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LETTER REPORT

PRELIMINARY ASSESSMENT OF THE LEGAL FEASIBILITY OF IMPAIRMENT RESISTANCE/REDUCTION PROGRAMS

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INTRODUCTION

This is a letter report prepared under Contract DOT-HS-7-01536 that addresses the legal feasibility of programs to teach drivers to drive more safely in spite of alcohol or fatigue impairment.

The research and analysis leading to the preparation of this letter report was conducted by staff of the Policy Analysis Division of The University of Michigan Highway Safety Research Institute (HSRI) under sponsorship of the National Highway Traffic Safety Administration (NHTSA).

BACKGROUND

It is believed that many drivers, in spite of law enforcement activity, educational programs, and social pressures, will continue to operate motor vehicles while their abilities are impaired by consumption of alcohol, fatigue, or both. These impaired drivers pose a substantial traffic crash risk to themselves and to other highway users. One proposed means of reducing this crash risk is to train persons to drive more safely in spite of their impairments by means of "impairment resistance or reduction programs" (IRRPs).

An IRRP, **which is currently only a concept**, would consist of classroom instruction, practice sessions using a driving simulator, or both. It could be offered to the public through community health agencies, educational instructions, and fraternal or service organizations. IRRP training, it is believed, would enable an impaired driver to counteract the deterioration of driving skills associated with alcohol consumption or fatigue; this, in turn, would decrease the probability that a traffic crash involving that driver would occur. IRRP would not, however, reduce a driver's blood alcohol concentration (BAC) or provide a substitute for needed sleep. Nor would IRRP eliminate entirely the driver's impairment.

The following section provides a brief discussion of law-based constraints that could affect the implementation of IRRPs.

DISCUSSION OF LEGAL CONSTRAINTS

- Constitutional/Statutory Authority to Offer IRRP

Any public or private agency willing to sponsor an IRRP normally would have the authority to offer the program to drivers (1). The chief potential law-based constraint concerns the allocation of state funds to subsidize IRRPs sponsored by church-affiliated groups. Such subsidies would violate the Establishment Clause of the First Amendment to the U.S. Constitution (2); this is so because on one hand, pervasive state supervision is necessary to prevent diversion of funds to religious purposes (3); and such supervision would be a prohibited "excessive entanglement" of the state in church affairs (4). A second possible constraint involves the statutory authority of public secondary schools to offer IRRPs. Courts might view the inclusion of IRRP in a school curriculum as an abuse of the school board's authority (5), or might find that school districts lack the power to offer the program as an extracurricular activity (6).

- Civil Liability of IRRP Sponsors and Teachers

A willing sponsor, with authority to offer IRRP, faces potential law-based constraints involving civil liability resulting from traffic crashes involving IRRP participants. Specifically, the IRRP sponsor or teacher might face civil liability in one of two situations: first, when an IRRP participant who drives while impaired causes a traffic crash and is injured; and second, when an IRRP participant who drives while impaired causes a traffic crash resulting in injury to others. In the first case, where the driver himself is injured, his suit against the IRRP sponsor or teacher is not likely to succeed. Several arguments against the driver suggest themselves. First, the driver must identify some failure, on the instructor's part, to use reasonable care in teaching the IRRP. This could include, for example: conducting the course with the knowledge that participants who enroll in IRRP would, as a result, attempt to drive while they were too impaired to operate a vehicle safely (Prosser 1977, pp. 145-49, 170-76, 272-75); or failing to take proper precautions to ensure that grossly impaired persons did not attempt to drive (Prosser 1971, pp.

348-50). Even if the driver is able to show that the program sponsors or teachers departed from the proper standard of care, this alone would not ensure recovery. Current social policies dealing with teacher liability are reflected, for example, in the reluctance of courts to hold teachers liable for "educational malpractice" (7). Second, it is questionable whether IRRP can be said to have "caused" a particular injury (Prosser 1971, pp. 236-44): it is common knowledge that many drivers continue to operate vehicles while impaired in spite of public-information campaigns, deterrence created by law-enforcement activity and the drivers' own experiences. Third, some courts might conclude that a driver who voluntarily became intoxicated had caused or contributed to his own injuries. This is so because operating a vehicle in violation of driving-while-intoxicated (DWI) statutes raises at least an inference of negligence and is viewed in many states as negligence per se (Prosser 1971, pp. 200-202; McCoid 1956, pp. 46-56) (8). This is also true because courts have generally held that an intoxicated person cannot raise his own intoxication as a defense to his negligent conduct (9). Thus, the injured driver who sues IRRP sponsors or teachers may face diminution (10), or even outright denial, of recovery (Prosser 1971, pp. 416-26) on account of his voluntary intoxication.

In the second case, where an injured third party sues the sponsor or teacher, the injured party also faces several obstacles to winning the lawsuit. Again it is necessary for the injured party to establish some fault on the part of the IRRP instructors. This may result from the fact that impaired driving is a foreseeable result of offering IRRP, or it may result from failure to follow prescribed methods of instruction, such as offering participants assurances that completing IRRP would eliminate the risk of a traffic crash, or failing to emphasize the hazards of any impaired-driving experience. Another argument that will be raised against recovery is that the driver's conduct, not the IRRP instruction, was the true cause of the third party's injuries.

Because there is little law in this area of teacher liability, it is not possible to determine with certainty whether an IRRP sponsor or teacher could be held liable for injuries--to the driver himself or to the third

party--resulting from crashes caused by program participants. Whatever the probability of successful lawsuits against IRRP sponsors or teachers, though, the frequency with which individuals drive while impaired and cause traffic crashes suggests the potential for a large number of lawsuits involving IRRPs. The costs of paying off verdicts and settlements, defending lawsuits, and purchasing liability insurance, might create cost constraints for those wishing to conduct an IRRP.

Another source of potential civil liability involves the premises on which IRRP programs take place. The sponsor who has control of the premises owes IRRP participants a duty of reasonable care to ensure that the premises are safe (11). This duty is no different from that owed by other owners and renters of property; moreover, exposure to premises liability can be minimized by the purchase of appropriate liability insurance.

In any event, some IRRP sponsors might enjoy immunity from civil liability owing to the doctrines of sovereign (governmental) immunity (12) or possibly charitable immunity, which still may be enjoyed by nonprofit organizations in a few states (Prosser 1971, pp. 992-96). These immunities would not, however, extend to IRRP teachers (13).

- Effect of IRRP on Enforcement of DWI Laws

Because IRRP reduces the level of driving impairment associated with a given BAC level, but does not reduce the BAC level itself, the program could complicate the enforcement of (DWI) statutes. This may be so because the DWI offense is defined in many states in terms of impairment of capabilities. BAC levels raise "presumptions" of impairment, which are inferences that may be contradicted by other evidence (14). Thus, completion of IRRP might enable a driver to perform more capably at higher BAC levels and permit him to offer evidence at trial (15) to rebut the presumptions raised by chemical test results. Approximately one-quarter of the states have adapted statutes defining driving with a BAC above a given level—normally .10% (16)—as a drinking-driving offense; a driver operating a vehicle with a BAC at or above that level will be convicted irrespective of whether his driving

ability was impaired by the alcohol. In these so-called per se states completion of IRRP could not be introduced at trial as evidence to rebut chemical test results because it would not be relevant evidence (McCormick 1972, pp. 433-41) (17).

Whether or not IRRP participation is admissible in a particular DWI trial, IRRP may have an additional effect on enforcement of DWI statutes: drivers who complete the course will presumably be less likely to commit unsafe driving acts or driving errors that would attract the attention of police officers. Consequently it is possible that more persons would be driving with high BACs and yet may pose a diminished risk of causing a traffic crash. This effect of IRRP on the enforcement of DWI statutes is uncertain; it could undercut the effectiveness of those laws. Even though this does not give rise to legal constraints on the program, it might give rise to strong policy issues affecting IRRP implementation.

CONCLUSIONS AND RECOMMENDATIONS

Assuming that IRRP is a feasible means of teaching drivers to improve their driving performance, potential IRRP sponsors and teachers would not face significant legal difficulties in establishing their programs. These are two possible exceptions: first, public funding of IRRPs sponsored by church-affiliated groups is unconstitutional and therefore prohibited; and second, school boards might, in some states, lack the authority to offer IRRP to the community as an extracurricular activity.

It is probable that IRRP participants involved in crashes, and third parties injured in crashes caused by impaired IRRP participants, would sue program sponsors or teachers for negligence. Such suits by drivers will be met by the defense that the impaired driver—not the IRRP--probably will have caused the crashes. Suits by drivers and by third parties also are likely to encounter the argument that the instructors had followed prescribed teaching methods. However, should courts find it foreseeable that impaired driving and resulting traffic crashes are foreseeable consequences of IRRP instruction, suits by injured persons against IRRP sponsors and teachers would be more likely to succeed. In addition, it should be noted that even an unsuccessful civil action generates costs for

those forced to defend it, and it is possible that a large number of such suits would be brought against IRRP sponsors and teachers. Thus, we conclude that possible civil actions against IRRP sponsors and teachers could result in increased costs of conducting IRRPs. It is also possible that sponsors and teachers could face premises liability arising out of their conducting an IRRP, but this type of liability is similar to that faced by schools in general, and could be dealt with by purchasing liability insurance.

IRRPs might also create a class of drivers who could drive more safely with high BAC levels than non-IRRP participants, and who could offer their participation in IRRP as evidence of nonimpairment at a DWI trial. This could in turn undercut the enforcement of DWI statutes, especially in states where impairment of capabilities is a key element of the DWI offense. Such a result is not by itself a law-based constraint on IRRP, but it does raise the possibility of practical constraints.

Thus, we conclude that it would not be illegal for most organizations to offer IRRPs to interested persons. Note, however, that this report addresses neither the technical and practical feasibility of IRRP, nor its political acceptability, as these are the subject of studies by NHTSA or by other NHTSA contractors.

FOOTNOTES

1. This letter report expressly avoids discussion of the public acceptability of this program. IRRP, by its very nature, invites criticisms alleging it "teaches drivers how to drive drunk." These allegations could produce a significant practical constraint to implemention of IRRP. The potency of that constraint, and possilbe means of overcoming it, are, however, matters beyond the scope of this report.

2. U.S. CONST. amend. I provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This provision has since been applied to the states through the Due Process Clause of the Fourteenth Amendment.

3. See, Walz v. Tax Commission, 397 U.S. 664, 675 (1970), quoted with approval in Lemon v. Kurtzman, 403 U.S. 602, 662 (1971). Without such oversight, a church-affiliated institution could, by sophisticated bookkeeping techniques, use state-provided funds to subsidize religious instruction. In this regard see, Berghorn v. Reorganized School District, 364 Mo. 121, 260 S.W.2d 573 (1953).

4. DiCenso v. Robinson, 316 F. Supp. 112, 119-20 (D.R.I. 1970); see also, Johnson v. Sanders, 319 F. Supp. 421 (D. Conn. 1970) (three-judge court), aff'd mem., sub. nom. Sanders v. Johnson, 403 U.S. 955 (1971); and Opinion of the Justices, 357 Mass. 836, 258 N.E.2d 779, 781 (1970).

5. Curricular decisions made by a school board will be overturned by a court only if the board has abused or exceeded its curricular authority; in this regard, see: State Tax Commission v. Board of Education, 146 Kan. 722, 73 P.2d 49, 52 (1937); Todd v. Rochester Community Schools, 41 Mich. App. 320, 200 N.W.2d 90, 99 (1972); and Brewton v. Board of Education, 233 S.W.2d 697, 699-700 (Mo. 1950). In many states the curricular authority of schools is quite broad; statutes granting broad curricular authority include: MICH. COMP. LAWS ANN. § 380.1282 (Supp. 1978-79); and OKLA. STAT. ANN. tit. 70, § 11-103(8) (West Supp. 1978-79).

6. Michigan, for example, enumerates the extracurricular powers of school boards. See, the following provisions, MICH. COMP. LAWS ANN. §§ 380.1285-380.1287, 380.1293, 380.1289, 380.1521 (Supp. 1978-79), which authorize child care, kindergartens, vocational education, adult education, interscholastic athletic competition, and interscholastic athletic tournaments, respectvely. Restrictive interpretation of such statutes might result in a court holding that a school board lacks specific statutory power to sponsor or offer an

extracurricular IRRP.

7. See, Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976); and Donohue v. Copiague Union Free School District, 64 A.D.2d 29, 407 N.Y.S. 2d 874 (1978), both rejecting claims of educational malpractice.

8. UNIFORM VEHICLE CODE § 11-902.1 (Supp. II 1976), the model DWI statute which is followed in principle by nearly all states, provides that a blood alcohol concentration (BAC) of .10% or more raises a "presumption" of being under the influence of alcohol and that a BAC of greater than .05% can, in combination with other evidence, justify a finding of intoxication. Thus, a driver whose abilities have been impaired by consuming large quantities of alcohol is in violation of the DWI statute.

9. An intoxicated person is held to the same standard of care and prudence as a sober person. See, e.g., in this regard: State ex. re. Miser v. Hay, 328 S.W.2d 672 (Mo. 1959); McMichael v. Pennsylvania R. Co., 331 Pa. 584, 1 A.2d 242 (1938); and Scott v. Gardner, 137 Tex. 628, 156 S.W.2d 513 (1941).

10. Many states have adopted in place of contributory negligence the concept of "comparative negligence." The first comparative-negligence statute was enacted in Wisconsin; WIS. STAT. ANN. § 895.045 (West Supp. 1978-79). Under comparative negligence the injured party's recovery is reduced in proportion to the extent to his own fault caused the injury. It should be noted that in most comparative-negligence states, recovery is denied altogether where the injured party is found to be more than fifty percent at fault. The theories underlying comparative negligence, and an analysis of this doctrine as applied by the various states, can be found in Kirby v. Larson, 400 Mich. 585, 256 N.W.2d 400, 412-29 (1977) (plurality opinion).

11. See, e.g., Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); and Pickard v. City and County of Honolulu, 51 Haw. 134, 452 P.2d 445 (1969).

12. A majority of states have completely or partially abolished their immunity from suit. In this regard see, e.g., MONT. CONST. art. II, § 18; OHIO REV. CODE ANN. § 2743.02 (Page Supp. 1978); MICH. COMP. LAWS ANN. §§ 691.1402, 691.1405, 691.1406 (1968) [only with respect to certain designated activities]; Davies v. City of Bath, 364 A.2d 1269 (Me. 1976); and Jones v. State Highway Commission, 557 S.W. 2d 225 (Mo. 1977). However, many states recognize the existence of "governmental" functions that remain immune from suit. Respresentative statutes immunizing states and localities from liability in connection with the performance of their governmental functions include: ALASKA STAT. § 09.50.250(1)

(1973); MICH. COMP. LAWS ANN. § 691.1407 (Supp. 1978-79); and UTAH CODE ANN. § 63-30-3 (Supp. 1978); one should see also, Zawadski v. Taylor, 70 Mich. App. 545, 246 N.W.2d 161 (1976); and Bernhard v. Kerville Independent School District, 547 S.W.2d 685 (Tex. Civ. App. 1977), which classify school district activity as "governmental."

13. In this regard, see, e.g., Baird v. Hosmer, 46 Ohio St. 273, 347 N.E.2d 533 (1976).

14. As noted in note 8 above, DWI statutes typically provide that BAC test results may be rebutted by other evidence bearing on the driver's impairment of capabilities. Thus, in most states—excepting those cited in note 16 below—impairment, not BAC, is the principal factor in determining whether an individual had driven while intoxicated.

15. See, e.g., FEDERAL RULE OF EVIDENCE 402.

16. As of December 1978 the following statutes declared driving with a BAC above given level as an offense: DEL. CODE tit. 21, §§ 4177(a), 4177(b) (Supp. 1978); FLA. STAT. §§ 316.193(3), 322.262(2)(C) (1978); MINN. STAT. ANN. § 169.121(1)(a) (West Supp. 1979); MO. ANN. STAT. § 577.012 (Vernon Cum. Supp. 1979); NEB. STAT. ANN. § 39-669.07 (Cum. Supp. 1978); N.Y. VEH. & TRAF. LAW § 1192(2) (McKinney Supp. 1978-79); N.C. GEN. STAT. ANN. § 20-138(b) (1978); OR. REV. STAT. § 487.540(a) (1977); S.D. COMP. LAWS ANN. § 32-23-1(1) (1976); UTAH CODE ANN. § 41-6-44.2(a) (Supp. 1977); VT. STAT. ANN. tit. 23, § 1201(a)(1) (1978); and WIS. STAT. ANN. § 346.63(4) (West Supp. 1978-79).

17. See, e.g., FEDERAL RULE OF EVIDENCE 402.

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