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CONTEMPORARY ISSUES AND
COURT DECISIONS

SIXTH EDITION

2006 Supplement

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INTRODUCTION

In contemporary public education, policy-makers, administrators, classroom teachers and other personnel must stay up-to-date with the rapidly changing legal environment within which they operate. While in the past it was possible to rely for up to five years on a particular scholarly text and on other recognized resources for helpful information, this reliance is neither feasible nor advisable in today's environment. Experts tell us that rapid social, legal, and organizational change take place within a three-year cycle.

Much has happened since the Sixth Edition of *LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS* was published in 2003. This past year the United States Supreme Court itself experienced significant change when Chief Justice John G. Roberts, Jr., replaced the late William H. Rehnquist, and Associate Justice Samuel A. Alito, Jr., replaced Sandra Day O'Connor. Over the past two years legislative bodies and lower courts of law have added to the body of public education law. Thus, we decided to up-date our text at this time.

Maintaining busy schedules as university administrators and professors, the authors weighed two alternatives associated with up-dating their text. The entire book could be revised, culminating in the publication of a Seventh Edition, or a supplement that includes a representative sampling of recent statutory and case law information covering the 2004, 2005, and 2006 school years could be prepared. The authors decided on the latter approach.

The intent of the 2006 Supplement is to up-date the contents of the Sixth Edition of this text. In addition to referencing examples of recent statutory changes, the authors have selected and included 165 new court decisions from various jurisdictions, federal and state. In doing so we believe that our work will prove helpful to contemporary educational policy makers, educational practitioners, and attorneys who represent school systems; as well as to college and university professors who teach education law.

The authors wish to thank Mrs. Susan Goins for her hard work and technical assistance in preparing this 2006 Supplement. Her efficient and effective skills helped us reach our objective.

R.S.V.
W.C.B., Jr.

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PART I

LAW: SOURCES AND RESOURCES

Chapter 1

SOURCES OF EDUCATION LAW

§ 1.4 Federal Government and Public Education.

[a] Congress and the Schools.

Add on page 7, to footnote 9:

In November 2004, Congress amended and passed a reauthorized IDEA, 20 U.S.C.A. 1400, *et seq.* (2004). The Individuals With Disabilities Education Improvement Act (IDEIA), hereafter referred to by its short title, IDEA 2004, Title 1, contains amendments to IDEA, Parts A through D. Signed into law by President George W. Bush on December 3, 2004, IDEA 2004 became effective on July 1, 2005.

[b] The Executive Branch and the Schools.

Add on page 8, a new paragraph after paragraph 5:

Signed into law On January 8, 2002, the central purpose of the No Child Left Behind Act “is to ensure that all children have a fair, equal, and significant opportunity to obtain a high quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and State academic assessments.” Even though this federal law possesses such a noble purpose, the issues and ramifications associated with the implementation of the No Child Left Behind Act (2001), 20 U.S.C. 6301, *et seq.*, continue to grow. As of this writing, some states (*e.g.*, Maine and Utah) have in place or are in the process of enacting strong legislative resolutions challenging the federal government’s policy-making and regulatory authority under No Child Left Behind. Other states (*e.g.*, Connecticut) went to court challenging funding and other fiscal ramifications of NCLB. Other states (*e.g.*, Virginia) sought significant waivers from specific NCLB requirements that they say unreasonably punish them and hinder progress under their own, rigorous statewide standards. For recent cases on point, see *School District of the City of Pontiac, et al., v. Spellings*, 2005 U.S. Dist. LEXIS 29253 (E.D. Mich. 2005), and *Reading School District v. Department of Education*, 875 A.2d 1218 (Pa. Comwlth. Ct. 2005).

PART II

LAW AND LOCAL BOARDS OF EDUCATION

Chapter 3

LOCAL SCHOOL DISTRICTS AND BOARDS OF EDUCATION

§ 3.3 Meetings of School Boards.

[e] Rules of Procedure.

Add on page 51, to footnote 21:

For a case involving two families unsuccessfully challenging the traditional procedure of beginning meetings of a local public school board with an invocation (*i.e.*, a prayer), see *Dobrich v. Walls*, 380 F. Supp. 2d 366 (D. Del. 2005). Because it is firmly established in law that official meetings of local boards of education are public meetings, the authors encourage the reader to explore and look for guidance in case law in their states involving other local government bodies. See, for example, *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276 (4th Cir. 2005), *cert denied*, 2005 U. S. LEXIS 7349 (2005); and, *Wynne v. Town of Great Falls, South Carolina*, 376 F.3d 292 (4th Cir. 2004), *cert. denied*, 2005 U. S. LEXIS 5230 (2005).

Chapter 4

TORT LIABILITY

§ 4.1 Intentional Interference.

[a] Assault and Battery.

Add on page 60, to footnote 4:

In *Boone v. Reese*, 889 So. 2d 435 (La. App. 3 Cir. 2005), a teacher was taken into court because he made physical contact with a student in class who refused to do what the teacher had asked. Because the teacher's intent was viewed as an exercise of his authority to maintain discipline and control in the class, he had not committed battery.

§ 4.4 School Board Immunity.

Add on page 64, to footnote 19:

See also, *Frederick County School Board v. Hannah*, 590 S.E. 2d 567 (Va. 2004), where a local school board admitted negligence and thus a monetary award was made to a student injured in a school bus accident. This is an excellent case demonstrating the importance of state law limiting damages in a negligent tort matter. See also, *Walton v. Montgomery County Board of Education*, 371 F. Supp. 2d 1318 (M.D. Ala. 2005).

§ 4.6 School Employee Immunity.

Add on page 65, to footnote 20:

Whether or not a local school board's immunity defense extends to an employee is a matter of law and differs from state-to-state. For a case involving the extension of official immunity to a woodshop teacher in a public school, see *Anderson v. Anoka Hennepin I.S.D.* 11, 678 N.W. 2d 651 (Minn. 2004). The importance of foreseeability in assigning liability can be observed in New York case, *Smith v. Half Hallow Hills Central*

School District, 349 F. Supp. 2d 521 (E.D. N.Y. 2004). This case involves a former middle school student seeking damages for injuries suffered at the hands of another student while both were at lunch in the school cafeteria. The injured student claimed that he suffered harm when assaulted by a fellow student who tried to take some of his lunch money. The court held that school officials had not breached their duty to supervise. Under New York State law school officials must have had “prior knowledge” of an incident. In this case, even if school officials had been present, said the court, they could not have successfully intervened and stopped it from happening. See, more recently, *McQueen v. Beecher Community Schools*, 433 F. 3d 460 (6th Cir. 2006), where an elementary school student was fatally shot by another student.

[a] Supervision.

Add on page 66, to footnote 22:

Lindaman v. Vestal Central School District, 785 N.Y.S. 2d 549 (N.Y. Sup. Ct. App. Div. 3d Dept. 2004), emphasizes the importance of a teacher matching the appropriateness of an activity (in this case elementary school children), and the potential for injury to students who are engaged in the activity. For another example of a negligent tort suit involving a parent’s allegation that a teacher failed to adequately supervise her child and injury resulted, see *Peretin v. Codd Parish School Board*, 889 So. 2d 1190 (La. App. 2 Cir. 2004). See also, *Simmons v. Columbus County Board of Education*, 615 S.E. 2d 69 (N. C. App. 2005), involving a school bus driver whose failure to take appropriate action to stop a fight on the bus was the *proximate cause* of a student’s injury.

Add on page 66, to footnote 25:

For a recent case involving liability of a teacher for injury suffered by a student performing an experiment in a high school chemistry class, and issues related to class supervision as well as requiring students to wear protective eye wear, see *Hill v. Galesburg Comty. School Dist. 205*, 805 N.E. 2d 299 (Ill. App. 3rd Dist. 2004).

[d] Field Trips.

Add on page 72, to footnote 51

In *Tarlea v. Crabtree* (In re Estate of Tarlea), 687 N.W. 2d 333 (Mich. App. 2004), *appeal denied*, *Tarlea v. Crabtree* (In re Estate of Tarlea), 2005 Mich. LEXIS 447 (Mich. App. 2005), football coaches were sued following the death of a high school student during a three-day preseason football conditioning camp. In this case, the importance of parental consent and medical clearance being obtained prior to a student participating in a camp is emphasized.

Add on page 73, to footnote 53:

For an excellent example of a negligent tort case involving issues of alleged teacher liability for the death of a student on a school field trip, see, *Maracallo v. Board of Education*, 800 N.Y.S. 2d 23 (N.Y. App. Div. 1st Dept. 2005).

§ 4.9 Civil Rights Torts.

Add on page 83, to footnote 76:

For a recent Section 1983 case involving an African American high school teacher who alleged that her transfer from one teaching position to another amounted to a demotion and, as such, violated the Fourteenth Amendment's Equal Protection Clause, see *Bell v. S. Delta School District*, 325 F. Supp. 2d 728 (S.D. Miss. 2004).

Chapter 6

FINANCE

§ 6.5 Challenges to State Finance Schemes.

[f] School Finance Litigation in the 1990s to 2003.

Add on page 116, footnote 62:

Recently, the Supreme Court of Texas was once again called upon to decide whether or not the State of Texas' funding of its public schools violates the Texas Constitution. See *Neeley v. West Orange-Cove Consolidated I.S.D.*, 176 S.W. 2d 746 (Tex. 2005); *rehearing denied, Neeley v. West Orange-Cove Consolidated I.S.D.*, 2005 Tex. LEXIS 966 (Tex. 2005). For recent decisions involving other similar challenges, see *Brigham, et al., v. State of Vermont*, 889 A. 2d 715 (Vt. 2005); *Stroebe v. State*, 127 P. 2d 1051 (Mont. 2006); and *Hancock v. Commissioner of Education*, 822 N. E. 2d 1134 (Mass. 2005).

Add on page 117, to footnote 70:

In 2005-2006, however, while it is very difficult to establish a cause and effect nexus between funding levels and the improvement of student academic progress, the general public perceives money spent (input) and student academic progress (output) as being inextricably linked. Thus, the bottom line is that local boards of education, administrators, teachers, and other staff must be ready to demonstrate that: (1) all funds allocated (no matter what the revenue source) are wisely spent and accounted for, and (2) all children have progressed (especially in the academic subjects) and are educationally better for what the school system has provided. The judicial attitude that the adequacy of a child's education must be measured against the specific constitutional mandate and laws of a particular state, and not by federal constitutional standards, can be observed in *R.V. v. New York City Department of Education*, 321 F. Supp. 2d 538 (E.D. N.Y. 2004). For a recent school voucher case, where the Florida Supreme Court held that a State of Florida Opportunity Scholarship Program (OSP) violated the State of Florida's constitutional mandate to establish a

“uniform, efficient, safe, secure, and high quality system of free public school,” see *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

§ 6.6 School Fees.

Add on page 118, to footnote 72:

Mina ex rel. Anghel v. Board of Education, 809 N.E.2d 168 (Ill. App. 1st Dist. 6th Div. 2004), is a case where the court upheld a local school board’s charging tuition to parents for their daughter’s attendance at the public high school. Because the parents had moved out of the school district, their child was not a resident for purposes of school attendance.

Add on page 118, to footnote 74:

More recently, *Nagy v. Evansville-Vandenburg School Corp.*, 808 N.E. 2d 1221 (Ind. Ct. App. 1st Dist. 2004), involved a related issue, student fees. In this case a local school board charged students from kindergarten through the twelfth grade a twenty-dollar activity fee as a means to solve school system budget deficits without raising local taxes. Characterizing the fees as a form of “tuition,” the court held the financial plan violative of the Indiana Constitution.

§ 6.7 Summary.

Add on page 120 as a new paragraph after line 6:

As the case law in this Chapter demonstrates, the current era in public school finance can best be described as one in which the emphasis is on providing all children of school-age with access to a sound, basic, and adequate education. Within this context parents and other taxpayers hold school boards, administrators, teachers, and staff directly accountable for results. Thus, whether a local school board is *fiscally dependent* or *fiscally independent*, the legal ramifications and policy implications of school finance litigation are many.

PART III

LAW AND PROFESSIONAL STAFF

Chapter 7

EMPLOYMENT AND JOB SECURITY

§ 7.0 Types of School District Employees.

Add on page 123, to footnote 1:

For a court decision emphasizing the importance of and requirement that an employee be “properly licensed” for the position of public school principal, see *Hinckley v. School Board of I.S.D. No. 2167*, 678 N.W. 2d 485 (Minn. Ct. App. 2004).

§ 7.2 Legal Status of Professional Employees in Schools.

[a] The Legal Status of Superintendents.

Add on page 128, to footnote 19:

Baird v. Board of Education, 389 F.3d 685 (7th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 5515 (2005) involves a breach of contract action taken by a local superintendent of schools. See also, *Antonini v. W. Beaver Area School District*, 874 A. 2d 679 (Pa. Comwlth. 2005).

§ 7.4 Board Authority and Teacher Personnel.

Add on page 135, to footnote 55:

More recently, in *Settlegood v. Portland Public Schools*, 371 F. 3d 503 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 478 (2004), the United States Court of Appeals for the Ninth Circuit upheld a jury’s determination that a local school district had violated a special education teacher’s First Amendment rights. The teacher had openly expressed concerns regarding a lack of suitable equipment for children with educational disabilities, and was retaliated against for having done so. For a case in which a former high school principal claims that she was demoted in retaliation for “speaking out,” see *Cavazos v. Edgwood I.S.D.*, 2005 U.S. Dist. LEXIS 15800 (W.D. Tex. 2005).

Add on page 136, to footnote 58:

In an Illinois case, the Third Circuit affirmed the federal district and held that the teacher failed to show a nexus between her claim of retaliatory action and protected speech. *Lifton v. Board of Education*, 416 F. 3d 571 (7th Cir. 2005).

Add on page 136, to footnote 62:

For an example of a case where the court accepted evidence of “willful neglect” as grounds supporting the dismissal of a tenured elementary school teacher, see *Spurlock v. East Feliciana School Board*, 885 So. 2d 591 (La. App. 1st Cir. 2004).

Add on page 137, to footnote 74:

For a recent case involving the issue of whether school officials had “just cause” to terminate a teacher from her job, see *Walthart v. Board*, 694 N.W. 2d 740 (Iowa 2005). This case is interesting for several reasons. First, the root of the teacher’s problem did not involve inside school professional conduct, but rather her outside of school private life conduct. Second, it involved a party that she and her husband hosted for their own son (*i.e.*, a private party). Third, alcohol was served to the guests (many of whom were students and friends of her son). Fourth, the school board equated her outside school private life behavior to “unprofessional conduct.” Finally, the superintendent’s recommendation and the board’s decision were supported by hearsay and not direct evidence. The Supreme Court of Iowa upheld the termination. In the high court’s view, the hearsay evidence presented met the requirements of the preponderance of the evidence standard and therefore supported the board’s “just cause termination” of this teacher’s employment. The court stressed the importance of the credibility of witnesses and the consistency of their statements along with other factors present in the situation.

§ 7.5 Teachers' Tenure as Job Security.

[a] The Probationary Teacher.

Add on page 140, to footnote 93:

The importance of an employee possessing a legitimate expectation of continued employment as a precondition of affording the employee due process when faced with termination is emphasized in *Baird v. Board of Education*, 389 F.3d 685 (7th Cir. 2004), *cert. denied*, 126 S.Ct. 332 (2005). For another case involving due process and the non-renewal for a public school administrator, where the importance of establishing whether or not a property interest in continued employment might extend beyond the duration of a contract, see *Beischel v. Stone Bank School District*, 362 F.3d 430 (7th Cir. 2004), *rehearing denied*, 2004 U.S. App. LEXIS 8507 (7th Cir. Wisc. 2004).

[b] Tenure Guarantees.

Add on page 142, to footnote 105:

For a case in which a school principal was terminated for her “contentious leadership,” see *Howard v. Columbia Public School District*, 363 F.3d 797 (8th Cir. 2004), *cert. denied*, 2004 U.S. LEXIS 7128 (2004). While this case also involves issues of “free speech,” the court focuses on the principal’s lack of leadership and low teacher morale and the principal’s inability to show evidence to counter the board’s evidence that the principal would not be able to provide “positive leadership” if she remained in her position.

[c] Teacher Reassignment, Transfer, and Demotion.

Add on page 144, to footnote 123:

For an example of a case where a teacher unsuccessfully argued that her transfer to another teaching position was a *demotion* (she claimed, among other things, the new position required less skill than her former position

required), and thus constituted an act that forced her to resign (*i.e.*, a *constructive discharge*), see *Bell v. S. Delta School District*, 325 F. Supp. 2d 728 (S.D. Miss 2004).

Add on page 145, to footnote 124:

For two court decisions involving issues of working conditions and union representation for teacher grievances, see *Polk County Board of Education v. Polk County Education Association*, 139 S.W. 3rd 304 (Tenn. Ct. App. Knoxville 2004), where a teacher dress code policy is the issue producer; and *East Meadow Union Free School District v. East Meadow Teacher's Association*, 777 N.Y.S.2d 140 (N.Y. Sup. Ct. App. Div. 2nd Dept. 2004), where the number of teaching assignments (class periods) was the issue producer. See also, *Camden Board of Education v. Alexander*, 854 A. 2d 342 (N.J. 2004), where the employee grievance procedures and termination provisions of a union collective bargaining agreement and local school board non-renewal prerogatives are applied in a case involving school system custodians and mechanics.

[d] Procedural Safeguards.

Add on page 147, to footnote 137:

The importance of school officials establishing a rational basis for treating one employee different from how other employees in similar situations have been treated when making an adverse employment decision, is emphasized in *Montanye v. Wissachickon School District*, 2004 U.S. Dist. LEXIS 4496 (E.D. Pa. 2004). The same judicial attitude of fairness and equal treatment of all employees, including non-certified, support personnel, must be emphasized. In a recent employment case, involving the termination of a school bus driver, a New York appellate court expressed the traditional judicial attitude of judicial restraint and a reluctance to substitute the court's judgment for that of a local school board. *Bottari v. Saratoga Springs City School District*, 771 N.Y.S. 2d 261 (N.Y. Sup. Ct. App. Div. 3rd Dept. 2004). For additional case law involving employment issues raised by non-certified, support personnel in public school systems, see *State ex rel. Licklider v. School Employee Retirement System*, 819 N.E. 2d 289 (OH. 2004), involving a cook; *In re Moss*, 779 N.Y.S. 2d 846 (N.Y. Sup. Ct. App. Div. 3rd Dept. 2004),

involving a bus driver; *Benjamin v. Lafayette Parish School Board*, 886 So. 2d 1237 (La. App. 3 Cir. 2004), involving a custodian; *Norville v. Anne Arundel Board of Education*, 862 A.2d 477 (Md. App. 2004), *vacated and remanded*, 2005 Md. LEXIS 736 (2005) involving a media technician; and, *Van I.S.D. v. McCarthy*, 2005 Tex. LEXIS 425 (Tex. 2005), involving a school maintenance worker.

§ 7.6 Antidiscrimination in Employment: *Griggs v. Duke Power Company*.

Add on page 148, to footnote 141:

The importance in a Title 7 employment discrimination case of the plaintiff establishing a *causal link* (*i.e.*, proximate cause) between the alleged act(s) of discrimination, statements by the plaintiff's immediate superior, and the board's official decision to non-renew the employee's contract can be observed in *Reed v. Unified School District No. 233*, 299 F. Supp. 2d 1215 (D. Kan. 2004). For a recent case involving a claim of sex discrimination (under Title 7 and the Equal Protection Clause) taken into federal court by a non-certified employee (a high school night-shift lead custodian), see *Harvey v. Mark*, 352 F. Supp. 2d 285 (D. Conn. 2005).

§ 7.7 Teacher Evaluation and Job Security.

[a] Fairness in Evaluation.

Add on page 153, to footnote 163:

For a case in which the core issue in a non-tenured teacher's termination involved performance evaluation (especially the procedural aspects), see *Skilton v. Perry Local School District*, 807 N.E. 2d 919 (OH. 2004). See also, *Brown v. Regional School District 13*, 328 F. Supp. 2d 289 (D. Conn. 2004), in which a federal district emphasized the critical importance of school officials demonstrating a nexus between a supervisor's documentation of concerns regarding a teacher's work performance and the non-renewal of the teacher's contract. The dismissal of a teacher for her failure to improve her classroom performance, after repeated efforts of school officials to identify areas of weakness and counsel the teacher

regarding ways to improve her job performance is emphasized in *Shanklin v. Fitzgerald*, 397 F.3d 596 (8th Cir. 2005), *cert. denied*, 2005 U.S. LEXIS 9125 (2005). The importance of a discharged employee demonstrating that his work performance was satisfactory as part of establishing a prima facie case of discrimination, can be observed in *Sharif v. Buck*, 338 F. Supp. 2d 435 (W.D.N.Y. 2004), *affd.*, 2005 U.S. App. LEXIS (2nd Cir. N.Y. 2005).

§ 7.9 Privacy Issues: Drug Testing and AIDS.

[a] Drug Testing in Employment.

Add on page 163, to footnote 213:

In *Crager v. Board of Education*, 313 F. Supp. 2d 690 (E.D. Ky. 2004), a public school board's random drug testing policy covering all principals, assistant principals, teachers, teacher aides, substitute teachers, school secretaries, and bus drivers was challenged. Employees covered by the policy were subject to random drug tests regardless of whether or not suspicion of drug use existed. An elementary school teacher challenged the policy in a federal district court on Fourth Amendment grounds. The school board's position was that the drug-testing requirement was established to promote school safety and not to punish employees.

The United States Supreme Court's "special needs analysis," created in *Vernonia v. Acton*, 122 S. Ct. 2559 (1995) is utilized by the court to decide the issues. In the court's view, special needs arise in safety sensitive positions where an employee's job involves "the discharge of duties fraught with risks of injury to others..." The court stressed the need to: (1) utilize valid and reliable drug tests, (2) protect access to test results and the chain of custody of all test samples, and (3) maintain confidentiality.

§ 7.10 Legal Issues in the late 1990s and early 2000s.

[a] Sexual Harassment in the Workplace.

Add on page 165, to footnote 222:

For an example of a Title 7 "hostile work environment" case, see

Talamentes v. Berkeley County School District, 340 F. Supp. 2d 684

(D.S.C. 2004). In this case a female custodian unsuccessfully sought remedy for what she said was sexually harassing conduct causing her to suffer emotional distress.

Add on page 166, to footnote 226:

For more recent teacher-on-student sexual harassment decisions and potential liability of local school officials, see *Bostic v. Smyrna School District*, 418 F.3d 355 (3rd Cir. 2005); *Yates v. Mansfield Board of Education*, 808 N.E. 2d 861 (OH. 2004); *Jane Doe v. Green*, 298 F. Supp. 2d 1025 (D. Nev. 2004); *Roe ex rel. Preschooler II v. Nevada*, 332 F. Supp. 2d 1331 (D. Nev. 2004); and, *Doe v. D'Agostini*, 367 F. Supp. 2d 157 (D.Mass. 2005). The importance of school officials taking immediate and appropriate action can be observed in a decision from the United States court of Appeals for the Second Circuit. *Shaul v. Cherry Valley-Springfield School District*, 363 F.3d 177 (2d Cir. 2004). This case involved suspension with pay (pending an investigation) of a high school teacher who had been accused of inappropriate conduct and sexual harassment of female students. For a more recent case where a student sued her former teacher and the school board, claiming that the board had been “deliberately indifferent” to her teacher’s sexual contact with her, see *Craig v. Lima City School Board*, 384 F. Supp. 2d 1136 (N.D. Ohio 2005).

Add on page 166, to footnote 228:

For a recent decision from the United States Supreme Court involving an employee’s allegation of retaliation, and a private action under Title IX, see *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S. Ct. 1497 (2005). *Jackson* involved a teacher who also served as the girl’s high school basketball coach. He had complained to his supervisors about unequal treatment between his team and the high school boy’s basketball team. He cited, among other things, disparity in funding, access to facilities, and equipment problems. While his complaints were ignored, he began to receive negative work evaluations. Ultimately, he was dismissed from coaching. He brought suit in federal court claiming that he was relieved of his coaching position in retaliation for making complaints about disparities and discrimination in the girl’s athletic program. Failing

to prevail at both the trial and appellate levels, he took his case to the United States Supreme Court.

In a 5 to 4 decision, the United States Supreme Court held that the coach had a third party private right of action under Title IX of the Education Amendments of 1972. What is more, said the court, retaliation is a form of intentional sex discrimination covered under Title IX. In a dissenting opinion, Chief Justice Rehnquist, and Justices Scalia and Kennedy joined Justice Thomas. To the dissenters the majority was creating things in the law that Congress did not intend to be there. For a related (non-employment) case involving equal treatment of male and female athletic programs under Title IX, see *McCormick v. School District of Mamaroneck*, 370 F.3d 275 (2nd Cir. 2004). This is a recent decision where the court emphasizes that Title IX does not require identical treatment of male and female athletic programs. The court stressed that the overall effect of the differences in treatment (keeping in mind that these differences in treatment must be nondiscriminatory) is what matters. See also, *National Wrestling Coaches Association v. Department of Education*, 366 F.3d 930 (D.C. Cir. 2004), *cert. denied*, 125 S.Ct. 2537 (2005).

[b] The Americans With Disabilities Act.

Add on page 168, to footnote 233:

For a recent court decision involving the termination of a teacher and her subsequent legal action under the Americans With Disabilities Act (ADA), see *Lutz v. Glendale Union School District No. 205*, 403 F.3d 1061 (9th Cir. 2005).

PART IV

LAW AND STUDENTS

Chapter 9

ASSIGNMENT AND PLACEMENT

§ 9.1 Compulsory Attendance.

Add on page 201, to footnote 7:

Some states (*e.g.*, Ohio) are legislating new and more restrictive standards of accountability for charter schools. Focusing on student academic performance, these new standards specifically apply to charter schools and subject charter schools to a strict review process. For a recent case from Wisconsin in which the court had to decide the legal status of a charter school, see *Racine Charter One v. Racine School District*, 424 F.3d 677 (7th cir. 2005). See also, *School District of City of York v. Lincoln Charter School*, 889 A.2d 1286 (Pa. Comwlth. 2006), where a local school revoked the charter of a local charter school; and *Montour School District v. Propel Charter School-Montour*, 889 A.2d 682 (Pa. Comwlth. 2006) for a case where a charter is denied.

[a] *Yoder* and Exceptions to Compulsory Attendance.

Add on page 202, to footnote 13:

The Court of Appeals for the Sixth Circuit made it clear in a recent employment decision that parents have a “constitutionally protected liberty interest” in raising and directing the education of their children. This case involved a substitute teacher in a public school system who claimed that he was denied a full-time teaching position solely because he had enrolled his child in a Roman Catholic school. In the court’s view, public employment cannot be conditioned on a waiver of that right. *Barrett v. Steubenville City Schools*, 388 F.3d 967 (6th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 5530 (2005).

Add on page 203, to footnote 17:

More recently cases involving the prerogatives of parents to participate in their child’s education and to gain access to information concerning their child’s educational progress in school have made their way into court.

See, for example, *Crowley v. McKinney*, 400 F.3d 965 (7th Cir. 2005), *cert. denied*, 126 S.Ct. 750 (2005), where the court held that while a non-custodial divorced parent does not have a federal constitutional right to participate in his child's education (in this case the father wanted access to his child's educational record and other information), and that school officials have the legal prerogative to limit parental presence in schools, a non-custodial divorced parent may have a right to access his child's educational record and other information under appropriate state law.

A good example can be found in the Commonwealth of Virginia where the Code of Virginia (§§ 22.1-4.3) states, "unless a court order has been issued to the contrary, the noncustodial parent of a student enrolled in a public school or day care center shall not be denied the opportunity to participate in any of the student's school or day care activities ... solely on the basis of such noncustodial status."

§ 9.3 Admission to Public School.

Add on page 209, to footnote 42:

See also, *Longwood Central School District v. Springs Union Free School District*, 774 N.Y.S. 2d 857 (N.Y. App. 2004) where the court determined that a family's "intent to remain permanently" in a location is paramount and, as such, the parents' temporary residence in a "homeless shelter" does not meet the definition of "residence" in a public school district; and, *Reid v. Kenowa Hills Public Schools*, 680 N.W. 2d 62 (Mich. App. 2004), where the court upheld a Michigan High School Athletic Association rule that required students to be enrolled in a public school within a school district for at least twenty hours a week to be eligible to participate in that school district's interscholastic athletic programs. Parents of home-schooled children had challenged the rule.

Add on page 211, to footnote 44:

In the past two years charter schools have been in court. For example, a Pennsylvania local school board's decision to deny a charter school application to operate within the school district was challenged in state court. The local board denied the application because the charter school said that its purpose would be to serve "mentally gifted" students.

Considering the school to be engaging in an impermissible discrimination based on intellectual ability, the local school system also argued that it already provided educational opportunities for gifted students. The court disagreed with the school system's stance and held that the charter school, simply because it focused on intellectual ability of students, would not be engaged in unlawful discrimination. *Central Dauphin School District v. Founding Coalition of the Infinity Charter School*, 847 A. 2d 195 (Pa. Comwlth. 2004), *appeal denied*, 2004 Pa. LEXIS 2407 (2004). See also, *State of Missouri v. Williamson*, 141 S.W. 3d 418 (Mo. App. W.D. 2004), involving a petition filed by a charter school to gain reversal of a local school district's decision denying renewal of the charter. See also, *School District City of York v. Lincoln Charter School*, 889 A.2d 1286 (Pa. Comwlth. 2006); and *Montour School District v. Propel Charter School-Montour*, 889 A.2d 682 (Pa. Comwlth. 2006).

§ 9.4 Bases of Pupil Assignment to Classes and Schools.

Add on page 212, to footnote 54:

For cases involving challenges to a formerly segregated public school system's current student assignment plan and maintaining an integrated school system, see *McFarland v. Jefferson County Public School System*, 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd.*, 2005 U.S. App. LEXIS (2005); and *Anderson v. City of Boston*, 375 F.3d 71 (1st Cir. 2004), where the court determined that the Boston Public School System's student assignment plan did not use "racial classification" in making student assignments to schools. See more recently, *Parents Involved in Community Schools v. Seattle School District No. 1*, 426 F.3d 1162 (9th Cir. 2005).

[a] Race as a Factor.

Add on page 217, to footnote 77:

The importance of determining whether or not current racial imbalances existing in a public school system that once operated segregated schools are traceable to prior de jure segregation, or whether or not they are the direct result of shifting demographics, housing patterns, and other such factors can be found in *Thomas County Branch of the NAACP v. City of*

Thomas School District, 299 F. Supp. 2d 1340 (M.D. Ga. 2004), *affirmed* in part, *reversed* in part, *vacated* in part, *remanded*, 2005 U.S. App. LEXIS 20635 (11th Cir. 2005). See also, *Moses v. Washington Parish School Board*, 379 F.3d 319 (5th Cir. 2004), and *U.S. v. Board of Education of the City of Chicago*, 2004 U.S. Dist. LEXIS 25086 (N.D. Ill. 2004).

§ 9.5 State Testing and Student Competencies.

Add on page 233, to footnote 155:

More recently, in *Student No. 9 v. Board of Education*, 802 N.E. 2d 105 (Mass. 2004), a group of public school students, some of whom were students with disabilities, challenged the Massachusetts Comprehensive Assessment System (MCAS) requirement that they pass certain statewide standardized examinations as a precondition of graduation.

In their case, they had failed the tenth grade English language arts and mathematics sections, and thus were kept from taking the other sections of the test as seniors. The state court made it clear that education officials had the discretionary authority to require that all students demonstrate competence in English language arts and mathematics before being tested on science, history, and other academic areas of study. See also, *Center for Law and Education v. U.S.D.O.E.*, 315 F. Supp. 2d 15 (D.D.C. 2004), *aff'd.*, 2005 U.S. App. LEXIS (2005); where advocacy groups and parents unsuccessfully challenged the composition of the committee that proposed regulations for implementation of the No Child Left Behind Act (2001). In the court's opinion, No Child Left Behind does not confer an enforceable right on parents to insist on a certain committee membership composition.

Chapter 10

CONTROL AND PUNISHMENT

§ 10.1 Corporal Punishment.

[b] Legal Guidelines.

[7] It Involves an Appropriate Instrument.

Add on page 239, to footnote 19:

For a corporal punishment case involving the “paddling of a student,” and parents claiming in court that their “paddled” son suffered emotional trauma because of this form of discipline, see *Setliff v. Rapides Parish School Board*, 888 So. 2d 1156 (La. App. 3 Cir. 2004), *writ denied*, 896 So. 2d 1011 (La. 2005).

§ 10.3 Exclusion from School.

[b] Procedural Due Process.

Add on page 246, to footnote 44:

For an excellent example of a recent court decision in which the court stresses the need to link the severity of the punishment to the seriousness of a student’s disciplinary offense, see *Rossi v. W. Haven Board of Education*, 359 F. Supp. 2d 178 (D. Conn. 2005), *motion denied*, 2005 U.S. Dist. LEXIS 6086 (D. Conn. 2005). In this case the court stresses the need to establish the rationality for differential treatment between students.

[1] Notice of Charges.

Add on page 245, to footnote 42;

Recently, a federal appellate court stressed the importance of the *vagueness* standard in judging the validity of student disciplining policies and rules. See *Collins v. Prince William County School Board*, 2005 U.S. App. LEXIS 14412 (4th Cir. 2005).

Add on page 246, to footnote 45:

In a Virginia case a student (involved in a petty larceny situation) had made statements to an assistant principal in the presence of a school resource officer (SRO). The student argued that he should have received a *Miranda* warning prior to answering the questions. The Virginia Court of Appeals disagreed. In the court's opinion the assistant principal was not acting in a law enforcement capacity. The SRO was merely present during the questioning. The SRO did not question the student, and he did not instruct the assistant principal during the questioning of the student. *J.D. v. Commonwealth*, 591 S.E. 2d 721 (Va. App. 2004).

§ 10.4 Search and Seizure.

Add on page 250, to footnote 55

For a court decision where the court relied on the two-pronged *T.L.O.*-standard to analyze and uphold the strip-search of a female student, see *Phaneuf v. Cipriano*, 330 F. Supp. 2d 74 (D. Conn. 2004). For a more recent case in which an assistant principal and a security guard engaged in a "strip search" of students, see *Lamb v. Holmes*, 162 S.W. 3d 902 (Ky. 2005).

[d] Administrative v. Police Searches.

Add on page 255, to footnote 71:

For a case involving the expulsion of a student following a search of the student's book bag, and the subsequent discovery of notebooks containing references to death, drugs, gang signals, a fake I.D., and a box cutter blade, see *Porter v. Ascension Parish School Board*, 301 F. Supp. 2d 576 (M.D. La. 2004), *corrected* 2004 U.S. Dist. LEXIS 1175 (M.D. La. 2004). The search was upheld based on the facts. For a more recent strip search case involving searches of student backpacks, and student clothing and underwear, see *Beard v. Whitmore Lake School District*, 402 F.3d 598 (6th Cir. 2005). A student reporting to her teacher the possible theft of her prom money prompted the searches.

§ 10.6 Substance Abuse.

Add on page 260, to footnote 82:

For an example of a post-*Earls* court decision upholding suspicion less, random searches of student property, see *Doe v. Little Rock School District*, 380 F.3d 349 (8th Cir. 2004). The court was impressed by evidence that the searches were intended not to be solely punitive, but rather to detect and prevent illegal student drug use. Moreover, the searches were reasonable at their inception, minimally intrusive, and students received adequate notice . See also, *Dominic J. v. Wyoming Valley W. High School*, 362 F. Supp. 2d 560 (M.D. Pa. 2005).

§ 10.7 School Violence.

Add on page 262, to footnote 91:

As a federal court recently opined, simply because a public school's environment might be classified as dangerous, it does not necessarily make it foreseeable that one student might be inadvertently assaulted by another student. *Mohammed ex rel. Mohammed v. School District of Philadelphia*, 355 F. Supp. 2d 779 (E.D. Pa. 2005). See, more recently, *McQueen v. Beecher Community Schools*, 433 F. 3d 460 (6th Cir. 2006), where an elementary school student was fatally shot by another student. The teacher had left students unattended in a classroom.

Add on page 262, to footnote 92:

Application of the *special relationship doctrine* was critical in *Doe v. Detroit Board of Education*, 310 F. Supp. 2d 871 (E.D. Mich. 2004). A special education student was left unattended in a classroom. Subsequently, fellow students committed sexual acts on the student. In the court's analysis, the fact that the teacher was not physically present in the classroom to supervise the student was not enough to establish a special relationship. Moreover, in this situation the teacher could not have reasonably forecast what took place after she left the classroom.

§ 10.8 Peer Sexual Harassment.

Add on page 263, to footnote 95:

A different type of student-on-student harassment case is *Yap v. Oceanside Union Free School District*, 303 F. Supp. 2d 284 (E.D. N.Y. 2004). In this Section 1983 suit, parents of an elementary school student claimed that acts of verbal and physical abuse of their son by other students were solely because of his Chinese ancestry. As a result of the abusive episodes their son was denied both due process and equal protection under the Fourteenth Amendment. The parents were unsuccessful in their lawsuit because the court could not find evidence that school officials were “deliberately indifferent” to the name-calling, physical abuse, and racial harassment. For an excellent case involving a student bullying a fellow seventh grade student, and the importance of an administrative process being implemented immediately following the mother’s reporting of the incident involving the bullied student, see *Albers v. Breen*, 806 N.E. 2d 667 (Ill. App. Ct. 2004), *appeal denied*, 2004 Ill. LEXIS 1240 (Ill. 2004). More recently, in *L.W. v. Tomms River Regional Schools Board of Education*, 886 A.2d 1090 (N.J. Super. App. Div. 2005), a student claimed harassment by other students based on sexual orientation. See also, *Shuman v. Penn Manor School District*, 422 F.3d 141 (3d Cir. 2005) for a case involving student-on-student sexual violence. The reader is reminded that the same elements of analysis will be used in a claim of student harassment based on educational disability, especially where the student victim has an I.E.P.

Add on page 264, to footnote 100:

See also, *Harry A. v. Duncan*, 351 F. Supp. 2d 1060 (D. Mont. 2005), involving a group of high school female students and their parents seeking damages against a local school district and school officials. Without their knowledge, the female students had been videotaped in the girl’s locker room and bathroom by a group of male students. Plaintiffs were unsuccessful in their claim that school officials showed deliberate indifference to the videotaping scheme. In the court’s opinion, teachers and school officials cannot be held liable under Section 1983 absent a showing that they: (1) knew or were willfully blind to what was going on,

and (2) had actual knowledge of what was going on but they failed to adequately investigate the situation.

Chapter 11

EXPRESSION

§ 11.2 Student Appearance and Expression.

[b] Student Appearance Post-*Tinker*.

Add on page 271, to footnote 25:

For a recent decision in which an appellate court upheld a school system's student dress code, see *Blau v. Fort Thomas Public School District*, 401 F.3d 381 (6th Cir. 2005). In this case the court makes the point that a public school system's prerogative to enact and implement a student dress code furthers a substantial government interest (in this case expressed as improving the educational environment). Moreover, the court emphasizes that the First Amendment does not protect a student's right to dress as she/he wants, simply because the student thinks the attire "looks nice." *Jacobs v. Clark County School District*, 373 F.Supp. 2d 1162 (D. Nev. 2005), is an excellent case where a mandatory student dress code and student uniforms are involved.

Add on page 272, to footnote 32:

For a case involving student expression (an objectionable T-shirt) and a school dress code see, *Guiles ex rel. Lucas v. Marineau*, 349 F. Supp. 2d 871 (D. Vt. 2004). See also, *Brandt ex rel. Brandt v. Board of Education*, 326 F. Supp. 2d 916 (N.D. Ill. 2004), *summary judgment granted*, 2006 U.S. Dist. LEXIS 9820 (N.D. Ill. 2006), where students in a program for gifted students wanted to have an official class T-shirt made. Subsequently, determining that the caricature on the T-shirts violated the school system's dress code, the school principal set restrictions on their wearing the T-shirt while at school. In the court's opinion, the principal's actions were "reasonably related to legitimate pedagogical concerns." For another student discipline case involving a T-shirt containing an objectionable message, see *Harper ex rel. Harper v. Poway Unified School District*, 345 F. Supp. 2d 1096 (S.D. Cal. 2004). In this case a high school student unsuccessfully argued that he wore the T-shirt to express

his religiously motivated objection to homosexuality. The school system had a policy (expressed in the student handbook) that prohibited violence or hateful behavior including derogatory messages directed toward sexual identity. In the court's opinion the policy was not vague as applied to the T-shirt in question. This past year, *Griggs ex rel. Griggs v. Fort Wayne School Board*, 359 F. Supp. 2d 731 (N.D. Ind. 2005) involved the disciplining of a high school student who wore a T-shirt (to school) supporting the United States Marine Corps. The T-shirt included, among other things, a picture of an M-16 rifle. The basis of the disciplinary action was a local school board policy prohibiting the wearing of apparel bearing "symbols of violence." Ruling in the student's favor the court was convinced that as applied to this particular T-shirt (1) the policy did not serve a legitimate pedagogical concern, (2) there had been no incidents of disruption tied directly to this student's T-shirt, and (3) no student at the school had complained about this particular T-shirt. See also, *Bragg v. Swanson*, 371 F. Supp. 2d 814 (S.D. W.Va. 2005), involving students wearing Confederate flag T-shirts and belt buckles. In *Nixon v. Northern Local School District Board of Education*, 383 F. Supp. 2d 965 (S.D. Ohio 2005), the court stressed that school officials could not prohibit a student from wearing his T-shirt to school unless it could be demonstrated that his T-shirt substantially disrupts or interferes with the school's activities or that an imminent and substantial disruption is "likely to occur."

§ 11.3 Student Publications as Expression.

[a] School-Sponsored Publications.

Add on page 275, to footnote 44:

In a more recent case involving the distribution of a questionnaire to high school students asking about their personal lives (*e.g.*, relationships with parents, alcohol and drug use, sexual activities), the court emphasized, among other things, the importance of giving parents adequate prior notice of the: (1) survey's distribution, (2) nature of the questions asked, (3) opportunity to review the entire questionnaire, and (4) "opt-out" of their children from the survey activity. In this case the court emphasized that parents have a "due process right" regarding the care and control of their children. *C.N. ex rel. J.N. v. Ridgewood Board of Education*, 319 F. Supp. 2d 483 (D.N.J. 2004), *aff'd.*, 2005 U.S. App. LEXIS 26164 (3rd Cir. 2005).

§ 11.5 Flag Salute.

Insert on page 289, in footnote 139:

In 2004, the United States Supreme Court held that the parent (Newdow) lacked standing to sue on behalf of his daughter. In a narrow ruling the high court left intact the words “one nation under God” in the Pledge of Allegiance. See *Elk Grove v. Newdow*, 542 U.S. 1 (2004), *rehearing denied*, 542 U.S. 961 (2004). In a recent post-*Newdow* decision, *Myers v. Loudoun County*, 251 F.3d 1262 (4th Cir. 2005), *aff’d.*, 2005 U.S. App. LEXIS 16722 (4th Cir. 2005), the United States Court of Appeals for the Fourth Circuit ruled that the phrase “under God” in the Pledge of Allegiance, when said by public school students as a part of a state law requirement, does not violate the First Amendment to the United States Constitution. Under Virginia law, public schools must include the recitation of the Pledge of Allegiance as a part of the daily exercises. Students who do not want to participate are allowed to quietly opt-out of the recitation. A parent had argued that his children’s free exercise rights were being encroached upon by the requirement. Differentiating between a patriotic exercise and one that is religious in nature, the panel affirmed a federal district court decision. Simply because the words “under God” are included in the recitation does not make the Pledge a religious exercise.

§ 11.6 The Right to Receive Expression.

[c] *Pico*.

Add on page 297, to footnote 207:

For a case involving a challenge to a local school board’s removal of the Harry Potter series from general circulation in the school library, and requiring parental permission before a student could check out the books, see *Counts v. Cedarville School District*, 295 F. Supp. 2d 996 (W.D. Ark. 2003).

§ 11.7 Freedom of Expression in the 1990s.

Add on page 299, to footnote 219:

For a case in which *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988) and the *reasonable pedagogical concerns* test is applied to an exercise of school-sponsored expression that appeared in a nonpublic forum, and where the issue of viewpoint discrimination also is raised, see *Bannon v. Palm Beach County School District*, 387 F.3d 1208 (11th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 5505 (2005). More recently, a federal judge held that public school officials did not violate the constitutional rights of a classroom teacher and did not engage in viewpoint discrimination when they removed posters with religious content from the teacher's classroom bulletin boards. See, *Lee v. York County School Division*, 2006 U.S. Dist. LEXIS 7114 (E.D. Va. 2006).

§ 11.8 Assaultive Speech.

Add on page 300, to footnote 224:

For an excellent example of a case involving threatening language, where a student was expelled from school after he said that he would “get his dad’s gun” and “bring it to school, start with the seventh grade, and work his way up,” see *Sherrell v. North Community School Corp.*, 801 N.E. 2d 693 (Ind. App. 2004). See *Smith v. Barber*, 316 F. Supp. 2d 992 (D. Kan. 2004), *motion denied*, 2005 U.S. Dist. LEXIS 18971 (D. Kan. 2005), where five high school students were arrested for plotting an armed attack and threatening to kill administrators, teachers, and students. For a court decision highlighting the discretionary authority of school principals to implement policies intended to eliminate “threatening behavior” of students, within a “zero tolerance” context, see *S.G. v. Board of Education*, 333 F.3d 417 (3rd Cir. 2003), *cert. denied*, 124 S.Ct. 1040 (2004). A New Jersey case, *S.G.* involved a kindergarten student and an issue of free speech. In a matter that received national media attention, a five-year-old, male student was suspended from school because he was involved in a children’s game of “cops and robbers” on school grounds during recess time. The game involved pretending to have guns and simulating shooting other students. A teacher took the student and some of his peers to the principal’s office where they were subsequently

suspended from school for three days. The principal's decision was backed by the school superintendent. It was the school system's policy to eliminate student-on-student *threats*, prevent the possession of weapons, and to curb violence on school grounds. Such activities were not tolerated. The United States Court of Appeals for the Third Circuit rejected the First Amendment free speech claim taken on behalf of the student. In the court's view, in the context of a public school, the free speech rights of elementary school students are greatly diminished. Even though the students in this case were just playing, and their game actually did not disrupt the school, school officials possess the legal prerogative and discretionary authority to decide what is or is not acceptable student expression. See also, *D.F. v. Board of Education of Syosset Central School District*, 386 F. Supp. 2d 119 (E.D. N.Y. 2005), involving the discipline of a sixth-grade student for what he had written in his journal. The journal was kept by students as a part of a class assignment. School officials said that his work contained threatening and assaultive language. The student brought suit under Section 1983, claiming violation of his First, Fifth, and Fourteenth Amendments. See also, *L.W. v. Tomms River Regional Schools*, 886 A.2d 1090 (N.J. Super. App. Div. 2005).

Chapter 12

RELIGION

§ 12.1 Finance of Religious Activities.

[f] Special Services.

Add on page 313, to footnote 54:

In February 2004, the United States Supreme Court handed down *Locke v. Davey*, 540 U.S. 712, 124 S. Ct. 1307 (2004). At issue in *Locke* was a State of Washington statute (the Promise Scholarship Program) that precluded post-secondary school students majoring in “devotional theology” from receiving state scholarship money. The scholarship money went to qualified students. To be qualified a student had to be a graduate of a Washington public or private school, meet certain academic prerequisites, and satisfy specific family income requirements. The scholarship money was solely available to students engaging in secular studies. The State’s intent was to avoid potential First Amendment Establishment Clause problems.

Davey was a student at a private Christian college. He decided to major both in pastoral ministries and in business management/administration. He applied for and received a Promise Scholarship but was told the he could not use the money toward his pastoral ministries major because it met the definition of “devotional theology.” Davey filed suit in federal district court claiming First Amendment and Fourteenth Amendment violations. Unsuccessful in the district court he appealed his case to the Ninth Circuit. 299 F.3d 748 (9th Cir. 2002), *cert. granted*, 538 U.S. 1031 (2003).

Subsequently, by a vote of 7 to 2, with Chief Justice Rehnquist writing for the majority, the United States Supreme Court did not consider the devotional theology prohibition as placing an undue burden on religion or on the private choice of individual students. The statute, said Chief Justice Rehnquist, “does not require that a student choose between his religious beliefs and receiving a government benefit.”

In the view of the dissenters (Justices Scalia and Thomas), the Washington statute places a burden on students solely because they wish to follow a religious calling. In their view, the State of Washington is engaging in a form of “religious discrimination.”

§ 12.2 Activities Involving Religion.

[a] Prayer and Bible Reading.

Add on page 316, to footnote 64:

In *Rusk v. Crestview Local School District*, 379 F.3d 418 (6th Cir. 2004), the parent of two elementary school children challenged a practice of allowing the distribution of flyers (some of which described community religious activities) in student school mailboxes. A federal district court ruled that the school system’s practice violated the First Amendment’s Establishment Clause. On appeal, however, the United States Court of Appeals for the Sixth Circuit applied the “endorsement test” and stated that the impressionability and misperceptions of school children are not the sole determiners of whether or not establishment of religion is present in a public school. The reasonable observer in this case is the parent and parents in this school knew, because of past history (a policy allowed for the distribution of information from a variety of community nonprofit organizations) that the intent of the flyer distribution was not to endorse religion.

§ 12.3 Study of Religion.

[a] At School.

Add on page 322, to footnote 93:

In *McCreary v. ACLU of Kentucky*, 125 S. Ct. 2722 (2005), *cert. denied sub nom. Horton County v. ACLU*, 125 S. Ct. 2988 (2005), the United States Supreme Court, by a vote of 5 to 4, held that displays in two Kentucky courthouses were unconstitutional. The controversial displays,

“The Foundations of American Law and Government,” included a copy of the Ten Commandments and references to God. County officials said that the displays were meant to show that The Ten Commandments form the foundation of Kentucky’s present legal code. In an opinion written by Justice Souter, the high court noted the past history of the displays and held that even though the current displays also included copies of eight famous historical documents (*e.g.*, Magna Carta, Mayflower Compact, the Bill of Rights), the State’s intent, was religious in nature. Failing to see a clear integration of the Ten Commandments and other documents, searching for intent, and applying *Lemon v. Kurtzman* (1971), the high court majority held that posting the displays in county courthouses violated the Establishment Clause of the First Amendment.

By contrast, however, in a second decision (out of the Fifth Circuit) involving the Ten Commandments, the high court did not find unconstitutional, a granite monument existing on the grounds of the capitol of the State of Texas. In *Van Orden v. Perry*, 125 S. Ct. 2854 (2005), the court’s analysis focused on the monument’s *context* (one of several historical markers and other monuments on the capitol grounds), *purpose* (to deter delinquency), and *history* (a gift in 1961, donated by a nationally recognized civic service group, unchallenged for forty-years). Characterizing it as a “passive monument,” the court opined that simply because the monument contained something of religious significance did not create a violation of the Establishment Clause of the First Amendment. See also, *Skros v. New York City Department of Education*, 2006 U.S. App. LEXIS 2579 (2d. Cir. 2006).

In our opinion, *McCreary v. ACLU of Kentucky* and *Van Orden v. Perry*, above, do not bring clarity to issues involving religious displays on public school grounds. At the time of this writing, the consensus among experts in school law is that court decisions will be made on a case-by-case basis, with the results determined by the specific facts and evidence presented in each situation.

§ 12.4 Religion in the General Curriculum.

Add on page 325, to footnote 106:

See, more recently, *Morrison v. Board of Education of Boyd County*, 2006 U.S. Dist. LEXIS 6373 (E.D. Ky. 2006), where parents objected on religious grounds to a required “diversity” program.

Add on page 325, to footnote 109:

See also, *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707 (M.D. Pa. 2005), where Darwin’s theory of evolution and the concept of intelligent design are at the heart of a First Amendment Establishment Clause issue; and, *Selman v. Cobb County School District*, 390 F. Supp. 2d 1286 (N.D. Ga. 2005).

§ 12.5 Religion and Extracurricular Activities.

Add on page 326, to footnote 113:

Caudillo v. Lubbock I.S.D., 311 F. Supp. 2d 550 (N.D. Tex. 2004), demonstrates the application of the Equal Access Act (EAA) to other types of student clubs in secondary schools. In this case a gay-straight student association (GAP) was denied permission to be recognized as a student group with permission to meet on school grounds, post and distribute flyers, and have access to the school’s public address system.

§ 12.6 Accommodating the Needs of Religious Sects.

Add on page 327, to footnote 115:

Wigg v. Sioux Falls School District 49-5, 382 F.3d 807 (8th Cir. 2004), *rehearing denied*, 2004 U.S. App. LEXIS 20976 (8th Cir. 2004), is an interesting case. In this case a community-based religious club met after school hours, on school grounds. Sponsored by the Child Evangelism Fellowship (A Christian group), the Good News Club had a stated purpose to “evangelize” young people. An elementary school teacher wanted to attend the meetings, but a local school system policy prohibited personnel from participating in religious activities on school grounds or at school-

sponsored functions. To school officials the teacher's attendance at the club meetings would cause Establishment Clause problems. In the teacher's view the policy infringed on her First Amendment free speech and association rights.

Applying a limited public (open) forum analysis, and citing *Pickering v. Board of Education*, 391 U.S. 563 (1968), *Board of Education v. Mergens*, 496 U.S. 226 (1990), and other case law on point, the court ruled in favor of the teacher. Since her attendance was after school hours at a non-school sponsored activity, and was private speech, it would not give the reasonable observer the impression that her involvement (simply because it happened on school grounds) constituted a state endorsement of religion. For a recent case involving issues of access to school programs and facilities and outside religious groups, see *Child Evangelism Fellowship v. Montgomery County Public Schools*, 368 F. Supp. 2d 416 (D. Md. 2005). See also, *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District*, 386 F.3d 514 (3rd Cir. 2004), in which the court also must consider allegations of "viewpoint discrimination;" and, *Bronx Household of Faith v. Board of Education of the City of New York*, 400 F. Supp. 2d 581 (S.D. N.Y. 2005).

Chapter 13

SPECIAL EDUCATION

§ 13.3 Emergence of Statutes at the Federal Level.

Add on page 335, to footnote 28:

Passed by the United States Congress on November 19, 2004, and signed into law by President George W. Bush on December 3, 2004, the Individuals With Disabilities Education Improvement Act (IDEIA), a reauthorization of and amendments to the Individuals With Disabilities Education Act (IDEA), 20 U.S.C.A. 1400 *et seq.*, became effective on July 1, 2005. As of this writing, new federal regulations to implement the provisions of IDEIA are being processed. Referred to by its short title IDEA 2004, some of several new provisions of the law are: (1) improving the educational results of special education students, (2) aligning accountability systems (state and local) for student results to federal No Child Left Behind Act, 20 U.S.C. 6301, *et seq.*, mandates, (3) reducing the amount of paperwork associated with special education, (4) supporting early intervention programs, (5) strengthening the role and involvements of parents, (6) requiring the use of scientifically, research-based instructional strategies, (7) improving the academic performance of students with educational disabilities, (8) requiring that special education teachers be “highly qualified,” (9) maximizing the use of technology to improve instruction, and (10) in addition to allowing for the removal of special education students for up to 45-school days for drug and weapons offenses, allowing for the same removal of a student who inflicts serious bodily injury (defined as a substantial risk of death; extreme bodily pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty) upon another person while at school, on school premises, or at a school function.

§ 13.4 Recent Litigation Involving Special Education.

Add on page 337, to footnote 33:

See also, *Armstrong v. Vance*, 328 F. Supp. 2d 50 (D.D.C. 2004), for issues of “prevailing party” and parent eligibility for attorney fees. For

more recent cases involving issues of attorney fees and prevailing parties, see *Troy School District v. Boutsikaris*, 317 F. Supp. 2d 788 (E.D. Mich. 2004); *Antonio ex rel. Mother v. Boston Public School District*, 314 F. Supp. 2d 95 (D.Mass. 2004); *Mrs. M. v. Tri-Valley Central School District*, 363 F. Supp. 2d 566 (S.D. N.Y. 2005); and, *Arlington Central School District v. Murphy*, 402 F.3d 332 (2nd Cir. 2005), *cert. granted*, 126 S. Ct. 978 (2006), where the court determined that prevailing parties under IDEA could recover costs associated with reimbursement of an expert working on their behalf. For a case in which parents of an elementary school student requested reimbursement for expenses for related services provided to their child during summer ESY, as well as attorney fees and costs, see *J.H. v. Henrico County School Board*, 395 F. 3d 185 (4th Cir. 2005). See also, *Lopez v. District of Columbia Public Schools*, 383 F. Supp. 2d 18 (D.D.C. 2005), where parents request attorney fees plus costs for clerical fees.

[a] Right to an Appropriate Educational Program.

Add on page 339, to footnote 40:

The United States Court of Appeals for the First Circuit, paraphrased the *Rowley* standard when it emphasized that under the *IDEA* an *IEP* must be reasonably calculated to provide “an appropriate education.” *T.B. v. Warwick School Committee*, 361 F.3d 80 (1st Cir. 2004). In special education cases the consistent judicial attitude has been and remains in 2006, one of requiring that children covered by the Individuals With Disabilities Education Act (reauthorized as the Individuals With Disabilities Education Improvement Act, 2004) be provided with “meaningful educational benefit” from the program and services provided. As the United States Circuit Court of Appeals for the Sixth Circuit opined, maximizing a child’s potential is not the intent of the law; rather, determining whether or not a child is receiving educational benefit is the standard to apply. More specifically, “meaningful educational benefit” is dependent on the potential of the particular child, regardless of the cost of the program, *Deal v. Hamilton Board of Education*, 392 F.3d 840 (6th Cir. 2004), *cert. denied*, 126 S.Ct. 422 (2005). See also, *D.F. ex rel. N.F. v. Ramapo Central School District*, 348 F. Supp. 2d 92 (S.D. N.Y. 2004), *vacated and remanded*, 2005 U.S. App. LEXIS 25260 (2nd Cir. 2005), and *R.L. v. Plainville Board of Education*, 363 F. Supp. 2d 222 (D. Conn.

2005). The necessity to show that a student's disability is covered under federal special education law and that the disability "adversely affects a student's educational performance" in order to claim the protections and benefits of the law, can be observed in *S.L. v. Prince William County School Board*, 100 Fed. Appx. 908 (4th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 793 (2005). For a case where the dispute centers on question of "eligibility" under IDEA, see *D.L. v. The Unified School District No. 497*, 392 F. 3d 1223 (10th Cir. 2004), *cert. denied*, *D.L. v. Unified School District No. 497*, 2005 U.S. LEXIS 4211 (2005). See also, *M.H. v. Nassau County School Board*, 918 So. 2d 316 (Fla. App. 1 Dist. 2005), where the court held that a local school district had failed to give a student, covered by IDEA, a comprehensive evaluation to determine his educational needs.

Add on page 340, to footnote 40:

In *Ms. S. v. Scarborough School Committee*, 366 F. Supp. 2d 98 (D. Me. 2005), a parent claimed that her son was denied related services and accommodation necessary to provide him with the "least restrictive environment." The service and accommodation needed involved transportation. The court held for the school system.

[c] Tuition Reimbursement and Transportation.

Add on page 345, to footnote 67:

In *Blanchard v. Morton School District*, 420 F.3d 918 (9th Cir. 2005), the court stressed that exhaustion of remedies is required only where administrative remedies are available.

Add on page 346, to footnote 70:

For a sampling of cases on point, see *New Paltz Central School District v. St. Pierre*, 307 F. Supp. 2d 394 (N.D.N.Y. 2004), and *Jacob H. v. Janesville School District*, 305 F. Supp. 2d 986 (W.D. Wis. 2004), involving parents placing their children in private schools and subsequently going to court seeking reimbursement from public school systems for tuition and other education costs. See also, two federal appellate court decisions in which it was held that a student's IEP and subsequent placement in a general education setting, and not the parents'

unilateral private school placement, met IDEA's Least Restrictive Environment (LRE) requirement, see *L.B. v. Nebo School District*, 379 F.3d 966 (10th Cir. 2004), and *A.B. v. Lawson*, 354 F.3d 315 (4th Cir. 2004). For a recent decision from the Fourth Circuit in which parents disagreed with local school officials regarding the free appropriate public education requirement of IDEA, and the parents subsequently enrolled their child in a private setting and requesting financial reimbursement from school officials, see *County School Board of Henrico (Virginia) v. Z.P.*, 399 F.3d 298 (4th Cir. 2005). For a case in which a parent's moving out of one school district and to another school district before she requested a hearing in her former district mooted her request, see *M.P. v. I.S.D.*, No. 726, 326 F.3d 975 (8th Cir. 2003), *rehearing denied*, 2003 U.S. App. LEXIS 13504 (8th Cir. 2003). Finally, for a court decision involving parents' unilateral placement of their special education child in a private school, and their subsequent request that the local public school system pay his tuition, see *Pawling Central School District v. New York State Department of Education*, 771 N.Y.S. 2d 572 (N.Y. Sup. Ct. App. Div. 3rd Dept. 2004). More recently, see *M.M. v. School Board of Miami-Dade County Florida*, 437 F.3d 1085 (11th Cir. 2006); and, *Emery v. Roanoke City School Board*, 432 F.3d 294 (4th Cir. 2005).

§ 13.5 Discipline and Children with Disabilities.

Add on page 349, to footnote 81:

In making a "manifestation determination" the team must carefully examine the facts of the situation, especially looking for a possible link between the student's disability and his misbehavior. For example, in a Virginia case, a student had the ability to think out his actions and their consequences ahead of time. As such, said the court, it would be difficult to conclude that his/her misbehavior was the direct result of his/her disability. See, *A. W. v. Fairfax County*, 372 F.3d 674 (4th Cir. 2004). The reader is reminded that the law also requires but does not specify the substantive content of a behavioral intervention plan. Thus, the decision on each case will depend on criteria used to judge the appropriateness of a student's behavioral intervention plan. Such a determination must be made on a case-by-case basis. See, *Alex R. v. Forrestville Valley*, 375 F.3d 603 (7th Cir. 2004), *cert. denied*, 2004 U.S. LEXIS 7827 (2004).

Add on page 349, to footnote 84:

For more recent IDEA “stay-put” decisions, see *Van Scoy v. San Luis Unified School District*, 353 F. Supp. 2d 1083 (C.D. Cal. 2005); and, *Escambia County Board of Education v. Jarred Benton*, 358 F. Supp. 2d 1112 (S.D. Ala. 2005).

Add on page 350, to footnote 90:

In the 2004 reauthorized IDEIA, the language of Section 615 (K) regarding procedural safeguards in matters of student discipline requires that the manifestation review establish a “direct and substantial relationship” between the student’s disability and the student’s misbehavior, or that the student’s misbehavior was caused by a failure to implement the student’s IEP as a precondition of invoking special education disciplinary procedures.

In addition to removal to an alternative setting for dangerous weapons and drug violations, IDEA 2004 allows for the removal of a student with disabilities to an alternative setting for 45-days if the student has inflicted “serious bodily injury upon another person while at school, on school premises, or at a school function...” Serious bodily injury is defined [restated from 18 U.S.C. 1365 (h)(3)] as “a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”

[b] Americans with Disabilities Act (ADA).

Add on page 354, to footnote 107:

In 2004, a federal district court in Hawaii held that state education officials were not liable under either the Rehabilitation Act of 1973 or 42 U.S.C. 2983 for disciplinary actions taken by local school administrators against a second grade student with ADHD. To prevail, plaintiff had to: (1) establish that state education officials had actual or constructive knowledge of the disciplinary incidents, and (2) show that state education officials were either personally involved in or induced the disciplinary actions taken by local administrators. *Doe v. Hawaii Department of Edu-*

ation, 351 F. Supp. 2d 998 (D. Haw. 2004), *reconsideration denied*, 2004 U.S. Dist. LEXIS 26241 (D. Haw. 2004).

§ 13.7 Summary.

Add on page 355, a new footnote 108:

For a case in which the court held that requiring exhaustion of the administrative remedies would prove futile, see *McCormick v. Waukegan School District #60*, 374 F.3d 564 (7th Cir. 2004). Similarly, in *Starkey v. Somers Central School District*, 319 F. Supp. 2d 410 (S.D.N.Y. 2004), the requirement that plaintiff prove to the court that the exhaustion of administrative remedies would be futile is underscored.

An important issue to watch involves the “burden of proof.” The United States Supreme Court’s 6-2 decision in *Schaffer v. Weast*, 126 S.Ct. 528 (2005) will prove significant in assigning the burden of proof in situations where parents challenge the appropriateness of their child’s IEP. Because the IDEA (2004) is silent on the burden of proof, stated Justice O’Connor, “we hold that the burden lies, as it typically does, on the party seeking relief.”

The reader should note, however, that the high court left open the possibility that States can enforce existing statutes that assign the burden of proof in such cases. See also, *Kenton County School District v. Hunt*, 384 F.3d 269 (6th Cir. 2004), *rehearing denied*, 2004 U.S. App. LEXIS 24498 (6th Cir. 2004), a pre-*Schaffer* extended school year services case, where the burden of proof rests on the party wishing to obtain the services. For examples of post-*Schaffer* decisions, see *Bay Shore Union Free School District v. T.*, 405 F. Supp. 2d 230 (E.D. N.Y. 2005), and *L.E. v. Ramsey Board of Education*, 435 F. 3d 384 (3rd Cir. 2006).