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**526 CONSTITUTIONAL RIGHTS
Fall Semester 2006**

UNM School of Law
Final Examination
Three Credits

Professor James Ellis
Eight Hour Take-Home Examination
December 7-15, 2006

INSTRUCTIONS

This is an eight-hour, open-book final examination.

Your eight consecutive hours begin when you open the Secure Exam software program. You should not open the program until you are ready to begin. Working on the exam past the eight-hour deadline will constitute a violation of the Honor Code.

In preparing your answer, you may consult your textbook, published and photocopied supplements, any notes prepared by you (either alone or in conjunction with your classmates), treatises and other primary or secondary materials to be found in the law library. Please note that this exam is not a research project. It is my belief and anticipation that you can prepare a successful answer based solely on the course materials and your notes alone, but I have no objections if you want to consult the full text of a relevant case or check your understanding against a secondary source. You may not discuss any aspect of this exam or your answer with any other student or any other individual.

Your answer is limited to 3,000 words. Please count the words in your answer and indicate the total on the first page of your exam answer. No credit will be awarded for anything past the 3,000 words of your answer.

You have eight hours to write an exam answer that is no longer than that expected of a three-hour, in-class, ambush-style exam. This gives you the opportunity to re-read a case or two and any notes or materials you might deem relevant to the question, and consider your answer. It also gives you the opportunity to read over what you have written to determine whether it makes sense to you.

GOOD LUCK!

QUESTION

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

The public schools in Unease ranked 47th 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 Unease responded by enacting the School Reform Act, portions of which are attached in the **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 Unease State flag, which flies over the headquarters building.)

Charter schools (i.e. those approved by the Foundation) cannot charge fees or tuition, and receive 100% of their funding from the Foundation. No school that fails to receive approval from the Foundation is permitted to receive any funds from the Foundation or from any other public source, including local school districts (thus rendering them purely private schools, without public financial support, and subject to the certification process of the State Board of Education).

Private (i.e. non-charter) schools can operate in the State of Unease only with the approval of the State Board of Education, which has promulgated its own regulations for acceptable private schools. (The primary difference between charter schools and private schools is that the latter receive no public funds.) The State's mandatory attendance statute requires that parents send their children to public schools, to Foundation-approved charter schools, or to state-approved private schools. Any parent who fails to provide for his child's education under one of these three options, until high school graduation or the child attaining the age of 18, is subject to prosecution for child neglect, which carries a potential sentence of six months in jail.

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 offered expert testimony 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 claiming that the ruling violates their rights (and those of their prospective students) under the Fourteenth Amendment.

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 anticipated school enrolment was 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 proposed to serve primarily minority student communities. Once the bonus point system was implemented, the approval rate for minority schools rose to 75%, precisely equaling the rate for non-minority schools.

A libertarian advocacy group called Color-Blind Society (CBS) has sued the Foundation, 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 parents, students, and charter school organizers.

The Society for Creative Anachronisms (SCA) has operated a private school in Unease 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. The scientists pointed out that 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, 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.

Carl and Carlotta Camden indignantly pulled their eight-year-old son, Carl, Jr., out of Emily Litella Elementary School, a public school in Unease, after his second-grade teacher mentioned the word "evolution" in class, inciting the parents' expression of revulsion against "Godless, standardless public schools." (As it happens, the teacher was referring to the American Revolution, but Carl, Jr. has a hearing impairment and misunderstood.) The Camdens decided to home-school Carl, Jr., but were threatened with prosecution under the mandatory attendance law. The Camdens have sued the Unease State Department of Education, asking the court to enjoin the enforcement of the prohibition against home-schooling. Their complaint claims that the policy violates their parental rights and unconstitutionally discriminates against Carl, Jr. because the Litella School offers no specialized services for hearing-impaired students. Although there is a state-approved private school that offers services to hearing-impaired students near their home, the Camdens refuse to send their son to it because instruction is in American Sign Language, to which they have principled objections. (Carlotta is a

certified teacher with specialized training in the education of students with hearing impairments.) The Camdens' complaint alleges that unless their son is allowed to be educated by home schooling he will not be prepared for competitive employment as an adult "except in the food service industry." (Assume that the complaint in this case focuses exclusively on constitutional grounds and involves no federal statute other than 42 USC §1983.)

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 UNEASE SCHOOL REFORM ACT (portions)

Section 1. Legislative Findings.

The Legislature finds that 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.

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.

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.

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. 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. Schools that are not certified as charter schools by the Foundation may not receive public funds from the Foundation or from any other public entity, including local school districts.

Section 4. Private Schools. No private school may operate in Unease 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. Private schools shall receive no public moneys from the State or from school districts.

[END OF EXAMINATION]