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ABSTRACT

In its 1988-89 term, the Supreme Court, dominated by a conservative 5-4 majority made possible by the addition of Justice Kennedy, issued a number of decisions of significance to school districts. These decisions of the Supreme Court's 1988-89 term are summarized in this study and organized by subject matter into five sections: (1) civil rights in the context of employment and other liability-related issues; (2) special education; (3) freedom of speech and religion issues; (4) school desegregation; and (5) school finance-related issues. In each section, the key cases decided by the Court, the lower court decisions the Court declined to review and, where relevant, decisions scheduled for review in the 1989-90 term, are summarized. A list of 55 cases discussed, including case citations, is presented at the end of the summary. (SI)

HOGAN & HARTSON

THE 1988-89 TERM OF THE U.S. SUPREME COURT AND ITS IMPACT ON PUBLIC SCHOOLS

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INTRODUCTION

In its 1988-89 Term, the Supreme Court, dominated by a conservative 5-4 majority made possible by the addition of Justice Kennedy, issued a number of decisions of significance to school districts. In the civil rights area, for example, the Court preserved the availability of a century-old civil rights statute as a remedy in some hiring discrimination cases, but significantly narrowed the scope of the statute, made proof of discrimination and civil rights claims more difficult, and made it harder to justify and preserve voluntary affirmative action programs. For school officials, these decisions mean reduced burdens and scrutiny with respect to employment-related decisions, but less support for affirmative action and related programs.

In addition to its important decisions in the civil rights area, the Court continued a recent trend of showing deference to school districts and state and local authorities in employment and other administrative decisions. Schools may also have been afforded the room to develop drug testing programs within certain limits. Generally, school districts appear somewhat less vulnerable to a wide range of legal actions and greater deference is likely to be shown to local school district judgment in a number of areas.

The impact on schools of several important free speech and religion cases is less clear. The Court struck down a Texas statute prohibiting flag desecration and thus supported

the protection of expressive conduct, but it does not appear that this decision will affect the latitude of school officials recently recognized by the Court in regulating school-related expression. In an attempt to define constitutionally permissible government-sponsored holiday displays, the Court did not articulate clear standards, but suggested generally that displays which do not appear to endorse particular beliefs are more likely to be approved. An important decision is expected from the Court in 1989-90 concerning the permissibility of student-initiated religious activities in public schools.

This summary of the Supreme Court's 1988-89 Term is organized by subject matter into five sections: (1) civil rights in the context of employment and other liability-related issues; (2) special education; (3) freedom of speech and religion issues; (4) school desegregation; and (5) school finance-related issues. In each section, we summarize the key cases the Court decided, lower court decisions the Court declined to review and, where relevant, decisions scheduled for review in the 1989-90 Term. A list of all cases discussed, including case citations, is included at the end of this summary.

I. CIVIL RIGHTS AND EMPLOYMENT-RELATED ISSUES

A. Affirmative Action Programs

The Court made affirmative action programs more vulnerable as a result of several decisions in 1988-89. In Martin v. Wilks, the Court ruled that white firefighters in Birmingham, Alabama, could sue to reopen an affirmative-action settlement approved by the trial court eight years earlier. The settlement was intended to remedy discrimination that kept blacks out of all senior positions in the fire department. Martin may result in the reopening of many consent decrees long believed closed, and may make consent decrees a less viable route for ending major and protracted civil rights litigation.

In City of Richmond v. J.A. Croson Co., the Court struck down as unconstitutional a city ordinance requiring city construction contractors to set aside 30% of their subcontracts for minority business enterprises. The majority determined that the "set-aside" plan at issue was unconstitutional because (1) the city had failed to provide evidence of past discrimination and the need for remedial action and (2) the plan was not narrowly tailored to remedy prior discrimination. A majority of the Court suggested that a government program using racial criteria, even for remedial purposes, is valid only if it can be shown to be necessary in order to promote a compelling government interest, a standard which is often difficult to meet.

Croson has no impact on school districts implementing court-ordered affirmative action plans. It will directly affect school boards which have voluntary affirmative action programs in contracting and other areas, and may indirectly affect districts that have voluntarily adopted racial balance criteria in areas such as faculty or student assignment. School districts may still be able to implement such programs under some circumstances, but they must be careful to tailor the programs to respond to demonstrated prior discrimination or other legitimate objectives recognized by the courts, such as the promotion of racial diversity. Such programs should also be flexible, avoid rigid quotas, and seek to minimize harm to those who do not benefit from affirmative action. The validity of such programs will depend on a case-by-case analysis of the individual circumstances in each situation. 1/

1/ For a more detailed analysis of Croson and related affirmative action issues, see D. Tatel & E. Mincberg, Affirmative Action Contracting Programs: Richmond v. J.A. Croson Co., 51 Educ. Law Rep. 1099 (April 27, 1989).

B. Employees' Civil Rights Claims Against School Districts

1. Scope of civil rights statutes

In a case that had been carefully watched by civil rights advocates, Patterson v. McLean Credit Union, the Court left intact the rights of minorities to sue private parties for racial discrimination under a major Reconstruction-era civil rights law, 42 U.S.C. § 1981. The decision is significant because the Court indicated last year that it might overrule the 1972 decision that had recognized that minorities could bring such suits under section 1981. Although the Court declined to overrule its earlier decision, Justice Kennedy's majority opinion ruled that section 1981 applied only to discrimination in the initial hiring process, not discriminatory treatment or harassment on the job. These latter claims may be pursued under Title VII, but a Title VII plaintiff must work for a business with more than 14 employees and can recover only back-pay, not punitive or other damages. The Court's decision may also limit the use of section 1981 in discrimination cases which do not concern employment decisions.

2. School district liability for school officials' conduct

School districts are less vulnerable to civil rights claims made by employees as a result of decisions this term. In Jett v. Dallas Independent School District, the Court held

that school districts are generally not liable for the actions of individual school officials unless the individual acts either as a policymaker of the school district or in keeping with established or official policy.

Norman Jett, a white male, claimed that he was discriminated against on the basis of his race by the black principal at South Oak Cliff High School in Dallas. The two men had clashed repeatedly over school policies and statements Jett made to local media about the high school's football team. The principal recommended that Jett be removed from a faculty head coach position. The superintendent accepted the principal's recommendation and transferred Jett to another school. Jett was replaced by a black coach.

Jett brought suit against the school district, claiming violations under 42 U.S.C. §§ 1981 and 1983. In a 5-4 decision, the Court ruled that school districts and other government agencies are liable only when discriminatory acts are committed by officials with ultimate policymaking power or when the conduct was in accord with the school district's custom or policies. The Supreme Court affirmed the lower court's finding that the district was not liable because the alleged discrimination against Jett was not caused by a district custom or practice, and sent the case back to the lower court to determine who had policymaking authority concerning employee transfers.

The Court declined to review a similar case decided by the U.S. Court of Appeals for the Fourth Circuit. 2/ In Fields v. Durham, the court of appeals held that there was no constitutional violation when the conduct of state employees was a product of unauthorized behavior rather than a matter of official policy because the state is powerless to predict or control arbitrary behavior. Fields, fired from his position as dean and provost at a community college, claimed that the college did not follow established procedures in dismissing him. The court did not accept Fields' argument, finding no due process violation since the action was not the result of official policy. 3/

2/ A decision by the Supreme Court to decline to review a case (which is known as a denial of certiorari) simply means that the Court has decided not to consider the case and that the lower court decision will therefore stand. It does not necessarily mean that the Court agrees with the lower court result; the Court has very broad discretion as to what cases it considers important enough to review, and does not explain the reasons for a decision not to review a case.

3/ The Supreme Court also declined to review two additional lower court decisions concerning school employees' rights. In Short v. Kiamichi Area Vocational-Technical School District, the lower court ruled that tenured teachers in Oklahoma are entitled to a hearing before their contracts are terminated or not renewed. In Stevens v. Tillman, a court of appeals ruled that a principal could not file a federal civil rights claim against PTA officials who allegedly called her a racist and campaigned to have her transferred to another school.

In another decision, the Court ruled that a local government agency may be liable under federal civil rights laws if injury results from failure to properly train employees under limited circumstances. In Canton v. Harris, a woman arrested by police in Canton, Ohio was injured while in police custody and did not receive any medical assistance. She claimed that Canton had violated her rights under federal law by failing to provide proper training to police concerning when to provide medical aid to people in police custody. The Supreme Court ruled that in order to prevail, Ms. Harris was not required to prove that the lack of training resulted from an established or official policy or custom, but that she must prove that "deliberate indifference" by the city resulted in lack of proper police training. A school district could similarly be held liable for employees' actions where "deliberate indifference" by the district results in violations of rights by inadequately trained employees.

3. Statistical proof and shifting burdens of proof

Title VII of the Civil Rights Act of 1964 forbids race and gender discrimination in employment. In Griggs v. Duke Power Co., a 1971 decision, the Supreme Court ruled that Title VII prohibited practices which have a discriminatory effect, not just those in which discriminatory intent could be demonstrated, and that employers had the burden of justifying

requirements--such as written tests--that disparately disqualified minorities and women. Without expressly overruling Griggs, the Court in Wards Cove Packing v. Atonio effectively shifted the burden of proof to employees. In Atonio, nonwhite employees filled most "unskilled" cannery line positions at an Alaskan salmon cannery, while white workers were hired for most of the "skilled" noncannery jobs. The nonwhite workers claimed that discriminatory hiring and promotion practices led to this racial stratification of the workforce. As a result of the decision in Atonio, it is the employees who must now prove that job requirements and practices that have discriminatory effect, but no discriminatory intent, are essentially unrelated to job performance. By placing this burden on employees, the Court has weakened their ability to prevail in discrimination suits.

The Court did not, however, completely eliminate all burdens on the employer in Title VII cases. In Price Waterhouse v. Hopkins, a senior manager claimed that she was denied partnership in an accounting firm largely because of her gender. The Court concluded that when an employee in a Title VII case like Hopkins proves that her gender played a part in an employment decision, the employer then must prove that gender stereotyping was not a motivating factor in the employment decision.

4. Time period to bring claims

In contrast to many of its decisions this term, the Supreme Court gave a procedural boost to § 1983 civil rights claims in Owens v. Okure. Okure, claiming he was unlawfully arrested and beaten, filed a civil rights claim within New York's three-year general statute of limitations for lawsuits not covered by other specific time limit rules. Defendants argued that the one-year time limit for intentional torts such as false imprisonment should apply, which would have forced dismissal of the lawsuit as too late. Instead, in Owens, the Court held that a state's general personal injury statute of limitations should apply to § 1983 claims, rather than the varying time periods attached to each specific injury statute. This almost always will allow a plaintiff more time to seek remedy for harm related to civil rights violations because the general or "catch-all" category usually provides a relatively long statute of limitations.

C. School District Liability for Harm Suffered by Students

In a decision with significant implications for public schools, the Supreme Court ruled in DeShaney v. Winnebago County Department of Social Services that public agencies are not bound constitutionally to safeguard children who are not in their direct custody or control, even when the children are clearly endangered. The DeShaney child was beaten repeatedly

by his father. Although Department of Social Services authorities were monitoring the situation, they did not seek to remove the child from his father's custody. Two years after county officials learned that he might be an abuse victim, the child had suffered brain damage so extensive from the accumulated beatings that he is expected to spend the rest of his life in an institution for the profoundly retarded. The Court held that the Department did not violate the child's federal constitutional rights under the due process clause. The Court explained that the due process clause protects "the people from the state," and does not "ensure that the State protect[s] them from each other." According to the DeShaney Court, there is no affirmative due process right to governmental aid, even where it is necessary to protect life, liberty, or property, and the government is not constitutionally liable for its failure to protect an individual against private violence.

The child's attorneys also claimed that a "special relationship" existed between the child and the Department. They argued that since the Department had actively assumed some responsibility for the child's welfare by monitoring his care over the two years prior to his permanent hospitalization, it should have been obligated to perform this duty, protecting him against the danger of his father's abuse, in a reasonably competent fashion. But the Court rejected this rationale, and

suggested that such a relationship, and its accompanying duty, is created only where the State has imposed limits on the individual's freedom to act on his own behalf. For example, according to the Court, the state assumes such a duty when it imprisons someone. The Department of Social Services' conduct did not similarly constrain the child's ability to take action, the Court ruled.

DeShaney protects school authorities from constitutional claims that they failed to adequately protect a child whom they suspected was being abused or harmed at home. The Court has not obviated all available legal remedies since state law claims may still be brought, such as claims for negligence, but the decision in DeShaney has narrowed the scope of potential federal claims.

The Court's discussion of "special relationships" sufficient to meet the constitutional due process protection threshold leaves unclear the responsibility of the school if its students are abused by a school employee or at school. Stoneking v. Bradford Area School District involves just such a situation. A female student alleged sexual abuse by a male teacher about whom school authorities had received several complaints of other instances of such abuse. The student claimed her due process liberty rights were violated by school officials because they failed to adequately protect her. A federal court of appeals ruled that school officials could be

sued under such circumstances. At the same time the Court decided DeShaney, it sent Stoneking back to the court of appeals for reconsideration. The lower court must now determine whether, in light of DeShaney, schools have a constitutional obligation to protect students under the circumstances in Stoneking. The final outcome in this case may help establish the circumstances under which a school district has a federal constitutional duty to shield students from physical harassment.

The Court declined to review a challenge to a Texas law that allows school officials to utilize corporal punishment. In Cunningham v. Beavers, two kindergarteners were beaten with paddles, leaving bruises on their buttocks, for "snickering in the hall." The lower court rejected the children's claims that their due process rights were violated because the punishment was excessive, determining that state criminal and tort remedies were adequate for addressing issues of excessive punishment under the law. The court similarly rejected the claim that the children's right to equal protection had been denied, ruling that Texas corporal punishment laws were rationally related to a legitimate public purpose of "maintenance of discipline and order in public schools . . . a prerequisite to establishing the most effective learning atmosphere," and thus passed the applicable constitutional test.

D. Other Employment-Related Issues

1. Drug testing

The Supreme Court handed down two decisions approving public employee drug testing programs. In Skinner v. Railway Labor Executives Association, the Court upheld a drug and alcohol testing program for railroad employees involved in train accidents. Emphasizing past instances of drug and alcohol-related train accidents, the Court determined that public safety concerns justified testing railroad employees without suspecting specific individuals of drug or alcohol use. Justices Brennan and Marshall dissented, arguing that the fourth amendment protection against unreasonable searches requires some individualized suspicion of substance abuse to justify drug testing.

In a companion case, National Treasury Employees Union v. Von Raab, the Court approved mandatory drug testing of individuals applying for certain U.S. Customs Service positions. The Court approved the testing in Von Raab despite the lack of prior drug related problems in the Customs Service. Two members of the Skinner majority, Justices Scalia and Stevens, dissented in Von Raab, arguing that no real government need supported the drug testing program at issue.

Skinner and Von Raab establish that drug testing of public employees constitutes a search subject to constitutional limitations. These cases indicate, however, that special

governmental needs may justify drug testing in the absence of individualized suspicion. Future drug testing cases will hinge on whether asserted government interests outweigh the privacy interests of employees to be tested.

The cases do not establish clear guidelines for drug testing in public schools because the Court's approval of the programs in Skinner and Von Raab depended on the specific nature of the tested employee positions. Unlimited testing of school employees is unlikely to withstand constitutional scrutiny, however. The Court has acknowledged special needs associated with the school environment which allow school officials broad authority to circumscribe some constitutional rights to meet disciplinary and educational goals in public schools. On this basis, a school employee drug testing program calculated to promote the safety of students or to maintain an ordered school atmosphere may be permissible.

For example, taking its cue from the Court, the District of Columbia Circuit Court of Appeals recently ruled that Washington, D.C. school officials can legally require drug testing of bus drivers to ensure safety. In Jenkins v. Jones, the court held that the school system had legitimate justification for its drug testing program, which was begun after school officials found evidence, including bloody syringes, that suggested that some drivers transporting handicapped children were using drugs. Concern about the

children's safety outweighed consideration of the bus drivers' privacy rights, according to the court. 4/

The employee drug testing cases leave open the question of student drug testing programs. As in drug testing of employees, testing of public school students would require a school district to articulate a specific court-accepted rationale for the action. For example, Schaill v. Tippecanoe County School Corp. involved a plan to test interscholastic athletes and cheerleaders randomly for drug use. A court of appeals in Schaill held that the need to prevent disruption of the academic environment and to promote a drug-free athletic program warranted the random testing program. While this case was decided before Skinner and Von Raab, it is consistent with both: the testing was related to the school district's educational goals and safety concerns and involved a specifically defined group of students.

4/ The decision in Jenkins resulted directly from the Court's ruling in Von Raab and Skinner; in a 1988 decision, the court of appeals ruled that the D.C. drug testing program was unconstitutional, but then reversed itself and upheld the program when the Supreme Court directed that it reconsider its decision in light of Von Raab and Skinner. Prior to the Court's drug testing decisions in Skinner and Von Raab, the Second Circuit Court of Appeals invalidated a school district policy requiring all probationary teachers to submit to urinalysis, in Patchogue v. Board of Education. Acknowledging the board of education's strong interest in ensuring fitness, the court held that reasonable suspicion of drug use was still necessary to legitimize the drug testing program.

2. Unions and free speech

In a rare unanimous decision, the Supreme Court supported the free speech rights of a union member under the Labor Management Reporting and Disclosure Act (LMRDA). In Sheet Metal Workers v. Lynn, the Court held that the statute protected a local union official from being removed from his elected position for voicing opposition to an increase in union dues, a position contrary to that of the international union. According to the Court, the local official could not be forced to choose between his right to express his opinion and his union position. This decision suggests that unions will not have unlimited control of their locals. Since LMRDA applies to some positions held by persons belonging to school employee unions, Sheet Metal Workers should give locals more freedom to express and negotiate positions which may be at odds with their national unions.

II. SPECIAL EDUCATION

In Dellmuth v. Muth, a 5-4 opinion written by Justice Kennedy, the Court ruled that parents of handicapped children cannot sue the states in federal court under the Education of the Handicapped Act (EHA). A parent sought reimbursement under the EHA in federal court from the Commonwealth of Pennsylvania and the local school district for private school tuition he paid during delayed proceedings to determine an appropriate

"individualized education program" (IEP) for his child. In general, a state government is immune from individual claims for reimbursement or damages in federal court under the Eleventh Amendment, and a specific federal or state statute waiving this immunity is necessary for such claims to succeed. The Court ruled in Dellmuth that the EHA did not contain an express waiver of Eleventh Amendment immunity, and accordingly reversed the lower court's award of tuition reimbursement to the parent.

The long-term impact of the Dellmuth decision is unclear. The Rehabilitation Act, which bars disability bias in federally funded programs and provides many of the same rights as the EHA, was amended prior to the Dellmuth decision to expressly abrogate state immunity to suit in federal court. 5/ Parents of handicapped children may thus be able to proceed in federal court against a state under the Rehabilitation Act if the EHA does not provide a satisfactory solution to special education disputes. Also, the Senate Labor and Human Resources

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5/ The Court refused to hear another case related to the Rehabilitation Act, Jackson v. Maine. In Jackson, a diabetic bus driver fired from his job in violation of the Rehabilitation Act sought attorneys' fees and damages from the State of Maine, which was responsible for his firing. The Maine Supreme Court allowed the bus driver to collect attorney's fees but not damages from the state; the state had claimed immunity from payment of both damages and fees.

Subcommittee on the Handicapped has already announced its intention to introduce legislation adding an express abrogation of state immunity to the EHA, effectively reversing the result in Dellmuth. 6/

Dellmuth's effect on school districts is uncertain. The decision left intact a parent's right to sue a school district in federal court because school districts are not protected by the Eleventh Amendment. However, school districts may be able to seek reimbursement from the state for shared special education liability under some circumstances.

The Court declined to review several other rulings in the area of special education. With respect to attorneys' fees payments, in Georgia Association for Retarded Citizens v. McDaniel, the Court let stand a court of appeals decision denying retroactive effect to a statute that allows successful EHA plaintiffs to recover attorneys' fees. In Connecticut v. Counsel, the Court declined to review a court of appeals decision that a parent who obtained a favorable consent decree

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6/ The Supreme Court did not reach one aspect of the court of appeals decision in Dellmuth. The lower court had invalidated Pennsylvania's special education administrative review procedure because it channeled appeals through Pennsylvania's Secretary of Education, an allegedly partial officer. Because the Supreme Court did not address this issue, the decision disqualifying the state education chief as a reviewing officer remains valid.

against a state in an administrative proceeding was a "prevailing party" and entitled to attorneys' fees under the Handicapped Children's Protection Act. The Court also refused to hear arguments in Arons v. New Jersey State Board of Education, in which the court of appeals upheld a state rule prohibiting compensation of lay advocates for representation at IEP hearings.

The Court also let stand three other special education decisions relating to the appropriateness of specific IEPs developed for handicapped children. First, in Spielberg v. Henrico County Public Schools, the lower court held that the county violated procedural requirements by deciding to place a mentally retarded child in a local school before developing an IEP to support the placement. A second case, Lachman v. Illinois State Board of Education, involved a parental challenge to the board of education's decision to use sign language rather than cued speech to teach a severely deaf child. The court of appeals rejected the parents' challenge and refused to second-guess the school board's decision. Finally, Central Columbia School Dist. v. Polk presented the question of whether an IEP developed for a severely mentally and physically handicapped child benefited the child sufficiently to satisfy the standards of the EHA. The court of appeals held that the EHA requires more than trivial but less

than a maximal education benefit for handicapped children. Again, the Supreme Court did not disturb this ruling.

III. FREEDOM OF SPEECH AND RELIGION

A. Freedom of Speech in the Public School Context

The Supreme Court has heard no cases involving free speech in public schools since last term's landmark decision in Hazelwood v. Kuhlmeier. School administrators retain broad authority to regulate school-related student speech under Hazelwood. In Hazelwood, the Court held that school officials may restrict school-sponsored student speech so long as the restriction is "reasonably related to legitimate pedagogical concerns." Lower court decisions in the past year confirm that school officials have broad authority to regulate student speech that bears the mark of school approval. At the same time, however, the lower courts have suggested that school officials have much more narrow power to limit non-school sponsored student speech.

In Crosby v. Holsinger, for example, the Fourth Circuit Court of Appeals cited Hazelwood to uphold a high school principal's decision to bar the school's "Johnny Reb" mascot. The court determined that the mascot disrupted the school environment because it offended black students. Noting that a mascot bears the school's stamp of approval, the court held that eliminating the "Johnny Reb" symbol fell within the

principal's authority to disassociate the school from controversial speech. Similarly, the Eleventh Circuit Court of Appeals applied the Hazelwood standard and upheld a school board decision to remove a previously approved textbook from an elective high school class. In Virgil v. School Board of Columbia County, Florida, the court of appeals upheld a school board's decision to cease using a textbook because of the sexually explicit and allegedly vulgar character of two selections, Lysistrata by Aristophanes and The Miller's Tale by Geoffrey Chaucer. Although the court disagreed with the school board's assessment of the two literary classics, it concluded that eliminating the textbook did not violate students' first amendment rights under Hazelwood, because using the textbook in an elective course would mark it with the school's approval, and excluding the book based on the inappropriateness of sexually explicit material for high school students satisfied Hazelwood's legitimate pedagogical concern standard.

In Burch v. Barker, however, the Ninth Circuit Court of Appeals suggested that Hazelwood provides much more narrow authority to regulate non-student sponsored speech. High school students in Burch challenged a school regulation requiring pre-distribution review and approval of all student-written materials. The school principal had censured the students for distributing an underground newspaper at a school function without first obtaining school approval. The

court held that the approval requirement constituted an illegal prior restraint on student speech. The court further held that the school could not constitutionally punish the students for distributing the underground paper, which contained no obscene, defamatory, or commercial speech.

The Supreme Court decided one case this year concerning speech-related activities on college campuses which may also affect public school officials. In Board of Trustees of the State University of New York v. Fox, the issue was whether the university could prohibit a student from inviting a sales company into his dorm room for a "Tupperware party"-type sales presentation. University rules banned commercial operations in domitories. The Supreme Court held that a university can prohibit such activities where its rules are "narrowly tailored" to promoting such interests as fostering "an educational rather than commercial atmosphere", "promoting safety", and "preventing commercial exploitation of students and preserving residential tranquility." The Court specifically ruled that a university does not have to show that its rules are the "least restrictive" method to accomplish its goals. This decision should strengthen the ability of university and public school officials to regulate commercial speech.

The Supreme Court decided one other case this term which may affect school officials' authority to regulate

non-sponsored student expression. In one of its most controversial decisions, the Court voted 5-4 that the First Amendment protects flag burning as a form of political protest. The Court's decision in Texas v. Johnson, which reversed a political demonstrator's conviction for flag desecration, clarified the constitutional protection afforded "expressive conduct. Under Johnson, the government cannot prohibit conduct intended to express an idea based on the content of the message it conveys. Speech in the form of expressive conduct may be limited only if it raises concerns about the safety of the individual actor or others in the vicinity of his expressive activity. Basically, the Johnson decision affords expressive conduct the same type of first amendment protection as ordinary speech. Under Hazelwood, however, school officials continue to have broad authority to regulate school-related expressive conduct.

B. Religion and Public Schools

1. Religious activities and displays in public facilities

Several cases which may affect religious activities and displays in public schools reached the Supreme Court this term. Allegheny County v. American Civil Liberties Union Greater Pittsburgh Chapter, for example, may affect the way in which public schools handle Christmas and other religious holidays. In Allegheny, the Court examined the

constitutionality of two city-sponsored holiday displays. The Court found that the first display, a creche placed in the Allegheny County Courthouse, violated the First Amendment prohibition on establishment of religion because it conveyed government support for Christianity. The second display, which was located in the Allegheny County building, contained a Christmas tree, a Chanukah menorah, and a statement about liberty. The Court upheld the constitutionality of this display, noting that a Christmas tree is primarily a secular symbol. The Court found that the display simply acknowledged Christmas and Chanukah as parts of the same winter holiday season without endorsing either the Christian or Jewish faiths. Allegheny indicates that the constitutionality of such displays will be decided on a case-by-case, fact-specific basis, and that in order to be permissible, such displays should emphasize religious plurality and secular aspects of the holidays. 7/

7/ Allegheny exemplifies Justice O'Connor's critical role as the swing vote between the conservative and liberal wings of the Court. In fact, the majority in Allegheny adopted the analysis that Justice O'Connor set forth in her concurring opinion in an earlier holiday display case, Lynch v. Donnelly. Justice O'Connor provided the necessary fifth vote in the first portion of the case disallowing the creche display. Chief Justice Rehnquist, Justice Kennedy, Justice White, and Justice Scalia dissented from this portion of the decision, arguing in

[Footnote continued]

At least one Justice indicated that the result in Allegheny could have been different in a public school setting. Justice Blackmun suggested that a combined Christmas tree and menorah display in a public school might not be permissible because of the "special sensitivity" applied by the court in considering such issues in the public school context. The Court noted, for example, that it has previously ruled that it is unconstitutional to provide religious instruction on public school premises or to post the Ten Commandments on the wall of a public school classroom.

The Court declined to review Jager v. Douglas County School District, a court of appeals decision disallowing prayer before public high school football games. Jager concerned a student's objection to the practice of opening high school football games with a prayer led by a Protestant Christian minister. In response to the student's complaint, the school district adopted an "equal access plan" which allowed student groups to select an individual to give the game opening

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7/ [Footnote continued]

favor of a much more lenient standard to apply to holiday displays. They joined the second portion of the decision allowing the Christmas tree and menorah display which Justices Brennan, Marshall and Stevens voted to ban. Justice O'Connor's position between these two groups enabled her to provide the decisive vote.

invocation. The school district rejected an alternative plan which called for an entirely secular pregame invocation. Noting the predominantly Protestant Christian population of the school and the rejection of the secular invocation, the court of appeals concluded that the school district intended to continue the traditional prayer before games. Because the court of appeals found that the supposedly facially neutral "equal access plan" was religious in its purpose and its probable effect, the court held it unconstitutional as an infringement of the establishment clause. The court also refused to hear S.T. v. Board of Education of Millville, N.J., in which the parents of a high school junior unsuccessfully claimed her free exercise of religion was violated when school officials refused to excuse her from a state-mandated drug education program on religious grounds.

2. Government regulation and aid to religious groups and activities

In one of the most ideologically charged cases in the 1987-88 term, Bowen v. Kendrick, the Court upheld a federal law permitting government funding of religious groups which counsel teenagers against having sexual relations and abortions. The Court determined that the law did not violate the First Amendment because (1) it had a valid secular purpose; (2) it did not have the primary purpose of advocating religion; and (3) it did not create excessive entanglement of church and

state. The application of this three-pronged standard is evident in two cases dealing with government regulation of sectarian schools which reached the Supreme Court this term. In each, the Court declined review of the lower court's decision. In Forest Hills Early Learning Center v. Grace Baptist Church, child care centers challenged a Virginia law which specifically exempted their church-run counterparts from licensing and program regulations. The Fourth Circuit Court of Appeals upheld the law, stating that its purpose, to prevent excessive state entanglement in church affairs, was constitutionally valid. The non-religious child care centers had claimed that the law impermissibly benefited religious groups by placing less stringent requirements on church-affiliated schools.

The second case, North Dakota v. Anderson, involved home education and state teacher certification laws. In Anderson, parents of three school children claimed that North Dakota's compulsory attendance law, which allows children to attend only schools taught by state-certified teachers and thus forces parents to obtain state certification to educate children at home, violated their religious freedom. The North Dakota Supreme Court upheld the law. The Supreme Court's denial of certiorari means both decisions will stand.

The Supreme Court will address the issue of student-initiated religious activities in public schools next

term. The Court agreed to hear Mergens v. Board of Education of the Westside Community Schools, involving a student effort to organize a Christian Bible Study Club at a public high school. Students at Westside High School claimed the right to hold Bible study meetings on school premises under the federal Equal Access Act. That act, which became law in 1984, requires that a public secondary school allow religious student groups to use school facilities if it allows other noncurriculum-related groups to use such facilities during the school day. This is similar to the constitutional standard established several years ago by the Supreme Court for state universities in Widmar v. Vincent, where the Court held that a state university which generally maintained an open forum for student groups could not exclude student religious organizations from its facilities.

The Supreme Court will interpret the Equal Access Act for the first time in Mergens. The court of appeals held that student activities such as chess clubs qualify as noncurriculum-related use of school space and ruled that the student bible club must be permitted to meet on school grounds. The lower court rejected Westside High School's argument that chess clubs are curriculum-related because they further curricular goals. The Supreme Court's decision in Mergens should clarify the meaning and scope of "curriculum related" activities under the Equal Access Act, as well as the

applicability of Widmar to secondary schools. The decision should thus help clarify a public high school's obligation to accommodate religious student organizations. 8/

IV. SCHOOL DESEGREGATION

The only desegregation decisions issued this year involved Kansas City, Missouri. The case was Missouri v. Jenkins, which came before the Court twice this term and will be heard next term as well. Missouri v. Jenkins represents the aftermath of major school desegregation litigation which has stretched over a number of years. The district court ordered a comprehensive desegregation remedy to be funded by the State and the Kansas City School Board. The district court also ordered the State to pay plaintiff's attorneys' fees. Because

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8/ While granting certiorari in Mergens, the Court declined to hear Perumal v. Saddleback Valley Unified School District. In Perumal, a student club wished to distribute religious flyers at a public high school during school hours and place religious advertisements in the high school yearbook. The court of appeals ruled against the student group. It held that the school district's closed forum policy, which prohibited off-campus groups from functioning or advertising on campus, was constitutionally permissible because it was intended to promote the general well-being of the campus, did not single out religious groups for better or worse treatment, and neither enhanced nor inhibited religion. For a more detailed discussion of the Equal Access Act and related issues, see D. Tatel, E. Mincberg, & J. Middlebrooks, An Introduction to the Equal Access Act, 21 Educ. Law Rep. 7 (Jan. 10, 1985); D. Tatel & E. Mincberg, The Equal Access Act Four Years Later: The Confusion Remains, 51 Educ. Law Rep. 11 (March 16, 1989).

the case had lasted so long, the court had approved (1) an enhanced fee award for the students' attorneys and (2) a fee award which compensated the work of paralegals and law clerks at the market rate. The Supreme Court affirmed the awards. It held that since a state could not claim immunity for payment of attorneys' fees on civil rights claims, it could not refuse to pay such fees because it disagreed with the court-approved amount. An adjustment for delay in payment and the compensation of work at market rates were appropriate factors in calculating a reasonable fee, according to the Court. 9/

The Court agreed to hear two cases which will further define the power of federal district courts to implement desegregation remedies. In Missouri v. Jenkins, the district court's remedy order included extensive desegregation relief, including additional capital improvements and magnet school development. The court of appeals affirmed the remedy and

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9/ Further support for plaintiffs' attorneys seeking to recover attorneys' fees is provided by Texas State Teachers Association v. Garland Independent School District. In this case, teachers' unions challenged a school board policy limiting teachers communication which concerned employee organization. Since the teachers did not prevail on "the central issue," lower courts denied their request for fees. The Supreme Court reversed, rejecting the "central issue" test as a method of determining the prevailing party for fee purposes. Instead, the Court held that parties may be awarded fees if they "succeed on any significant issue . . . which achieves some of the benefit [they] sought in bringing the suit."

authorized the lower court to enjoin a Missouri law that prevented the school district from levying additional property taxes which were necessary to raise the funds required to help pay for the remedies. The Supreme Court declined to hear argument on the scope of the remedy, allowing the lower court decision to stand. It granted certiorari, however, to consider the appropriateness of the court order enjoining state laws and authorizing imposition of a property tax increase necessary to fund the mandated remedies. The Court's decision in Jenkins may help determine whether lower courts may enjoin state law limitations on local officials' taxing authority or require local officials to exercise this authority when such action is necessary to remedy a constitutional violation.

A similar issue will be considered by the Court in Spallone v. U.S., which concerns the Yonkers desegregation litigation. An earlier district court decision linked racial segregation in the Yonkers public schools to intentional housing segregation by the city. Yonkers City Council members, however, refused to approve legislation creating public housing as part of the remedy in the case, even though the city was committed to enact such legislation by a previously signed consent decree. The district court judge imposed coercive sanctions on the city and held those council members who voted against the legislation in contempt, subjecting both the city and the individuals to fines which doubled daily until the

legislation was approved. In Spallone, the Court is to consider whether the individual city council members could be required to vote to implement remedies contained in a consent judgment agreed to by the city and approved by the Council.

V. SCHOOL FINANCE-RELATED ISSUES

Several cases decided this term could have direct and indirect effects on school district finance decisions. They relate to revenue projections, pension plans, copyright concerns, and decisions about participation in litigation.

Allegheny Pittsburgh Coal Company v. County Commission of Webster County, West Virginia affects property tax valuations by counties. Under Webster County's tax rate plan, property was taxed based on the price for which it had been purchased. As a result, recent purchasers of property, particularly property that changed hands frequently, paid taxes which were considerably higher than the taxes paid on comparable property which had remained with the same owner for an extended period. A unanimous Court held that such a plan posed an unfair and unequal tax burden on recent purchasers, denying them equal protection of the law. In addition, the Court ruled that unfairly burdened owners deserved a remedy beyond that of increasing tax assessments on comparable undervalued property. If such remedies are pursued elsewhere, lower tax revenues could result.

On the labor-related finance front, Davis v. Michigan Department of Treasury could affect employee pension agreements. Under Michigan law, retirement benefits paid by the State were exempt from taxation while benefits paid by other employers, including the federal government, were not. The Court held that the State was allowed to tax such federal employee benefits only if it did so in a non-discriminatory manner. Because Michigan's tax scheme favored retired state and local government employees over retired federal employees, the court ruled that it was discriminatory. The State's rationale for discriminating--its interest in hiring qualified personnel through the inducement of tax exemptions for retirement benefits--carried no weight. Such discriminatory treatment would be justified only where there were significant differences between state and federal employees, the Court held.

The Court declined to review a decision relating to state claims against manufacturers for asbestos problems in Hawaii v. Proko Industries. Hawaii officials challenged a lower court decision which prevented the state from "opting-out" of a class action settlement involving an asbestos manufacturer. Hawaii wished to pursue its own separate lawsuit against the manufacturer, but the lower court ruled that the State was too late in its request to separate itself from the class.

The Court also declined to hear two cases, Anderson Photography v. Brown and BV Engineering v. UCLA, dealing with suits challenging the use by state university officials of copyrighted materials. Both cases were dismissed by lower courts, which ruled that state authorities acting in their official capacity were immune from suit.

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Allegheny Pittsburgh Coal Company v. County Commission, 109 S. Ct. 633 (1989)

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Anderson Photography v. Radford University, 852 F.2d 114 (4th Cir. 1989), cert. denied, 109 S. Ct. 1171 (1989)

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Bowen v. Kendrick, 108 S. Ct. 2562 (1988)

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