disabilities have a federal constitutional right to a publicly funded education.

Congress recognized the right of disabled children to have a free appropriate public education by enacting P.L. 94-142, the Education for All Handicapped Children Act (EAHCA) in 1975. In 1990 the EAHCA was renamed as the Individuals With Disabilities Education Act (IDEA).

IDEA requires that all children with disabilities between the ages of three and twenty-one and in need of special education are to be identified, located and evaluated. Under IDEA and the Act's implementing regulations, state educational agencies are

charged with the responsibility of assuring that all eligible children within the state are provided with a free appropriate public education.

Another federal statute relevant to children with disabilities is Section 504 of the Rehabilitation Act of 1973 which prohibits discrimination against "otherwise qualified" individuals with handicaps. In operating educational programs for handicapped students under Section 504. Indiana cannot deny students with disabilities the opportunity to participate in or benefit from a program. Indiana must provide a free appropriate education to all handicapped students in publicly funded placements. Section 504 is a general anti-discrimination statute and should be viewed as an overlapping complementary state with the IDEA. The Office of Civil Rights (OCR) is the agency which enforces the provisions of Section 504.

The most important educational legislation for children with disabilities is IDEA. Indiana has created the Division of Special Education to supervise and implement the requirements of the IDEA. The IDEA requires that children with disabilities be provided an education in the least restrictive environment. It also mandates that education is to be individualized and appropriate. The development of a program to ensure an appropriate education for each disabled child is accomplished through the use of the individualized education program (IEP). In Indiana the IEP is prepared at a meeting of the case conference committee.

The substantive due process right to a free appropriate education is undergirded by the comprehensive procedural rights, rules, and requirements mandated by IDEA. At the core of procedural due process is notice. A basic underlying theme of IDEA is that parents should be involved in the education of their disabled child as one means of protecting the child's rights.

Under the IDEA parents must provide written consent before a school district conducts a preplacement evaluation or makes an initial placement in a special education

program. Indiana rules also require written consent of the parent before action is taken regarding a child's special education placement or transfer. If a parent disagrees with the school corporation's proposed change and does not provide written consent, and requests a hearing, the proposed change or action may not occur until the resolution of the dispute, unless both parties agree otherwise.

If a parent (or school district) requests a hearing, it must be conducted by an impartial hearing officer selected by the State Superintendent of Public Instruction, at a time and place convenient to the parent. Either party may appeal the hearing officers decision to the Board of Special Education Appeals. Any party aggrieved by the decision of the Board may bring an action in state or federal court.

Special education litigation frequencies increased steadily over the decade of the 1980s. In Indiana, the average number of administrative hearings scheduled during the three year period of 1986-1988 was forty-seven per year.

One controversial area of litigation involves the issue of whether the IDEA contemplates serving all disabled children, regardless of their disability and capacity to benefit from education. The First Circuit Court of Appeals held in 1989 that no handicapped child in need of special education can be denied special education regardless of the handicap. However, the Seventh Circuit Court of Appeals in 1985 in dictum said that a completely uneducable child who could not benefit from education (such as a child in a coma) falls outside of P.L. 94-142.

The United States Supreme Court has defined an appropriate education under the IDEA as providing a basic floor of opportunity to children with disabilities which consists of access to specialized instruction and related services individually designed to provide educational benefits to the handicapped child. The judicial trend has been to give deference to school district decisions with respect to educational methodology in cases involving the question of appropriateness of a disabled child's education.

One aspect of the IDEA which has been the subject of much litigation and debate is the breadth of services that must be provided children with disabilities as related services pursuant to the IDEA. The Supreme Court has ruled that clean intermittent catheterization is a related service not subject to the "medical service" exclusion of the Act. If nonmedical health services (those not necessarily provided by a licensed physician) are necessary to allow a disabled child to benefit from special education, then they must be provided as a related service under IDEA.

Both the IDEA and the regulations implementing Section 504 require school districts to furnish transportation if a child needs it in order to benefit from special education. School districts must provide transportation services to disabled students that are as effective as those provided nondisabled students similarly situated.

The courts have struggled with maintaining a balance between providing an appropriate level of special education services and integrating the disabled child with nondisabled children at the same time. The Seventh Circuit Court of Appeals has indicated that the mainstreaming goal of the IDEA is secondary to the principal goal of ensuring that the public schools provide disabled children with a free appropriate education. Generally, courts leave issues pertaining to educational methodology to school officials.

One of the most controversial issues in special education law involves the issue of discipline. Indiana educators must make a determination whether there is a causal relationship between a disabled child's misconduct and his or her disability before imposing long term suspension or expulsion on the child. A handicapped child may be expelled where the misconduct is not handicap-related. However, a complete cessation of educational services is not permissible. Any handicapped child may be suspended from attending school on a short term basis (under ten days) in the same manner observed for non-disabled children. In Indiana, a disabled child must be afforded due process procedures before he or she is denied transportation and related services.

The U.S. Supreme Court held that suspensions of handicapped children which exceed ten days constitute a change in placement under the IDEA. During the pendency of expulsion proceedings (unless a parent agrees otherwise) a student must be kept in his or her "then current" educational placement.

Courts have awarded tuition reimbursement and compensatory education as a means of relief where disabled children have not received educational benefits in the past as intended under the IDEA. However, compensatory education is not recoverable in Indiana.

Attorney's fees are recoverable to parents who prevail in court or at the administrative level in proceedings brought under the IDEA.

The judiciary has generally ruled that students with AIDS (and other contagious diseases) are handicapped and must be permitted to attend public schools if their attendance does not pose a health risk to the school community.

## Footnotes

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10. Brown v. Board of Education, 447 U.S. 483 (1954).

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35. 20 U.S.C. § 1412(1).

36. I.C. 20-1-6-1.

37. I.C. 20-1-6-4.

38. I.C. 20-1-6-1.

39. 34 C.F.R. § 300.300(a).

40. I.C. 20-1-6-14; 20-1-6-14.1

41. 34 C.F.R. § 300.300(b)(1).

42. 34 C.F.R.§ 300.300(b)(2).

43. I.C. 20-1-6-1(7).

44. 511 IAC 7-1-1(BB).

45. P.L. 101-476; 20 U.S.C. § 1400.

46. 20 U.S.C. § 1401(20)(b).

47. 511 IAC 7-1-1(D).

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50. Howey v. Tippecanoe School Corporation, supra. p. 1504.

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# Chapter 5

## *The Terms and Conditions of Teacher Employment*

### Certification

An Indiana public school educator's employment relationship with a school corporation is governed by many legal sources including the United States Constitution, the Indiana Constitution, federal and state statutes, administrative regulations, and contractual agreements. The right of the state to impose reasonable certification requirements for teaching in the public schools of the state rests upon the well-settled doctrine that education is a function of the state.[1]

A teacher's employment with a school corporation in Indiana commences with the teacher's license. The license is evidence of eligibility for employment as a public school teacher. The license indicates that an individual is competent to teach.[2] There is no legal distinction between the granting of a license to teach, and the act of issuing a certificate to teach. In an early Indiana case, Elmore v. Overton, 4 N.E. 197 (1886), the Indiana Supreme Court said the terms are interchangeable and that licensing implies issuing to an applicant written permission to teach in the public schools. The Indiana Code uses the term "licensing" and establishes the State Board of Education as the administrative agency responsible for the licensing of teachers and school administrators.[3]

Every teacher (including a substitute teacher) and school administrator employed by any school corporation in Indiana must hold a license issued by the State Board of Education through the state superintendent.[4] The basic administration of the licensing program in Indiana is handled by the Commission on Teacher Training and Licensing within the Department of Education.[5] The State Board of Education regulations set forth the requirements for certification and are published in the Administrative Rules of the Indiana State Board of Education. The requirements for a license mandate a certain minimum number of college credit hours and courses in the area of concentration. In addition, Indiana educators are required to take a minimum number of professional (general) education credit hours. The focus of the regulations is on college course work. In 1984 the Indiana legislature joined most other states in adopting legislation requiring teachers to pass a written proficiency examination as a prerequisite for obtaining an initial license.[6] Beginning in 1985, applicants for an Indiana initial standard teaching certificate have been required to successfully complete the communication skills, general education and professional education sections of an examination prepared and administered by the Commission on Teacher Training and Licensing. Further, every applicant must pass the specialty area test for every specialty area in which the applicant has applied.[7] Indiana uses the National Teachers Examination (NTE) specialty tests administered by the Educational Testing Service (ETS) for this part of the teacher proficiency examination.[8]

The NTE has been the subject of litigation in some jurisdictions. The test has been challenged on the basis of illegal racial discrimination. Individuals who have been denied certification as a result of their exam scores on the NTE and other tests have claimed that their rights under the equal protection clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964 have been violated.[9] The issue of racial bias in tests and their impact on minorities under Title VII was considered by the

United States Supreme Court in a non-education case, Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849 (1971). In Griggs, the use of general tests and the requirement of high school graduation were challenged as unrelated to specific job requirements for purposes of hiring and promotion. The tests disproportionately disqualified and excluded minorities from being hired or promoted. The court found that neither the test nor the high school diploma requirement were validly related to predicting job performance. The court ruled that Title VII prohibits "an employment practice which operates to exclude Negroes [which] cannot be shown to be related to job performance."[10] The court ruled that even if a company (or school district) has a neutral job selection and promotion process if that process has a disparate impact (effect) on minorities, then the practice violates Title VII unless the employer can show a business necessity. The court concluded that unintentional discrimination which has a disproportionate adverse impact on minorities is just as wrongful as intentional discrimination.

However, in Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040 (1976), the Supreme Court considered the question whether the disparate effect test, which was applied to Title VII, also applied to constitutional issues arising from the Fifth Amendment and the Fourteenth Amendment. In Washington, the court heard a case involving the use of an examination for prospective police officers, which black applicants failed disproportionately. The court distinguished between litigating cases under Title VII, where disparate impact analysis is appropriate, and bringing an action under the Fourteenth Amendment. The court held that claims under Title VII may focus solely on racially disproportionate adverse effect, but the Fourteenth Amendment requires a plaintiff to prove intentional or purposeful discrimination. Thus, two independent and contrasting standards emerge to determine racially discriminatory employment practices. The

Fourteenth Amendment standard requiring proof of discriminatory purpose or intent is a much higher and limited standard than the disparate effect standard for Title VII.

A South Carolina federal district court ruled that the use of the NTE for certification and salary schedules was not discriminatory.[11] The plaintiffs presented evidence that eighty-three percent of the black applicants who took the test failed, whereas only seventeen and one-half of the white applicants did not pass the test. The court, relying on Washington v. Davis, held that the test was not unconstitutional because the plaintiffs failed to prove discriminatory intent or purpose with respect to the implementation of the test. The court also ruled that the test was rationally related to the government's legitimate interest of improving the quality of education in South Carolina. Moreover, the court found that the test covered material taught in teacher preparation courses, therefore meeting the test validation requirements under Title VII. The Supreme Court affirmed the decision in 1978.[12]

In a 1986 decision, a Texas appeals court ruled that teachers holding lifetime licenses could be required to successfully complete a competency test as a condition of continued employment.[13]

Indiana requires further academic credit for license renewal to maintain certification.[14] By statute, junior high, middle school or secondary education license cannot be renewed simply to obtaining a graduate degree, the teacher must complete eighteen semester hours in their major, minor, primary, supporting or endorsement area beyond their undergraduate degree.[15] Other continuing education requirements are established in the State Board of Education regulations.

Teaching licenses may be revoked by the State Board of Education upon the recommendation of the superintendent of public instruction.[16] The grounds for revocation of a license as set forth by statute are immorality, misconduct in office,

incompetency or willful neglect of duty. A teacher or administrator must be afforded due process protection in connection with a license revocation.[17]

The Indiana Code specifically prohibits school corporations from employing any individual who is addicted to drugs, or is intemperate, or has syphilis in an infectious stage.[18]

Indiana also requires applicants for teaching licenses to sign an oath of support for the U.S. Constitution and the Indiana Constitution[19] (this issue will be discussed later in this chapter).

States may change certification requirements. In an early Indiana case involving a revocation of a teacher's license for failure to meet changing certification requirements, the court held "a license has none of the elements of a contract, and does not confer an absolute right, but only a personal privilege to be exercised under existing restrictions, and such as may thereafter be reasonably imposed."[20]

Courts in other jurisdictions have recently upheld revocations for teachers found guilty of such offenses as possession of marijuana,[21] sexual assault on children,[22] and conviction of extortion and perjury charges.[23]

## Contracts

An individual who obtains a teaching license is not guaranteed employment simply because they are certified by the state.[24] Matters pertaining to the employment of Indiana educators are in the province of the local school corporations.[25] An Indiana court of appeals decision in 1986 held that teacher contracts are required to be approved by a majority vote of a quorum of the school board and not by a majority vote of the entire school board.[26]

Every teacher employed in a public school in Indiana must sign a uniform teaching contract prescribed on forms prepared and furnished by the state superintendent. The contract is entered into by a teacher and a school corporation and must:

> (1) be in writing;
> (2) be signed by both parties; and
> (3) contain:
> (A) the beginning date of the school term as determined annually by the school corporation;
> (B) the number of days in the school term as determined annually by the school corporation;
> (C) the total salary to be paid during the school year; and
> (D) the number of salary payments to be made during the school year.
> The contract may provide for the annual determination of the teacher's annual compensation by a local salary schedule, which schedule is considered a part of each contract. This salary schedule may be changed by the school corporation on or before May 1 of a year; the changes begin the next school year. However, each teacher affected by the changes shall be furnished with printed copies of the changed schedule within thirty (30) days after its adoption.[27]

In a 1987 Indiana court of appeals decision[28] the court found that all teachers and principals, regardless of whether they are tenured must be employed on a uniform teacher's contract. The court concluded that the written uniform contract does not preempt any teacher's rights that are provided by statute, but merely supplement those rights by consummating the contractual relationship. The contract that is used statewide for all teachers is called the regular teacher's contract.[29]

Indiana school corporations are specifically prohibited from establishing any residency requirements as a condition of employment by contract or otherwise.[30] Many states permit school boards to establish residency requirements.

In the event teachers provide teaching service in night school or summer school, then a supplemental service contract must be signed.[31] The salary must be equivalent to the salary of a teacher on a regular salary schedule and computed on the basis of six hours as a complete day of service.[32]

A substitute teacher may be employed without a written contract.[33] However, if a substitute teacher is employed to serve in the absence of a teacher who has been granted a leave of absence by the school board, then the substitute teacher must be provided a written temporary teacher's contract.[34]

## Teacher Leaves of Absence

The Indiana Code allows school corporations to grant a teacher a leave of absence for up to one year for a sabbatical, disability, or sick leave.[35] These leaves of absence are credited to the teachers retirement. In addition, most rights that teachers enjoy at the time they take leave remain intact. This includes status as a permanent teacher, accumulation of successive years of employment and status and any rights negotiated under a collective bargaining agreement.[36]

When a teacher is granted a leave of absence, the teacher has a right to return to school in a teaching position for which the teacher is "certified or otherwise qualified" pursuant to the state licensing requirements.[37] In a case involving "teacher burnout," Jay School Corp. v. Cheeseman, 540 N.E.2d 1248 (Ind. App. 3 Dist. 1989), the court considered a case in which a teacher held both an elementary teacher's certificate and a mentally retarded subject endorsement. The teacher had been teaching special education classes for a number of years. She requested a medical leave of absence based on a doctor's opinion that she suffered from stress-related problems due to her special education assignment. The school board approved her medical leave. The teacher asked to be reassigned to a regular class and indicated that her medical leave would end as soon as she was reassigned. The school board denied the request and assigned her to a special education class for the following year. She did not return to her assigned teaching position. A regular elementary teaching position was open for which she was certified. The court interpreted the following statute regarding a return from leave:

> Except where a contract is not required . . . in any situation occurring before or after the commencement of leave, the teacher and the school corporation shall execute a regular teacher's contract for each school year in which any part of the teacher's leave is granted, and the teacher shall have the right to return to a teaching position for which the teacher is certified or otherwise qualified in accordance with the rules of the state board of education.[38]

The court held that since a regular elementary teaching position was open that the teacher was certified to fill the school board breached her statutory right to return to that position.

Indiana law permits teachers to be absent from work with pay for ten days during their first year of employment and seven days in each year thereafter.[39] Sick days may accumulate up to ninety days. Teachers are permitted to miss school for five days for a death in his or her immediate family.[40] Other absences are generally agreed upon in the collective bargaining agreement between school employers and school employees.

## Assignment of Teaching Duties

School boards generally have the authority to assign employees to specific jobs. The Indiana Code provides that the school employer has the authority to transfer and assign its employees.[41] School boards may direct the work of its employees and take reasonable actions necessary to carry out the educational mission of the public schools. In this regard the interests of teachers are subordinate to the right of children to a thorough and adequate education.[42] A teacher who refuses to undertake a reasonable and lawful assignment may be discharged for insubordination.[43] However, transfer and assignment decisions cannot be made in bad faith or in violation of constitutional or statutory provisions. In Wygant v. Jackson, 106 S.Ct. 1842 (1986), the Supreme Court ruled that a school board could take affirmative steps such as recruiting, hiring, and transferring minorities to promote racial balance to remedy past discriminatory policies but only for a short period of time necessary to remedy the past illegal discrimination. The transfer of teachers for disciplinary reasons has been upheld even where a teacher's salary was diminished.[44]

School boards also have the authority to assign teachers to extracurricular duties unless the teacher's contract states otherwise. The duties must be related to the instructional activities for which the teacher is licensed. Assignments must be made in an equitable and reasonable manner.[45]

## Tenure

Tenure is generally considered as meaning the statutory right of a teacher to the continued possession of their employment, subject only to removal for good cause as established by law. Tenure represents job security to teachers. Alexander and Alexander provide several reasons as to why tenure was established "(1) to remove political abuse from the profession; (2) to prevent arbitrary interference by boards; (3) to provide a permanent, competent teaching force; and (4) to protect the competent, experienced professional, thereby providing job security."[46]

In Board of Trustees of Hamilton Heights School Corp. v. Landry, 560 N.E.2d 102 (1990), an Indiana appeals court explained the rationale behind Indiana's tenure statute and the judiciary's general view on interpreting tenure laws. The court said:

> The Teachers' Tenure Act, now certified at IND.CODE § 20-6.1-4-9 et seq., is based upon the public policy of protecting the educational interest of the state and its principal purpose is to secure permanency in the teaching force by creating a uniform system of permanent contracts. See State ex rel. Tittle v. Covington Community Consolidated Schools of Fountain and Warren Counties (1951), 229 Ind. 208, 215, 96 N.E.2d 334, 336; Watson v. Burnett (1939), 216 Ind. 216, 222, 23 N.E.2d 420, 423; School City of Lafayette v. Highley (1938), 213 Ind. 369, 376, 12 N.E.2d 927, 930 (all three cases interpreting prior versions of the Teachers' Tenure Act). The Teachers' Tenure Act was not meant to grant special privileges to teachers as a class or as individuals. State ex rel. Clark v. Stout (1933), 206 Ind. 58, 64, 187 N.E. 267, 269; Engel, Trustee v. Mathley 1943), 113 Ind.App. 458, 469, 48 N.E.2d 463, 467, trans. denied. Therefore, since it is legislation in which the public is interested, we must liberally construe the statutory provisions to effect the Act's general purpose. Tittle, 229 Ind. at 215, 96 N.E.2d at 336.[47]

Indiana teachers have enjoyed statutory protection under tenure laws since 1927.[48] The law shields teachers from being dismissed arbitrarily and unfairly.

Generally, states may alter their tenure laws but local school boards may not attempt to amend the relationship established by teacher tenure laws. The Indiana legislature created a tenure law in 1927 that established a contract between the state and tenured teachers. In a case that ultimately was heard by the United States Supreme Court, Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 58 S.Ct. 443 (1938), an Indiana township school canceled a tenured teacher's contract. In 1933 the state legislature repealed the earlier 1927 tenure act as it related to township teachers and schools. Justice Roberts, writing for the majority, held that under the act of 1927 the right of a permanent (tenured) teacher to a continuing contract was contractual, and the obligation of the contract in the case of the township teacher was unconstitutionally impaired by the act of 1933. The court invoked Article I, § 10 of the United States Constitution to protect the tenured teacher. Article I, § 10 of the Federal Constitution provides that the obligation of a contract may not be impaired. The court found that the tenured teacher had a valid contract with the township school pursuant to the 1927 act and the obligation would be impaired by the termination of her employment by an act of the school board. The court reversed the judgment of the Indiana Supreme Court which had held for the school corporation. Justice Roberts concluded his opinion as follows:

> Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power but we have repeatedly said that, in order to have this effect, the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adapted to that end, and the Supreme Court of Indiana has taken the same view in respect of legislation impairing the obligation of the contract of a state instrumentality. . . . the repeal of the earlier Act by the latter was not an exercise of the public power for the attainment of the ends to which its exercise may properly be directed.[49]

It is noteworthy that Justice Black dissented from the opinion saying that "this reversal unconstitutionally limits the right of Indiana to control Indiana's public school system."[50] Justice Black concluded, "Indiana, in harmony with our national tradition, seeks to work out a school system, offering education to all, as essential to the preservation of free government."[51]

Following the decision Indiana could not amend the tenure act with respect to those teachers covered by the 1927 Act but could pass new legislation aimed at new teachers not protected under the 1927 Act.

In a 1989 case the Connecticut Supreme Court upheld as constitutional an amendment to the state's education law which eliminated permanent teaching licenses and mandated that teachers would henceforth be required to renew their licenses every five years.[52]

Most states require new teachers to serve a period of probation, usually two to five years, before they are entitled to tenure rights. In Indiana, teachers receive tenure status after their fifth year of teaching.[53]

Indiana has established a tenure system composed of three distinct and separate tiers. The newly-appointed teacher must serve as a non-permanent teacher for two years before any tenure protection is triggered. A non-permanent teacher's contract may be discontinued or terminated by the school board of a school corporation, "for any reason considered relevant to the school corporation's interest; or because of a teachers inability to perform the teacher's teaching duties."[54]

A public school teacher who serves under a contract for two successive years becomes a semi-permanent teacher.[55] A semi-permanent teacher serves under a continuing indefinite contract. An indefinite contract with a semipermanent teacher may be canceled only for the following reasons:

> (1) Immorality.
> (2) Insubordination, which means a willful refusal to obey the state school laws or reasonable rules prescribed for the government of the school corporation.
> (3) Neglect of duty.
> (4) Substantial inability to perform teaching duties.
> (5) Justifiable decrease in the number of teaching positions.
> (6) Good and just cause.
> (7) The cancellation is in the best interest of the school corporation.
> (b) An indefinite contract with a semipermanent teacher may not be canceled for political or personal reasons.
> (c) Before the cancellation of a semipermanent teacher's indefinite contract, the principal of the school at which the teacher teaches shall provide the teacher with a written evaluation of the teacher's performance before January 1 of each year. Upon the request of a semipermanent teacher, delivered in writing to the principal within thirty (30) days after the teacher receives the evaluation

required by this section, the principal shall provide the teacher with an additional written evaluation. As amended by P.L. 201- 1989.[56]

In Indiana, teachers receive full tenure status after their fifty year under contract in a public school corporation. The teacher becomes a permanent teacher and serves under a continuing indefinite contract.[57] An indefinite contract continues until the permanent teacher reaches seventy-one (71) years of age unless it is replaced by a new contract by mutual consent of the teacher and school corporation.[58] A permanent teacher's indefinite contract may be canceled for any of the statutory grounds pertaining to the cancellation of a semi-permanent teacher's indefinite contract with two significant exceptions. A permanent teacher's contract may not be terminated pursuant to statute for "substantial inability to perform teaching duties" or "cancellation in the best interest of the school corporation."[59] A permanent teacher's indefinite contract may be canceled for the other five grounds enumerated by statute pertaining to semi-permanent teachers. This includes the catch all ground for cancellation, "good and just cause."[60] However, this ground does not seem as broad as cancellation for reasons considered in the best interest of the school district.

## Teacher Dismissal

Educators have been afforded certain liberty and property interests in their employment and the extent of these constitutional rights have been delineated by the judiciary. A teacher with tenure has a property right in his or her employment and must be granted procedural due process under the Fourteenth Amendment.[61]

In addition to a property right a teacher may be able to demonstrate a liberty interest in their employment if a school corporation's employment decision adversely effects their reputation in the community or stigmatizes the employee and forecloses

future employment opportunities.[62] When a property or liberty interest is infringed, then a teacher is entitled to protection by procedural due process.

These principles of law concerning the extent and applicability of property and liberty interests in the educational setting were the subject of two cases decided on the same day by the United States Supreme Court. The two cases are Board of Regents of State Colleges v. Roth[63] and Perry v. Sindermann.[64] Both cases involved the applicability and scope of liberty and property interests pursuant to the Fourteenth Amendment of nontenured teachers in their employment. In Roth the court determined that in order to have a property interest in continuing employment a person would have to establish the following: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[65] In order to establish a legitimate claim of entitlement an educator must be able to prove that through existing state law or "existing rules and understandings" between the educator and the state, he or she has acquired a property interest in his or her continued employment.[66]

Alexander and Alexander summarize the ways in which property interests are established, by "(1) tenure statute, (2) dismissal during the contract year, or (3) if the individual has a legitimate and objective expectation of reemployment."[67]

In Roth the Supreme Court also discussed when a deprivation of liberty might occur in the context of an adverse employment decision. The court determined that a liberty interest arises if the adverse employment decision is based on a charge "that might seriously damage his standing and association in the community"[68] or a liberty interest would arise if the decision imposed "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities."[69]

In Perry v. Sindermann the court continued to define when teachers are entitled due process rights with respect to decisions affecting their employment. Sindermann had

taught in a Texas community college for four years although he had been employed by the state college system for ten years. He was employed under one-year contracts with no formal tenure. The college decided not to rehire him to another one-year contract and alleged in a press release that he had been insubordinate. The college would not grant him a hearing. Sindermann claimed that a college policy contained in the faculty handbook which stated, "[the college] wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory . . ."[70] created an expectation of reemployment. The court ruled that Sindermann had established a legitimate property interest in his employment.

The Roth and Perry v. Sindermann cases established that nontenured teachers are not entitled to procedural due process in decisions affecting their employment unless they demonstrate that either a property or liberty interest is implicated in the adverse employment decision. In addition, in order to obtain a liberty interest the reasons for nonrenewal must be "publicized."[71]

If a nontenured teacher does not challenge the validity of the employer's publicized reasons for nonrenewal, then he or she loses the right to procedural safeguards. When non-tenured teachers do contest charges leveled at them for not renewing their contracts, the burden of proving a deprivation of liberty or property is upon the teacher.[72]

Courts have determined that employer assertions alleging that teachers have a serious drinking problem, are emotionally unstable or suffer from a mental illness are stigmatizing and give rise to due process protections.

## *Dismissal for Cause*

As indicated, the Indiana Code sets forth several grounds for canceling a semi-permanent or permanent teacher's indefinite contract. The courts have often been called upon to resolve disputes relating to teacher dismissal that arise from the somewhat broadly phrased causes or grounds established for dismissal under the Indiana statute. The burden of proof when dealing with cancellation of a teacher's contract (or for disciplinary action) rests on the school board.[74]

## *Immorality*

The Indiana Supreme Court determined in 1941 that immorality is anything that offends the morals of the community.[75] More recently in Fiscus v. Board of School Trustees of Central School District of Greene County, 507 N.E.2d 1137 (Ind. App. 1 Dist. 1987), the court sought guidance in setting a definitional standard of what constitutes immorality by a teacher by quoting an early Pennsylvania Supreme Court Decision. "In Horosko v. Mount Pleasant Township School District (1939), 6 A.2d 866, 868, cert. denied, 308 U.S. 553 (1939), the court defined immorality as 'not essentially confined to a deviation from sex morality; it may be such a course of conduct as offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and to evaluate.'" The 1987 Indiana court generally agreed with this definition of teacher immorality, but added that the concept of immorality "is subject to varying interpretations based on shifting social attitudes, [and] must be resolved on the facts and circumstances of each case."[76]

At issue in Fiscus v. Board of Trustees was the cancellation of a permanent teacher's indefinite contract for uttering an obscene remark in her classroom. The school board concluded that the obscene remark constituted immorality for purposes of disciplinary action and cancellation of her contract. The teacher had been employed as an art, physical education and library skills teacher in an elementary school for twelve years. She had an unblemished record during her twelve years of service. The teacher allegedly said, "Fuck you" in response to a question concerning what grade a student received on an art project.[77] Six children, aged ten or eleven years out of twenty-four students in the class testified that they heard the teacher utter the obscene remark. The teacher vehemently denied making the remark. The school board believed the students. The appeals court upheld the decision of the school board. It found that the teacher's conduct constituted immorality. The court noted that several other state courts had upheld the cancellation of a teacher's contract because of the use of vulgar and offensive language in school.

Immorality often involves matters related to teacher's sexual conduct. An Indiana appeals court in 1986 upheld the dismissal of a permanent high school teacher for placing his hand on a female student's leg, pinching her hip and making sexually inappropriate comments to her.[78] Similarly, in 1989 an Illinois court[79] ruled in favor of a school district which had terminated the contract of a male tenured teacher for improperly touching a female student. The court noted that the psychological damage to the students and the damage to the faculty as a result of the act was irremediable. Courts have been almost unanimous in upholding teacher dismissals based on sexual involvement with students.[80] Teachers are considered to be role models and courts will not approve sexual activity with students. Teachers have been discharged for sexual conduct with nonstudents where there is a nexus between the teacher's behavior and an adverse impact on the school. Courts may consider community attitudes with respect

to a teacher's sexual activities and the ability to satisfactorily carry out his or her teaching duties. In a small rural community in South Dakota a teacher was discharged for immorality for openly living with her boyfriend.[81] The court upheld the dismissal because the teacher violated local mores. In addition, she was popular with her students making it likely they would imitate her behavior. However, a Florida court held that sexual relationships involving consenting adults may not constitute immorality where the activity takes place away from school and a teacher's ability to satisfactorily carry out his or her professional responsibilities is not impaired.[82]

Teachers have been dismissed for homosexual conduct with nonstudents. Generally, courts have required proof of a negative impact on a teacher's effectiveness to teach stemming from the teacher's homosexual conduct. If the homosexual conduct does not adversely effect students, other teachers and the learning environment, then the teacher may not be dismissed. Courts will also consider whether the conduct is likely to continue or whether it was an isolated incident in the past. In a 1988 Nebraska case the Supreme Court of that state[83] upheld the dismissal of a tenured male teacher for immorality stemming from his overtly sexual aggressiveness toward a male typewriter salesman who was waiting for the school principal in the teacher's lounge. The male teacher made sexually oriented comments out of context to the salesman and "rubbed his own genital area" while making the comments.[84] Another witness at the teacher's dismissal hearing, the husband of the school's secretary, testified that the teacher grabbed him in the genitals and on the buttocks at a staff Christmas party. The teacher denied the misconduct. The court concluded that the teacher's aggressive and uncontrollable sexual behavior was immoral and caused the teacher to be unfit to teach.

School boards have dismissed teachers who are unwed and pregnant. Generally, the courts have held that dismissal of unwed, pregnant teachers is impermissible because it violates a teacher's privacy rights and the Fourteenth Amendment.[85]

### *Incompetency*

In an early Indiana case, an appeals court described incompetency as a relative term meaning a lack of requisite qualifications needed to perform as a teacher.[86] In a more recent decision, Harrison-Washington Community School Corporation v. Bales, 450 N.E.2d 559 (Ind. App. 2 Dist. 1983), the court held that a teacher "wanting in practical efficiency in discipline" may be considered by a school board to be incompetent.[87] A South Dakota court found that incompetency may include a lack of knowledge of the subject matter that the teacher teaches, or inadequate teaching methodology or lack of discipline.[88]

Teachers should be given notice and an opportunity to correct deficiencies in their teaching. In a 1990 Illinois case[89] an appeals court upheld the reversal of a school board decision to dismiss a teacher of nine years because he was deemed incompetent to teach in his field. The court held that the school district had failed to inform the teacher of the deficiency and did not prove that the deficiency was irremediable. Conversely, in a 1990 Florida case[90] the court upheld a tenured teacher's contract cancellation for incompetency where the teacher had been provided with continuous notice of her teaching deficiencies and did not improve her performance.

In an Indiana case, a court of appeals found that a tenured teacher could be dismissed for incompetency for failing to follow generally accepted teaching methods used for teaching elementary students.[91]

### *Insubordination*

An Indiana teacher may be dismissed for insubordination if the teacher willfully refuses to follow a reasonable rule of the school corporation.[92] A school principal's directive or order to a teacher constitutes a rule of the school corporation. However, a teacher cannot be terminated for disobeying or ignoring a principal's directive unless the school's evidence demonstrates that the order was unambiguous and reasonable. In addition, the order must be lawful.[93]

In State ex rel. Newton v. Board of School Trustees, 460 N.E.2d 533 (Ind. App. 3, 1984), a tenured teacher's indefinite contract was terminated for insubordination, neglect of duty, and undermining public confidence in the normal educational process. The teacher paddled three students without an adult witness as required by a rule of the school district. The school board claimed that the teacher's conduct in failing to comply with the corporal punishment rule constituted insubordination. The appeals court upheld the dismissal finding that the teacher's failure or refusal to follow established school rules was sufficient to terminate the teacher's indefinite contract.

In 1989 in Werblo v. Bd. of School Trustees of Hamilton Heights School Corporation,[95] an Indiana appeals court heard a case in which a teacher was dismissed for insubordination for failure to obey a principal's directive. The teacher sought permission from the high school principal for her theater class to view a "Romeo and Juliet" movie in preparation of a school play instead of attending a "Sportsworld" convocation which contained religious material. The principal directed the teacher to attend the convocation with her students. However, the principal made a schoolwide announcement discussing the convocation and advised that anyone who did not wish to attend for religious or any other reasons were to report to his office. The teacher and sixteen of her students chose to view the movie. The teacher and the students reported to the of-

fice and objected to attending on religious grounds. The principal considered the excuses subterfuge for not attending the convocation. The court held that although the teacher was provided an unambiguous order to attend the convocation, the subsequent schoolwide announcement "muddled the scope of the [principal's] order" and negated the teacher's duty to attend.[96] The court also noted that the school's endorsement of a religious oriented convocation may have violated the establishment clause of the First Amendment. The court noted that school rules and directives must be lawful.

### *Neglect of Duty*

One of the statutory grounds for dismissal in Indiana is neglect of duty. In State ex rel. Newton v. Board of School Trustees, an Indiana appeals court held that the term was sufficiently specific to give teachers "fair apprisal" of the standard.[97] In this case, a tenured teacher was charged with neglect of duty for being tardy to school on seventeen occasions during a four month period. In addition, the teacher failed to timely issue progress reports to students on two occasions over a four month period. The duties for distribution progress reports had been established by the school principal. Moreover, the teacher failed to make reasonable efforts to follow his principal's recommendation to improve his relationships with parents and other teachers. The court found that all three of these charges constituted neglect of duty.

In a 1989 South Carolina case[98] a court of appeals held that a teacher could be dismissed for neglect of duty where he failed to adequately supervise his welding shop class.

In a 1990 case out of Oregon[99] a tenured teacher was dismissed for neglect of duty and immorality when her house was searched by police and they discovered that her husband was involved in trafficking marijuana. The evidence revealed that the

teacher was aware of his illegal activity. The court found, however, that the school board misapplied the term neglect of duty in this case by determining that it imposed a duty on her to act on her husband's business. In an Indiana case, a court of appeals found that a teacher who failed to prepare for class and slept during classroom periods could be dismissed for neglect of duty.[100]

### *Good and Just Cause--Best Interest of School Corporation*

Teachers may be dismissed for good and just cause in Indiana. This is in effect a catchall phrase which gives wide discretion to school boards. An Indiana court defined "other good and just cause" to include a lack of cooperation with school officials, and any cause which has a reasonable relation to a teacher's fitness or capacity to discharge his or her educational duties.[101] Indiana courts have determined that a teacher's conduct outside of the classroom bears a reasonable relation to his qualifications for employment. In Gary Teachers Union Local No. 4, A.F.T. v. School City of Gary, 332 N.E.2d 256 (1975), the court of appeals upheld the discharge of a tenured teacher who was convicted of assault and battery and fleeing a police officer which are misdemeanors. The court held that conviction of a misdemeanor was good and just cause under the Tenure Act.

A 1990 Illinois appeals court decision[102] upheld the dismissal of a tenured high school teacher for transporting two female students who were intoxicated to his home where they were permitted to drink "wine coolers" (from his refrigerator) in his presence. The court found the dismissal for good and sufficient cause sustainable. In another recent 1990 Illinois case[103] an appeals court ruled that a tenured teacher's conviction for failing to file his federal income tax returns gave rise to sufficient cause to warrant his dismissal. The Connecticut Supreme Court[104] found due and sufficient cause to dismiss

a tenured physical education teacher and athletic director for tampering with school telephones in an effort to intercept telephone calls (eavesdropping) involving other school employees. The teacher was charged with "illegal wiretapping" but was acquitted. The court found that the teacher's behavior undermined the educational mission of the school. An Indiana court determined that "failing to communicate and take an interest in the students in [a teachers] class" constituted "other good and just cause."[105]

### *Justifiable Decrease in the Number of Teaching Positions--RIF*

Indiana tenured teachers may have their contracts canceled for a "justifiable decrease in the number of teaching positions . . ."[106] This activity is commonly known as "riffing." However, Indiana courts have held that under the Indiana Teacher's Tenure Act school officials cannot dismiss tenured teachers while retaining nontenured teachers. In Barnes v. Mendenhall[107] an Indiana appeals court held that a permanent teacher's license could not be canceled as long as there were non-permanent teachers holding positions which the permanent teacher was licensed to fill. In Watson v. Burnett[108] the Indiana Supreme Court explained the reasoning behind the protections afforded tenured permanent teachers:

> The principal purpose of the Act was to secure permanency in the teaching force. If a justifiable decrease in the number of teaching positions should be held to give the trustee the power to choose between tenure and nontenure teachers, both of whom are licensed to teach in the teaching position which remains, he is thereby given the power to nullify the Teachers' Tenure Act, and to discharge without cause a teacher who has, by reason of having served satisfactorily as a teacher during the specified period, secured a tenure status and an indefinite permanent contract. To countenance such an interpretation of the law would be to permit the trustee to do indirectly that which the law expressly forbids him to do directly.[109]

Alexander and Alexander explore the permissible reasons for dismissing teachers under the reduction in force plan, "Reduction in force may be caused by such factors as enrollment decline, fiscal restraints, reorganization, or elimination of positions or

programs."[110] A school board must act in good faith in determining a need to reduce the number of teaching positions.[111]

In Stewart v. Fort Wayne Community Schools, 564 N.E.2d 274 (Ind. 1990), a school board canceled the contract of a tenured psychologist's contract because of a decrease in the number of teaching positions. The school board retained a nontenured teacher in a position in which neither individual was fully certified. The court held that Indiana's tenure law only protects teachers who are qualified for positions that are available in connection with a reduction in force plan.

Importantly, in Stewart v. Fort Wayne Community Schools, the Indiana Supreme Court established the standard of review that all Indiana courts must employ in reviewing school board decisions. In reversing the appellate court's use of a review standard which asked whether a school board's decision is "arbitrary and capricious" and whether it is "unsupported by substantial evidence," the court mandated use of the "substantial evidence" test.[112] The test is as follows:

> If the procedural requirements are followed including the assignment of a legal cause for cancellation [of the contract], and if there is substantial evidence presented which tends to support the legal cause, and if the hearing is, in fact, fair, the proceeding is lawful.[113]

The court stated that under this test "A court may vacate a school board's decision only if the evidence, when viewed as a whole, demonstrates that the conclusions reached by the school board are clearly erroneous."[114]

Local school boards often establish reduction in force rules. Once established they must follow their own rules (as long as they are lawful). Generally, teachers with more seniority may "bump" other teachers in their area of certification in teacher reduction plans.[115]

## *Procedural Due Process*

As indicated non-tenured teachers are not entitled to procedural due process in decisions affecting their employment unless they demonstrate that either a property or liberty interest is implicated in the adverse employment decision. In Indiana, a non-permanent teacher does not have a right to a hearing prior to dismissal. School boards in Indiana enjoy broad discretion in determining whether to renew a non-permanent teacher's contract.

Indiana's Teacher Tenure Act sets forth the procedure which a school corporation must employ in canceling a semi-permanent or permanent teacher's contract. The due process procedures are as follows:

> (1) The teacher shall be notified in writing of the date, time, and place for the consideration by the school corporation of the cancellation of the contract; this notification must occur not more than forty [40] days nor less than thirty [30] days before the consideration;
> (2) The teacher shall be furnished, within five [5] days after a written request, a written statement of the reasons for the consideration;
> (3) The teacher may file a written request for a hearing within fifteen [15] days after receipt of the notice of this consideration;
> (4) when the request for a hearing is filed, the teacher shall be given a hearing before the governing body on a day no earlier than five [5] days after filing;
> (5) the teacher shall be given not less than five [5] days' notice of the time and place of the hearing;
> (6) at the hearing, the teacher is entitled:
> (A) to a full statement of the reasons for the proposed cancellation of the contract; and
> (B) to be heard, to present the testimony of witnesses and other evidence bearing on the reasons for the proposed cancellation of the contract;
> (7) a contract may not be canceled until:
> (A) the date set for consideration of the cancellation of the contract;
> (B) after a hearing is held, if a hearing is requested by the teacher; and
> (C) the superintendent has given his recommendations on the contract; on five [5] days' written notice to him by the school corporation, the superintendent shall present his recommendation on each contract, except on a superintendent's contract;
> (8) pending a decision on the cancellation of a teacher's contract, the teacher may be suspended from duty; and
> (9) after complying with section 10 [20-6.1-4-10] of this chapter in the case of permanent teachers, or section 10.5 [20-6.1-4-10.5] of this chapter in the case of semi-permanent teachers, and this section, the governing body of the school corporation may cancel an indefinite contract with a teacher by a majority vote evidenced by a signed statement in the minutes of the board; the decision of the governing board is final.[116]

Indiana courts have held that school corporations must strictly adhere to the due process requirements afforded to tenured teachers when canceling their indefinite contracts.[117] In a 1984 case,[118] an Indiana court of appeals decision affirmed this

principle of law. The superintendent did not provide his recommendation to the school board on a tenured teacher's contract as required by the due process requirements under the statute. The court held that a tenured teacher's contract cannot be canceled until the superintendent has given his recommendation on the contract. The burden of proof rests with the school board in cancellation and disciplinary hearings.[119] Indiana courts have emphasized that they will not reweigh evidence in reviewing a school board's decision to cancel a teacher's contract. The courts are bound by the "substantial evidence" test (see above) in reviewing school board decisions.

### *Specific Terms of Employment for Principals and Other School Administrators*

The Indiana Code defines "teacher" to include school principals, any superintendent, supervisor, attendance officer or librarian.[120] Thus, these school officials are covered under the tenure laws of Indiana. However, principals, assistant principals and assistant superintendents operate on a different contractual basis than public school teachers. The state code provides that principals and assistant principals enter contracts with school boards for minimum terms of not less than two years.[121] The contract can be modified at any time by mutual consent of the parties. The Indiana Code details the procedure by which a school corporation must inform one of its school principals that his or her contract is not being renewed.[122] Principals, assistant principals and assistant superintendents are entitled to written notice of this refusal to renew on or before February 1 of the year the contract will expire or else the contract will be reinstated for the next school year. These school administrators are entitled to preliminary notice of refusal to renew at least thirty days before the notice of nonrenewal is issued. School administrators must be given private conferences with the school superintendent and the school board if they request such a meeting in a timely manner.[123] Notice of refusal to

renew may be satisfied by any method of delivery as long as the school official is given actual notice.[124]

### *Remedies for Illegally Dismissed Teachers*

Teachers who can prove that their contracts have been breached may recover damages for breach of contract. An Indiana teacher may recover his or her salary which would have been received if the contract was not breached. In addition, loss of retirement income, loss of health and life insurance premiums, severance pay and costs may be recovered.[125]

Teachers often bring Section 1983 claims against school personnel and school boards alleging that their termination of employment was in violation of a federal constitutional right. A Section 1983 claim is made out by a teacher by establishing that a deprivation of rights, privileges, or immunities secured by the U.S. Constitution or federal law resulted from conduct occurring under the color of state law. Tenured teachers in Indiana have a property interest in their jobs and they cannot be deprived of their jobs for arbitrary and capricious reasons.[126] Indiana school districts must not violate either state tenure law or its own employment policies or their conduct may constitute a Section 1983 violation.[127] (See the chapter on tort liability, subsection on Constitutional Torts for a detailed analysis of Section 1983 actions.)

## Collective Bargaining

### *Professionalization of Teachers*

During the last century it was assumed that most of those who taught school would do so only for a few years. The teaching corps was primarily composed of women. Women typically chose marriage and child rearing over teaching after a few years in the classroom. Teaching was considered as employment for workers who were "passing through," to more serious pursuits.[128]

Willard Elsbree, in The American Teacher: Evolution of a Profession in a Democracy[129] documents that from the 1830s up to the Civil War, increasing numbers of women began teaching. They received their training at normal schools. The Civil War seriously depleted the numbers of men who had entered teaching and propelled the infusion of women into the ranks of teaching.

Women were treated as second class citizens during the nineteenth century and this enabled schools to offer low salaries. Consequently, teachers were accorded a low social status. .In many school districts, male teachers were paid more than female teachers for comparable work.[130]

During the 1960s, teachers increasingly accepted the idea of collective bargaining and even the use of the strike. The nature of the teaching workforce was changing. More women and men began looking at teaching as more than a short term job, but as a career.

Although not addressing union membership, the Supreme Court held in 1967 that public employment could not be conditioned on the relinquishment of free association rights in Keyishian v. Board of Regents, 385 U.S. 589 (1967). One year later, the

Seventh Circuit Court of Appeals held that, "an individuals right to form and join a union is protected by the first amendment" in McLaughlin v. Tilendis, 398 F.2d 287 (1968). Several courts have invalidated state statutes that create barriers to union membership.

Recent court decisions have affirmed teachers' constitutional rights to participate in union activities.[131] Educational policy matters are usually defined in collective bargaining statutes, such as "management rights" and "scope of bargaining" provisions.

Collective bargaining in education is moving into its fourth decade and the issue of its impact on educational programs and the management of schools is drawing the attention of educational leaders. Several studies have centered on the relationship between collective bargaining and the negotiating process and efforts to "restructure" (decentralize school decision making, i.e., school-site management) the public schools. The evidence is conflicting concerning the impact of collective bargaining and the teacher empowerment movement on reform measures. Some researchers maintain that collective negotiations has caused increased rigidity in the manner in which schools are administered.[132] Others agree that collective negotiations has changed the ways schools are managed, but they may have enhanced the flexibility and cooperation between teachers and administrators because of the new power equalization between the two.[133]

Indiana is one of about two-thirds of the states[134] which has passed a collective bargaining law. In 1973 the Indiana General Assembly enacted the Teacher Collective Bargaining Act. The legislature expressed its intent: "The citizens of Indiana have a fundamental interest in the development of harmonious and cooperative relationships between school corporations and their certified employees."[135] The legislature further declared that collective bargaining "can alleviate various forms of strife and unrest."[136]

The Indiana legislature created the Indiana Education Employment Relations Board (IEERB) to implement the Act. The IEERB is charged with the responsibility to

intervene in resolving contract disputes arising from the determination of a school district's exclusive representative, unfair labor practices, and mediation and factfinding.[137]

School employers have an obligation to meet and bargain in good faith with school employees exclusive bargaining representative. Indiana courts have held that the parties must collectively bargain in good faith so as to "promote meaningful input and a free interplay of ideas with respect to discussable topics."[138]

Under the Teacher Collective Bargaining Act certain items are made mandatory subjects of bargaining. The statute provides that "salary, wages, hours and salary and wage related fringe benefits" shall be considered mandatory subjects of bargaining.[139] In addition the statute contains a "grandfather clause," "any item included in the 1972-73 agreements between any employer school corporation and the employee organization shall continue to be bargainable."[140]

Indiana law requires that a school employer shall discuss certain items with the exclusive representative of certified employees but makes the items permissible for purposes of bargaining collectively, negotiation or entering into a written contract, or being subject to impasse procedures for those items. The statute actually declares that an employer commits an unfair labor practice for refusing to discuss any of the following matters:

> working conditions, other than those provided in Section 4; curriculum development and revision, textbook selection; teaching methods; selection, assignment or promotion of personnel; student discipline; expulsion or supervision of students; pupil-teacher ratio; class size or budget appropriations. . .[141]

These are mandatory subjects of discussion which may be the subject of collective bargaining.

However, certain management rights are reserved to school employers. The collective bargaining statute provides that "No contract may include provisions in conflict with . . . school employer rights as defined in Section 6(B) of this chapter."[142] The rights of school employers then are as follows:

(b) School employers shall have the responsibility and authority to manage and direct in behalf of the public the operations and activities of the school corporation to the full extent authorized by law. Such responsibility and activity shall include but not be limited to the right of the school employer to:

(1) direct the work of its employees;
(2) establish policy;
(3) hire, promote, demote, transfer, assign, and retain employees;
(4) suspend or discharge its employees in accordance with applicable law;
(5) maintain the efficiency of school operations;
(6) relieve its employees from duties because of lack of work or other legitimate reason;
(7) take actions necessary to carry out the mission of the public schools as provided by law.[143]

The act provides that school employees defined as any full time certified person in the employment of the school employer will compose the teachers bargaining unit.[144] The act excludes supervisors from the bargaining unit. In a 1989 decision an Indiana appeals court[145] held that athletic directors, head football coaches and basketball coaches who supervise full time, certified school employees, are supervisors excluded from the bargaining unit of school employees. The court reasoned that coaching duties are generally connected with curricular activities and therefore a coach who exercises authority over certificated school employees and acts as supervisor to be entirely excluded from the rank and file bargaining unit.

The scope and meaning of the subjects open to discussion and bargaining are often the subject of litigation. As a general rule, school boards wish to limit the scope of the subjects so that they may maintain their management prerogative. School boards often would rather not deal with the school employees exclusive representative before making or changing policy.

The subject of working conditions which is a mandatory subject of discussion but a permissible item for bargaining purposes has been the subject of extensive litigation in Indiana. The question involves the ordinary meaning of "working conditions." One major area of conflict between school boards and teacher representative revolves around the issue of teacher evaluations. In Evansville-Vanderburgh School Corp. v. Roberts, 405 N.E.2d 895, the Indiana Supreme Court ruled:

> We believe the teacher evaluation in issue is indeed within the plain and ordinary meaning of "working conditions." The "philosophy" of the plan is to maintain high teacher competence by means of self evaluation forms, classroom observations by "evaluators," and an evaluation conference . . . We believe these factors significantly touch and concern the everyday activities of school teachers and, therefore, are within the ordinary understanding of "working conditions."[146]

Thus, the Indiana Supreme Court determined that the teacher evaluation process significantly affects the educational environment by impacting on the relationship between supervisors conducting evaluations and teachers. The court determined that meaningful input must occur between school employers and bargaining units prior to implementing or changing the teacher evaluation process. The court determined that discussing teacher evaluation plans with the bargaining representative did not unduly infringe upon the managerial responsibilities and authority of the school district. In Board of Trustees of Gary Community School Corporation v. Indiana Education Employment Relations Board, 543 N.E.2d 662 (Ind. App. 1 1989) the court reviewed a school corporation's decision to institute an instructional program based on the pedagogical theories of Madeline Hunter and the Blooms. The program was implemented and teachers were evaluated by individual supervisors on how well they used the new methods. The school district refused to discuss or bargain the implementation of the new teaching strategy. The teachers bargaining representative claimed that the school corporation had engaged in an unfair labor practice in unilaterally changing the conditions of employment. The court found that the implementation of new curricula, teaching techniques and teacher evaluations were embraced within the meaning of working conditions. Thus, the subject was a discussable item according to the TCBA. In addition, the court determined that a clause in a pre 1971-72 collective bargaining agreement which prohibited instructional supervisors from making written evaluations was "grandfathered" into the current contract, causing the subject of evaluation of teachers to be a mandatory bargaining topic.

Issues revolving around the school calendar have been repeatedly raised in litigation in Indiana. In Eastbrook Community Schools v. Indiana Education Relations Board, 446 N.E.2d 1007 (1983), reh. granted 450 N.E.2d 1006, trans. denied, an Indiana appeals court held that a school board is not required to bargain the school calendar with the teacher's bargaining unit. The court concluded that the item of the school calendar was an exclusive school board managerial matter which the school board was prohibited from bargaining. However, in Union County School Corp. v. Indiana Education Employment Relations Board, 471 N.E.2d 1191 (Ind. App. 1984), the court ruled that although the subject of the school calendar is not an item of mandatory bargaining, it is a subject of mandatory discussion as a "working condition." Issues which are subject to mandatory discussion may but shall not be required to be bargained collectively.[147] Some Indiana school districts may be obligated to bargain collectively over calendar items which were bargained as part of collective bargaining agreements before 1972-73 (under the grandfather clause). In Northwestern School v. Ed. Emp. Rel. Bd., 529 N.E.2d 847 (Ind. App. 1988) the court held that calendar items which were bargained for as part of a 1973-1973 agreement which do not infringe upon a school boards exclusive managerial power remain bargainable under the grandfather clause of the TCBA. In Indiana Education Employment Relations Board v. Highland Classroom Teachers Association, 546 N.E.2d 101 (Ind. App. 3 Dist. 1989), the appeals court heard a case in which a long list of calendar items had been included in a pre-1972-1973 collective bargaining agreement. The court held that certain calendar items are part of a school board's exclusive managerial prerogative. The court concluded then, that the following items are not subject to mandatory bargaining:

> the date of the first day of school, the dates when students would be in school for 1/2 day but teachers would attend for a full day, the starting and ending dates of winter (Christmas) break and the spring (Easter) break, the scheduling of holiday recesses . . ., the closing of schools for the ISTA Conference on Instruction, and the date of the last day of student attendance.[148]

The issue of classroom size has been a topic of litigation in several states. The question has often been whether class size should be considered a mandatory topic of bargaining. An Illinois court in 1989[149] held that class size is a mandatory topic of bargaining in that state. Indiana seems to have avoided the problem by making class size a mandatory subject of discussion but a permissive subject for bargaining.

One issue in the collective bargaining setting that has been litigated extensively is whether teachers who are not union members can be required to pay union dues to a school employee representative. The United States Supreme Court has ruled that a non-union member can be required to share in the expenses incurred by a union in its role as the designated teachers representative.[150] Accordingly, the Supreme Court has decided that a teachers exclusive bargaining representative is under a duty to represent all of the employees in a bargaining unit including those who are not members in a fair manner.[151] However, the Supreme Court has held that it is a violation of the First Amendment to require non-union employees to pay for expenses incurred by the union to support their political and ideological activities. The court has established procedural safeguards to prevent "compulsory" subsidization of ideological activity by employees who object thereto without restricting the union's ability to require every employee to contribute to the cost of collective bargaining activities.[152] Thus, "agency shop" or "fair share" arrangements have been established to collect fair share fees from non-union employees. Fair share due represent a non-union employees' pro rata share of the expenses of the bargaining representative for work in dealing with management. Fair share fees do not include money spent by the union to support their political viewpoints.

Indiana law provides that teacher exclusive bargaining representatives have the right to collect "fair share" union dues from union non-members.[153] Indiana bargaining units cannot deduct the fees from paychecks with a teacher's permission, but they may seek to recover the dues from nonmembers in court. The Indiana fair share fee provision

is called voluntary in the sense that it does not permit automatic involuntary payroll deductions. However, the "payments themselves are not voluntary."[154] In Fort Wayne Education Association v. Aldrich, 527 N.E.2d 201 (Ind. App. 3 Dist. 1988), the court explained the voluntary fair share deduction arrangement:

> Although Indiana forbids both involuntary payroll deductions and making the representation fee a condition of employment, the word "voluntary" ascribed to Indiana's system is misleading. The requirement that payroll deductions be voluntary does not make the payment itself voluntary. While not a condition of employment, Indiana's nonmember teachers are required, under Indiana law and the terms of the Master Contract, to pay the fee. Thus, with or without voluntary payroll deductions, the payment is mandatory. Consequently, since the payment is not voluntary, the rights of Indiana teachers are no less infringed upon than their Illinois counterparts. Therefore, we hold today that the nonmember teachers are entitled to the protections announced in the Hudson decision.[155]

In Ake v. National Education Association-South Bend, 531 N.E.2d 11 (Ind. App. 3 Dist. 1988), the court held that the use of a rebate procedure which rebated funds to teachers that were "overcollected and used for political purposes" is unconstitutional.[156] The court reasoned that during the interim period, between the collection of fees from nonmembers and the return of funds spent for political purposes, the union was able to use the funds.

The Indiana Code expressly prohibits Indiana school employees from striking. The statute specifically provides:

> Strikes--(a) It shall be unlawful for any school employee, school employee organization, or any affiliate, including but not limited to state or national affiliates thereof, to take part in or assist in a strike against a school employer or school corporation.
>
> (b) Any school corporation or school employer may, in an action at law, suit in equity, or other proper proceeding, take action against any school employee organization, any affiliate thereof, or any person aiding or abetting in a strike, for redress of such unlawful act.
>
> (c) Where any exclusive representative engages in a strike, or aids or abets therein, it shall lose its dues deduction privilege for a period of one(1) year.
>
> (d) No regulation, rule or law with respect to the minimum length of a school year shall be applicable or shall require makeup days in any situation where schools in a school corporation are closed as a result of a school employee strike. A school corporation shall not pay any school employee for any day when the school employee fails as a result of a strike to report for work as required by the school year calendar.[157]

In a 1991 case, Coons v. Kaiser, 567 N.E.2d 851 (Ind. App. 3 Dist. 1991), the court held that a student could not maintain a lawsuit seeking damages against teachers who participated in an illegal strike.

The IEERB is authorized to deal with negotiations between school employers and employees regarding the making of collective bargaining agreements that proceed to an impasse. The IEERB offers a confidential mediation service in which the mediators act as a neutral adviser in an attempt to assist the parties to meaningfully bargain collectively.[158] Mediators do not render decisions. If mediation does not resolve the parties disputes, then the parties must engage in fact finding.[159] The IEERB appoints a neutral factfinder to investigate the contract dispute. The factfinder may hold hearings and after his or her investigation a nonbinding recommendation is issued to the parties. The parties may choose to submit their dispute to arbitration. The Indiana Code provides that the parties may "submit any issue in dispute to final and binding arbitration by an arbitrator appointed by the Board. The award in any such arbitration shall constitute the final contract between the parties with respect to such issue."[160]

## Constitutional Rights of Teachers

### *Free Speech and Association*

Prior to the 1960s public employment, including the employment of teachers was considered a privilege rather than a right. Accordingly, teachers were expected to limit and give away their First Amendment rights to their employers. However, during the 1960s with the public's attention focused squarely in individual rights, "the courts determined that the 'privilege doctrine' was inappropriate and the relationship between teachers and school board began to change."[161] In 1968, the United States Supreme Court in Pickering v. Board of Education of Township High School District 205, 391 U.S. 563, 88 S.Ct. 1731 (1968), established the legal principle that public school teachers

have the First Amendment right of freedom of expression. In Pickering a school board terminated the employment of a teacher for writing a letter to a local newspaper which was published that criticized the school superintendent and school board for spending school funds on athletic programs and neglecting to inform the district taxpayers of their decisions. The Supreme Court applied a "balance of interests" test in determining that the teacher's letter did not disrupt the orderly educational process. The court struck the balance in favor of the teacher. The court recognized the right of teachers as citizens to express their views on matters of public concern. However, a teacher's right of speech and expression is not of unlimited scope. If a teacher's comments seriously damage the relationship between employer and employee, or are deliberately or recklessly false or seriously impede the educational mission of the school, then the exercise of such speech may be grounds for dismissal.[162] However, the burden of proving any of these matters rests with the school district.[163]

In Mount Healthy v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977), the Supreme Court visited the issue of teacher's First Amendment rights. In this case an untenured teacher claimed that his teaching contract had not been renewed because he called a local radio station and criticized the school. The teacher argued that he was simply exercising his First Amendment rights in telephoning the radio station. However, the school contended that the teacher was not rehired for a variety of reasons, including an altercation with another teacher, making obscene gestures to female students, swearing at students, all in addition to the statements he made on the air. The court held that a school board can dismiss or not rehire a teacher even if constitutionally protected speech is involved, if there are other valid and legitimate reasons involved that justify dismissal. Justice Rehnquist, writing for the court, said:

> A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching

a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.[164]

In Mount Healthy, the court found that the initial burden is on a teacher to show that his or her conduct is constitutionally protected and that it played a substantial role, or was a "motivating factor" in the decision not to rehire or dismiss a teacher.[165] However, once this burden is met, the burden shifts to the school board to show by a preponderance of the evidence that it would have taken the action even in the absence of the constitutionally protected behavior.

In summary, where an educator's First Amendment right is at issue, the judiciary uses a three-step analysis. The court must first determine if the teacher's speech is constitutionally protected. Here the court determines whether the statements made by the teacher, taken as a whole, are on a matter of public concern. Second, a court must ascertain whether the school board's dismissal was motivated by the teacher's exercise of his or her First Amendment rights. Third, the school district must be given an opportunity to demonstrate that it would have taken the same action in the absence of the teacher's constitutionally protected conduct.

In Hesse v. Board of Education, 848 F.2d 748 (7th Cir. 1988), the Seventh Circuit Court of Appeals said with respect to comments made that are not a matter of public concern, "absent the most unusual circumstances" a court will not "review the wisdom of a personnel decision taken by a public agency alleged in reaction to the employee's behavior."[166]

In Vakadinovich v. Bartels, 853 F.2d 1387 (7th Cir. 1988), the Circuit Court considered a case in which a basketball coach (who represented himself on appeal) was removed as head basketball coach at Westville High and subsequently lost his teaching job. He claimed that the school board canceled his contract because of critical comments he made to a newspaper which were published concerning the high school principal. The Seventh Circuit Court of Appeals determined that the basketball coach's

comments regarding his "forced resignation as basketball coach" was "a matter of personal rather than public concern and thus was not protected under the First Amendment."[167] Thus, the court did not reach the other two steps of the three step inquiry enumerated above. In sharp contrast, the Ninth Circuit[168] ruled that a teacher's public criticism of his school district's treatment of Mexican-American children and its affirmative action program was protected by the First Amendment. Although his speech was related to his employment it also reflected his views on a public issue as a citizen of his community.

In a case involving free speech and association, an Indiana case ultimately landed in the United States Supreme Court. In Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983), the court considered the Perry Township Indiana policy that allowed access to its interschool mail system to the teacher's certified exclusive collective bargaining unit as well as various private groups. A rival union charged that its First Amendment rights were violated when the school board only provided access to the teacher's mailboxes to the teacher's exclusive representative. The court held that the exclusive access policy was constitutionally permissible because the school corporation interschool mail system did not constitute a "public forum" rather the school mail facilities were properly defined as a "limited public forum." Thus, school officials could place reasonable restrictions on the use of the mail system (such as prohibiting access to it) to help assure labor peace.

In another Indiana case involving the First Amendment, May v. Evansville-Vanderburgh School Corporation, 787 F.2d 1105 (7th Cir. 1986), the Seventh Circuit was asked to consider whether a school teacher had a free speech right to hold morning prayer meetings with other teachers in the school building before school commenced and students arrived. A group of seven or eight teachers who taught at Harper Elementary School in southern Indiana claimed that the elementary school was a public forum for

expressive purposes. The school board applied a long standing policy prohibiting the use of school facilities to the group. The court held that a school maintains a nonpublic forum even it if occasionally invited outside speakers. More importantly, the court concluded that teachers do not have a right under the First Amendment's free speech clause to hold meetings that are unrelated to the work of the school on school premises.

By statute, Indiana educators have a right to run for or hold public office unless a school board determines (based on credible evidence) that the teacher's political activities have "impaired his effectiveness" as an educator.[168]

An Indiana statute guarantees teachers' freedom of association including affiliation or engaging in activities of any organization unless that organization advocates the violent overthrow of the United States government or violation of the law to achieve its goal.[170] However, the U.S. Supreme Court has decided that it is only the knowing membership in an organization that advocates the violent overthrow of the government with a specific intent to further the organization's illegal objectives that can be made the reason for dismissing or not hiring a teacher.[171] The Indiana law has not been challenged to date.

### *Academic Freedom*

The idea of academic freedom has a rich history of protecting the integrity and right of scholars to search for truth unrestrained by political ideas or popular notions. The Supreme Court in a 1957 decision recognized the value of academic freedom, "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always be free to inquire, to study and to evaluate . . ."[172] In the landmark case of Keyishian v. Board of Regents, 385 U.S. 58, 87 S.Ct. 675 (1967), in which the court invalidated laws requiring teachers (and others) to sign certificates declaring

that they were not communists, Justice Brennan eloquently defended the concept of academic freedom:

> Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that case a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."[173]

However, courts, including the Seventh Circuit Court of Appeals, have recognized that the First Amendment freedoms inherent in the concept of academic freedom are more limited for public school teachers than university professors, particularly in curriculum related matters, because of the age, experience and maturity of the students.[174] The Seventh Circuit stated in a 1980 opinion that a school board "has a legitimate, even a vital and compelling, interest in the choice of and adherence to a suitable curriculum for the benefit of our young citizens."[175]

The Seventh Circuit Court of Appeals upheld the dismissal of a teacher who refused to teach subjects in the school's regular curriculum related to patriotic matters, love of country, or respect for the American flag because of her religious beliefs. The court concluded:

> There is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to individual teachers to teach what they please. Plaintiff's right to her own religious views . . . remain unfettered, but she has no constitutional right to require others to submit to her views. . . .[176]

Thus, the competing views of society outweighed the personal views of a teacher even when couched in terms of academic freedom. Generally, most courts accept a limited view of academic freedom in the public schools. Teachers do not have a right to select textbooks for their classrooms.[177] They also do not have the right to introduce obscenity into elementary school classrooms under the guise of academic freedom.[178] Moreover, teachers are not entitled to promote religious beliefs in a public school classroom.[179] Teachers may be dismissed for showing films that are considered

pornographic even though they argue that their conduct is protected by academic freedom.[180]

In a 1990 case, Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990), the court upheld a decision by school authorities ordering an elementary teacher to keep his Bible out of his students sight in his classroom and refrain from silently reading the Bible during class. The school officials believed that the teacher was proselytizing in his classroom. The court concluded that the school principal actually had a duty to take measures to eliminate the activity.

In Fowler v. Board of Education of Lincoln County, 819 F.2d 657 (6th Cir. 1987), cert. denied, 484 U.S. 986 (1987), a Kentucky teacher of fourteen years was discharged by a school board for showing an "R" rated movie, Pink Floyd--The Wall, to her high school students on the last day of the school year. The teacher claimed that she showed the movie for a variety of reasons including its significant educational value. She contended "the movie portrayed the dangers of alienation between people and of repressive educational systems."[181] The teacher maintained that she was protected by a teacher's First Amendment right of academic freedom "to exercise professional judgment in selecting topics and materials for use in the course of the educational process."[182] While the court agreed that the teacher possessed a limited right of academic freedom, the court said that the scope of the protection inside the classroom is defined by "the inculcation of fundamental values necessary to the maintenance of a democratic political system."[183] The court determined that:

> The single most important element of this inculcative process is the teacher. Consciously or otherwise, teachers . . . demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models.
>
> The accommodation of these sometimes conflicting fundamental values has caused great tension, particularly when the conflict arises within the classroom. . . . In the final analysis,
>
> > [t]he ultimate goal of school officials is to insure that the discipline necessary to the proper functioning of the school is maintained among both teachers and students. Any limitation on the exercise of constitutional rights can be justified only by a conclusion, based upon reasonable inferences flowing from concrete facts and not abstractions, that the interests of discipline or sound education are materially and substantially justified. . . . "The problem in any

> case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." James, 461 F.2d at 571-72 (quoting Pickering v. Board of Education).[184]

The court held against the teacher concluding that the showing of the movie was not protected by academic freedom protected by the First Amendment. Likewise, school boards in Indiana are given wide latitude in matters relating to the curriculum, selection of textbooks, and methods of teaching. Indiana courts will not disturb the decisions of local school boards in curriculum-related matters unless their decisions case a "pall of orthodoxy" on the offerings of the classroom.[185]

## Loyalty Oaths

In 1952, sparked by the "red scare" of the McCarthy Era, the Supreme Court in Adler v. Board of Education, 342 U.S. 485 (1952), the United States Supreme Court upheld a New York law which permitted the discharge of teachers belonging to "subversive" organizations. The court explained its decision:

> A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and duty to screen officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.[186]

However, Justice Douglas dissented, saying, "What happens under this law is typical of what happens in a police state . . . A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin."[187]

In 1967 in Keyishian v. Board of Regents, supra, a higher education case, the Supreme Court reversed its decision in Adler. The court held that teachers cannot be required to sign oaths that declare they are not members of submissive groups. How-

ever, the Supreme Court has upheld state laws requiring teachers to sign oaths that pledge they will uphold the U.S. and their respective state constitutions.

In a 1984 case, Arval Morris argued successfully to the U.S. Supreme Court that the State of Washington loyalty oath was unconstitutional. In Bagget v. Bullitt,[188] Justice White found a loyalty oath that required applicants to swear in part ". . . and will by precept and examine promote respect for the flag and the institutions of the United States . . . [and pledge] reverence for law and order and undivided allegiance to the government of the United States"[189] unconstitutional as vague uncertain and broad on its face. The court noted that such an oath might result in teachers feeling inhibited to "freely disseminate ideas" and exercise their First Amendment freedoms in the classroom.[190]

Every person applying for a teaching license or a license renewal to teach in an Indiana public school must sign an oath or affirm to the following oaths:

> I solemnly swear (or affirm) that I will support the constitution of the United States of America, the constitution of the state of Indiana and the laws of the United States and the state of Indiana, and will, by precept and example, promote respect for the flag and the institutions of the United States and of the state of Indiana, reverence for law and order and undivided allegiance to the government of the United States of America.[191]

The Indiana loyalty oath has never been challenged but it is almost identical in language to the Washington State loyalty oath which was found unconstitutional.

## Personal Appearance--Right of Privacy

The issue of personal appearance of teachers and what constitutes appropriate dress and grooming has been the subject of considerable litigation. The Seventh Circuit Court of Appeals has ruled on the issue of teacher personal appearance. In Miller v. School District Number 167, Cook County, Ill., 495 F.2d 658 (7th Cir. 1974), the court considered the issue of whether a school board could not renew a teacher's contract be-

cause he wore a beard and sideburns. The court held against the teacher asserting that "the denial of public employment because the employer considers the applicant's appearance inappropriate for the position in question, does not in and of itself represent a deprivation that is forbidden by the Due Process Clause."[192] The court deemed the liberty interest in one's choice of style of appearance to be of minor significance. The court ruled that if a teacher's dress or grooming style had an adverse impact on the educational process, then his or her interests were subordinate to the schools.

In a 1978 case[193] involving dress and grooming issues, the Seventh Circuit modified the position it took in Miller. The court continued to follow the holding in Miller, but suggested another approach to analyzing public employees liberty interest in their choice of personal appearance. The court said it preferred to use a "rational basis" test, determining whether there is a rational relationship between the grooming and dress rule and a public purpose.[194] The court went on to say that judicial action would only be appropriate where school board actions truly arbitrarily infringed upon personal freedom. Applying this test in Pence v. Rosenquist, 573 F.2d 395 (1978) the Seventh Circuit concluded that school authorities could not suspend a school bus driver for refusal to shave off a neatly trimmed mustache. The Court ruled that the school's policy of not permitting school bus drivers to grow a mustache had no rational relationship with a proper school purpose.

Although the United States Constitution does not expressly mention privacy, the United States Supreme Court has interpreted the U.S. Constitution to include a fundamental right of privacy.[195] However, as indicated in the section regarding teacher dismissal, a teacher's conduct outside of the classroom may be the basis for cancellation of a contract or disciplinary action. In Gary Teachers Union Local No. 4, A.F.T. v. School City of Gary, supra, the court ruled that a teacher's behavior outside of school does indeed bear a reasonable relation to his or her qualifications for employment.

Thus, the problem in cases involving protections of personal privacy is to arrive at a balance between the privacy interests of the teacher and the schools interest in maintaining an appropriate educational environment. As previously mentioned teachers have been discharged from public school employment for matters arising in their private lives such as a conviction of a crime or sexual activity. One case which clearly stands out as a illustration of a school board's restrictive view toward teachers' privacy rights is a case out of Washington. In Gaylord v. Tacoma School District No. 10, 559 P.2d 1340 (Wash. 1977), cert. denied, 434 U.S. 879 (1977), the Washington Supreme Court upheld the discharge of a high school teacher for his known status in the community as a homosexual. The court determined that the teacher's publicly known status as a homosexual would impair his teaching efficiency. The court noted that school officials do not need to wait for evidence of overt homosexual conduct before dismissing a known homosexual teacher. However, in matters concerning private sexual relationships of a teacher, generally, courts will require school boards to show that the conduct adversely affects the teacher's ability to teach before approving sanctions against the teacher.[196]

In other cases involving the right of privacy a 1985 decision by the Sixth Circuit held that a public school teacher cannot be denied employment solely on the basis that she is seeking a divorce.[197] A federal appeals court held that a teacher cannot be prohibited from breastfeeding her baby in school.[198] In a 1988 case the First Circuit Court of Appeals[199] found that a school board's directive to a teacher to seek counseling from a psychiatrist as a condition of continued employment (after the teacher had engaged in unusual behavior) was not an invasion of the teacher's right of privacy. In another case, out of the Seventh Circuit Court of Appeals,[200] in 1987, the court considered the case of a tenured school psychologist who was suspended from employment because he failed to promptly report child abuse to a state agency. The school psychologist had learned that a student might have been the victim of sexual misconduct by another teacher at

the school. The school psychologist had assured the student of the confidentiality of any information divulged at their meetings. A few days later the student agreed with the school psychologist that it would be best to reveal the information to school authorities. However, the psychologist was disciplined and demoted for failure to inform authorities promptly. Illinois, like other states, had adopted prompt disclosure of any suspected child abuse. The school psychologist argued to the court that the student had a right of privacy not to have the confidential information disclosed and by disclosing the information, the school psychologist would have violated the right of privacy emanating from a right of confidentiality. The court rejected the privacy claim of the psychologist noting that the "federal right of confidentiality might under certain circumstances be implied when a state conditions continued employment on disclosure of private information" but not where a state has a compelling interest in protecting abused children.[201]

Indiana educators must report suspected child abuse. The Indiana Code mandates that any person who has reason to believe that a child is a victim of abuse or neglect and does not report the abused child to authorities is guilty of a Class B misdemeanor which carries a penalty of up to six months in the county jail and a possible $1,000 fine.[202]

As a general rule, the judicial trend is to hold that teachers cannot be discharged from school employment for private conduct unless it has a negative impact on their teaching ability. However, teachers may be dismissed for immoral private conduct, contrary to community values, if their behavior becomes known to the community and as a consequence adversely affects their teaching ability.

## Search and Seizure

The Fourth Amendment of the United States Constitution guarantees citizens the right to be free from unreasonable search and seizure. The Fourth Amendment guarantees against unreasonable searches extends to public school teachers. As indicated, most cases involving unreasonable searches in the educational setting are brought in connection with the rights of students to be free from unreasonable searches. However, the question becomes to what extent does the Fourth Amendment prohibition against unreasonable searches apply to teachers while they are at school. In O'Connor v. Ortega, 480 U.S. 709, 107 S.Ct. 1492 (1987), the United States Supreme Court addressed the issue of whether and to what extent searches and seizures by government employees or supervisors of private property of their employees are subject to the limitations of the Fourth Amendment. The court concluded that government employers (this would include school authorities) were subject to a reasonableness standard when they conducted workplace searches. The plurality opinion emphasized that "public employers are not enforcers of the criminal law; instead, public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner."[203] Therefore, a reasonableness standard rather than a probable cause standard applies to searches of teachers desks, file cabinets, and offices.

The country's heightened awareness of widespread drug abuse has caused many school districts to consider drug testing of teachers. The legality of drug testing programs for teachers has been challenged in court. In Patchogue-Medford Congress of Teachers v. Board of Education of Patchogue-Medford Free School District No. 156, 510 N.E.2d 325 (N.Y. 1987), a school district required all probationary teachers to submit to a urinalysis drug testing screening to ferret out illicit drug use. The court held that

a urinalysis test is a search and seizure and impermissible under the Fourth Amendment without reasonable suspicion to believe that a teacher is using illegal drugs.

In a recent case involving a school district's mandatory drug testing program, the District of Columbia Circuit Court upheld a drug testing program for those involved in the transportation of handicapped children.[204] The school district had implemented a drug screening (urinalysis) program in response to a perceived "drug culture" in the district's transportation department. The program only involved school transportation employees. The court held "that the drug testing program bears a close and substantial relation to the [government's] goal of deterring drug use on the job . . . and the school systems [drug testing program] is not an undue infringement on the justifiable expectations of privacy of covered employees and therefore the government's compelling interests outweigh privacy concerns."[205]

## Equal Protection--Discrimination in Employment

The Fourteenth Amendment's equal protection clause states that no state shall deprive any person of the equal protection of the laws. The equal protection clause prohibits the government from invidiously discriminating among classes of individuals within its jurisdiction. In order for a plaintiff to make out a successful racial discrimination action under the equal protection clause he or she must establish that the public school intentionally or purposefully discriminated on the basis of race.[206]

The United States Supreme Court has established an equal protection analysis or standard of review test in deciding suits involving discrimination under the Fourteenth Amendment. In cases involving differential treatment of individuals on the basis of race or national origin a school district can only justify such differential treatment by showing

it has a compelling purpose to be served by the difference in treatment. This standard of review is called the strict scrutiny test. This is a very difficult test to meet and almost always precludes purposeful discrimination on the basis of race or national origin. The second test is called the intermediate approach and it holds that a school district rule or policy which treats males and females (or illegitimate children) differently must be substantially related to the achievement of a legitimate and important governmental purpose. The third test is known as the mere rationality test and generally allows a school district to create classifications on the basis of disabilities, age or wealth as long as they are rationally related to a legitimate governmental purpose.[207]

As noted, in order to prevail in a discrimination suit brought under the equal protection clause, a plaintiff must prove that school officials intentionally discriminated against them. As a consequence of the difficulty of proving discriminatory intent, plaintiffs have increasingly turned to federal anti-discrimination statutes which have wider application for relief. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination in both public and private (with fifteen or more employees) institutions on the basis of race, color, religion, sex and national origin. Title VII allows an employer to defend an allegation of gender discrimination in hiring if sex is a bona fide occupational qualification (BFOQ). The BFOQ defense is not permitted as a defense in race discrimination cases under Title VII. Title VII covers discrimination in hiring, promoting and sexual harassment.[209] The Equal Employment Opportunity Commission (EEOC) is charged with responsibility of enforcing Title VII.[210] Gender-based employment discrimination is prohibited by Title IX of the Education Amendments of 1972[211] and sex-based wage discrimination is forbidden by the Equal Pay Act of 1963.[212] The Age Discrimination in Employment Act of 1975 (ADEA)[213] protects individuals between the ages of forty and seventy from discrimination on the basis of age with regard to hiring, firing and the terms and conditions of employment. Discrimi-

nation against "otherwise qualified handicapped individuals" is prohibited by Section 504 of the Rehabilitation Act of 1973.[214]

As a general rule, a plaintiff bringing an employment discrimination suit must initially demonstrate a prima facie case of discrimination. In establishing a prima facie case a plaintiff must show that he or she was burdened or belongs to a specific category burdened by an employer practice affecting a group protected by one of the federal anti-discrimination laws.[215] The inference from a prima facie showing may be rebutted by the employer by producing evidence of a nondiscriminatory business justification for the employee's treatment.[216] In Wards Cove Packing Co. v. Antonio, 109 S.Ct. 2115 (1989), the United States Supreme Court held "that the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times."[217]

The nature of Title VII protection varies with the nature of the alleged discrimination. Two approaches are used by plaintiffs to prove discrimination in employment decisions. Plaintiffs allege disparate treatment, which focuses on discriminatory intent, and disparate impact, which seeks to prove that a facially neutral employment practice has a statistically significant adverse effect on members of a protected class. Competing concepts of equality underlie these two analytical frameworks.[218] Disparate treatment seeks equality of opportunity and treatment. It emphasizes that race or other impermissible criteria should not be considered in employment decisions. Disparate impact, on the other hand, seeks to attain equality of outcome or achievement. The goal in disparate impact cases is not simply to compensate individual victims of specific acts of intentional discrimination, but rather to remedy the class wide effects of racial injustice.[219] In International Brotherhood of Teamsters v. U.S.,[220] the court maintained that Title VII plaintiffs may base their claim on either or both approaches and courts may apply one or the other in deciding a case.

The disparate impact discrimination theory of Title VII was developed by a unanimous Supreme Court in Griggs v. Duke Power Co.[221] in 1971. Griggs extended Title VII to practices which are "fair in form, but discriminatory in operation."[222] The premise underlying disparate impact theory is that if an ostensibly neutral employment practice has an exclusionary effect that operates as the functional equivalent of intentional discrimination, then that practice must be scrutinized to determine whether it serves an essential purpose of the employers operation. If the practice cannot be shown to be a business necessity, the practice violates Title VII. In Griggs, Chief Justice Warren Burger speaking for the court declared: "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as built in headwinds for minority groups and are unrelated to measuring job capability."[223] Thus, under disparate impact theory, an employers liability can be proven without evidence of the employers subjective intent to discriminate.

A claim of discrimination under Title VII may be based on statistical data even to the extent that statistical proof alone may make out a prima facie case of discrimination against an employer.[224] The Supreme Court recognized the probative value of statistical analysis of an employers work force in Title VII suits as early as 1977 in the Teamsters case.

A significant complication arises in determining and constructing the proper statistical comparison in Title VII cases. In Hazelwood School District v. United States[225] the Supreme Court addressed the question of comparison in cases involving statistical evidence of discrimination and held that in cases involving skilled job categories, the proper comparison should be between the employer's work force and only that pool of the local labor market qualified for the job, not as Teamsters had suggested, the local general population. The court indicated in Hazelwood that general population statistics had been appropriate in Teamsters "because the job skill there involved--the

ability to drive a truck--is one that many persons possess or can fairly readily acquire. When special qualifications are required to fill particular jobs [these statistics] may have little probative value."[226] Thus, in Hazelwood to infer whether or not the defendant, a suburban St. Louis School District, had discriminated in the hiring of teachers, the court held that the "proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market."[227]

It would appear that the Supreme Court has approved at least three types of statistical comparisons for assessing the impact of an employer practice on a protected group.[228] General population statistics can be used to compare in a relevant geographic area the percentage of protected class members adversely affected by the employers practice with the percentage of non-protected individuals similarly affected. Such data commonly are used when, due to a lack of specialized employment requirements, most of the population at large would be sufficiently qualified, as in the Teamsters case. "Applicant flow data" compares the minority composition of the pool of individuals applying for a job or promotion with the composition of those actually hired or promoted by the employer. Lastly, the "available workforce statistic" compares the percentage of a protected class in the relevant market, defined as those individuals having the requisite skills for the job, with the percentage of that class in the employer's workforce. Which statistical population is used for comparison can determine whether or not a significant statistical disparity is shown.[229]

How does the court determine the qualified population and the relevant job market? The problem of identifying a pool of persons possessing special qualifications, skills which sometime even an employer may have difficulty quantifying or describing are formidable. Even where courts and parties can agree on the appropriate labor pool, disagreements will inevitably arise over the proper geographic measure of the labor pool.

In the case widely criticized by civil rights activists, Wards Cove v. Antonio, supra, the Supreme Court visited the Title VII initial inquiry of what constitutes the proper "qualified population-relevant labor market comparison." The litigation in Wards Cove involved a Title VII challenge to the hiring and promotion practices in the Alaskan salmon industry. The defendant company operated canneries in which jobs were divided into skilled and unskilled, the skilled jobs paying more and providing much better working conditions than the unskilled jobs. The skilled jobs (non-cannery jobs) were filled almost entirely by whites and the unskilled jobs (cannery jobs) were filled by minorities. The company also divided the living and dining areas between the skilled and unskilled employees. The plaintiffs alleged that the hiring and promotion practices of the company were responsible for the work force's racial stratification and denied them (unskilled workers) employment as skilled (non-cannery) workers on the basis of race. The plaintiffs based their claims on both disparate treatment and disparate impact theories.

The plaintiffs (unskilled workers) lost on both theories of action in the district court. The Court of Appeals for the Ninth Circuit reversed the lower court, finding that the plaintiffs had established a prima facie case of disparate impact, on the basis of comparing the internal workforce (skilled and unskilled) statistics showing a wide disparity between the high percentage of whites in skilled jobs and the high percentage of minorities in the unskilled jobs.

The Supreme Court reversed the Ninth Circuit's opinion in a 5-4 vote. Justice White delivered the opinion of the divided court, finding that the Court of Appeals erred in ruling that a comparison of the unskilled cannery workers who were nonwhite and the percentage of skilled noncannery workers who were also nonwhite made out a prima facie disparate impact case. Rather, according to the majority in Wards Cove the proper comparison is generally between the racial composition of the at- issue jobs and the ra-

cial composition of the qualified population in the relevant labor market, citing Hazelwood.[230] The court held, with respect to noncannery skilled jobs at issue, that the cannery unskilled work force in no way reflected the pool of qualified job applicants or the qualified labor force population. As long as the employers selection methods or employment practices cannot be said to have a disparate impact on nonwhites and if the absence of minorities holding such skilled jobs reflects a dearth of qualified nonwhite applicants for reasons that are not plaintiffs fault the court found that Title VII would not be violated. With respect to the unskilled cannery jobs, the court concluded, as long as there are no barriers or practices deterring qualified nonwhites from applying, the employer's selection mechanism probably does not have a disparate impact on minorities if the percentage of selected nonwhite applicants is not significantly less than the percentage of qualified nonwhite applicants. Where this is the case, the majority maintained, the percentage of nonwhite workers found in other positions in the employer labor force is irrelevant to a prima facie statistical disparate-impact case.

With respect to relying on statistics alone to establish a prima facie case of disparate impact, the Supreme Court said in Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 108 S.Ct. 2777 (1988):

> The plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff . . . is responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.[231]

In addition, Watson is a very significant employment discrimination case because the court held that disparate impact analysis is applicable to subjective hiring and promotion practices such as personal interviews. Thus, if a plaintiff can demonstrate that a facially neutral employment practice, such as a personal interview or other subjective employment practice, has a significant adverse effect on a protected group, then discriminatory intent or purpose is not required to make out a Title VII case. The court stated:

> [A]n employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct. . . . It does not follow, however,

> that the particular supervisors to whom this discretion is delegated always act without discriminatory intent. . . . If an employer's undisciplined system of subjective decision-making has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply. . . We conclude, accordingly, that subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases.[232]

In City of Richmond v. J. A. Croson Company,[233] a 1989 U.S. Supreme Court decision, the court held that a rigid quota system whereby employers set aside a certain percentage of positions for those within a protected group without regard for qualifications is impermissible. The court determined that a claim of a generalized history of societal discrimination against blacks does not justify a remedial strict quota system. However, a school district may establish a voluntary affirmative action program to remedy the effects of past discrimination in its specific geographical area (rather than general societal discrimination).[234] The school district should be prepared to prove that a particular group has specifically been discriminated against in the past by named employers and public institutions in its geographical area.[235] Any court ordered affirmative action program, of course, continues to be legal.

As pointed out earlier, Title VII of the Civil Rights Act of 1964 prohibits discrimination in public and private employment on the basis of sex as well as race, color, religion or national origin. Pregnancy related conditions are addressed by Title VII. The federal statute expressly forbids discrimination based on pregnancy, childbirth or related medical conditions.[236] Pregnancy related disabilities must be treated in the same manner as other temporary disabilities under medical and disability insurance plans or sick leave policies.[237] The United States Supreme Court in Cleveland Board of Education v. Lafleur[238] held that a mandatory maternity leave policy (which contained an arbitrary cutoff date for continued employment before childbirth) violated the due process clause of the Fourteenth Amendment. The court held that "the arbitrary cutoff dates embodied in the mandatory leave rules before us have no rational relationship to the valid state interest of preserving continuity of instruction."[239] The court noted that

teachers may be required to provide substantial advance notice of their intention to begin maternity leave. The court concludes that school districts could establish reasonable maternal leave regulations but not policies containing arbitrary cutoff dates. In a 1986 case, Ponton v. Newport News School Board, 632 F.Supp. 1056 (1986), a federal district court in Virginia ruled that a school board cannot force a pregnant (and single) teacher to take a leave of absence. The court held that the discrimination in the case was based on two "immutable sex characteristics--pregnancy--and a constitutionally protected activity--the right to bear a child out of wedlock."[240] The court ruled that the discrimination violated Title VII.

School employees are protected from sexual harassment under Title VII. The Equal Employment Opportunity Commission's (EEOC) regulations implementing Title VII define sexual harassment this way:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[241]

Sexual harassment can be divided into two different types, quid pro quo harassment and non quid pro quo harassment. In quid pro quo harassment an employee must choose between providing sexual favors or losing the job, promotion or other employment benefits.[242] The other types of sexual harassment, non quod pro quo, involves a workplace environment where sexual conduct creates a sexually intimidating, hostile or offensive working environment.[243]

According to EEOC regulations an employer is responsible for sexual harassment: "for its acts and those of its gents and supervisory employees with respect to sexual harassment regardless of whether the specific acts were complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."[244] In addition, with respect to sexual

harassment between employees the employer is responsible if it ". . . knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."[245]

## Summary

A teacher's employment with a school corporation in Indiana commences with the teachers license. The license is evidence of eligibility for employment as a public school teacher. Since 1985 applicants for an Indiana teaching certificate have been required to pass a teacher proficiency examination.

Teaching licenses may be revoked by the State Board of Education. Every teacher and principal employed in a public school in Indiana must sign a uniform teaching contract with his or her employing school corporation. Indiana school corporations are prohibited from establishing any residency requirements as a condition of employment. Indiana school corporations may grant a teacher a leave of absence for up to one year for a sabbatical, disability or sick leave.

Indiana school officials have the authority to transfer and assign their employees. School boards cannot bargain away the right to transfer and assign employees.

Indiana teachers have enjoyed statutory protection under tenure laws since 1927. Indiana has established a tenure system composed of three distinct and separate tiers. The newly-appointed teacher must serve as a non-permanent teacher for two years before any tenure protection is triggered. A non-permanent teacher may be discontinued or terminated by the school board for any reason considered relevant to the school corporation's interest or for teaching ineffectiveness. A teacher who serves under a contract for two successive years becomes a semi-permanent teacher. Teachers receive full tenure

status after their fifth year under contract in a public school corporation. A teacher with full tenure serves under a continuing indefinite contract.

A teacher with tenure has a property right to his or her employment and must be granted procedural due process under the Fourteenth Amendment. A teacher may be able to demonstrate a liberty interest in their employment.

The Indiana Code establishes several grounds for dismissing a semi-permanent or permanent teacher. The grounds for cancellation of an indefinite contract are immorality, incompetency, insubordination, neglect of duty, a justifiable decrease in the number of teaching positions, and other "good and just cause" in the best interest of the school corporation.

Non-tenured teachers are not entitled to procedural due process in decisions affecting their employment unless they demonstrate that either a property or liberty interest is implicated in the adverse employment decision. School boards enjoy broad discretion in determining whether to renew a non-permanent teacher's contract.

Indiana law sets out an elaborate due process scheme that school corporations must strictly adhere to when canceling tenured teachers indefinite contracts.

Teachers who have been illegally dismissed can bring actions to recover damages for breach of contract. They may also bring constitutional tort claims against school authorities and school boards if their employment has been terminated in violation of a well-established constitutional right.

Indiana is one of about thirty-five states which has passed a collective bargaining law. School employees have an obligation to meet and bargain in good faith with school employee's exclusive bargaining representative. Under the Teacher Collective Bargaining Act certain items are made mandatory subjects of bargaining and other items are made permissible subjects of collective bargaining. However, certain management rights are reserved to school employers. Indiana courts have determined that teacher exclusive

bargaining representatives have the right to collect "fair share" union dues from teachers who are not members of the union. Fair share fees do not include money spent by the union to support their political viewpoints. The Indiana code expressly prohibits Indiana school employees from striking.

Public school teachers possesses the First Amendment right of freedom of expression. They may not be dismissed or disciplined for exercising their First Amendment rights except under certain limited circumstances. Courts attempt to arrive at a balance between the interests of the teacher, as a citizen, in commenting on matters of public concern and the interest of the state in promoting the efficiency of an orderly educational process. A school board may dismiss a teacher, even if constitutionally protected speech is involved, if there are other valid and legitimate reasons involved that justify the dismissal.

Indiana teachers by statute are guaranteed freedom of association and have a right to hold public office.

Indiana educators enjoy limited academic freedom in the classroom. School boards in Indiana are given wide latitude in matters related to the curriculum, selection of textbooks, and methods of teaching.

Every person applying for a teaching license or license renewal in Indiana must sign a loyalty oath.

Indiana school employers may impose dress and grooming regulations on teachers if there is a rational basis between the grooming and dress rule and the school's objective for imposing the rule. Schools may not act arbitrarily to restrict teachers' personal freedom.

Teachers enjoy a constitutional right of privacy but their conduct outside of school may be the basis for cancellation of a contract or disciplinary action. As a gen-

eral rule, teachers cannot be discharged from school employment for private conduct unless it has a negative impact on their teaching ability.

Indiana law requires educators to report suspected child abuse.

The Fourth Amendment's guarantees against unreasonable searches and seizures extends to public school teachers. However, a reasonableness standard rather than the probable cause standard applies to searches of teachers' desks, file cabinets and offices.

The equal protection clause of the Fourteenth Amendment prohibits the government from invidiously discriminating among classes of individuals within its jurisdiction. In order to prevail under the equal protection clause a plaintiff must prove that school officials intentionally discriminated against them. As a consequence of the difficulty of proving discriminatory intent plaintiffs have increasingly turned to federal anti-discrimination statutes which have wider application for relief from discriminatory practices. In recent years the Supreme Court has modified the meaning and applicability of many of the anti-discrimination statutes.

## Footnotes

1. Kern Alexander and M. David Alexander, The Law of Schools, Students, and Teachers in a Nutshell (Minnesota: West Publishing Company, 1984).
2. Ibid., p. 271.
3. I.C. 20-6.1-3-1.
4. I.C. 20-6.1-3-1.
5. Ibid.
6. I.C. 20-6.1-3-10.
7. 511-IAC 10-4-1.
8. Ibid.
9. National Education Association v. South Carolina, 445 F.Supp. 1094 (D.S.C. 1977), aff'd. 434 U.S. 1026 (1978).
10. Griggs v. Duke Power Company, supra, p. 431.
11. National Education Association v. South Carolina, 445 F.Supp. 1094 (D.S.C. 1977), aff'd. 434 U.S. 1026 (1978).
12. Ibid.
13. Texas State Teachers Association v. State, 711 S.W.2d 421 (Tex. App. 1986).
14. 511 IAC 10-3-1.
15. I.C. 20-6.1-3-9.
16. I.C. 20-6.1-3.7.
17. Ibid.
18. I.C. 20-6.1-4-2.
19. I.C. 20-6.1-3-4.
20. Stone v. Fritts, 82 N.E. 792 (Ind. 1903), p. 794.
21. Adams v. State Professional Practices Council, 406 So.2d 1170 (Fla. Dist. App. 1981).

22. Couch v. Turlington, 465 So.2d 557 (Fla. Dist. Ct. App. 1985).

23. Homer v. Commonwealth Department of Education, 485 A.2d 1059 (Pa. Comm. Ct. 1983).

24. Lost Creek School Township, Vigo County v. York, 21 N.E.2d 58 (1939).

25. I.C. 20-6.1-4-3.

26. Board of Trustees of South Vermillion School Corporation v. Bennetti, 492 N.E.2d 1078, transfer denied (1986).

27. I.C. 20-6.1-4-3.

28. Chambers v. Central School District, School Board of Greene Co., 514 N.E.2d 1294 (Ind. App. Dist. 1, 1987).

29. I.C. 20-6.1-4-6.

30. I.C. 20-6.1-6-12.

31. I.C. 20-6.1-4-8.

32. Ibid.

33. I.C. 20-6.1-5-3.

34. I.C. 20-6.1-4-7.

35. I.C. 20-6.1-6-1.

36. Ibid.

37. Ibid.

38. Jay School Corp. v. Cheeseman, supra, citing I.C. 20-6.1-6-1(a).

39. I.C. 20-6.1-5-6.

40. Ibid.

41. I.C. 20-7.5-1-6.

42. Eastbrook Community School Corporation v. Indiana Education Employment Relations Board, 446 N.E.2d 1007 (Ind. App. 1983), reh. denied 450 N.E.2d 1006 (1983).

43. Harrisburg Sch. District v. O'Brien, 540 S.W.2d 945 (Miss. 1976).

44. Alabama State Tenure Commission v. Shelby County, 474 So.2d 723 (Ala. App. 1985).

45. See Kern Alexander and David Alexander, The Law of Schools, Students, and Teachers.

46. Ibid., p. 282.

47. Board of Trustees of Hamilton Heights School Corp. v. Landry, supra, p. 105.

48. Ibid.

49. Indiana ex rel. Anderson v. Brand, supra, pp. 108-109 of U.S.

50. Ibid., p. 109.

51. Ibid., p. 117.

52. Connecticut Education Association Inc. v. Tirozzi, 554 A.2d 1065 (Conn. 1989).

53. I.C. 20-6.1-4-9.

54. I.C. 20-6.1-4-14.

55. I.C. 20-6.1-4-9.5.

56. I.C. 20-6.1-4-10.5.

57. I.C. 20-6.1-4-9.

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59. I.C. 20-6.1-4-9.

60. Ibid.

61. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972).

62. Ibid.

63. Ibid.

64. Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694 (1972).

65. Board of Regents v. Roth, supra, p. 578 of U.S.

66. Ibid.

67. Kern Alexander and David Alexander, The Law of Schools, Students and Teachers, p. 308.

68. Board of Regents v. Roth, supra, p. 573.

69. Ibid.

70. Perry v. Sindermann, supra, p. 600 of U.S.

71. Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074 (1976).

72. See Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977).

73. See Kern Alexander and David Alexander, The Law of Schools, Students and Teachers, pp. 310-313.

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# Chapter 6

## *Summary of Legal Principles and Implications for Further Study*

The purpose of this study has been to identify, examine, and analyze judicial decisions and legislation, state and federal, for those principles of law that govern the legal rights and responsibilities of Indiana public school educators. The study has identified and clarified pertinent constitutional and statutory law and judicial interpretations derived from a synthesis of cases and statutes which have significance to Indiana educators. Indiana educators are bound by the judicial opinions of the United States Supreme Court, the Seventh Circuit Court of Appeals, Indiana federal district courts and the appellate courts of Indiana. Federal and state statutes and pertinent administrative agency policies and opinions also bind Indiana educators. The following legal principles specifically define the legal rights and responsibilities of Indiana educators and affect them in the daily administration of the public schools.

## Summary of Legal Principles

### *Tort Liability*

The most common tort with which educators become involved is negligence. Negligence is defined as conduct falling below an established standard of care that results in injury. Indiana courts recognize a duty on the part of teachers, principals, school boards and other school personnel to exercise ordinary and reasonable care for the safety of the students under their control--with the level of care that an ordinary prudent person would exercise under the circumstances. Indiana courts have specifically and repeatedly warned that children may do unreasonable things and therefore educators have a special responsibility to be on guard against such unreasonable actions by students.

The extent of reasonable supervision required by Indiana courts for the care and supervision of students will depend on the ages and physical and psychological condition of the students involved, as well as the type of activity and conditions under which the activity took place.

The standard of care required by courts of school authorities increases with the immaturity, lack of mental capacity or inexperience of students.

Indiana educators are likely to be found liable for inadequate supervision if the occurrence leading to a student's injury is foreseeable and the accident is of the sort that could have been avoided if appropriate steps had been taken by school personnel.

The greatest risk of liability in connection with incompetent or negligent instruction arises most often with respect to physical education, vocational education and laboratory classes.

Indiana courts require greater supervision or care where a dangerous condition exists, and the school knows of the condition, or should have known of its existence with reasonable diligence.

Indiana school corporations must provide adequate supervision over students under its control while they are waiting for, boarding, on board, and leaving a school bus or courts may find liability for negligence.

The legal defenses in suits involving allegations of negligence in Indiana include contributory negligence, incurred risk and the doctrine of in loco parentis.

Indiana educators may also be liable for intentional torts such as assault and battery. Allegations of assault and battery against school authorities most often arise from the infliction of excessive corporal punishment. Indiana school personnel may use the defense of in loco parentis against charges of assault and battery.

Teachers may be liable for libel and slander, the twin torts of defamation. The Indiana Constitution recognizes truth as a complete defense in cases involving defamation. Educators are generally extended a qualified privilege against liability for defamation as to communications with parents regarding their children, and communications with other teachers with a legitimate educational interest in the student.

The Indiana General Assembly enacted the Indiana Tort Claims Act, which provides procedures that must be complied with as a prerequisite to recovery by anyone claiming an injury as a result of governmental negligence.

Indiana public schools are not protected by the doctrine of governmental immunity.

Prior to 1988 Indiana educators enjoyed full protection against personal liability for torts committed while performing discretionary acts. The Indiana Supreme Court has sharply limited that immunity by redefining discretionary acts. The court adopted the planning-operational test for use in determining discretionary-act immunity. Edu-

cators are only immune from acts that constitute significant policy and political decisions generally attributable to the essence of governing. Most acts by school authorities that occur in the day-to-day operation of the public school are not protected under this test.

Although Indiana educators are not generally protected under the doctrine of immunity from suit, they are protected from monetary loss by a "save harmless" statute as long as their negligent conduct occurred within the scope of their employment.

A separate category of torts in addition to civil torts are constitutional torts. Many injured parties seek redress in federal court for violations of their constitutional rights under Section 1983 of the Civil Rights Act of 1871 (commonly called a constitutional tort). In Indiana, in a Section 1983 action against a school governing body, a plaintiff must prove he or she suffered a deprivation of a constitutional right through the act of a school official or employee who was directly implementing a policy or custom of the school's governing body. Second, the plaintiff must demonstrate that the school official or employee knowingly, willfully, or at least recklessly caused the constitutional deprivation by his or her action or failure to act.

School board members and other educators acting in good faith will not be found liable in their individual capacities under Section 1983 unless they personally violate clearly established constitutional rights of individuals. Neither compensatory nor punitive damages are recoverable under Section 1983, unless the constitutional deprivation resulted in actual harm.

### *Legal Responsibilities Regarding Students*

Indiana compulsory education laws prohibit parents from denying their children a minimal education. Indiana law allows home schooling, private schooling and other

non-school arrangements as long as they constitute instruction equivalent to that given in the public schools.

Although the Indiana Constitution provides for a system of free public schools, Indiana statutory law permits schools to charge students textbook rental fees.

Indiana courts recognize the right and duty of school boards and school authorities to maintain order and control in the classroom and in the public schools.

Indiana common and statutory law grants school authorities the right to impose reasonable corporal punishment on students.

Students may be suspended or expelled from attending school for violating reasonable rules and regulations of the school. The Fourteenth Amendment guarantees students procedural due process with respect to their liberty and property rights vested in their education. In Indiana short term suspensions of five days or less require minimal due process consisting of notice, reasons, and an opportunity for a hearing. Indiana has established a formal, elaborate and comprehensive procedural scheme to be used for expulsions and exclusions.

The Fourth Amendment applies to searches and seizures conducted by public school authorities but the probable cause standard is not required of school officials. School authorities must have reasonable cause to justify a search of a student. The school's interest in maintaining a safe, orderly environment conducive to learning is weighed against the student's right to privacy and the Fourth Amendment's prohibition against unreasonable search and seizure.

Indiana school corporations may implement random drug testing programs to determine athletic eligibility for student participation in interscholastic sports.

By statute, Indiana public school students have no expectation of privacy in their school locker or its contents. A student's locker may be searched at any time by a

school administrator. When it is possible, the search should be conducted in the presence of the student.

The use of trained dogs to randomly search for drugs on school premises based on general information of drug use by students is permissible in Indiana. In addition, searches of student's pockets and purses are permissible based on a positive alert by the trained dog.

The Family and Educational Rights and Privacy Act (FERPA) and Indiana statutory law provide protection for the privacy interests of students and their parents in connection with school records.

Students are entitled to First Amendment protections in the educational setting but this protection is not coextensive with that of adults. Students' individual political, personal or religious speech is protected by the First Amendment and cannot be limited unless it causes substantial disruption, or may be reasonably forecasted to cause substantial disruption of the educational process or interferes with the rights of others.

Speech which is vulgar or offensive can be punished and prohibited in classrooms, assemblies and other school sponsored educational activities.

School officials may exercise editorial control over the style and content of student speech in school sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. A curricular related student newspaper is not a public forum for student expression.

Indiana educators may not require prior approval of non-school sponsored student written publications before publication and distribution. School administrators may regulate the time, manner and place of distribution. School officials can prohibit and discipline students who publish and distribute obscene or libelous material on school premises.

An Indiana public school must confine itself to secular objectives and remain neutral with respect to religious activity. School sponsored prayer is impermissible even if participation is voluntary. A voluntary private prayer said by a student is permissible so long as the school does not sanction and advance the silent devotional activity. The Bible or other religious literature may be used in studying history, government, culture, civilization or ethics, but not to promote religion.

Indiana public school policies and acts of public school employees must have a secular purpose; its principal or primary effect must be one that neither advances nor inhibits religion and it must not foster an excessive government entanglement with religion.

The Equal Access Act makes it unlawful for public schools that have created a limited open forum to deny access or discriminate against student initiated non-curriculum groups on the basis of the religious, political, or philosophical content of their speech.

Students derive protection from discrimination from the Fourteenth Amendment's equal protection clause. Indiana and federal law also protect students from discrimination on the basis of race, sex, national origin, age, religion, alienage and disabilities.

Married students must be allowed to participate in athletic and extracurricular activities. Generally, in Indiana noncontact sports must be open equally to both sexes unless a comparable girls team is available.

Indiana students may wear their hair at any length and style as an ingredient of their personal freedom. Clothing which is immodest, dirty, or disruptive of the educational process may be prohibited.

School officials are granted broad discretion in curriculum matters relating to the method of teaching, and the selection of books.

Indiana courts have held that participation in extracurricular activities is a privilege and not a right. A student may not be arbitrarily denied the opportunity to qualify to participate in interscholastic athletics but he or she does not have the right to be chosen. The ISHAA which administers high school athletics in Indiana is considered a private association and not an arm of the state for purposes of allowing student's injunctive relief under Section 1983.

Indiana has adopted an extensive minimum competency test (MCT) program called ISTEP. To be lawful, the test must accurately reflect what students are taught in school.

### *The Legal Responsibilities Toward Individuals With Disabilities*

Indiana statutory law, the Individuals with Disabilities Education Act (IDEA), and Section 504 of the Rehabilitation Act of 1973 combine to form the basis of extensive substantive and procedural rights which afford children with disabilities a right to a free appropriate public education.

The IDEA requires that all children with disabilities between the ages of three and twenty-one and in need of special education are to be identified, located and evaluated. The IDEA requires that children with disabilities be provided an education in the least restrictive environment. It also mandates that education is to be individualized and appropriate. The individualized education program (IEP) in Indiana is prepared at a meeting of the case conference committee.

The substantive due process right to a free appropriate public education is undergirded by the comprehensive procedural rights, rules, and requirements mandated by the IDEA. At the core of procedural due process is notice. Parental involvement is a central underlying theme of the IDEA.

Indiana law requires written parental consent before a school district conducts any educational evaluation, makes an initial placement of a child in a special education program, or before action is taken regarding a child's special education placement or transfer. If a parent disagrees with the school corporation's proposed change and does not provide written consent, and requests a hearing, the proposed change or action may not occur until the resolution of the dispute, unless both parties agree otherwise.

The United States Supreme Court has defined an appropriate education under the IDEA as providing a basic floor of opportunity to children with disabilities which consists of access to specialized instruction and related services individually designed to provide educational benefits to the disabled child.

Indiana school districts must provide transportation services to disabled children if a child needs it in order to benefit from special education in a manner that is as effective as those transportation services provided nondisabled students.

The Seventh Circuit Court of Appeals has indicated that the mainstreaming goal of the IDEA is secondary to the principal goal of ensuring that public schools provide disabled children with a free appropriate education.

Indiana educators must make a determination whether there is a causal relationship between a disabled child's misconduct and his or her disability before imposing long term suspension or expulsion on the child. A disabled child may be expelled where the misconduct is not handicap-related. However, a complete cessation of educational services is not permissible. Any disabled child may be suspended from attending school on a short term basis (under ten days) in the same manner observed for non-handicapped students. In Indiana, a disabled child must be afforded due process procedures before he or she is denied transportation and related services. During the pendency of expulsion proceedings (unless a parent agrees otherwise) a student must be kept in his or her "then current" educational placement.

Indiana courts may award tuition reimbursement, but not compensatory education, as a means of relief where disabled children have not received educational benefits in the past as intended under the IDEA.

Students with AIDS (and other contagious diseases) are handicapped and must be permitted to attend Indiana public schools if their attendance does not pose a health risk to the school community.

## *The Terms and Conditions of Teacher Employment*

Every teacher and school administrator employed in Indiana must obtain a license from the State Board of Education and sign a contract with his or her employing school corporation. Applicants for an Indiana teaching license are required to pass a teacher competency test.

Indiana school corporations are prohibited from establishing any residency requirements as a condition of employment.

Indiana school officials have the authority to transfer and assign their employees and school boards cannot bargain away this right.

Indiana has established a tenure system composed of three distinct and separate tiers. The newly-appointed teacher must serve as a non-permanent teacher for two years before any tenure protection is triggered. A non-permanent teacher may be discontinued or terminated by the school board for any reason considered relevant to the school corporation's interest or for teaching ineffectiveness. A teacher who serves under a contract for two successive years becomes a semi-permanent teacher. Teachers receive full tenure status after their fifth year under contract in a public school corporation. A teacher with full tenure serves under a continuing indefinite contract.

A teacher with tenure has a property right in his or her employment and must be granted procedural due process under the Fourteenth Amendment. A teacher may be able to demonstrate a liberty interest in their employment.

The Indiana Code establishes several grounds for dismissing a semi-permanent or permanent teacher. The grounds for cancellation of an indefinite contract are immorality, incompetency, insubordination, neglect of duty, a justifiable decrease in the number of teaching positions and other "good and just cause" in the best interest of the school corporation.

Non-tenured teachers are not entitled to procedural due process in decisions affecting their employment unless they demonstrate that either a property or liberty interest is implicated in the adverse employment decision. School boards enjoy broad discretion in determining whether to renew a non-permanent teacher's contract.

Indiana law sets out an elaborate due process scheme that school corporations must strictly adhere to when canceling tenured teachers indefinite contracts.

Teachers who have been illegally dismissed can bring actions to recover damages for breach of contract. They may also bring constitutional tort claims against school authorities and school boards if their employment has been terminated in violation of a well-established constitutional right.

School employees have an obligation to meet and bargain in good faith with school employee's exclusive bargaining representative. Under the Teacher Collective Bargaining Act certain items are made mandatory subjects of bargaining and other items are made permissible subjects of collective bargaining. However, certain management rights are reserved to school employers. Indiana courts have determined that teacher exclusive bargaining representatives have the right to collect "fair share" union dues from teachers who are not members of the union. The Indiana code expressly prohibits Indiana school employees from striking.

Public school teachers possess the First Amendment right of freedom of expression. They may not be dismissed or disciplined for exercising their First Amendment rights except under certain limited circumstances. Indiana courts attempt to arrive at a balance between the interests of the teacher, as a citizen, in commenting on matters of public concern and the interest of the state in promoting the efficiency of an orderly educational process. A school board may dismiss a teacher, even if constitutionally protected speech is involved, if there are other valid and legitimate reasons involved that justify the dismissal.

Indiana teachers by statute are guaranteed freedom of association and have a right to hold public office.

Indiana educators enjoy limited academic freedom in the classroom. School boards in Indiana are given wide latitude in matters related to the curriculum, selection of textbooks, and methods of teaching.

Every person applying for a teaching license or license renewal in Indiana must sign a loyalty oath.

Indiana school employers may impose dress and grooming regulations on teachers if there is a rational basis between the grooming and dress rule and the school's objective for imposing the rule. Schools may not act arbitrarily to restrict teachers' personal freedom.

Teachers enjoy a constitutional right of privacy but their conduct outside of school may be the basis for cancellation of a contract or disciplinary action. As a general rule, Indiana teachers cannot be discharged from school employment for private conduct unless it has a negative impact on their teaching ability.

Indiana law requires educators to report suspected child abuse.

The Fourth Amendment's guarantees against unreasonable searches and seizures extends to public school teachers. However, a reasonableness standard rather than a probable cause standard applies to searches of teachers' desks, file cabinets and offices.

The equal protection clause of the Fourteenth Amendment prohibits the government from invidiously discriminating among classes of individuals within its jurisdiction. In order to prevail under the equal protection clause a plaintiff must prove that school officials intentionally discriminated against them.

Indiana educators are also protected from discrimination based on unalterable personal characteristics by various federal anti-discrimination statutes including Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Equal Pay Act, the Age Discrimination in Employment Act and Section 504 of the Rehabilitation Act of 1973.

In Title VII cases the plaintiff must initially demonstrate a prima facie case of discrimination. The inference from a prima facie showing may be rebutted by the employer by producing evidence of a nondiscriminatory business justification for the employee's treatment. The ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times.

Two approaches are used by plaintiffs in Title VII cases to prove discrimination in employment decisions. Plaintiffs allege disparate treatment, which focuses on discriminatory intent, and disparate impact, which seeks to prove that a facially neutral employment practice has a statistically significant adverse effect on members of a protected class. The plaintiff is responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.

## Implications for Further Study

As a result of this study, the following implications for further study are being made:

1. that a study of Indiana's legal experience with desegregation be conducted;
2. that a study of the impact of collective bargaining on school site management be conducted;
3. that a study of recent changes in the educational programs of public schools in response to the Mergens decision be conducted;
4. that a study of the jurisdiction and impact of the Office of Civil Rights investigations of special education programs be conducted;
5. that a study of preventive school law practices and techniques aimed at curbing litigation be conducted;
6. that a study of the financing of Indiana public schools be conducted; and
7. that similar studies such as this study be conducted in other states which lack this specific synthesis of school law.

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# Vita

**JOSEPH R. McKINNEY**

Born: Columbus, Indiana; August 13, 1953
Married: Three Children

## EDUCATIONAL BACKGROUND

Ed.D. Educational Administration, Virginia Polytechnic Institute and State University, July 1991

J.D. Indiana University, 1978

B.A. Indiana University, 1975
Major: Forensic Studies
Minor: Psychology

## PROFESSIONAL EXPERIENCE - Education

Assistant Professor, Department of Educational Leadership, Ball State University, 1991--

Adjunct Professor, Virginia Polytechnic Institute and State University, 1989-1991

Graduate classes taught include Legal Aspects of Educational Administration and Legal Aspects of Special Education

Graduate Assistant, Educational Administration, Virginia Polytechnic Institute and State University, 1990-1991

Assistant Editor, Journal of Education Finance, 1989-1990

Assistant Professor (Part-time): Northern Arizona University, 1987-1989

Graduate classes taught included Legal Aspects of Educational Administration (school law) and Arizona School Law.

Associate Instructor, Indiana University, 1976-1978

**PROFESSIONAL EXPERIENCE - Law**

Member: Arizona State Bar (since 1981), Florida State Bar (since 1981), and Indiana State Bar (since 1980).

City Attorney: Nogales, Arizona, 1985-1986, 1988-1989.

City Prosecutor: Nogales, Arizona, 1987.

Private Practice of Law: Bloomington, Indiana (1980) and Nogales, Arizona (1981-1989).

Attorney for Santa Cruz County Public Fiduciary, 1984.

**LEGAL REPRESENTATION AND CONSULTING - Education Law**

Attorney for public school teachers in disciplinary hearings and teacher dismissal matters.

Attorney for public school teachers in legal matters related to employment evaluations, academic freedom, instructional program issues, and procedural due process issues.

Attorney for students in legal matters related to suspensions, expulsions and search and seizure issues.

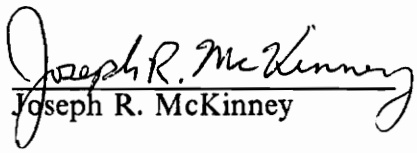
Attorney for public school administrators in employment related matters.

***HONORS***

Who's Who in Arizona, 1989

Exemplary Public Service Award, City of Nogales, 1988

Award for Dedication and Loyalty to City of Nogales, 1986



Joseph R. McKinney