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**526 CONSTITUTIONAL RIGHTS**

**Semester I, 2006-2007**

Final Examination  
UNM School of Law  
Three Credits

Professor M. Browde  
December 7, 2006  
9:00 am – 12:30 pm

**INSTRUCTIONS**

**Examination Format  
Essay Answers**

1. **Laptops**: Start the Securexam program entering your examination number, course name, professor's name, and date of examination. Click "proceed" to enter the program. Type START in the next window that is displayed but do NOT press the enter key until the proctor says to begin the exam. Use 12 point or larger type face and double space (but not triple space) your answer.

2. **Bluebooks**: Write in ink, on only one side of the page, and skip lines. On the front of bluebook record the class name, professor's name, date of exam, and your examination number. Be sure to number your bluebooks in consecutive order. DO NOT WRITE YOUR NAME ON BLUEBOOKS.

A five-minute warning will be given prior to the conclusion of the examination. When time is called, stop immediately. If you are handwriting, lay down your pen and close the bluebook immediately. If using a laptop, save and exit the program.

Go to the exam check-in table at the conclusion of the exam and fill out an examination receipt.

**Professor's Instructions**

1. This is a 3 ½ hour exam; however, during the first half hour you may only read the examination and make notes on the examination itself or on the provided scratch paper. You may not start writing (either in blue books or on your computer) until the proctor tells you to "start." The exam consists of a single question, raising four separate legal challenges. Each is approximately of equal weight, so you should judge your time accordingly.

2. This is an open book exam, except that you may not bring any commercial materials, including commercial outlines, hornbooks, or treatises. You may bring your casebook, class notes, the Constitution, and any outline you helped prepare.

[EXAMINATION BEGINS ON PAGE 2]

## QUESTION

Public dissatisfaction with the State's public schools has engendered a number of controversies in the State of Apex. And as the Legislature sought to address that clamorous dissatisfaction, constitutional litigation necessarily followed.

The public schools in Apex ranked 47<sup>th</sup> among the states in student achievement on standardized tests required by the federal No Child Left Behind Act. The high school dropout rate in the State was an alarming 68%. Publication of those statistics had the potential for worsening the problem, because parents of the highest-performing students began exploring ways of escaping the public school system by leaving the State or putting their children in private schools.

The Legislature in Apex responded by enacting the School Reform Act. (The most relevant portions of that Act, together with relevant portions of the Apex Constitution, are found in the attached Appendix).

- The legislation established the Charter School Foundation, a private entity, whose governing board consisted of five representatives of the State Board of Education, five representatives of the teachers' union, and five parents of children under the age of 18 (none of whose children could be enrolled in public schools).
- The Legislature then appropriated \$800 million for the Foundation, one million dollars of which was for the operating expenses of the Foundation, and \$799 million of which was to be distributed among approved charter schools. (The Foundation expended \$500,000 on its headquarters building, \$400,000 on staff salaries, and \$100,000 on miscellaneous expenses, including \$39.95 for an Apex State flag, which flies over the headquarters building.)

Private (i.e. non-charter) schools operate in the State of Apex under the authority of the State Board of Education. As made clear in the School Reform Act, the primary difference between charter schools and private schools is that the latter receive no public funds.

1. One of the schools that unsuccessfully sought recognition from the Foundation as a charter school was Girl Power Academy (GPA). The organizers of Girl Power had sought to create a charter high school where admissions would be limited to female students. Their application had asserted that for many teenaged girls, co-education, and particularly the presence of teenaged boys, interfered with their potential for academic success. GPA presented studies from educational researchers showing that many adolescent girls performed better in their schoolwork without the distracting presence of male students. GPA also asserted that it could not afford to operate without the subsidy that accompanies recognition as a charter school. The Foundation denied their application, and in an accompanying letter explained that single-sex schools were both unconstitutional and "as a matter of educational policy, perpetuate[d] the stereotypes associated with the iniquitous and long-discredited doctrine of separate-but-equal."

The organizers of GPA have sued the Foundation in state court, claiming that the ruling violates their rights (and those of their prospective students) under the federal and state constitutions.

2. In the first year of the Foundation's operation, using what it believed to be neutral criteria (educational qualifications of teachers and principals, level of financial resources for libraries and computers, etc.) the Foundation's board wound up approving 75% of the applications from primarily white groups, but only 10% of the applications from schools whose leadership and school populations were primarily African-American or Hispanic. Concerned by this imbalance, the Foundation altered its operating rules in its second year of operation to provide "bonus points" in evaluating the applications of schools that serve primarily minority student communities. Once the bonus point system was implemented, the approval rating of minority school applicants rose to 75%, precisely equaling the rate of approval for non-minority schools.

A libertarian advocacy group called Color-Blind Society (CBS) has sued the Foundation, also in state court, challenging the process by which its board approves charter schools, alleging that its inclusion of racial and ethnic considerations in the "bonus point" system constitutes an unconstitutional use of race. The NAACP Legal Defense Fund (LDF) has intervened in the CBS lawsuit, claiming that the bonus-point system was constitutionally mandated because the previous system constituted discrimination against minority schools, the students who attend those schools, and their parents.

3. The Fundamentalist Academy, patterned after a highly successful private school from a neighboring state, sought Charter School certification here in Apex. It failed to get approved by the Charter School Foundation for the following reasons:

a) Its civics classes teach that participating in elections is a Godless act, since the electoral system is dominated by secular interests and one of its civics texts proclaims that "Christians have a duty to abstain from all elections until Jesus Christ is officially acknowledged as the Ruler of All and prayer is restored to all public occasions,"

(b) The school's handbook declares that "Enrollment in this school is purely voluntary, and since discussion of controversial issues is a necessary part of the curriculum, enrollment is an acknowledgment that the students so enrolled may engage in no expressive activity which is not sanctioned by the Principal," and

(c) The handbook also provides that "Teachers employed by this school may not speak publicly against the war effort whenever this country is engaged in a nationally sanctioned war."

Suit is brought by the Academy against the Foundation in state court seeking a order compelling the Foundation to grant it Charter School certification.

4. The Society for Creative Anachronisms (SCA) has operated a private school in Apex for a number of years. But a group of scientists from a nearby National Laboratory filed a challenge with the State Board of Education, urging that the school's license be revoked because the SCA science curriculum contains no mention of the fact that the earth is round, or that it

revolves around the sun. SCA defended its curriculum on the grounds that many parents do not believe the earth is round, and that they have a right to their children educated according to their beliefs. SCA pointed out that as a private school, it received no funds from the public treasury, and argued that the State lacked a sufficient interest in mandating a curriculum including “so-called modern science.” Following receipt of the complaint from the scientists, the Board of Education summarily revoked the license of the SCA school (meaning that parents could no longer satisfy their obligations under the mandatory attendance law by enrolling their children in the school).

The school and a number of parents filed a request for a hearing before the Board, which was denied. SCA and the parents have sued the Board in state court asking the court to enjoin the Board from revoking the license without giving them a hearing, asking that their children be allowed to continue attending the school (and that their parental obligations be declared satisfied while awaiting the hearing), and asking the court to overturn the Board’s substantive decision as violating the constitutional rights of the school and the parents.

**You work as an assistant in the office of the State Attorney General (who has the statutory responsibility of representing both the Board of Education and the Charter School Foundation). She has asked you for your analysis of these cases, your recommendation of the position to be taken by the Attorney General’s office, and your candid assessment of the likelihood of success on each constitutional issue.**

**APPENDIX**

**STATE OF APEX CONSTITUTION**

**Art. II, § 3. Right to Individual Dignity**

No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, culture, physical condition, or political ideas or affiliations. Equality of rights under law shall not be denied on account of the sex of any person. [Last sentence added with passage of State Equal Rights Amendment in 2002]

**Art VII, § 14. Free and Open Exchange**

The educational institutions of this State shall be dedicated to the free and open exchange of ideas, with each member of the community being responsible for the abuse of that right.

**STATE OF APEX SCHOOL REFORM ACT (relevant portions)**

**Section 1. Legislative Findings.**

- (a) The state of education in our State is deplorable. The graduation rate for high school students is unacceptably low. The performance of our students on standardized tests is deplorable.
- (b) The educational opportunities for students will be enhanced by ensuring a diversity of choices through which parents can meet their obligation to provide for the education of their children.
- (c) Charter schools can be an essential component of the State's educational system. Placing the responsibility for innovation in public instruction into private hands will reduce the drag of bureaucratic inertia and allow experimentation and creativity to flourish with financial support from the State. Placing responsibility for the development and regulation of charter schools in a quasi-private Foundation will help assure the accomplishment of these goals.
- (d) Private schools have long been an essential part of the education system in our State. Their continued operation enhances the opportunities for parents to instill their own values and serves to promote the pluralism that our State has valued so highly. But the State must also ensure that educational standards are maintained and that private education is entrusted to educators who will promote studies plainly essential to good

citizenship, and further ensure that nothing be taught which is manifestly inimical to the public welfare.

**Section 2. Mandatory School Attendance.**

Every parent of a child under the age of 18 shall enroll that child in public, charter, or private school (until and unless the child has graduated from high school). Failure to satisfy the requirement of this section shall constitute sufficient evidence to charge the parent with child neglect [under the relevant portion of the Children's Code, carrying a potential penalty of six months in jail].

**Section 3. Charter Schools.**

(a) The Charter School Foundation shall, in certifying charter schools, ensure that educational standards are maintained in a fair and nondiscriminatory fashion, and that the children enrolled in charter schools receive a high-quality, appropriate education at public expense.

(b) No Charter School that fails to receive approval from the Foundation may receive any funds from the Foundation or from any other public source, including local school districts. Schools that fail to receive such approval thereby become purely private, without public financial support, and become subject to the certification process of the State Board of Education pursuant to Section 4 of this Act.

**Section 4. Private Schools.**

(a) No private school may operate in this State without certification by the State Board of Education. In deciding on the certification of private schools, the Board shall implement such procedures and consider such evidence as it deems to be in the best interest of the State's schoolchildren.

[End of Examination]