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## STATE LEGISLATION AND COURT CASES

### Illinois State Courts

*Board of Trs. of Univ. of Ill. V Shapiro, 799 N.E.2d 383 (Ill. App. 1 Dist. 2003)*

The suit arose out of a condemnation action. The university board of trustees had used its power of eminent domain to acquire property through condemnation for a campus project. The landowner failed to present a timely answer to the condemnation, but did file a complaint against the university over the valuation of his property. He stated that the value of his property was improperly established. In determining what he thought was the proper valuation, the landowner he used properties zoned differently, in better condition, and other properties which had been sold under threat of condemnation. The landowner was unsuccessful at the trial level. On appeal, the court affirmed the trial court, stating that the use of properties sold under threat of condemnation, values of improved properties, and testimony about possible rezoning was not admissible to establish valuation because none was credible.

### Pending Bills in the Illinois General Assembly

*SB 3000 and HB 5001:*

These two bills are in response to the Governor's educational agenda. They create a Department of Education, with a Secretary of Education as its head, as another state agency under the direct control of the governor. These bills would transfer to the new Department of Education all of the powers, duties, and functions currently vested in the State Board of Education by the School Code. This would be done on July 1, 2005. The State Constitution would not, however, be amended thus leaving the State Board and the State Superintendent as figure head positions with no actual power.

*SB 3001:*

In an attempt to centralize services for local school districts and thereby saving money, this bill would remove the School Construction Grant Program away from the State Board of Education and give power over the program to the Capital Development Board. All architectural, engineering, and land surveying services for projects that are funded by the School Construction Law would be obtained by the CDB on behalf of the school district. One major advantage claimed by the authors of this bill is savings on the cost of construction managers. Currently local school districts are paying around 7% of the total contract cost for construction management services. The CDB claims to be able to obtain the same services for 1% of the total contract cost.

*HB 5004:*

Another attempt at cost savings, this bill would create a state purchasing pool for school districts to buy various commodities. Also in the works, but not yet assigned a bill number, is an attempt to

require all public school districts to purchase health insurance from a state pool rather than independently or through local consortiums.

*HB 5041:*

This bill would erode local control by having a state requirement that every high school student complete 40 hours of community service as a prerequisite for graduation.

*HB 3974:*

Another bill, which intrudes on local control, this bill would mandate that by January 1, 2005, every public school district must pass a policy prohibiting soft drinks and candy in school vending machines. Such a law would threaten a lucrative source of revenue for many school districts.

*HB 3962:*

This bill would effectively end the common practice of providing enormous increases in salary for administrators in their last three years of employment before retirement, thereby milking the retirement system. Under this terms of this bill, if a teacher's or administrator's salary for any school year that is used to determine final average salary is increased by more than the employment cost index, the school district will be required to pay to the Teacher's Retirement System the present value of the increase in benefits resulting from the portion of the increase in salary that is in excess of the ECI percentage. In addition, there are two Illinois State Board of Education initiatives that warrant watching:

*SB 2774:*

This initiative increases graduation requirements by adding an additional year of math and science. Under the terms of this bill, high school students would need to successfully complete one year of Algebra 1 or geometry and one year of biology, chemistry, or physics.

*SB 2918:*

This bill would increase the age of compulsory attendance from 16 to 17 and would allow certain to student to enroll in graduation incentives programs.

## FEDERAL COURTS

**Federal District Court**

*Lifton v Bd. Of Educ. Chi., 290 F. Supp. 2d 940 (N.D. Ill. 2003)*

The plaintiff was a kindergarten teacher. After speaking out against her principal's request for early renewal of his contract, and making negative comments about the kindergarten program, the principal asserted that the teacher's negative public comments regarding the kindergarten program in which she taught damaged her ability to teach and created problems with school staff. The school board held a hearing where it passed a resolution warning her that her conduct was unbecoming a teacher.

The plaintiff alleged that the hearing was a sham, that the conduct of the principle was retaliation for her exercising her right to free speech, and that the harassment which followed was so stressful that it amounted to constructive termination. In finding for the plaintiff, the district court held that her speech was a matter of public concern therefore was protected under the First Amendment.

The allegations of the principle were not compelling, thus insufficient to override her constitutional rights. The court also found that the plaintiff had a liberty interest in her reputation as a teacher and her ability to be employed on the reputation sufficient to state a cause of action for deprivation of substantive due process.

*McMiller v Bd. Of Trs. Of the Univ. of Ill., 275 F. Supp. 2d 974 (N.D. Ill. 2003)*

This case dealt with the denial of tenure of an African-American professor psychiatry professor. The professor sued alleging violations of the ADA and Title VII. His allegations under the ADA were based on a serious spinal condition from which he suffered, and his Title VII allegation stemmed from allegedly racist remarks made by his supervisor. The federal district court held for the defendant institution stating that they enjoyed Eleventh Amendment immunity from ADA claims. As for the Title VII allegations, the court held that no grounds existed because, even if arguendo the statements were made, the supervisor alleged to have made them had very little power over the granting of tenure. The plaintiff had failed to make a prima facia case, and in fact the evidence provided by the institution pertaining to the plaintiff's lack of publications and excessive extensions and reassignment made to help benefit the plaintiff's quest for tenure was persuasive.

**7th Circuit**

*T.D. v LaGrange Sch. Dist. No. 102, 349 F.3d 469 (7th Cir. 2003)*

T his case arose out of a due process hearing where parents of a disabled girl were denied state payment of tuition at a private therapeutic school. The hearing officer only allowed reimbursement for transportation services and one-on-one services while the child attended the private school. The parents appealed to the district court seeking tuition reimbursement and continued placement at the private school. The district court never had a chance to rule on the case because the parties reached a settlement prior to verdict on everything but attorney's fees, leaving that issue to the court. The district court considered the parents a prevailing party under the IDEA, thus awarded them attorney's fees. The 7th Circuit reversed stating that there was insufficient judicial involvement to consider either side a prevailing party, therefore the award of attorney's fees was inappropriate.

*Doe v GTE Corp, 347 F.3d 655 (7th Cir. 2003)*

Athletes at several universities filed suit against operators of websites, Internet service providers, and university officials for violation of their right to privacy. The athletes had be secretly photographed is various states of undress in the locker room by hidden remote cameras. It was unknown who had hidden the cameras, but the pictures were displayed in real time to subscribers of several Internet sites such as "youngstuds.com." The federal district court dismissed the suit against the university officials and the Internet Service Providers. Although the plaintiffs who a $500 million judgment against the remaining defendants, the amount was unable to be collected because either the defendants were insolvent or had disappeared. In an attempt to find someone from whom to collect, the plaintiffs appealed to the circuit court the decision to dismiss the action

as against the Internet Service Provider. The 7th Circuit affirmed the dismissals stating that under the Communications Decency Act and the Electronic Communications Privacy Act grant immunity to Internet service providers who are unaware of misuse of their services by subscribers.

*In re Chambers, 348 F. 3d 650 (7th Cir. 2003)*

A student, who had incurred tuition debt under an open account at the university she was attending, filed for Chapter 7 bankruptcy. While her debts were discharged, the university claimed that she still owed them tuition money and related fees from the open account. The university was viewing these moneys as a type of student loan, which cannot be discharged through bankruptcy. The student maintained the position that the debt was properly discharged. In deciding for the student, the 7th Circuit reasoned that the unpaid balance on a student account does not meet the definition of a student loan under the bankruptcy code. The court did not consider it a loan because no money changed hands, nor was they're a promise to pay tuition at a later date as an exchange for an extension of credit.

*Galdikas v Fagan, 842 F.3d 684 (7th Cir. 2003)*

The plaintiffs were graduate students in a Master's of Social Work. They had enrolled in the program because they were under the belief that the program was nationally accredited or would be prior to their graduation. After the program failed to gain national accreditation, the university suspended the program and cancelled all classes. The students attempted to protest at a campus alumni event but were restricted to the atrium and outside the building to hold their protest. The students sued for violation of their First Amendment rights to freedom of speech and of their 14th Amendment rights to Due Process as regarding the false inducements given by the university to enroll in the now defunct program. In finding in favor of the institution, the 7th Circuit said that the institution was properly exerting its power to regulate the time, place, and manner of speech and had not crossed over into the impermissible regulation of the content of the speech. As for the due process claims, the court stated that no due process violations existed so long as the plaintiffs had redress, as they did, through the state court system.

## SUPREME COURTS

**Cases Decided**

*Locke v Davey, 2004 U.S. LEXIS 1626 (2004)*

Joshua Davey was a Washington resident who had been awarded a Washington State Promise Scholarship. The Washington Legislature had established the Promise Scholarship Program as a way to assist academically gifted students with postsecondary education expenses. After being awarded the scholarship, Davey chose to use it to finance his education at Northwest College, a private, church-affiliated institution where he declared a double major in pastoral ministries and business management/administration. In short, he wanted to study to be a minister.

Unfortunately for Davey, the Washington Constitution, Article I, Section II, states, ". . .No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." This effectively precluded Davey from using his scholarship to study for the ministry. Davey brought suit claiming that limiting his choice of study violated the Religion Clause of the First Amendment of the Federal Constitution. The

question before the Supreme Court was whether Washington's exclusion of the pursuit of a devotional theology degree from the Promise Scholarship Program violated the Free Exercise Clause of the First Amendment.

This case dealt with that murky gray area between the Establishment Clause and the Free Exercise Clause; the area, which Chief Justice Rhenquist stated, was the "play in joints" of the Religion Clause: "

This case involves that "play in the joints" described above. Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients. As such, there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology . . . The question before us, however, is whether Washington, pursuant to its own constitution, which has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry, can deny them of such funding without violating the Free Exercise Clause." [2004 U.S. LEXIS at 1639]

Justice Scalia contended that if the state paid for training for secular professions, that it was do the same for training for sectarian professions. To do otherwise would be basing a decision on the content and therefore was constitutionally suspect. The majority disagreed, finding instead that states had a substantial state interest in note having public funds going toward training ministers. Moreover, nothing in the constitutional history of the Washington Constitution, nor in the operation of the Promise Scholarship Program, suggested hostility toward religion in general. Looking at both of the facts in concert, the Court concluded that the provision was not constitutionally suspect, therefore Davey's claim failed. "The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars." [2004 U.S. LEXIS at 1649]

This decision was somewhat of a surprise in light of past Court decisions in Zelman v Simmons-Harris, 536 U.S. 639 (2002) and Witters v Washington Dept. of Servs. For Blind, 474 U.S. 481 (1986) where programs neutral on their face and only allowing public money to flow to religious institutions through the personal choice of individuals were considered constitutional. In neither case, however, was the money going for the purpose of training religious clergy. The Davey case is important to educators because it essentially upholds a clause in a state constitution, which is more restrictive on the use of public money to fund religious endeavors that the federal constitution has been found to be. This decision essentially strengthens the argument of those who oppose vouchers in two ways. First, it provides precedent to disallow vouchers under state constitution provisions such as exist in many state constitutions, such as in Illinois. Second, it narrows what state behavior will be considered constitutionally suspect under the Religion Clause of the First Amendment, thereby making it harder for individuals to claim a violation of their free exercise of religion. The ramifications of this case may be farther reaching then many currently believe.

**Certiorari Granted**

*United States v Newdow, 321 F.3d 772 (9th Cir. 2003); Elk Grove Unified School District v Newdow, 321 F.3d 772 (9th Cir. 2003).*

This is the infamous "Pledge of Allegiance" case. In this case, a non-custodial parent of an minor elementary school student brought suit against the school district for requiring his child to recite

the words "one nation under God" during the saying of the Pledge of Allegiance. The non-custodial parent asserts that such a practice puts the minor student in an untenable situation of either feigning a belief in monotheism or attempting to protest the coercive practice. Besides the obvious First Amendment questions, there is also the question as to whether a non-custodial parent has legal standing to bring suit on behalf of his minor child.

## OTHER COURT CASES AND ITEMS OF INTEREST

**No Child Left Behind:**

It should come as no surprise that, as the requirements of NCLB have started to have unexpected and often adverse consequences across the country, states are starting to get fed up with regulations. Here are the reactions of some states:

Pennsylvania: As has already be discussed in ISLQ-Online, the Reading School District is suing the Pennsylvania Department of Education for failing to fund measures under the NCLB. The basis of the suit is that the lack of funding was the primary cause for the failure of 13 of the Reading's 19 schools to meet AYP. As of late January, the Pennsylvania School Board Association has decided to conduct a formal review of grounds for a legal challenge to the NCLB. The focus of this review will be on NCLB provisions that "are inconsistent with state and federal law, unduly restrict local school boards, create unfounded or under-funded mandates, or threaten the quality of public education in Pennsylvania." [NSBA Legal Clips, NSBA Office of the General Counsel, January 15, 2004, page 2]

Ohio: After conducting a study, the General assembly concluded the NCLB will cost Ohio $1.4 billion more than the state will receive from the federal government. The study run in Ohio predicts that, in order to be in compliance with NCLB, the state of Ohio will need to spend $105 million to hire and train teachers and implement testing procedures, and $1.3 billion to establish remedial programs for students of "failing" schools.

Utah: Legislation was passed 64 – 8 in the Republican controlled state legislature requiring Utah to participate in NCLB only in those areas where there is adequate federal funding. The bill refers to language in NCLB legislation that says nothing in the act shall require a state or school district to incur any costs not fully funded by the federal government. Unfortunately to those wishing to challenge NCLB, the bill was killed in the senate and has been relegated to the status of a summer study issue.

Minnesota: A Minnesota Legislative Audit is predicting that 80 to 100% of the state's public schools will fail to make AYP. In also estimates costs of compliance at around $40 million. The Minnesota Education Commissioner, Cheri Pierson Yecke, supports NCLB and claims that 2014 is too far in the future to make projections. One of the failures of the audit, which she mentions is the fact that the audit did not take into account the possibility that NCLB will be amended and/or federal funding will increase. In light of the audit, there are now rumblings of Minnesota possibly opting out of NCLB even though it would cost the state approximately $200 million annually in federal funding.

Virginia: The state of Virginia has asked the federal government to exempt states with strong accountability systems for compliance with NCLB. In a 98 – 1 vote, the House of Delegates passed a resolution denouncing the NCLB as an unfunded mandate. Washington State has passed a similar resolution Perhaps as a response to the uproar of approximately 20 states, which are studying ways to opt out of NCLB, especially in an election year, the NCLB is starting to face amendments. The U.S.

Department of Education has announced changes to the way ESL students will be tested. Under the amendments, in the first year of attendance, ESL students will be tested just on how well they know English. Their tests will be counted toward participation but not toward performance. In addition, the school will be able to continuing counting such students for two years after they have gained English proficiency and have left the program. Changes are also being proposed for disabled students because of complaints that the current rules are unreasonable. "We are listening to their issues and ideas for improvement as the law continues to be implemented." [Rod Paige, Secretary of Education]

**Teachers Rights:**

The Houston School Board (Houston, TX) has upheld the transfer of an assistant principal from Sharpstown High School to Ashford Elementary School following his exposure of Houston's inaccurate dropout rates. Robert Kimball, now an elementary assistant principal assigned clerical and custodial duties, had asked for reinstatement to a secondary school, claiming he was reprimanded and demoted for calling attention to the understated dropout rates. Mr. Kimball is expected to file a whistle-blower lawsuit and appeal the board's decision to the Texas Education Agency. Editor's Note: This was the school district from whence our current federal Secretary of Education, Ron Paige comes. No wonder he could look like he worked miracles in Houston in lower dropout rates – just doctor the data!

**Student Discipline**

Heads up! A new method of cheating in a California high school involved a computer device called "KeyKatcher" which captures teacher passwords which student can then use to steal and share tests and answers to change grades. The KeyKatcher device records keystrokes on a computer and is about the size of an AA battery. It is installed between the keyboard and the computer.

**Corporal Punishment**

While corporal punishment is illegal in the state of Illinois, it is still legal in 22 states. Corporal punishment is commonplace across much of the southern Bible belt. The United States and one state in Australia are the only places in the industrialized world, which still allows the infliction of pain for punishment upon children. Editor's Note: The 8th Amendment prohibits the same for incarcerated adults such as convicted mass murders and serial rapists.

**Student Speech**

Several issues have arisen concerning symbolic students speech.

- In Pinellas County, Florida officials are considering whether to ban the wearing of the Confederate Flag by the students in the county's schools. There are arguments on both sides. Supporting the ban are many African-American residents who view the Confederate flag as a symbol of slavery and racism. On the other side are the Sons of Confederate Veterans who view the flag as a symbol of the south's heritage.
- Newsom v Albemarle county School Board, 354 F.3d 249 (4th Cir. 2003): The First Amendment entitled a student to a preliminary injunction preventing a school district from enforcing its dress code with respect to the student's NRA T-shirt. The district has reportedly settled the lawsuit on undisclosed terms and revised its dress code.

- Nathan Griggs and his father, David Griggs, have filed suit against the Fort Wayne Community Schools after Nathan was suspended from Elmhurst High School for wearing a T-shirt emblazoned with the likeness of an M-16 rifle and the text of the Marine Corps creed. The Marine Corps creed focuses on the relationship between a Marine and his or her rifle, and is also known as My Rifle.

**Religion and Education**

In an attempt to fund programs run by religious organizations, the U.S. Department of Education proposed regulations, which will funnel money to such organizations through grants, contracts, and sub-contracts

**Idea Reauthorization**

The reauthorization of the IDEA is well underway. A vote on the Senate floor is expected in March 2004. If this happens then both House and Senate bills (H.R. 1350, S. 1248) can be moved on to conference committee.

**Drug Testing**

A bill has been introduced by Pennsylvania Congressman, John Peterson that would encourage public schools to conduct random drug testing of students. The proposed $23 million dollar program would target students in grades 8 – 12. Although testing would not be mandatory, parents who do not want their child to participate would have to affirmatively opt out. Test results would only be shared with schools and parents – not released to law enforcement officials. Editor's Note: I would say that this is a law for those parents who don't really want to parent – let the school do it! Also, question as to the constitutionality of drug testing as a pre-requisite for an education. Prior case law only deals with extra-curricular activities. In addition, the federal Office of National Drug Control Policy (ONDCP) has announced that it will hold four Student Drug Testing Regional Summits to inform community leaders about drug testing and promote discussion at the local level. The summits will provide information about current programs, research, technology, and legal issues, as well as the new Department of Education grant program proposed by President Bush in his State of Union Address.

**Desegregation**

A 23-year old desegregation agreement concerning the Chicago Public Schools may be about to come to an end. A deal worked out between Chicago and the U.S. Justice Department, has been approved by the U.S. District Court. The presiding judge stated that it was unwise for such things to go on forever.

**Discrimination**

Single-sex classrooms may be making a comeback. Under Brown v Board of Education, separation was deemed inherently unequal. This has always been the precedent relied upon when interpreting Title IX discrimination. Now, however, returning to the "separate but equal" doctrine, the U.S. Department of Education has issued proposed regulations to allow school districts to create single-sex classrooms and schools. Under the proposed regulations, elementary and secondary schools may offer voluntary single-sex classes within a coeducation school as long as both sexes are treated fairly and equally. If, instead, a district offers a single gender school, it does not need to offer the

same to the other gender. For example, if a district wished to offer an all-male math and science academy, under the proposed regulations the same would not need to be offered for females. Not surprisingly numerous civil rights groups are not supportive of this initiative in its current form.

**Vouchers**

Special education advocacy groups warn that voucher programs threaten the hard-won rights of disabled students. ADA Watch and the National Coalition for Disability Rights cite a 1998 U.S. Department of Education survey that found 70-85% of inner city private schools would "definitely or probably not participate in a voucher program if required to accept "students with special needs such as learning disabilities, limited English proficiency, or low achievement." The percentage climbed to 86% among religious schools. Despite these inequities, the U.S. Senate has approved the first federally funded voucher program. Under this program $14 million will be provided to students in the public schools of the District of Columbia. A five-year pilot program will provide grants of up to $7,500 a year to at least 1,600 students in families earning up to approximately $36,000 for a family of four, to attend private schools, both secular and sectarian starting in the fall of 2004. Priority will be given to children attending low-performing public schools.