THE GOOD OF THE MANY OR THE GOOD OF A FEW?
HOT TOPICS IN SCHOOL LAW

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CHAPTER 9

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Chris Gilbert is one of the founding partners of Thompson & Horton LLP, which opened its doors for business representing school districts and other public entities on January 1, 2009. Prior to that, Mr. Gilbert was a partner in the School and Public Law Section of Bracewell & Giuliani LLP, where he practiced from 1993 to 2008. He is an experienced practitioner in all aspects of the representation of public and private schools, colleges, universities and other public entities, with a particular focus on the role of the First Amendment at these institutions. He is a former member of the Board of Directors of the Education Law Association in Dayton, Ohio, and the Executive Council of the School Law Section of the State Bar of Texas.

Mr. Gilbert has litigated and advised clients on free speech rights of students and employees, free speech and the Internet, and free speech retaliation; school prayer, the distribution of religious literature in a school or government setting, the use of public facilities by religious groups, the celebration of religious holidays in the public schools, the rise of esoteric religions and their impact in the public sector, and the use of religious music in the public schools; dress codes; student newspapers and yearbooks; and library and curriculum issues.

Mr. Gilbert is the author of *The Oldest Rule: A Primer on Student First Amendment Issues for Attorneys and School Officials* (Xlibris Dec. 5, 2014), a First Amendment book, and "The Oldest Blog" (www.theoldestrule.com), a First Amendment blog for school administrators and attorneys. He was the lead author of the National School Board Association's amicus brief filed in the United States Supreme Court in *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002), a case involving the drug testing of students involved in extracurricular activities.

Mr. Gilbert has also developed an interesting niche practice involving schools and weird barnyard animal disputes. He terminated a student teacher for engaging a high school biology class in a discussion about sexual practices involving gerbils and sheep. He spent two years advising a school district as to how to deal with claims arising out of the death of a pig, including the fallout from making Ann Lander's column no fewer than four times. He has also helped a school resolve a situation involving a Counterfeit Goat. Really, it's too weird to discuss here.

Mr. Gilbert is a graduate of Cornell University and the University of Michigan Law School, and also studied abroad at the University of Edinburgh in Scotland, where he majored in pubs.

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THE GOOD OF THE MANY OR THE GOOD OF A FEW? HOT TOPICS IN SCHOOL LAW

I. THE COMING OF THE WITCHES: THE RISE OF ESOTERIC RELIGIONS

> "[T]he dispute over the Harry Potter books illustrates a growing phenomenon in the public schools: the extent to which the public schools are having to deal with so-called esoteric religions. Esoteric religions are not necessarily "bad" or "wrong"; they are simply different, and different in such a way that many public schools are unprepared for how to deal with someone who claims to be a Wiccan, or requests permission to start a Satanist book discussion group….."[1]

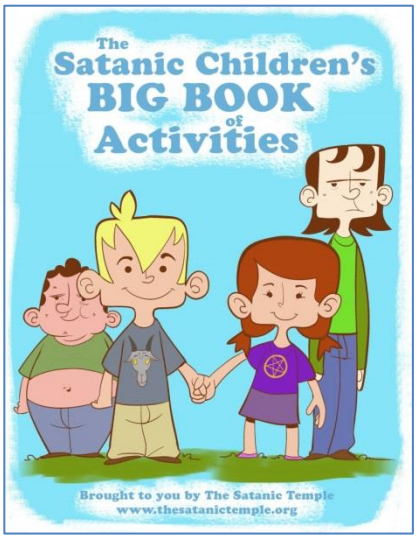
Numerous schools have had to deal with the rise of esoteric religions, and none more so than the Orange County School Board in Florida.[2] There, the school district allowed World Changers of Florida to passively distribute copies of the New International Version Bible to students at eleven public schools. The distribution was done pursuant to a Consent Decree issued in *World Changers of Fla, Inc. v. District Sch. Bd. of Collier County, Fla.*, C.A. No. 2:10-cv-419-FtM-36SPC. Orange County was not a party to that lawsuit, but apparently it (and several other local school districts) had voluntarily agreed to follow that Consent Decree in handling requests to distribute literature by third parties.

The Freedom from Religion Foundation ("FRF") initially asked Orange County not to allow any third party distribution, but failing that, asked to be allowed to pass out their own literature. The District allowed some of the material to be passed out, but denied the rest on the grounds that it was age inappropriate, pornographic, obscene or libelous, or capable of causing a substantial disruption. Examples included:

- Why Jesus?
- An X-Rated Book: Sex and Obscenity in the Bible
- Why Women Need Freedom From Religion
- What's Wrong With The Ten Commandments?
- Why I Am Not A Muslim
- Jesus Is Dead

In January 14, after further discussion, the school board "unconditionally" allowed FRF to distribute all of their material, and represented that it "has no intention in the future to prohibit these materials." The court dismissed the lawsuit as moot; FRF has appealed to the Eleventh Circuit.

However, in September 2014, the Satanic Temple announced that in light of the courts' "ruling" allowing religious materials to be distributed, it intended to hand out its own religious literature in the Orange County Schools: "The Satanic Children's Big Book of Activities."



Satanic Temple spokesman Lucien Greaves was quoted as saying:

> [The organization] would never seek to establish a precedent of disseminating our religious materials in public schools because we believe our constitutional values are better served by respecting a strong separation of Church and State."
>
> "However, if a public school board is going to allow religious pamphlets and full Bibles to be distributed to students — as is the case in Orange County, Florida — we think the responsible thing to do is to ensure that these students are given access to a variety of differing religious opinions, as opposed to standing idly by while one religious voice dominates the discourse and delivers propaganda to youth."[3]

[1] Christopher B. Gilbert, "The Coming of the Witches: Schools, Esoteric Religions and the Christian Backlash," *Texas School Administrators' Legal Digest*, March 2002.

[2] *Freedom from Religion Foundation, Inc. v. Orange County School Board*, ___ F.Supp.2d ___, 2014 WL 3057881 (M.D. Fla. July 3, 2014).

[3] *See* http://www.salon.com/2014/09/16/satanic_temple_hands_out_activity_books_to_schools_in_response_to_judicial_ruling/ (visited September 17, 2014).

In February 2015, the school board voted to ban the passive distribution of all religious, political, denominational, sectarian and partisan materials. The Board actually came close to shutting down the distribution of all outside materials. The Liberty Counsel has threatened to file suit over the new prohibitions.[4]

Satanists are not the only esoteric religion that schools may have to deal with. Modern day pagans plan to build Iceland's first Norse temple in over 1,000 years.[5] Apparently the worship of Odin and Thor (called the "Asatru Association") is still the second biggest religious organization in Iceland after Christianity (although that only means it has roughly 2,400 adherents out of Iceland's population of 330,000). I could see a student claiming to be an adherent of the Norse gods, and refusing to read Thomas Bulfinch's "Bulfinch's Mythology," a classic collection of Greek mythology, in English class. Would a school have to allow the student to hold a communal *blót* feast at school, during which drinking horns are usually passed around and animal sacrifices are sometimes conducted? (Although it should be noted that when Sveinbjörn Beinteinsson, one of the Asatru Association's founders and early leaders, was asked if his group actually conducted the ritual slaughter for their *blót*feast, he answered, "No, for the simple reason that we can't be bothered.")

Many people remember this news story: an elementary school boy in Kermit, Texas was suspended for making a "terroristic threat" after telling a classmate that he could make him disappear with the "One Ring" from "The Hobbit: The Battle of Five Armies," which he had just seen in the theaters.[6] Said his dad: ""I assure you my son lacks the magical powers necessary to threaten his friend's existence. If he did, I'm sure he'd bring him right back." The Hobbit story is more likely to lead to a First Amendment claim, for the simple reason that there are dozens of cases where a student accused of making threats to other students defended his or her choice of words on First Amendment grounds.

II. CURRICULUM CHALLENGES: YOU WANT TO TEACH MY KID WHAT?!?

> This case is a skirmish in the culture wars of the last century. Our culture has been the product, at least in part, of Jewish and Christian religious teaching; and the culture wars have, almost inevitably, brought about challenges to that teaching. The plaintiffs here emphasize the religious roots and religious nature of their message. The defendants focus on secular consequences of a message that they nonetheless maintain comes from a religious group using such a fundamentally religious category as sin.[7]

With the increased national emphasis on accountability in education, more and more school districts are beginning to discard their "traditional" curriculum and experiment with more innovative instructional models. At the same time, many schools are heeding recent criticism that the public school system needs to play a greater role in teaching students moral values. Add to that mix the various programs that both the federal and state governments have encouraged or even required the schools to begin teaching – such as sex education, anti-drug programs, and self-esteem classes – and you have a potent recipe for curriculum disputes that may rival the evolution debates of the 1960's. Courts are still willing – for the most part – to defer to educators in the matter of what should and what should not be a part of a public school's curriculum.[8] The one area in which the courts will not defer to local control over curriculum, however, is when school authorities attempt to use their discretion over curriculum in violation of the First Amendment.

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[4] http://www.orlandosentinel.com/features/education/os-bibles-satanic-pamphlets-banned-20150210-story.html (visited June 4, 2015).

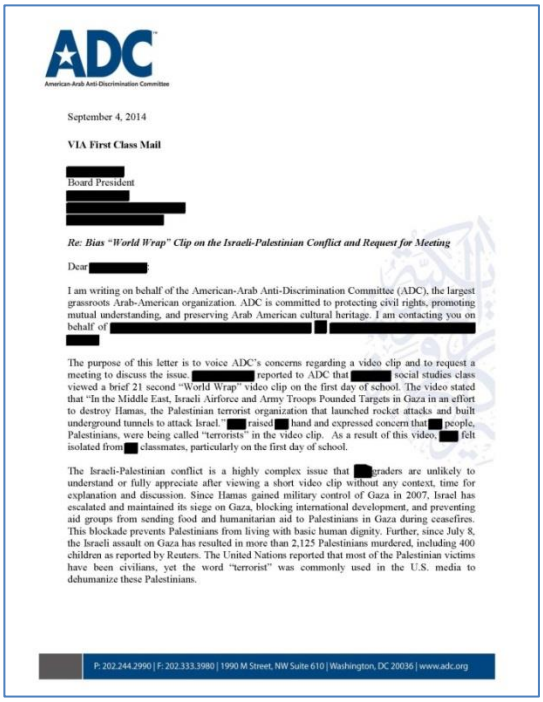
[5] http://www.pbs.org/newshour/rundown/modern-day-pagans-plan-build-icelands-first-norse-temple-1000-years/ (visited June 4, 2015).

[6] http://www.nydailynews.com/news/national/texas-boy-suspended-bringing-ring-power-school-article-1.2099103 (visited June 4, 2015).

[7] *American Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1126 (9th Cir. 2002) (Noonan, J., dissenting).

[8] *See, e.g., Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 568-70 (1988).

A. Complaints about "taking sides" in the Arab-Israeli conflict



ADC
American-Arab Anti-Discrimination Committee

September 4, 2014

VIA First Class Mail

[redacted]
Board President
[redacted]

Re: Bias "World Wrap" Clip on the Israeli-Palestinian Conflict and Request for Meeting

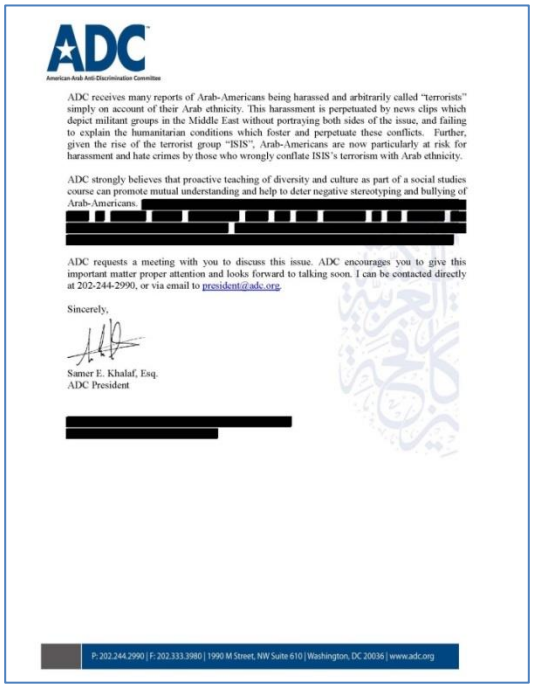
Dear [redacted]:

I am writing on behalf of the American-Arab Anti-Discrimination Committee (ADC), the largest grassroots Arab-American organization. ADC is committed to protecting civil rights, promoting mutual understanding, and preserving Arab American cultural heritage. I am contacting you on behalf of [redacted]

The purpose of this letter is to voice ADC's concerns regarding a video clip and to request a meeting to discuss the issue. [redacted] reported to ADC that [redacted] social studies class viewed a brief 21 second "World Wrap" video clip on the first day of school. The video stated that "In the Middle East, Israeli Airforce and Army Troops Pounded Targets in Gaza in an effort to destroy Hamas, the Palestinian terrorist organization that launched rocket attacks and built underground tunnels to attack Israel." [redacted] raised [redacted] hand and expressed concern that [redacted] people, Palestinians, were being called "terrorists" in the video clip. As a result of this video, [redacted] felt isolated from [redacted] classmates, particularly on the first day of school.

The Israeli-Palestinian conflict is a highly complex issue that [redacted]graders are unlikely to understand or fully appreciate after viewing a short video clip without any context, time for explanation and discussion. Since Hamas gained military control of Gaza in 2007, Israel has escalated and maintained its siege on Gaza, blocking international development, and preventing aid groups from sending food and humanitarian aid to Palestinians in Gaza during ceasefires. This blockade prevents Palestinians from living with basic human dignity. Further, since July 8, the Israeli assault on Gaza has resulted in more than 2,125 Palestinians murdered, including 400 children as reported by Reuters. The United Nations reported that most of the Palestinian victims have been civilians, yet the word "terrorist" was commonly used in the U.S. media to dehumanize these Palestinians.

[redacted] P: 202.244.2990 | F: 202.333.3980 | 1990 M Street, NW Suite 610 | Washington, DC 20036 | www.adc.org



ADC
American-Arab Anti-Discrimination Committee

ADC receives many reports of Arab-Americans being harassed and arbitrarily called "terrorists" simply on account of their Arab ethnicity. This harassment is perpetuated by news clips which depict militant groups in the Middle East without portraying both sides of the issue, and failing to explain the humanitarian conditions which foster and perpetuate these conflicts. Further, given the rise of the terrorist group "ISIS", Arab-Americans are now particularly at risk for harassment and hate crimes by those who wrongly conflate ISIS's terrorism with Arab ethnicity.

ADC strongly believes that proactive teaching of diversity and culture as part of a social studies course can promote mutual understanding and help to deter negative stereotyping and bullying of Arab-Americans. [redacted]

ADC requests a meeting with you to discuss this issue. ADC encourages you to give this important matter proper attention and looks forward to talking soon. I can be contacted directly at 202-244-2990, or via email to president@adc.org.

Sincerely,

Samer E. Khalaf, Esq.
ADC President

[redacted]

[redacted] P: 202.244.2990 | F: 202.333.3980 | 1990 M Street, NW Suite 610 | Washington, DC 20036 | www.adc.org

B. The older version of such disputes: the Ottoman Empire and the Armenian Genocide

In *Griswold v. Driscoll*,[9] a Turkish group and several Turkish-Americans challenged a curriculum guide created by the Commissioner of Education for Massachusetts, pursuant to a state law that required him to "formulate recommendations on curricular material on genocide and human rights issues." The initial draft referred to "the Armenian genocide" and stated that the "Muslim Turkish Ottoman Empire destroyed large portions of its Christian Armenian minority population" in the late nineteenth and early twentieth centuries.[10] A Turkish cultural group protested, asking that a more "objective study of history" be included that did not accuse the Ottoman government of a policy of genocide against the Armenians (referred to as the "contra-genocide perspective") The Commissioner gave in, leading to protests by Armenian groups against any pro-Turkish references. The Commissioner waffled *again*, removing a number of references to Turkish sources of information and leading to what the Turkish groups called "an obvious, if incomplete, attempt to appease the political opposition to anything appearing to be Turkish."[11] At that point the Chair of the State Board dug in his heels and announced that the law required the Board to "address the Armenian genocide and not to debate whether or not it occurred."[12] Accordingly, they refused to include any references in the Guide that questioned whether genocide had occurred.

The individual plaintiffs claimed that the revisions to the Guide had violated their First Amendment right to learn "free from viewpoint discrimination."[13] Citing *Pico*, the plaintiffs analogized the Guide to a virtual school library, and argued that the references to contra-genocide material could not be removed to promote an anti-Turkey orthodoxy. The defendant argued that the Guide was curriculum, over which it could exercise much greater control. The opinion, which was written by retired Justice David Souter, found that while neither analogy was perfect, "classification of the Guide as part of the state curriculum is the better choice."[14] Justice Souter noted that even under *Pico*, the state's decision was constitutional:

[9] *Griswold v. Driscoll*, 616 F.3d 53 (1st Cir. 2010).
[10] *Id.* at 54.
[11] *Id.* at 55.
[12] *Id.*
[13] *Id.* at 56. The Turkish cultural group, which claimed that once its website had been included in the Guide, could not be removed "to further a political agenda," was dismissed as its claims were found to be time barred.

[14] *Id.*

> [H]owevermuch discretion may be limited in the instance of the library, where "the regime of voluntary inquiry ... holds sway," a school board "might well defend [a] claim of absolute discretion in matters of *curriculum* by reliance on their duty to inculcate community values."[15]

The Court concluded that even if the revisions were made in response to political pressure, they did not violate the First Amendment.

In *Turkish Coalition of America v. Bruininks*,[16] the Director of the Center for Holocaust and Genocide Studies at the University of Minnesota posted a list of "unreliable websites" to the Center's website, which stated that students writing papers should be warned not to use the sites because of unreliable content. Along with websites questioning the veracity of the Nazi genocide of Jews during World War II, the Center listed the Turkish Coalition of America ("TCA")'s website, which disputed the Turkish genocide of Armenians during World War I. When the TCA protested its inclusion on the list, the Center responded that that was simply its opinion of the TCA website, and that students remained free to access the website. Shortly thereafter, Cingilli, a student of Turkish descent, approached the director and asked whether he could use the TCA website for a paper. The director "strongly discouraged" him from using it and refused to deny that there would be academic consequences of he did so, after which the student claimed that he "was afraid" to use the TCA website.

Cingilli and the TCA brought suit against the University and the director, although Cingilli was quickly dismissed for lack of standing when it became apparent that he was not actually enrolled in any classes taught by the director, and that the director was not in any position to affect Cingilli's grades or academic standing.[17] TCA claimed that an advocacy organization's First Amendment right to express its ideas, as well as the First Amendment rights of others to receive those ideas, are violated when the government opines that the organization's materials are unreliable and warns students that using those materials in a research paper will result in bad grades, analogizing to *Pico*. However, the Court distinguished *Pico* on the grounds that there, the school board had actually removed the books in question, thereby completely impairing a student's ability to access the ideas they contained, whereas here students remained free to access the website, read its contents, and even advocate its positions; they were just under notice that the "audience of one – the grader" to whom they were submitting their work had already determined that the website was an unreliable source.[18] In essence, the Court found that a professor, in grading a student's paper, obviously has to make judgment calls about the reliability of the student's sources, and here, the professor had just done that in advance.[19] Accordingly, the Court dismissed the TCA's First Amendment claim.

III. JESUS: THE TERM PAPERRELIGIOUS TOPICS IN STUDENT ASSIGNMENTS

A. Public versus Private Speech

> "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clause protect." *Santa Fe ISD v. Doe*, 120 S.Ct. 2266, 2275 (2000) (*quoting Board of Educ. of Westside Comm. Sch. v. Mergens*, 496 U.S. 226, 250, 110 S. Ct. 2356 (1990)).

The distinction between what is public speech that may (and often must) be regulated by a government entity, and private speech that may not be regulated by the state, is at the heart of many recent First Amendment disputes.

B. The Kountze Cheerleader Dispute:

Case No. 14-0453; *Coti Matthews, on behalf of her Minor Child M.M, et al. v. Kountze Independent School District*; In the Supreme Court of Texas (Petition for Review filed August 6, 2014)

From "Statement of the Case" (p. vi):

> A group of middle school and high school cheerleaders brought a civil rights suit against their school district. They alleged that the district had violated their constitutional

[15] *Id*. at 58 (quoting *Pico*, 457 U.S. at 869, 102 S.Ct. 2799).

[16] *Turkish Coalition of America v. Bruininks*, 678 F.3d 617 (8th Cir. 2012).

[17] *Id* at 622-23. The Court rejected the argument that "professors regularly communicate to one another about work-related issues, such as …troublesome students," and that the director might conceivably tell one of Cingilli's actual professors about the use of the TCA website, who might then lower his grade, finding that such allegations, even if true, were still too speculative to confer standing.

[18] *Id*. at 623-24.

[19] *Id*. This is really my interpretation of the Court's ruling; after a fairly lengthy discussion of the facts of the case, the legal analysis is pretty terse. The Court of Appeals noted that the lower court had ruled that the doctrine of academic freedom protected the actions of all of the defendants, *see id*. at 621, and maybe that is a better rationale for the Court of Appeal's ruling as well.

> rights by declaring their private speech to be government speech—and accordingly prohibiting them from including their own religious messages on banners they had created to cheer on their school football teams.

From "Issues Presented" (p. ix) (emphasis in original):

> Did the court of appeals err when it held that this case was moot, even though the parties continue to dispute whether banners created by cheerleaders are the *private* speech of the cheerleaders, and not the *government* speech of their school district?

Morgan v. Plano Independent School District litigation:

> 8/31/2009 Brief of the Appellees (Plaintiffs):
>
> Whether under clearly established law school officials may engage in religious viewpoint discrimination against the private speech of elementary school children and their parents at school based on the Establishment Clause? (Issue #2)

C. Student Religious Expression in Curriculum Assignments

Numerous cases have been brought in the last several decades over whether a student's personal expression of religion in class assignments somehow would violate the Establishment Clause. For example, the Second Circuit found that a school violated a student's First Amendment rights when its censorship of the student's work amounted to viewpoint discrimination. In *Peck v. Baldwinsville Central School District*,[20] a kindergarten teacher asked her students to each create a poster, showing what they had learned about saving the earth during a two month unit on the environment. Each student would present his or her poster to the class, and have the poster displayed during a parent assembly. According to Peck's mother, Peck claimed that the "only way to save the world was through Jesus," and created a poster that showed a robed, praying figure (agreed to be Jesus) on the left, a church and a cross in the middle, and people picking up trash and placing it in a recycling can on the right.[21]

Although the teacher agreed that some of the images were related to the environmental unit, the school still felt that the kneeling figure was inappropriate, and that side of the poster was folded under when it was displayed. School officials testified that they censored the poster because:

1) the portion of the poster depicting the robed figure was not responsive to the environmental unit;
2) they suspected that poster had been designed not by Peck but by his mother; and
3) showing the image risked creating the impression that the kindergarten environmental unit had included the teaching of religion.[22]

The school admitted that had other students included non-religious images in their posters that had not been covered in the environmental unit – for example, animals that had not been discussed – the teacher would have discussed with the student how the student believed the images related to the environmental unit, but that Peck was never asked how the kneeling figure related to the unit. The teacher testified that she had not seen the need to have such a discussion with Peck, because they had not discussed religion and the environment in class.

The parties apparently did not dispute that the kindergarten classroom was a nonpublic forum. They did dispute whether *Tinker* or *Hazelwood* was the appropriate test for the poster, but the court had little trouble determining that:

> [T]he poster assignment and the environmental assembly at which the posters were hung – perhaps even more starkly than in the context of the newspaper articles at issue in *Hazelwood* – were indisputably "part of the school curriculum .... supervised by

[20] *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617 (2d Cir. 2005).

[21] Originally the poster was almost entirely religious. The teacher rejected it because it had almost nothing to do with the environmental lessons, and because "she legally didn't think she could hang the poster for religious reasons." *Id.* at 622. The Pecks agreed to redo the poster, and the school's treatment of the first poster was apparently not at issue in the lawsuit.

[22] The court acknowledged that the school's concerns, if true, were legitimate pedagogical concerns: "Unquestionably, whether a student's work is responsive to an assignment, whether the student is responsible for the work he or she has turned in, and whether the display of a school-sponsored, religious student speech might be perceived as promoting or instructing religious perspectives are interests that are part and parcel of a school's responsibility to ensure that "participants learn whatever lessons the activity is designed to teach" and that "the views of the individual speaker are not erroneously attributed to the school." *Id.* at 629 n.8 (quoting *Hazelwood*, 484 U.S. at 271).

> faculty members and designed to impart particular knowledge or skills to student participants and audiences."[23]

The court questioned, however, whether the school's reasons for censoring the poster were reasonably related to the three "legitimate pedagogical concerns" proposed by the school. The court rejected the argument that there was a factual dispute over whether the student really had created the poster himself, finding that "the predicate factual determinations made by the school in triggering the censorship need only be reasonable," and not necessarily accurate.[24]

The court did find, however, that a fact issue existed over whether the school had engaged in viewpoint discrimination by rejecting the poster[25] because it offered a religious perspective on how to save the environment. The teacher admitted that had a student included a non-religious image on a poster that had not been covered in class, the teacher would have asked the student to explain how the picture related to what they had learned in class – which did not occur with the religious poster – and that she probably would not have folded the non-religious image over before displaying the poster.

The court decided that based on the current record, it would not decide the school's Establishment Clause defense, but would instead remand the matter to the trial court "to ascertain whether the District's actions were necessary to avoid an Establishment Clause violation, and if so, whether avoidance of that violation was a sufficiently compelling state interest as to justify viewpoint discrimination by the District."[26] The court rejected the plaintiffs' claim, however, that the censorship of the poster had violated the Establishment Clause by inhibiting the student's religious expression. The court found no evidence that the school had acted to inhibit religion, especially considering that they had allowed the church with the cross to show on the censored poster.

However, not all "curriculum speech" is protected, especially when it may be attributed to the school. In *Busch v. Marple Newton School District*,[27] students were allowed as part of an "All About Me" curriculum unit to bring a poster to school with pictures of their family, hobbies, etc.; and the parent was allowed to read the student's favorite book to the class. Wesley made a poster that showed, among other things, his church, and supposedly told his mother that he wanted her to read his "favorite book," [28] the Bible, to his class. When Wesley's mother told his kindergarten teacher what she planned to read, the teacher went and got the principal, who told the mother that she could not read the Bible because "reading that to kindergarten students is promoting religion and it's proselytizing for promoting a specific religious point of view."

Recognizing that schools may exercise a greater degree of control over student speech "the younger the students" are, the court noted that while some classroom discussion of religion might be consistent with appropriate curricular standards, classroom speech promoting religion or specific religious messages presented special problems for teachers. The court concluded that parents participating in the classroom activities were subject to the same restrictions as the teachers:

> Likewise, when parents participate in an elementary school's curricular activities, the school may impose the same requirement—that they refrain from promoting specific messages in class. The school's pedagogical considerations are present, and are perhaps heightened, when a parent is the speaker because parents, much like teachers, are typically held in high regard and viewed as authoritative by young children. By inviting participation in curricular activities, educators do not cede control over the message and content of the subject matter presented in the classroom. Were teachers or school administrators required to do so, individual students or parents could use the classroom to promote any message in the guise of a pedagogically approved curricular activity.[29]

The court rejected the argument that the mother could say whatever she wanted so long as it was "All About Wesley," concluding that the court retained significantly greater control over its own curriculum, even if the curriculum was being delivered by a parent.

Likewise, in *Curry v. School District of the City of Saginaw*,[30] the court was asked to consider a three-day multi-disciplinary exercise called "Classroom City."

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[23] *Id.* at 629 (quoting Hazelwood, 484 U.S. at 271).
[24] *Id.* at 630.
[25] The Court determined, as a matter of first impression in the Second Circuit, that *Hazelwood* did not change the general requirement that restrictions on speech be viewpoint neutral. *Id.* at 631-33.
[26] *Id.* at 633.
[27] *Busch v. Marple Newton Sch. Dist*., 567 F.3d 89 (3d Cir. 2009).
[28] Accordingly to Wesley's babysitter, his favorite book in kindergarten was *Brown Bear, Brown Bear. Id*. at 92 n.3.
[29] *Id*. at 97.
[30] 452 F.Supp.2d 723 (E.D. Mich. 2006).

Fifth grade students were required to create a product to market to their fellow students. At the suggestions of his parents, Joel Curry made ornaments out of pipe cleaners and beads in the likeness of candy canes. The prototype was approved during a pre-event market survey. Afterwards, Joel added a card to the ornament that purported to explain the religious significance of the candy cane. Joel's partner, a child of Asian Indian descent, refused to participate as a result of the card, so Joel "sold" the candy canes by himself. After the first day, school officials refused to allow Joel to continue selling the candy canes with the card, out of concern about the religious message on the card.

The parties disputed what test should be applied to Joel's speech: *Tinker*, because his speech happened to occur on school grounds (the plaintiffs' position), or *Hazelwood*, because the school had created the vehicle for the speech (the school's position). The court refused to decide which test was proper, because it found that even under the more permissive *Hazelwood* standard, the school violated Joel's rights by censoring his product. The school offered three "legitimate pedagogical concerns" for restricting Joel's speech:

1) ensuing that the students learned the lesson that the activity was designed to teach;
2) eliminating the threat of disruption; and
3) ensuring that student views were not mistakenly attributed to the school, thus violating the Establishment Clause.

The court rejected the first reason because the students had been given a wide-open assignments of creating a product to market, with no limitations placed on the nature of the product. In fact, the court felt that Joel had learned the lesson all too well: "a religious theme might be viewed as a marketing niche. Joel would not be the first to discover the commercial allure that religion has brought to capitalism."[31] The court also found no real evidentiary basis for any concern that selling the candy canes with the card would create a disruption. The court found the Establishment Clause issue to be "a closer question," because "reasonable people could view the nature of the forum – the Classroom City environment – in different ways."[32] After analyzing the issue under *Lemon*, however, the court ultimately concluded that "no reasonable observer would attribute to the school the religious message on the card attached to the candy cane ornament."[33] The court therefore found that removing the card had violated Joel's free speech rights.

However, the court ultimately concluded that "the First Amendment speech rights of a student to make religious statements in a quasi-classroom setting were not clearly established at the time of the incident."[34] The court therefore granted qualified immunity to the school administrators. The court also found that the school district could not be held liable for the acts of its employees, as the plaintiffs had failed to meet the standards for municipal liability by failing to show that the employees had been inadequately trained. Accordingly, the court granted summary judgment to the school defendants and denied the plaintiffs' motion for summary judgment.

Joel's parents appealed, which was probably a huge mistake, because the Sixth Circuit Court of Appeals found a way to rule *even more* in favor of the school district. Whereas the lower court refused to decide whether *Tinker* or *Hazelwood* applied, the Sixth Circuit Court of Appeals had little trouble deciding that *Hazelwood* applied, because "[i]t is undisputed that Classroom City was part of the fifth grade curriculum."[35] The Court ruled that for speech to be perceived as bearing the imprimatur of the school does not actually require that the audience believe that the speech originated from the school, but only that an observer would reasonably perceive that the school approved the speech. The Court of Appeals felt that the lower court had focused its pedagogical analysis too narrowly on the academic issues – *i.e*. on whether Joel's candy canes met the academic lessons that Classroom City was intended to teach – and not on the other legitimate pedagogical concerns of the principal.

Focusing on the fact that Joel's speech was aimed at students as young as kindergarteners, and that he had actually evaded the formal approval process for the product to be sold, the Court concluded that the principal's desire to avoid offending other students and their parents, and to spare young children from being subjected to an unsolicited religious message, "was the product of her reasonable evaluation of legitimate pedagogical concerns, and fell within her discretion as a school administrator, and therefore did not violate any right Joel enjoyed under the First Amendment."[36]

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[31] *Id.* at 736. For those interested in the ongoing "candy cane" debate, it is worth noting that the court stated that "[i]t appears that he learned that lesson well by ascribing a religious – albeit unoriginal and inaccurate – aura to a historically secular object to enhance its marketability." *Id.*

[32] *Id.* at 738.

[33] *Id.* at 740.

[34] *Id.* at 742.

[35] *Curry v. Hensiner*, 513 F.3d 570, 577 (6th Cir. 2008).

[36] *Id*. at 579-80. The Court acknowledged that "*Hazelwood* does not require us to balance the gravity of the school's educational purpose against Joel's First Amendment right to free speech, only that the educational purpose behind the speech suppression be valid." *Id*. at 579. Accordingly, the Court found that it need not determine whether the principal made the *best* decision, but only a reasonable one. *Id*.

While students may have a general right to talk about religion in their assignments, they still must meet the general – and neutral – requirements of the assignment established by the teacher. In *Settle v. Dickson County School Board*,[37] Brittney Settle sued her school district after her teacher gave her a "zero" on her research paper on the life of Jesus Christ, claiming that the zero violated her free speech rights under the First Amendment. The teacher offered six reasons for the poor grade:

1. Settle had failed to obtain prior permission for the topic. In fact, she has originally signed up to do a paper on the history of theater, but had changed her mind sometime during the project;
2. The teacher was concerned that it would be difficult for Settle to write – and for the teacher to grade – such a paper, where the student had strong personal beliefs in the subject;
3. The teacher "knew" that personal religious beliefs were just not appropriate for the public schools;
4. The fact that Settle already knew a lot about the life of Jesus defeated the purpose of the research project;
5. According to the teacher, "the law says we are not to deal with religious issues in the classroom"; and
6. the assignment required the use of four sources, and the teacher believed that all the information on Jesus derived from one source: the Bible.

The court sided with the teacher. Noting that teachers should be given "broad authority" to base grades on the merit of a work and to focus students on the assignment at hand, the court found that all of the teacher's reasons for the zero were reasonable and fell within the teacher's broad discretion over curriculum – even if some of them were wrong. The court expressed some degree of skepticism that students should have "free speech rights" when it came to school work, ruling that "[l]earning is more vital in the classroom than free speech."[38]

***Town of Greece, New York v. Galloway*, 134 S. Ct. 1811 (2014).**

Does *Town of Greece* indicate a shift towards protecting student private religious speech and away from prohibiting student "government speech"? *Town of Greece, New York v. Galloway*[39] is a somewhat confusing 5-4 decision made up of five different opinions, in which even the majority opinion by Justice Kennedy is only partly the opinion of the Court.[40] Kennedy does not follow any of the traditional Establishment Clause tests (*Lemon* is only mentioned once, in Justice Breyer's concurring opinion, and even then only in passing), which is going to make it hard to derive any meaningful guidance from this decision.

The facts in brief: the town of Greece, New York invited local ministers to deliver an invocation at the beginning of town council meetings. They placed no restrictions on what a minister could say during the invocation, and did not review the invocations before the meeting. Apparently a secretary was tasked with finding someone to deliver the invocation at each meeting; she used a business directory put out by the local Chamber of Commerce which supposedly listed all of the churches in town, and literally just started calling each church in order to see who was available and interested. At some point, after she had developed a list of people who had previously agreed to deliver the invocation, she started calling primarily from that list. All of the churches in town listed in the directory were Christian, so almost all of the prayers initially were Christian-oriented.

After the plaintiffs initially complained that the predominantly Christian themes of the prayers were "offensive," "intolerable," and an affront to a "diverse community," the town decided that anyone could deliver an invocation if they were interested, and invited a Jewish layman and someone of the Hindu faith to deliver invocations. A Wiccan priestess read about the dispute in the newspaper and asked to be allowed to give an invocation, and the council agreed.

Despite the changes to the policy, the plaintiffs still brought suit, seeking not an end to the prayer practice in its entirety, but instead requesting that the town be limited to "inclusive and ecumenical" prayers that referred only to a "generic God" and would not associate the government with any one faith or belief.[41] *Town of Greece* primarily does two things: first, it agreed that *Marsh* could be extended to permit at least some local governmental bodies to start their legislative sessions with brief prayers. That part of the decision is not terribly controversial, since a number of lower courts since *Marsh* had already extended the

[37] *Settle v. Dickson Cnty. Sch. Bd*., 53 F.3d 152 (6th Cir. 1995).

[38] *Id*. at 156.

[39] *Town of Greece, New York v. Galloway*, 134 S. Ct. 1811 (2014).

[40] Section II(B), which makes up the last third of Justice Kennedy's opinion, was only joined by Chief Justice Roberts and Justice Alito; Justice Thomas and Justice Scalia explicitly did not join that part of the opinion.

[41] *Id*. at 1817.

concept of legislative prayer to local governmental bodies.

However, the Court next held that legislative prayers do not have to be nonsectarian in nature. This part of the opinion really does change what was generally understood to be the law regarding legislative prayer, since most of the courts that had extended *Marsh* to local governmental bodies had required the prayer to be nonsectarian, based on language from Justice O'Connor's opinion in the *County of Allegheny* case. Justice Kennedy based his conclusion almost entirely again on history, finding that the prayers given by the chaplain to the original Congress that were considered in *Marsh* were often highly sectarian in nature. He noted that even prayers given in Congress today are not always nonsectarian, and that Congress "acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds."[42] Kennedy noted many practical difficulties in enforcing a "nonsectarian rule," which he felt would require government officials to supervise and censor potentially religious speech in a manner that would involve government in religion to a far greater degree than simply allowing prayer givers to say whatever they want.

Justice Kennedy disagreed with the Court of Appeals that the fact that the town had invited a predominantly Christian set of ministers to lead the prayer violated the Establishment Clause, at least where there was no evidence that that was the town's intent; rather, the evidence showed that they had initially made a reasonable effort to contact all churches within their jurisdiction, and then later expanded their list to any minister or layman who wished to give an invocation. Kennedy also rejected the argument that the town had any duty to expand its search for non-Christian prayer givers in an effort to achieve some kind of religious balancing or diversity.

Kennedy did place some limitations on his own decision: he cautioned that "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historic foundation," and basically suggested that it was the connection of legislative prayer to the original Congress that made it permissible.[43] Kennedy quoted a passage from *Marsh* that the content of prayer is of no concern to judges, provided "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[44] He then suggested some limitations as to the content of the prayers:

> If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in a common effort. That circumstance would present a different case than the one presently before the Court.[45]

Justice Alito, writing in concurrence, noted that while governmental entities may not require nonsectarian speech, he felt it would be a good practice from a policy viewpoint to remind guest chaplains to keep in mind that they are addressing members from a variety of faith traditions.[46]

So how does *Town of Greece* impact the whole "*government* speech" versus "*private* speech" issue? Attorneys for parents and students are going to argue that the holding that legislative prayers given by private individuals selected via a neutral method do not have to be nonsectarian in nature, tilts the balance towards the "private speech" end of the spectrum by recognizing that speech given by third parties, even at government events, is still private speech that the government cannot regulate (and does not have to regulate to remain in compliance with the Establishment Clause).

However, Justice Kennedy went out of his way to limit his analysis to the *history* of legislative prayer, the same way that *Marsh v. Chambers* did. He based his conclusion that legislative prayers do not need to be sectarian almost entirely on the fact that prayers given by the chaplain to the original Congress that were considered in *Marsh* were often highly sectarian in nature. He also noted that even prayers given in Congress today are not always nonsectarian, and that Congress "acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds."[47] So the argument will be made – probably by one of us – that *Marsh* and now *Town of Greece* are really nothing more than judicial carve-outs for a very specific practice, because of its unique historical connection to the original Congress.

At some point, someone is going to challenge whether *Town of Greece* calls into questions cases such as *Lee v. Wesiman* and *Santa Fe ISD v. Doe*, where third parties were giving prayers at graduation ceremonies and football games. However, even the issue of whether school boards may begin their meetings with prayers was not definitively resolved by *Town of Greece*. Kennedy's official "majority opinion" does not address school boards in any way; he

[42] *Id*. at 1820-21.
[43] *Id*. at 1819.
[44] *Id*. at 1821-22.
[45] *Id*. at 1823.
[46] *Id*. at 1829-30 (Alito, J., concurring).
[47] *Id*. at 1820-21.

distinguished *Lee v. Weisman* and *Santa Fe Independent School District v. Doe*, but only in the section of his opinion that did not garner a majority of the justices.[48]

In addition, he did not distinguish those two cases on the grounds that school boards are somehow different than town councils. Instead, he seemed to feel that *Lee* in particular depended on the fact that school authorities "maintained close supervision over the conduct of the students and the substance of the ceremony," but that in the town of Greece, as in *Marsh*, people in attendance at the meeting would be free to come and go during the prayer, or to ignore the prayer altogether.[49]

Justice Kennedy does refer to the fact that "mature adults…presumably are not readily susceptible to religious indoctrination or peer pressure," which could be used to distinguish this case from school district cases, but he also notes that children were present at the Greece town council meetings, which did not seem to bother him. Also, neither *Lee* and particularly *Santa ISD* involved neutral selection methods, so *Town of Greece* would probably not be seen as overruling them (at best it casts doubt on the underlying spirit of the decisions).

IV. DO I HAVE TO TAKE THE STAAR TEST?

A. The Education Code and the Constitution

All Texas public school students are required by law to take the STAAR test in grades three through eight, although the subject matter tested and the impact of the test vary from grade to grade. *See* TEX. EDUC. CODE § 39.023(a). The Education Code does not provide for a specific ability to opt-out of taking the STAAR test. *See* Chapter 39, Texas Education Code. However, during the Spring 2015 administration of the STAAR test, numerous parents around the state contacted their school districts to request that their children be allowed to "opt out" of taking the STAAR (and End of Course, or "EOC" exams) for 2015.

So why did so many parents ask for their children to be allowed to opt out of the mandatory STAAR tests, if there is no opt out provision? I believe it is partly the result of the growing trend, discussed above, of parents wanting to dictate to public schools what portions of the established curriculum their children will or will not participate in – the "cafeteriaization" of public school curriculum.

Some parents may have requested that their children be allowed to opt out, because they heard on the news about parents in other states doing so, where state law allows for opt outs. For example, it was widely reported in the media that over 150,000 students opted out of taking the English exam in New York.[50]

In Texas, it may have been because of the Internet, as several special interest groups, including the Texas Parent's Educational Rights Network ("TPERN"), have websites that offer parents form letters to send to school districts about opting out of the STAAR test.[51] The websites actually anticipate what they think schools will say in response to their initial letters, and offer parents reply letters that they can then send. I had two different school district clients receive letters this spring that clearly came from the TPERN website.

Generally, opt out advocates argue that parents have a statutory right to opt out of the STAAR test under Texas Education Code § 26.010, which states as follows:

> A parent is entitled to remove the parent's child temporarily from a class or other school activity that conflicts with the parent's religious or moral beliefs if the parent presents or delivers to the teacher of the parent's child a written statement authorizing the removal of the child from the class or other school activity.

TEX. EDUC. CODE § 26.010(a). However, schools counter that the very next sentence of that provision states that "[a] parent is not entitled to remove the parent's child from a class or other school activity to avoid a test…" Section 26.010(b) also notes that "[t]his section does not exempt a child from satisfying grade level or graduation requirements in a manner acceptable to the school district and the agency." The STAAR test is required for satisfying grade level or graduation requirements for certain grades.

Opt out advocates respond that the second sentence of Section 26.010(a) does not apply to the STAAR exam, because the STAAR is an "assessment" (the first "A" in STAAR) and not a "test" (the word used in Section 26.010(a)). However, Texas Attorney General John Cornyn has already ruled that the word "assessment" in Section 39.023 of the Education Code (which is the statutory provision that establishes the

[48] *See Town of Greece*, 134 S.Ct. at 1827.

[49] This is a dubious conclusion in my opinion. I can see how people could come and go during a session of a state legislature, where people do mill around a lot and half the legislators are ignoring what is going on up front. However, most city council meetings that I have been to, like school board meetings, are much smaller, and I really don't think most people would be comfortable standing up and leaving during an opening prayer.

[50] http://www.cnn.com/2015/04/17/living/parents-movement-opt-out-of-testing-feat (visited June 4, 2015).

[51] http://www.txedrights.net/an-opt-out-course-for-schools/ (visited June 4, 2015).

STAAR) means the same thing as "test." *See* Texas Attorney General Opinion JC-0478 (2002).

Opt out advocates also sometimes argue that parents possess "constitutional rights as a parent" to "provide for the education and upbringing" of their children, which they believe gives them the right to opt out of the STAAR test. The fundamental right of a parent to direct the upbringing and education of his or her child was originally recognized in *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571 (1925), where the Supreme Court declared unconstitutional an Oregon law requiring parents to send their children to public schools, and in *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625 (1923), where the Court held that a Nebraska law restricting the instruction of foreign languages to children violated parents' rights to employ a teacher to instruct their child.

However, since those cases in the 1920's, the courts have repeatedly held that this right does not give a parent the right to control every aspect of her child's education at a public school. For example, in *Brown v. Hot, Sexy & Safer Productions, Inc.*,[52] a high school contracted with a private company to provide a ninety-minute assembly as part of an AIDS awareness program. The plaintiff students and their parents alleged that the presenter gave sexually explicit monologues and participated in sexually suggestive skits with students chosen from the audience. The parents argued that requiring the students to attend the AIDS awareness assembly violated their right to direct the education of their children under the *Meyer - Pierce* line of cases. The First Circuit rejected such an argument:

> The *Meyer* and *Pierce* cases, we think, evince the principle that the state cannot prevent parents from choosing a specific educational program – whether it be religious instruction at a private school or instruction in a foreign language. That is, the state does not have the power to "standardize its children" or "foster a homogenous people" by completely foreclosing the opportunity of individuals and groups to choose a different path of education. We do not think, however, that this freedom encompasses a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children .... If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools.[53]

As far as I know, no case in the *Meyer-Pierce* line of decisions has ever held that the Constitution gives a parent the right to determine what tests a public school can or cannot give the parent's child.

I do think it is important to clarify what both parties mean when they use the phrase "opt out of" (or "refuse participation in") standardized testing. Obviously if a parent chooses to keep his or her child home on STAAR test days, the school cannot force the child to come to school. If a parent allows the child to come to school but instructs him not to take the test, school officials cannot force him to pick up his pencil and take the test.

The question, then, is what consequences attach to not coming to school or not entering answers in your test?

Even TPERN states that "[w]e are very clear with any parent that we counsel that there are potential consequences to opting out. Indeed, I find one of the greatest strengths of the opt-out movement is the willingness of the parents to accept the consequences.[54] However, every parent letter I have ever read seems to seek to have the child excused from taking the STAAR test, as well as all other state-mandated standardized testing, without suffering any consequences. I don't know if these parents all received their advice from someone other than TPERN, or just ignored the "there are consequences" part of TPERN's counseling, but in my experience, these parents expect that nothing will happen to their child if they refuse to take the test.

However, schools can – and, as a matter of state law, will – attach consequences to that decision. A student who fails to come to school on the STAAR test days may be considered truant under the compulsory attendance laws, and a parent may commit the offense of contributing to nonattendance, depending on how many days the student has been absent. Similarly, a student who fails to attend class more than 90 percent of the days the class is offered may not receive credit or a final grade for the class, unless certain conditions are met. If a student attends class but refuses to take

[52] *Brown v. Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995).

[53] *Hot, Sexy and Safer*, 68 F.3d at 533-34.

[54] http://www.txedrights.net/an-opt-out-course-for-schools/ (visited June 4, 2015).

the STAAR test, it could impact the student's promotion to the next grade, especially promotion from 5th or 8th grades. Students who refuse to take the standardized End-of-Course ("EOC") exams in high school may not be able to graduate. These are all consequences that a parent should seriously consider before choosing to unilaterally "opt" their child out of taking the STAAR or EOC exams.

B. New State Law

In May 2015, Governor Greg Abbott signed into law Senate Bill 149, which went into effect immediately and applied to the 2014-2015 school year. Senate Bill 149 was designed to allow schools to override a student's failure to pass no more than two required End of Course ("EOC") exams. Senate Bill 149 expires on September 1, 2017, and therefore only applies to the 2014-15, 2015-16 and 2016-17 school years (i.e. until the legislature meets next time). Contrary to what was reported in some media outlets, Senate Bill 149 does not apply to the STAAR exam at all.

Senate Bill 149 establishes a fairly complex procedure for students who fail one or two EOC tests but otherwise complete their required curriculum. A school is required to establish an "individual graduation committee" to determine whether the student may graduate. The committee must consist of the principal, teacher of the course, department chair of the teacher, the student's parent (or person standing in parental relation) and the student, if the student is 18. There is a procedure for appointing a "designated advocate" for the student, if the parent is unable to serve.

Once established, the committee shall recommend additional requirements by which the student may qualify to graduate, including additional remediation, and for each EOC that the student failed, either a "project related to the subject area of the course that demonstrates proficiency in the subject area," or "the preparation of a portfolio of work samples in the subject area of the course." The committee must then consider 14 factors (plus any additional academic factors designated by the school board) in determining whether the student is "qualified to graduate", which include:

- The recommendation of the teacher;
- The student's grade in the course;
- The student's score on the EOC exam;
- The student's performance on the project/portfolio requirement;
- The number of hours of remediation; and
- The student's attendance rate.

To graduate, the student must complete all required remediation and the project/portfolio requirement, and the committee's vote must be unanimous. The decision of the committee is final and may not be appealed.

V. THE SCHOOL FINANCE LITIGATION

A. Relevant Texas Constitutional Provisions

ARTICLE VII, SECTION 1

A **general diffusion of knowledge** being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make **suitable provision** for the support and maintenance of an **efficient system** of public free schools.

ARTICLE VIII, SECTION 1-e

No State ad valorem taxes shall be levied upon any property within this State

B. Judge Dietz's Ruling

Judge Dietz issued his final judgment and findings of fact on August 28, 2014.

The Supreme Court held in *Neeley v. West Orange-Cove Consol. Independent School Dist*., 176 S.W.3d 746 (2005) ("*WOC II*"), the last major challenge to the school financae system, that "[a]n ad valorem tax is a state tax … when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is **without meaningful discretion**."[55] Local school districts must be able to provide **local supplementation** to fund programming beyond state educational requirements. "The State cannot provide for local supplementation, pressure most of the districts by increasing accreditation standards in an environment of increasing costs to tax at maximum rates in order to afford any supplementation at all, and then argue that it is not controlling tax rates."[56] Based on this language, Judge Dietz ruled that school districts do not have "meaningful discretion" over their tax rates because they are being forced to tax at or near the cap in order to achieve a general diffusion of knowledge.

Judge Dietz found that HB1, the legislature's "solution" to the *WOC II* state property tax ruling, actually reduced tax capacity in the long run. Tax compression created a structural deficit which has kept the State from properly funding Tier I. TRE requirements and the low yield from additional pennies above $1.06 has kept many districts from being able to access Tier II to make up the difference, much less provide enrichment Insufficient facilities funding is causing increasing I&S rates which further reduces

[55] *WOC II*, 176 S.W.3d at 751.
[56] *Id*. at 797.

district control over M&O rates, especially for fast-growth districts. The State continues to use local property value growth to fund "increases," further increasing state control.

With regards to **Adequacy**, the Texas Supreme Court warned in *WOC II* that it remains to be seen whether the Legislature would reverse the "predicted drift toward constitutional inadequacy."[57] Characterizing the situation as "an impending constitutional violation," the *WOC II* Court held that there is "substantial evidence . . . that the public education system has reached a point where continued improvement will not be possible absent significant change."[58]

Judge Dietz found that the current system is not providing a general diffusion of knowledge. Student performance expectations have dramatically increased since *WOC II*, but student performance is not improving on STAAR like it did on TAKS. Economically-disadvantaged and ELL students are not meeting standards and performance gaps are not closing. After 6 tries, 34% of this year's economically disadvantaged seniors still had not passed the required EOC exams. After 3 tries, 44% of this year's economically disadvantaged juniors still had not passed the required EOC exams.

With regards to **Suitability**, the *WOC II* Court held that "the Legislature may [not] define what constitutes a general diffusion of knowledge so low as to avoid its obligation to make suitable provision imposed by article VII, section 1."[59] "'[S]uitable provision' requires that the public school system be structured, operated, and funded so that it can accomplish its purpose for all Texas children."[60]

Judge Dietz found that the system is not structured, operated, and funded so as to achieve a general diffusion of knowledge. Despite a statutory mandate, the State has made no attempt to calculate the cost of adequacy or meeting its own standards. Most of the district and student level formula adjustments have not been updated since before the fall of the Berlin Wall. The school districts presented three credible estimates of the cost of accomplishing a GDK. The ***lowest*** of these - based off a number the Supreme Court found to be adequate in *Edgewood IV*, under an easier accountability system - shows that the State needs to spend **$800** more per student to fund a GDK at $1.04 tax rates.

With regards to **Efficiency**, the earlier *WOC I* Court held that "[c]onstitutional efficiency under article VII, section 1 requires only that districts must have substantially equal access to funding up to the legislatively defined level that achieves the constitutional mandate of a general diffusion of knowledge."[61] The Court warned that "[t]he effect of [holding otherwise] is to 'level down' the quality of our public school system, a consequence which is universally regarded as undesirable from an educational perspective."[62]

Judge Dietz found that school districts cannot raise the funds necessary to achieve a general diffusion of knowledge at similar tax rates. The vast majority of school districts do not have access to the level of funding that achieves a general diffusion of knowledge at any tax rate. 888 districts cannot raise the adjusted *Edgewood IV* adequacy estimate this school year at $1.17. 73 districts can raise the adjusted *Edgewood IV* adequacy estimate at $1. The actions of the 2011 and 2013 Legislatures have combined to *level down* funding in direct contravention to the Supreme Court's prohibition.

The State appealed Judge Dietz's ruling directly to the Texas Supreme Court on September 29, 2014. The Court took the case on January 23, 2015, and the State filed its initial brief on April 13, 2015. The school districts' briefs are due in early July 2015. Oral argument is anticipated in November or December 2015, and a ruling is expected sometime during the spring of 2016. Depending on the Court's rulings, a legislative response may be required during a summer 2016 special session.

VI. Transgender Issues – the School Lawyer's Perspective

A. Possible Issues (those most likely to come up):

- Names and Recordkeeping
- Restrooms and Locker Rooms
- Dress Codes

B. Is Transgenderism/Transexualism Protected Under the Law?

Neither the Americans With Disabilities Act nor the Rehabilitation Act protect transgenderism. As a matter of federal law, the Americans with Disabilities Act and the Rehabilitation Act expressly exclude "transsexualism" and "gender identity disorders not resulting from physical impairments" The Americans with Disabilities Act states that "For the purposes of this chapter, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite."[63] The ADA Regulations states that "[d]isability does not include: (1) Transvestism, transsexualism, pedophilia,

[57] *Id*. at 790.
[58] *Id*.
[59] *Id*. at 785.
[60] *Id*. at 753.
[61] *West Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558, 571 (2003).
[62] *Id*. (citing *Edgewood IV*, 917 S.W.2d at 729–730).
[63] 42 U.S.C. § 12208.

exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders."[64]

The Rehabilitation Act states that "For the purposes of sections 791, 793, and 794 of this title, the term "individual with a disability" does not include an individual on the basis of **(i)** transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders."[65]

Generally, the courts have ruled that transsexuals are not a protected class *per se* under Title VII.[66] Under *Price Waterhouse*, however, a number of courts have held that an employer's discrimination against a transgendered employee based on the employee's failure to conform to stereotypical gender norms is discrimination "because of sex" and may provide a basis for an actionable Title VII claim.[67]

In Price Waterhouse v. Hopkins,[68] the plaintiff, a woman, was denied partnership in an accounting firm at least in part because she was "macho," "somewhat masculine," and "overcompensated for being a woman." One partner advised her she could improve her chances for partnership if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." In concluding the plaintiff had met her burden of establishing gender played a motivating part in the employment decision, a plurality of the court explained that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[69] The court stated that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[70]

***Case Study (Texas): Lopez v. River Oaks Imaging & Diagnostic Group, Inc*., 542 F.Supp.2d 653 (S.D. Tex. 2008)**

Plaintiff Izza Lopez, also known as Raul Lopez, suffered from Gender Identity Disorder. Although born biologically male, Lopez identified herself as female and had lived her life as a woman. She planned to undergo sex reassignment surgery when financially able to do so. Lopez applied for a job as a scheduler at River Oaks Imaging & Diagnostic Group, a position for which sex was admittedly not a BFOQ. She listed both her names (Izza and Raul) on the application, and believed that the interviewers both knew she was transgendered, from friends of hers who worked at River Oaks. Lopez was offered the position, contingent on backgrounds checks and a drug test, both of which she passed. However, after being formally offered the job and accepting it, the Director of Human Resources learned Lopez had been born male, and withdrew the job offer because Lopez had allegedly "misrepresented" herself as a woman during the interview process – which the company analogized to someone who claims on an application to have no criminal record, but is later found not to have one. Lopez filed suit under Title VII, claiming that River Oaks had discriminated against her on the basis of her sex, both because River Oaks impermissibly rescinded its job offer because Lopez "failed to conform with traditional gender stereotypes," and because "River Oaks discriminated against her on the basis of her transgender status."

The Court noted that "[c]ourts consistently find that transgendered persons are not a protected class under title VII per se",[71] but refused to reach the *per se* issue because it felt that Lopez had waived the issue by not briefing it on summary judgment. However, the Court ruled that under *Price Waterhouse*:

Lopez's transsexuality is not a bar to her sex stereotyping claim. Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer.[72]

The Court then held that fact issues existed as to whether River Oaks had withdrawn its job offer because Lopez "lied" during the application process, or because she presented herself in a manner inconsistent with what the hiring managers' preconceived notions of what a male should look and act like, so summary judgment was denied for both parties.

[64] 29 C.F.R. § 1630.3(d).
[65] 29 U.S.C. § 705 (20)(F)(i).
[66] See *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1222 (10th Cir. 2007) ("This court agrees with *Ulane* and the vast majority of federal courts to have addressed this issue and concludes discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII.") *See also Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir.1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749-50 (8th Cir.1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir.1977).
[67] *See Etsitty*, 502 F.3d at 1222-23.
[68] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775 (1989).
[69] *Id.* at 250.
[70] *Id.* at 251.
[71] *id*. at 658.
[72] *Id*. at 660.

C. Names and Recordkeeping

Can a school enroll a male transgendered student under his preferred female name?

> (a) If a parent or other person with legal control of a child under a court order enrolls the child in a public school, the parent or other person or the school district in which the child most recently attended school shall furnish to the school district: (1) the child's birth certificate or another document suitable as proof of the child's identity;…..
> (b) If a child is enrolled under a name other than the child's name as it appears in the identifying document or records, the school district shall notify the missing children and missing persons information clearinghouse of the child's name as shown on the identifying document or records and the name under which the child is enrolled. The information in the notice is confidential and may be released only to a law enforcement agency.

TEX. EDUC. CODE § 25.002(a)&(b).

In each public school a student must be identified by the student's legal surname as that name appears:

> (1) on the student's birth certificate or other document suitable as proof of the student's identity; or
> (2) in a court order changing the student's name.

TEX. EDUC. CODE § 25.0021.

D. Restrooms and Locker Rooms

In *Johnson v. Fresh Mark*, 98 Fed.Appx. 461 (6th Cir. 2004), an employee who was born biologically male but presented and was hired as a female was confronted by her supervisors after she was caught using both the male and female restrooms. The employee stated that she was "not entirely male nor entirely female" and that it was most appropriate for her to use a female or unisex restroom. Based on the sex specified on her driver's license, however, her employer decided she was male and would have to use the men's restrooms.

> "The district court granted the defendants' motion to dismiss for failure to state a claim, finding that *Price Waterhouse* was inapplicable to the facts as pleaded in the complaint and that transsexualism was not covered by the ADA. Having had the benefit of oral argument, and having studied the record on appeal and the briefs of the parties, we are not persuaded that the district court erred in dismissing the complaint."[73]

In *Doe v. Clark County School District*, 2008 WL 4372872 (D. Nev. 2008), Mary Doe, a preoperative male-to-female transgendered student, sued the Clark County School District after the principal suggested that if she enrolled in the school district, she would need to use the nurse's unisex bathroom instead of the girls' communal bathroom. This case contains serious standing issues, in that Mary admitted that she had never actually enrolled in a CCSD school, attempted to enroll in one, or been denied permission to enroll in one, and "would not enroll at GVHS or any other CCSD high school prior to the time she would graduate."[74]

Although the Court concluded that Mary lacked standing, it proceeded to analyze her substantive Title IX claim anyway.[75] The court seriously questioned whether being denied access to a restroom would constitute being excluded from participation in, being denied the benefits of, or being discriminated against *under any educational program*, as is required to make out a violation of Title IX:'

> Even applying this linguistically broad definition of what constitutes an "educational program" under Title IX, it would be a stretch to conclude that a "restroom," in and of itself, is educational in nature and thus an education program.[76]

However, assuming that it was, the Court concluded that the fact that the school would have given Mary access to "a restroom" (*i.e.* the nurse's unisex bathroom) meant that she had not been deprived of anything protected by Title IX. The Court also concluded – albeit with very little substantive analysis – that being told she had to use a specific bathroom did not discriminate against Mary on the basis of sex – even under *Price Waterhouse*'s expanded "conform to socially-accepted gender expectations" definition of sex.

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[73] See also *Sommers v. Budget Marketing, Inc*., 667 F.2d 748 (8th Cir. 1982) ("Should Budget allow Sommers to use the female restroom, the male restroom, or one for Sommers's own use? Perhaps some reasonable accommodation could be worked out between the parties....")

[74] *Id*. at *2. The Court did acknowledge that Plaintiff' counsel had represented at oral argument that Mary had in fact enrolled in a CCSD high school for the current school year, but for some unexplained reason did not seem to think that that changed its standing analysis.

[75] The Court also concluded that a § 1983 and Equal Protection claim were both subsumed by the Title IX claim.

[76] *Id*. at *3.