School&CollegeLawSection

Spring/Summer 2000 **State Bar of Georgia**

A Message from the Chair

It's time to rejoin the School & College Law Section for the new Bar year. If you didn't do so when you received your dues notice, see the membership form on page 2. If you recently joined, pass the form on to an interested attorney.

Have you visited the State Bar's web site lately? The site is now being maintained by State Bar staff and you'll find postings will be more timely. Visit www.gabar.org and select "Sections". We have our own web page, complete with a copy of the newsletter. In the future, we will utilize this page to remind you of upcoming events. You'll still receive a written notice, but we'll follow with a notation on our web page. This site is a wealth of information. For instance, you can review your CLE hours and link to I.C.L.E. to review their seminar calendar. All section members are listed on the various section web pages. If you have any suggestions, drop me a line at pwmckee@mckeelaw.com.

Best regards,

Pat McKee, Chair

••••A Note From The Editor:

This second newsletter of the School and College Law Section has as its theme "in loco parentis." I first became familiar with this term as an entering freshman at Bucknell University in the late 1960's when I was looking forward to finally being able to make my own decisions about my life. I learned very quickly that there were still a lot of rules to follow, even in college. Mandatory chapel had been eliminated several years before I arrived (hallelujah), but there were still curfews, prohibitions on drinking, and, of course, strict rules about entertaining members of the opposite sex in your dorm room. We learned very quickly from the "grapevine" (the most reliable source of information) that while the regulations governing such visits required that the door be kept open the width of a "book," a matchbook would do the trick. We kept the letter of the law, if not the spirit.

The issue of "in loco parentis" today is no laughing matter, of course. It relates to the duty of care that colleges and universities owe students who live on the campus and study in the classrooms. To what extent

Editor's Notes Cont'd

does the concept still apply? Aren't students today adults, after all? Isn't the whole concept just a relic? Should it be abandoned altogether? Can it be? These are thorny questions. As the father of two middle school students who will be getting ready to go to college in just a few short years, the topic has taken on some personal urgency. In fact, I have written the president of Bucknell University requesting that the rules governing entertaining members of the opposite sex in dorm rooms be clarified to prohibit such visits unless the door is open at least the width of an encyclopedia.

This issue contains a brief overview of the topic of "in loco parentis," in an article by Professor Anne Proffitt Dupre (the Section's adopted law professor); a message from Pat McKee, the Section Chair; a report on a brainstorming session for section leaders held in November, sponsored by Lesley Smith, Section Liaison and the State Bar; and a list of recent law review articles on the main topic. Again, please let me or Pat or Marc Sirotkin, our section assistant, know if you have any comments, questions, contributions, or suggestions for the good of the order. You've been awfully quiet so far!.

Mel Hill, Editor

Forget Something?

Just A Reminder....

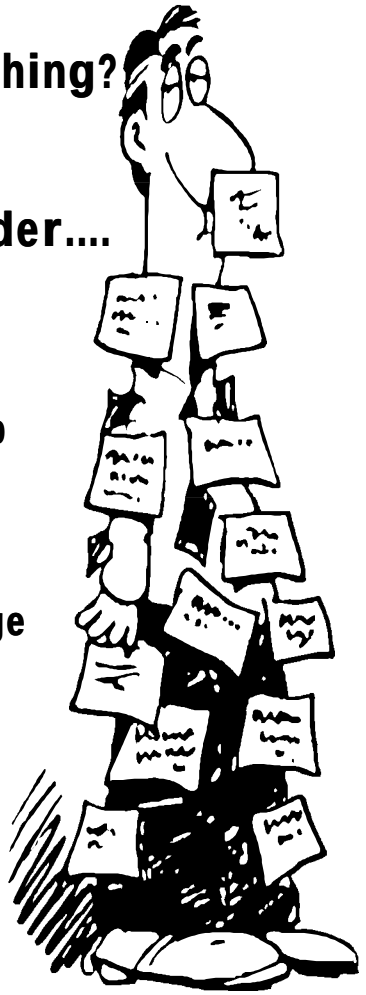
Your Membership

To The

School & College

Law Section

Is About To End



Use the form below if you'd like to rejoin & mail it to:
State Bar of Georgia
Membership Department
800 The Hurt Building, 50 Hurt Plaza
Atlanta, Georgia 30303

Yes, I Would Like To Join

The School & College Law Section

Name_____

Address_____ Bar # _____

_____

_____ (Zip Code)

Make Your $15 Check Payable To The State Bar of Georgia. This will give you membership through July, 2001

In Loco Parentis and the U.S. Supreme Court

By Professor Anne Proffitt Dupre*

History:

Traditionally under common law, the nature of school authority rested in the doctrine of in loco parentis.1 Historically, the authority of the schoolmaster over his students was analogous to that of the master over his apprentice.2 Even the name "schoolmaster," rather than teacher, connotes a master-apprentice relationship in the school setting. In fact, the training received in apprenticeships was the basic model for education for the lower classes in all the colonies during the seventeenth century.3 The apprentice served without pay, but in return, the master was required to give him food, clothing, and lodging. The master also taught the apprentice and took responsibility for his moral conduct and training.4 The master took over the care and training to such a degree that he came to possess the same authority over the child as a parent.

Upper class children did not serve as apprentices, but usually received tutorial instruction in the home.5 This voluntary relationship allowed for the theory that parents chose to delegate part of their authority to the tutor. As Blackstone put it, the father may "delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis and has such a portion of the power of the parent committed to his charge ,viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed."6

When the basic educational model moved from apprenticeship and private tutors to schools, in loco parentis moved with it.7 The nature of the teacher's power over the student was correlative to that of the parent over his child.8 Moreover, good order and respect for the teacher were two general concepts "necessary" for the teacher to affect the mission of inculcating society's values and so "to answer the purposes for which he is employed."9

In lawsuits filed against teachers in which the student claimed that disciplinary measures were too harsh, the teacher defended by claiming that the discipline was justified under the in loco parentis doctrine. Courts generally allowed discipline by teachers that could legally have been applied by parents and that was viewed as enhancing good order in the classroom and respect for the teacher. Courts also applied the in loco parentis doctrine to the relationship between college authorities and students.10 In the second half of the twentieth century, courts and commentators saw the doctrine as obsolete and began using contract law to characterize the student-university relationship.11

The schoolmaster generally had no right to punish a pupil for conduct that occurred after the class was dismissed.12 Some courts, however, allowed teachers to punish the pupil for speech--in one case simply calling the defendant "Old Jack Seaver" in front of fellow pupils--that occurred away from school, because the behavior might diminish the school master's authority and might "beget disorder and insubordination" in the school.13 When chastising students, the schoolmaster was required to exercise "reasonable judgment",14 and he would not be held liable unless the punishment was "clearly excessive."15

Development:

Even after states passed compulsory school laws,16 calling into question the concept of voluntary delegation of parental power, the doctrine was so well-entrenched that courts continued to apply the in loco parentis doctrine in school discipline and in school search cases.17 One court observed that in loco paren-

tis is "a social concept [that] antedate[d] the Fourth Amendment."18 Nonetheless, the advent of compulsory school laws undercut the theory that the parent was the source of the teacher's authority.19 Commentators and courts alike criticized the concept of parental delegation of authority in a system of compulsory education in where neither parent nor child has any choice in whether to attend school.20 The criticism focused on the source of the school power: "Under a system of compulsory education, a school authority acquires power over the child directly by reason of the law and solely because that authority is the agent of the governmental branch charged with carrying out the law."21 Despite the theoretical difficulties regarding the source of teacher authority--whether it stemmed from the law of the state or the delegation of the parent--until the 1960s, teacher authority still was "most often described in terms of its scope by the Latin phrase in loco parentis" and interpreted to give the teacher the right to discipline a child at school as a parent would at home."22

A Changing Court…A Changing Time:

The United States Supreme Court turned away from the in loco parentis doctrine in Tinker v. Des Moines Independent School District, 23 the case where students claimed a First Amendment right to wear black armbands to school in protest of the Vietnam War despite the fear of school officials that the protest would interfere with school discipline. The Tinker Court painted the public school
institution as an adversary of students. Schools could become "enclaves of totalitarianism" that would attempt to produce a society of robots.24 The Court held school authorities to a rigorous standard: they may discipline students for speech activities only if the students "materially and substantially" interfere with "appropriate discipline"25 or if the school official can reasonably forecast "substantial disruption of or material interference with school activities."26 This standard "implicitly rejected discipline in and of itself" as a goal of education.

Tinker was decided in 1969, only five years after the passage of the Civil Rights Act of 1964, and in the midst of angry protests about the Vietnam War. "Order" was one of the values, along with respect, deference, and trust, that was being challenged at all levels of consciousness. In an era that has been compared to the Protestant Reformation, the moral authority of institutions that had heretofore been virtually unquestioned crumbled, and public schools did not escape the onslaught. Although Tinker was perhaps the high water mark for student rights, later opinions like Goss v. Lopez27, Ingraham v. Wright28, Bethel v. Fraser29 and Hazelwood v. Kuhlmeier30 all played strains of Tinker to varying degrees.

In Loco Parentis in the 1980s:

In New Jersey v. T.L.O., the Supreme Court appeared to sound the death knell for in loco parentis.31 Before T.L.O. was decided, the lower courts were deeply split regarding how the in loco parentis doctrine affected searches at school. The Court relied on Tinker and Goss to resolve the conflict in the lower courts and to repudiate in loco parentis. According to the Court, the in loco parentis doctrine was "in tension with contemporary reality" and with Court precedent holding that school officials were "state actors" in Tinker and Goss.32 Many courts and commentators agreed that the T.L.O. Court, together with the long arm of Tinker, had snuffed out in loco parentis.33 In 1995, the Supreme Court showed that they were wrong.

The 1990's:

In Vernonia School District 47J v. Acton, the Court address random drug testing of student athletes in high school.34 The Acton majority first pointed out that "special needs" existed in the public-school context, and that the T.LO. Court had "explicitly acknowledged" that "the Fourth Amendment imposes

no irreducible requirement" of individualized suspicion of wrongdoing.35 But the Acton Court's analysis of school power lies primarily in the section of the opinion that described the privacy interest of public school students.36 In that section, the Court achieved much more than simply declaring that students athletes have limited privacy expectations. By linking the legitimacy of those privacy expectations to the student's legal relationship with the State, the Court could -- in defining that legal relationship -- set forth the nature of school power. In so doing, the Court breathed new life into what many viewed as the all-but-dead doctrine of in loco parentis. The Acton Court simply defined the nature of school power as "custodial," "tutelary," or that of a "reasonable guardian."37

The Court quickly noted that at common law, "and still today," children lack "some of the most fundamental rights of self determination."38 Even the "right to come and go at will" is subject to the "control of parents or guardians."39 Here the Court set up the control of parent or guardian as virtually absolute, "even as to [the child's] physical freedom,"40 and equated the power of a guardian--which it employed later in the opinion to describe the nature of school power41--with that of a parent. After describing how children lack rights because of parental power and control, the Court changed the scene to the school. But the Court did not immediately reveal the nature of power in public schools. The opinion made a special point to discuss the power of teachers and administrators in private schools who "stand in loco parentis over the children entrusted to them."42 In fact, the "tutor or schoolmaster is the very prototype" of in loco parentis status.43 The Court then quoted Blackstone's description of in loco parentis parental delegation of authority.44 Although the Court did not explicitly state that it unequivocally endorsed the in loco parentis doctrine in public schools, its description of the schoolmaster as the prototype of in loco parentis status and its quotation of Blackstone with approval surely conveys that the Court is comfortable with the doctrine, at least in some contexts.45 Moreover, by pointing out that private school teachers stand in loco parentis over schoolchildren, the Court pointed the reader toward the inference that the doctrine may be part of the reason that private schools are generally considered--at least in some areas--capable of preserving the kind of environment where serious learning can take place.46 By subtly approving the principle behind in loco parentis, the Court set the stage for the depiction of the nature of school power. In that regard, the Court stated:

While we do not, of course, suggest that public schools as a general matter have such a degree of control over children to give rise to a constitutional duty to protect, we have acknowledged for that many purposes school authorities act in loco parentis, with the power and indeed the duty to inculcate the habits and manners of civility.47

The Court stressed that the most significant element in the case was that the drug testing was undertaken in furtherance of government responsibilities as "guardian" and "tutor." The Court then added a new test: "[W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake."48

In Loco Parentis Today:

The contours of school power -- as defined by the Acton Court -- are thus broad and deep. Blackstone, whom the Court used to describe the power of the schoolmaster, describes the "guardian" as a "temporary parent."49 Generally, a guardian of a minor child has "the powers and responsibilities of a parent regarding the ward's support, care, and education."50 Similarly, a custodian generally means a person who has "care and control of a thing or person,"51 and custody of a minor child "embraces the sum of parental rights . . . includ[ing] the right to the child's services

and earnings, and the right to direct his activities and make decisions regarding his care and control, education, health, and religion."52 It is not clear what the Court meant by "tutelary" power, but the Court appears to contemplate a power greater than the state generally has over adults.53

Acton thus breaks the Tinker mold. Courts dealing with lawsuits against schools that attempt to enforce disciplinary rules must now deal with Acton's explicit declaration of school power.54

Endnotes

*Anne Proffitt Dupre, Associate Professor of Law, University of Georgia. For a more detailed version of this article see Anne Proffitt Dupre, Should Students Have Constitutional Rights? Keeping Order in the Public Schools, 65 GEO. WASH. L. REV. 49 (1996).

1The Latin phrase in loco parentis means "in the place of the parent."

2See Anderson v. State, 40 Tenn. (3 Head) 455, 457 (1859) (noting the similar relationship of schoolmaster and scholar, parent and child, and master and apprentice).

3PAUL MONROE, FOUNDING OF THE AMERICAN PUBLIC SCHOOL SYSTEM 46 (1940) (pointing out that even in New England the earliest educational laws were apprenticeship laws, rather than school laws).

4Id. at 7.

5Id. at 61.

61 WILLIAM BLACKSTONE, COMMENTARIES *453. Even Blackstone did not view the tutor's power as being coextensive with the parent, but limited the power to that "as may be necessary to answer the purposes for which he is employed."

7Public schools were considered extensions of the home in light of the culturally homogeneous local communities where the line between neighborhood and family was often blurred. See Bruce C. Hafen, Schools as Intellectual and Moral Associations, 1993 BYU L. REV. 605, 608.

8See Heritage v. Dodge, 64 N.H. 297 (1886) (ruling that a teacher was justified in the use of corporal punishment against a student who coughed when the teacher believed it was to attract attention and cause disturbance and it was later claimed that the student had whooping cough, and stating that "[t]he law clothes the teacher, as it does the parent, in whose place he stands, with power to enforce discipline by the imposition of reasonable corporal punishment"); Lander v. Seaver, 32 Vt. 114, 123 (1859) (quoting Blackstone for the proposition that the schoolmaster "has such a portion of the powers of the parent)" (emphasis omitted).

91 WILLIAM BLACKSTONE, COMMENTARIES *453. See generally State v. Mizner, 45 Iowa 248, 250 (1876) (finding "no doubt" that a teacher may legally inflict reasonable discipline "for the maintenance of his authority").

10See e.g. Gott v. Berea College, 161 S.W. 204 (Ky. 1913) (stating that "college authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils," and authorities may make rules or regulations that parent could make for same purpose).

11See Brian Jackson, Note, The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposals for Reform; 44 VAND. L. REV. 1135, 1136 (1991). There is some dispute about the current state of in loco parentis in colleges. Compare James J. Szablewicz & Annette Gibbs, Colleges' Increasing Exposure to Liability: The New In Loco Parentis, 16 J.L. & EDUC. 453, 464-65 (1987) (arguing that in loco parentis is making a comeback in college tort liability), and Philip M. Hirshberg, Note, The College's Emerging Duty to Supervise Students: In Loco Parentis in the 1990s, 46 WASH. U.J. URB. & CONTEMP. L. 189, 223 (1994), with Perry A. Zirkel & Henry F. Reichner, Is the In Loco Parentis Doctrine Dead?, 15 J.L. & EDUC. 271, 282 (1986) (positing that in loco parentis in the college context "has undergone a clear rise and a complete demise"), and Theodore C. Stamatakos, Note, The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship, 65 IND. L.J. 471, 490 (1990) (rejecting contention that in loco parentis is making a comeback).

12See Hobbs v. Germany, 49 So. 515, 517 (Miss. 1909) ("When the schoolroom is entered by the pupil, the authority of the parent ceases, and that of the teacher begins," but "[w]hen sent to his home, the authority of the teacher ends, and that of the parents begins.").

13Lander v. Seaver, 32 Vt. 115, 120 (1859).

14Id. at 123; cf. Vernonia Sch. Dist. 47J v. Acton, 115 S.Ct. 2386, 2397 (1995) (establishing a "reasonable guardian" standard).

15Lander, 32 Vt. at 124-25 (reasoning that whether whipping with rawhide is excessive is a jury question, but noting that schoolmaster has the advantage of being there to know all circumstances), see also, Vanvactor v. State, 15 N.E. 341, 343 (Ind. 1888) ("[If the teacher] really gave harder blows than ought to have been given, the error was one of judgment only. . . ."). But see Goss v. Lopez, 419 U.S. 565, 569-70, 582 (1975) (holding that a principal's direct observation of a student attacking a police officer did not alter due process requirements).

16Massachusetts passed the first statewide compulsory attendance law in 1852. Mississippi passed the last one in 1918. See LAWRENCE A. CREMIN, THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION, 1876-1957, at 127 (1961).

17See People v. Jackson, 319 N.Y.S. 2d 731, 736 (Sup. Ct. App. Term 1971) (stating also that in loco parentis is "compelling in light of public necessity"), aff'd, 284 N.E.2d 153 (N.Y. 1972) See also Gonyaw v. Gray, 361 F. Supp. 366, 369 (D. Vt. 1973) ("Of necessity, parents must delegate some disciplinary authority over their school children to the teachers . . . ."); In re Donaldson, 75 Cal Rptr. 220, 223 (Cal. Ct. App. 1969) ("The school stands in loco parentis and shares, in matters of school discipline, the parent's right to use moderate force to obtain obedience and that right extends to the search of the appellant's locker . . . .") (citation omitted); Andreozzi v. Rubano, 141 A.2d 639, 641 (Conn. 1958) (stating that a teacher stands in loco parentis and must maintain discipline); Calway v. Williamson, 36 A.2d 377, 378 (Conn.1944) (stating "[a] teacher in a limited sense is in loco parentis over the pupil"); People v. Ball, 317 N.E.2d 54, 56 (Ill. 1974) (noting Illinois statute providing that "[teachers] stand in the relation of parents and guardians of the pupils" in all matters relating to discipline and conduct); Mercer v. State, 450 S.W.2d 715, 717 (Tex. Civ. App. 1970, no writ) ("The principal in dealing with [the student] acted in loco parentis, not for an arm of the government when he demanded that [the student] disclose the contents of his pockets."); McLean Indep. Sch. Dist. v. Andrews, 333 S.W.2d 886 (Tex. Civ. App. 1960, no writ) (justifying rulemaking authority in part based on in loco parentis).

18Jackson, 319 N.Y.S.2d at 736.

19 If it is truly compulsory school laws that are the primary theoretical problem with the concept of parental delegation of power, the advent of home

schooling statutes may again allow for the theory of parental delegation. See Amy Kaslow, Learning at Home, CHRISTIAN SCI. MONITOR, Feb. 26, 1996, at 9 (discussing statutes or case law in all 50 states that allow home schooling). The parents who decide to educate their child at a school, rather than at home, affirmatively choose to delegate the duty to educate and the concomitant parental power to someone else.

20 See School Bd. Dist. No. 18 v. Thompson, 103 P. 578, 581 (Okla. 1909) (questioning wheter the "mere act" of sending a child to school amounts to a delegation of parental authority).

21 William G. Buss, The Fourth Amendment and Searches of Students in Public Schools, 59 IOWA L. REV. 739 767 (1974); see also McLeod v. Grant Co. School Dist., 128, 255, P.2d 360, 362 (42 Wash.1953) (en banc) ("[T]he protective custody of teachers is mandatorily substituted for that of the parent"); M.R. Sumption, The Control of Pupil Conduct by the School, 20 LAW & CONTEMP. PROBS. 80, 80 (1955) (arguing that the power to control the pupil is part of the power of the state).

22 Paul O. Proehl, Tort Liability of Teachers, VAND. L. REV. 723, 727 (1959) (footnotes omitted).

23 393 U.S. 503 (1969)

24 Id. at 511.

25Id. at 509.

26 Id. at 514. Compare the Supreme Court's higher standard with the standard set forth by the district court: whether "a disturbance in school discipline is reasonable to anticipate." Tinker V. Des Moines Independent Sch. Dist., 258 F. Supp. 971, 973 (S.D. Iowa 1966), aff'd, 383 F.2d. 988 (8th Cir. 1967), rev'd, 393 U.S. 03 (1969).

27 419 U.S. 565, (1975).

28 430 U.S. 651 (1977).

29 478 U.S. 675 (1986).

30 484 U.S. 260 (1988)

31 469 U.S. 325 (1985)

32 T.L.O., 469 U.S. at 336. The Court further stated that, given Tinker and Goss, it was "difficult to understand" why school authorities "should be deemed to be exercising parental rather than public authority" when conducting school searches. Id. Moreover, the T.L. O. Court emphasized a theoretical problem that had been acknowledged in Ingraham: "'the concept of parental delegation' as a source of school authority is not entirely 'consonant with compulsory education laws.'" Id. (quoting Ingraham, 430 U.S. at 662).

33 See e.g., Anable v. Ford, 653 F. Supp. 22, 38 (W.D. Ark.) (Observing that the T.L.O. Court "rejected the notion that school officials act in loco parentis in their dealings with students"), remedy modified, 663 F. Supp. 149 (W.D. Ark. 1985); Martin R., Gardner, Student Privacy in the Wake of T.L.O.: An Appeal for an Individualized Suspicion Requirmenet for Valid Searches and Seizures in the Schools, 22 GA. L. REV. 897, 912-13 (1988) (stating that the T.L.O. Court rejected the concept of educators assuming essentially parental roles); Robert J. Goodwin, The Fifth Amendment in Public Schools: A Rationale for Its Application in Investigations and Disciplinary Proceedings, 28 WM. & MARY L. REV. 683. 683, 690-91 (1987) (stating that the Court "put to rest" use of in loco parentis in Fourth Amendment context "once and for all"); Robert Berkley Harper, School Searches -- A Look into the 21st Century, 13 MISS. C. L. REV. 293, 294 (1993) (stating that the T.L.O. Court decided that "the common law doctrine of in loco parentis has no application to public school officials conducting searches of students"); Betsy Levin, Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School, 95 YALE L.J. 1947, 1671 (1986) (asserting that the notion that teachers are in loco parentis "is no longer a viable one" after T.L.O.); Stephen Faberman, Note, The Lesson of DeShaney: Special Relationships, Schools & The Fifth Circuit, 35 B.C. L. REV. 97, 132-33 (1993) (observing that the T.L.O. court rejected the in loco parentis doctrine); The Supreme Court,
1984 Term -- Leading Cases, 99 HARV. L. REV. 120, 235 n. 13 (1985) (noting the T.L.O. Court's rejection of in loco parentis).

34115 S.Ct. 2386 (1995)

35 Id. at 2391 (internal citation and quotation marks omitted). For a discussion of the special needs doctrine, see generally Kenneth H. Nuger, The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis, 32 Santa Clara L. Review 89 (1992).

36 Acton, 115 S. Ct. at 2391-93.

37 Id. at 2392, 2397.

38 Id. at 2391

39 Id.

40 Id.

41 Id. at 2397 (describing school power as that of "reasonable guardian").

42 Id. at 2391

43 Id.

44Id. (quoting 1 WILLIAM BLACKSTONE COMMENTARIES *453) (internal quotation marks omitted).

45Constitutional Law Conference Probes Impact of Supreme Court Term, 64 U.S. LAW WEEK 2240, 2246 (Oct. 24, 1995) (noting Court's emphasis on fact that drug detection policy involved minors "over whom school personnel stand in loco parentis" and questioning whether the entire student body could be tested under in loco parentis or some other justification).

46See JAMES S. COLEMAN ET AL., HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC AND PRIVATE SCHOOLS COMPARED 179-80 (1982) (finding that private school "produce better cognitive outcomes than public schools" even when "family background factors that predict achievement are controlled") see also JAMES S. COLEMAN & THOMAS HOFFER, PUBLIC AND PRIVATE HIGH SCHOOLS: THE IMPACT OF COMMUNITIES (1987) (noting "strong evidence of greater growth in Catholic schools, in both verbal skills and mathematics").

47Acton, 115 S.Ct. at 2392 (internal quotation marks, alterations, and citations omitted). See Lawrence F. Rossow & Jacqueline Stefkovich, Suspicionless Drug Testing, EDUC. L .Q. 39, 49 (1996) (stating that Acton "invigorated" in loco parentis); Drug Testing High Court Gives Schools' Adults Freedom to Make the Rules, CINCINNATI ENQUIRER, July 5, 1995, at A6 (stating the "Court held that schools serve 'in loco parentis' for the children entrusted to their care"); Ira Mickenberg, Court Settles on Narrower View of Fourth Amendment, NAT'L L.J., July 31, 1995, at C8 (noting Court's 'heavy reliance on the schools' in loco parentis responsibility"); Supreme Court, in School Case, Upholds Random Drug Testing, DRUG DETECTION REP., July 5, 1995, at 1 (explaining that the Court based its opinion on the fact that children are "under control of school officials as stand-ins for their parents"). (emphasis added).

48 Acton, 115 SCt. at 2397.

49 Id. at 2404 (O'Connor, J. dissenting).

50 Uniform Guardianship & Protective Proceedings Act § 2-109, quoted in 39 AM. JUR. 2d Guardian and Ward § 17.5 (Supp., 1996); see also 39 C.J.S. Guardian and Ward § 3 (1976) (stating that a general guardian of the person of a minor virtually occupies the position of a parent, but the legal relationship is not identical with that of a parent) (footnotes omitted); id. at § 55 ("A guardian of the person of a minor stands in loco parentis, being vested with general power of control, and should supply the watchfulness, care, and discipline essential to the young . . . .") (footnotes omitted); 39 AM. JUR. 2D Guardian and Ward § 65 (1968) (guardian stands in loco parentis to ward) (footnote omitted). Although different types of guardians have legal recognition -- statutory or testamentary guardians, public guardians, and general guardians, the Court did not specify any particular class of guardian-

ship; thus I state the powers thereof only in general terms.

51BLACK'S LAW DICTIONARY 384 (6th ed. 1990).

52 59 AM. Jur. 2D. Parent and Child § 23 (1987) (footnote omitted); see e.g., GA. Code Ann. § 15-11-2(5) (1994) ("'Custodian' means a person, other than a parent or legal guardian, who stands in loco parentis to the child…."); N.Y. Educ. Law § 3212(1) (McKinley 1995) (stating that a custodian stands in "parental relation").

53See LA. CIV. CODE ANN. art. 2333 (West 1995) ("Unless fully emancipated, a minor may not enter into a matrimonial agreement without the written concurrence of his father and mother, or of the parent having his legal custody, or of the tutor of his person."); LA. CODE CIV. PROC. ANN. art. 4261 9West 1961) ("The tutor shall have custody of and shall care for the person of the minor [and] shall see that the minor is properly reared and educated in accordance with his station in life."). In Louisiana a "tutor's" duties can also be similar to those of a trustee. See LA. CODE CIV. PROC. ANN. art. 4262 (West Supp 1996) ("The tutor shall take possession of, preserve, and administer the minor's property . . . . He shall act at all times a prudent administrator, and shall be personally responsible for all damages resulting from his failure so to act."); see also Rossow & Stefkovich, supra note 47, at 49 (describing tutelary power as somewhat less than in loco parentis but allowing "far more control" than governmental generally has against adults).

54Instead of being shaded by Tinker, one lower court has used Acton as support for holding that a search of a student by a public school "liason police officer" was permissible. See People v. Dilworth, 661 N.E.2d 310, 317, 183, 321 (Ill), cert. denied. 116 S.Ct. (1996). Another court has used Acton to uphold a generalized search of all male students if a metal detector has sounded; the students are asked to remove jackets, shoes, and socks, as well as empty their pockets and submit to a pat down. See Thompson v. Carthage Sch. Dist., 87 F.22d 979, 982 (8th Circ. 1996) see also Wojcik v. Town of North Smithfield, 76 F.3d 1 3 (1st Cir. 1996) (using Acton to support determination that school officials did not violate Fourth Amendment's prohibition against unreasonable seizure in transporting student thought to be abused to another school to be interviewed with sibling). Wallace v. Batavia Sch. Dist., 101, 68 F.3d 1010, 1013 (7th Cir. 1995) (implying that Acton limited rights of students: "We know that students do not completely surrender their constitutional rights at the schoolhouse gate [citing Tinker], but 'the nature of those rights is what is appropriate for children in school' [quoting Acton]"); Cheema v. Thompson, 67 F.3d 883, 892 (9th Cir. 1995) (Wiggins, J., dissenting) (stating that Action "reaffirmed that in the interest of safe school environments, students enjoyed fewer rights than adults, or even that children outside of classrooms"); Moule Through Moule v. Paradise Valley Unified Sch. Dist. No. 69, No. 94-17021, 1995 U.S. App. LEXIS 25187, at *1 (9th cir. July 10, 1995) (upholding school drug testing policy based on Acton). Commentators have observed that Acton may have provided the rationale for "re-empowering" school authorities. Rossow & Stefkovich, supra note 70, at 49. Nonetheless, there remains the possibility, of course, that some future majority will confine Acton to its specific facts●

In Loco Parentis Related Law Review Articles

Are schools protecting children from harassment? J.A. Thaler. 35no8 Trial 32-4+ A'99.

The college's emerging duty to supervise students: in loco parentis in the 1990s. P.M. Hirshberg, student author. 46 Washington University Journal of Urban and Contemporary Law 184-223 Summ'94.

Hell night hath no fury like a pledge scorned…and injured: hazing litigation in US colleges and universities. Gregory E. Rutledge. 25no2 Journal of College and University Law 361-97 F'98.

Illegal moves off the field: university liability for illegal acts of student athletes. G.B. Fried. 7 Seton Hall Journal of Sports Law 69-101 '97.

Intimate association under the law: the rights of social fraternities to exist and to be free from undue interference by host institutions. G.F. Hauser. 24no1 Journal of College and University Law 59-96 Summ '97.

It's all fun and games, until someone loses an eye: analysis of university liability for actions of student organizations. J.L. Spaziano. 22 Pepperdine Law Review 213-245 D'94.

Judicial intervention of private universities expulsions: traditional remedies and a solution sounding in tort. S.R. Sinson, student author, 46no1 Drake Law Review 145-232 '97.

Reconceptualizing the university duty to provide a safe learning environment: a criticism of the doctrine of in loco parentis and the restatement (second) of torts. Robert D. Bickel and Peter F. Lake. 20no3 Journal of College and University Law W'94.

The rise of duty and the fall of in loco parentis and other protective tort doctrine in higher education law. P.F. Lake. 64no1 Missouri Law Review 1-28 W'99.

Compiled by Marc Sirotkin

Ideas from the Brainstorming Luncheon at the State Bar of Georgia Headquarters (11/16/99)

Quarterly Section Leaders meeting for a "brainstorming luncheon. One was held on November 16, 1999 and was well attended by several of the state bar sections. Other section chairs presented a great deal of useful information on how to host a section CLE session. Their information was further practical for hosting any other type of speaker/seminar session. Below is a highlighted listing of several useful suggestions from the luncheon:

· Chose a high profile speaker for your CLE session. Find someone who will be well respected, but at the same time able to mingle with the section members in attendance. Try to chose someone that members will want to meet and will be willing to take time out of their busy schedules to want to come hear.
· Try to have a theme for the CLE session that is important and on the cutting edge. A theme will attract more people to sign up for the session early making the planning of the session much easier.
· Make sure the speakers are well aware of their time restrictions in advance and do not go over them. As host, fell free to cut a speaker off if he/she is going to go over his/her allotted time. It is vital to keep the sessions on schedule.

· In addition to keeping the sessions on time do not try to make up any lost time by cutting breaks, especially lunch time. Many guests are going to be counting on these breaks for various reasons. Sometimes simply cutting into a break could cause a poor evaluation for the whole session.
· Try to have more "nuts and bolts" type classes in these section meetings. Members who attend often want to learn the basics about a related area to their section that they may not have had a chance to take any coursework on while in law school.
· Do not set one of your speakers up to fall. Tell him/her in advance the set topic that he/she is expected to speak upon, and make sure that he/she sticks to this one topic and does not go off onto another tangent.

Many other points were brought up about newsletter and the Webpage. All of the sections now have the opportunity to forward to Caroline Sirmon, State Bar Web Coordinator, any materials (including newsletters) which the section would like to see on the Webpage. Please feel free to send any comments you might have on these suggestions, as the section is always open to feedback and new ideas.

Marc Sirotkin

Section Assistant

School & College Law Section Met At State Bar's Midyear Meeting January 7, 2000

The School & College Law Section Met during the State Bar's Midyear Meeting at the Swissotel. Our guest speaker was Anne Proffitt Dupre, Associate Professor of Law at the University of Georgia School of Law. Her topic was "Civility and Academic Freedom.

The luncheon was free of charge to members of the section.

Student Activity Fees

Patrick W. McKee, Esq.
Attorney at Law
The Candler Building
Suite 921
127 Peachtree Street
Atlanta, GA 30303
(404) 577-8300

I. Introduction

Five years ago in Rosenberger v. University of Virginia, 115 S.Ct. 2510 (1995), the Supreme Court began down the road of evaluating student activities fees on the basis of viewpoint neutrality. Two recent cases, decided this Spring and Summer - University of Wisconsin v. Southworth, 120 S.Ct. 1346 (March 22, 2000) and Mitchell v. Helms, 68 USLW 4668 (June 28, 2000) - which both concern the expenditure of public funds for education, give us a very clear idea how far the Supreme Court is willing to go toward allowing governmental support of religious messages and institutions. Governmental support of religious messages and institutions will be permitted so long as that support does not favor or burden a particular point of view. These decisions have profound implications not only for the narrow area of student activities fees, as is our main topic, but also for the larger question of State aid to religious institutions in general. The latter question will also be a topic of discussion today.

II Viewpoint Neutrality as the Touchstone of the Supreme Court

Oliver Wendell Holmes once stated that the job of the lawyer is prediction. By looking at precedent, the lawyer can advise his client what future conduct will be allowed and what will result in serious trouble. The trio of cases we will review, Rosenberger, Southworth, and Mitchell, have a high degree of interrelatedness and symmetry that lend themselves to the development of clear ideas of the Court's apparent direction and thus, to the ability of the lawyer to follow Holmes' dictum. For public institutions, we can give them a good idea about how their student activity fees should be structured to keep them viewpoint neutral. For private institutions, these cases support a course of action to give them greater access to public funds.

We begin with Southworth, decided just in March of this year, concerning a dispute about whether a public institution may charge mandatory student activities fees used in part to fund expression of speech to which some students object. We then go back to Rosenberger, decided five years previous, which tells us the uses to which these mandatory fees may be put. Finally, we come to Mitchell, decided in just June 28, 2000, which shows us how far the Court will go in allowing public funds to be spent to support a pervasively sectarian institution. This latter case has been widely discussed as a precedent to support private school vouchers, but it can also be seen to permit greater state aid to sectarian colleges and universities as well.

III Southworth

Whether a mandatory student activity fee imposed by the University of Wisconsin and used in part by the University to support student organizations engaging in political or ideological speech is constitutional. Approved, based on the following requirements:

A. The process for reviewing and approving allocations for funding is administered in a viewpoint neutral fashion.

B. The University does not use the fee program for advocating a particular point of view.

C. The fees are administered by the student government, not the University.

D. Excluded are: gifts, donations, and contributions, costs of legal services and activities that are politically partisan or religious in nature.

E. The University determines that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social and political subjects in their extracurricular campus life outside the lecture hall.

IV Rosenberger

Whether the University of Virginia may, consistent with the Constitution, withhold payments for printing costs from mandatory student activities fees for a student newspaper for the sole reason that the paper primarily promotes or manifests a particular belief in or about a deity or an ultimate reality. No, a government may not regulate or burden speech based upon its viewpoint. So long as the provision of governmental funds to such organizations is view point neutral, then it does not constitute state establishment of any religion in violation of the First Amendment.

V Mitchell

Whether the provision of government funds to a pervasively sectarian school constitutes the establishment of religion in violation of the First Amendment. No, so long as the aid provided is secular, neutral, and nonideological and it is provided on a view point neutral basis●