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Mission Statement

The primary purpose of the *Illinois State Education Law and Policy Journal* (formerly *Illinois School Law Quarterly On-Line*) is to provide a forum for the interchange of ideas, theories, and issues on various aspects of school law among practitioners, professors, and attorneys. The emphasis is on analyzing issues in school law for the purposes of developing new theories to explain current and past developments in the law and to provide the theoretical framework which can be used to anticipate and predict future developments in school law.

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DEVELOPMENTS IN THE COURTS

NO CHILD LEFT BEHIND

The Seventh Circuit Court of Appeals affirmed the dismissal of a lawsuit brought against the Federal Department of Education and the Illinois State Board of Education by two school districts in Illinois wherein it was alleged that the NCLB and the IDEA were legally incompatible and a declaratory ruling was sought invalidating NCLB requirements for systemic remediation activities that necessitate modifying students' individualized education programs without regard to the student's individual needs. Twice the district court had alleged that the districts lacked legal standing. The circuit court affirmed but on different grounds. It rejected the lower courts determination that the parties lacked standing because "both statutes establish voluntary programs and the school districts can solve any problem for themselves by turning down the federal money and escaping the obligations." The court said this reasoning was flawed because the decision to participate was made at the state not the local district level, the plaintiffs included parents who had not power over the decision to accept federal funding, and the decision to participate was for a year at a time.

Although the Circuit Court found that the plaintiffs did have standing, it affirmed the dismissal by the lower court because it found that the plaintiff's claim was too weak to justify continued litigation. In its decision the court almost seemed to prefer the newer NCLB over the older IDEA stating that the plaintiff's position had "time traveling in the wrong direction." Even assuming that there was some incompatibility, the attack on the NCLB was too broad. The court could not forbid the application of legislation passed in 2001 just because parts of it may conflict with legislation passed in 1970 and 1990. Consequently, the circuit court's dismissal was based on failure to state a claim on which relief may be granted. Consequently, if the districts articulate a claim on which relief could be granted a subsequent suit could be filed.

The woes for the NCLB never seem to end. Its reauthorization seems intractably stalled. States are continuing to take action in opposition to the law. The Virginia General Assembly is currently working on a bill which would demand that the Virginia Board of Education study and then make a recommendation as to whether the state should pull out of the NCLB. In Utah the State Board of Education has gone on record against a bill requiring outside approval for expensive federal programs by asking for a gubernatorial veto. The idea behind the bill is that a more extensive cost/benefit analysis needs to be done before the state signs on to costly federal categorical aid (such as the NCLB).

The U.S. Department of Education has asked all judges on the Sixth Circuit to rehear a three-judge panel ruling which held that schools are not required to comply with any provision of the NCLB which is not fully funded by the federal government. On a 2-1 decision, the panel found that since the law does not give clear notice to the states as to who bears the extra cost of compliance the burden falls on the federal government. According to the panel, under the Spending Clause of the Federal Constitution clear notice must be given to the states as to their liability should they chose to accept federal funds. Since such clear notice is absent in the NCLB the states can not be held liable for the cost of compliance; there could be no "meeting of the minds" as required under standard contract law.

The Bush administration has finally admitted that the NCLB as currently enforced cause too many schools to be considered failing. At last count, approximately 10% of the nation's

schools (9,000 out of 90,000 public schools) have been identified as “in need of improvement” and these numbers are expected to increase dramatically in the coming years. In response to this data, Secretary of Education Margaret Spellings laid out a new plan in a speech delivered in St. Paul, Minnesota. Under the new plan, 10 states will be given permission to focus their efforts on schools that are considered drastically underperforming, rather than those schools in which scores are rising except in certain areas such as with special education sub-groups. Priority for participation in this plan will be given to states where at least 20 percent of the public schools have been labeled as “in need of improvement.”

Not surprisingly, opinion is split on this new proposal. The National Education Association (NEA) is in favor of Spelling’s proposal, while the American Federation of Teachers (AFT) disagrees with the plan. The AFT’s position is that the NCLB is irretrievably broken and can not be fixed with the band-aid being proposed by the Bush administration. Since the schools which will be most helped by Spelling’s proposal are suburban and rural schools some have dubbed the plan the “Suburban Schools Relief Act.”

Special Education

Draper v Atlanta Indep. Sch. Dist., No. 07-11777 (11th Cir. Mar. 6, 2008): Draper entered the Atlanta public schools as a second grader. When he entered he lagged behind his peers. He could not read, he didn’t know the alphabet, and was writing at a kindergarten level. Every year his teachers recommended that he be assessed for special education services. When he was finally tested four years later he showed an IQ of 63. Although he had showed signs of dyslexia he was not assessed for any specific learning disability. For the next five years Draper was placed in a self-contained classroom for student with mild intellectual disabilities. When he was finally reevaluated it was determined that he did not have mild intellectual abilities but had an IQ in the low-average range and a specific learning disability. It was after this evaluation that he was placed in a regular education classroom with special education services.

When promised services were not provided and he failed to progress, Draper’s parents requested an administrative hearing. The administrative law judge found that the Atlanta public schools had violated the IDEA by (1) failing to provide Draper with an adequate education; and (2) misdiagnosing his disability. Two options were given to the parents: public school placement with significant special education services or placement in a private school. Not surprisingly Draper’s parents chose the private school option while the case was on appeal. Upon reaching the Eleventh Circuit the court held that the lower court did not abuse its discretion in giving the option of a private school because it had also provided a public school option. In the words of the court, “While the IDEA reflects a structural preference in favor of providing special education in public schools...we have explained that when a public school fails to provide an adequate education in a timely manner a placement in a private school may be appropriate.”

New York State Div. of Human Rights v East Meadow Union Free Sch. Dist., No. 10115533 (N.Y. Div. H.R. Mar. 10, 2008): Cave was a hearing impaired high school student who requested permission to bring his service dog to school with him. His request was based on a policy that allowed the use of guide, hearing, or service dogs on a “case-by-case” basis. The policy balanced the benefits to the student against the risks associated with having a service animal in the school building. His request was denied so he appealed to New York Division of Human Rights.

Upon hearing the case the Commissioner of the Division of Human Rights relied on the wording of the state's Human Rights Law to find in favor of Cave. The law "prohibits discrimination by 'an education corporation or association' against any person with a disability, as defined by the Law and regardless of level of impairment, on the basis of her/his use of a guide, hearing, and service dog, which discrimination includes...denying access to educational facilities." The school district had argued that it was not an "education corporation or association" under the law. Since the term was not defined in the law, the Commissioner decided that to allow a school to forbid such access just because there was no definition would violate the intent of the law. The Commissioner also found that the ADA did not govern the Division of Human Resources therefore the school's district reliance on precedent flowing from the ADA was unpersuasive.

Students' Rights

York v Wahkiakum Sch. Dist. No. 200, No. 78946-1 (Wash. Mar. 13, 2008): Despite the fact that the United States Supreme Court has held that suspicionless drug testing of student athletes, the Washington State Supreme Court has ruled that suspicionless drug testing of student athletes violated the state constitutional provision "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." After continuous drug and alcohol problems, the Wahkiakum School district enacted a random drug testing policy for all interscholastic athletics. Parents filed suit asking for a preliminary injunction. Lower courts found in favor of the school district.

The Washington State Supreme Court, however, decided to determine whether the district's policy, while allowed by the federal Constitution, violated the Washington State Constitution. The court found that while 4th Amendment analysis depends on whether a warrantless search is reasonable, the analysis under the state constitution depended on whether the search has the "authority of law." To make this determination, the court employed a two-part test: (1) whether asking student-athletes to provide urine samples constitutes a "disturbance of one's private affairs"; and, if so, (2) whether the "authority of law" justifies the intrusion, which is satisfied by a warrant or "a few jealously guarded exceptions."

Starting with the first prong, the court held that providing a urine sample is a "disturbance of one's private affairs"; it intrudes upon a privacy interest. As for the second prong, in making its determination the court reviewed state case law involving similar circumstances to determine whether the school district's claim that a narrow "special needs" exception, much like that used by federal courts, applied. After review the court stated, "We have not created a general special needs exception or adopted a strict scrutiny type analysis that would allow the State to depart from the warrant requirement whenever it could articulate a special need beyond the normal need for law enforcement." Therefore, the court found that the school's policy was in violation of the state constitution.

Phillips v Anderson County Bd. of Educ., No. 07-5103 (6th Cir. Jan. 15, 2008): Two girls enrolled in a high school weightlifting class. When the principal believed that one of the two girls had dropped from the class he removed the other girl over safety concerns. The girls claim that neither had dropped and that the principal unilaterally removed them both from the class. Fearing a Title IX action, the district investigated and reinstated the plaintiff. She chose to sue the district anyway and seek \$1,000,000 for violation of the Section 1983 and Title IX rights. The U.S. district court in Tennessee dismissed the action. In an unpublished opinion the Sixth Circuit

affirmed the lower court. In order to prevail, the plaintiff needed to show that (1) her constitutional rights had been violated; and (2) the school board was responsible for the violation. Even if the court assumed that the removal from class did violate her constitutional rights, the plaintiff had failed to show that the board of education was responsible for the violation because she failed to prove that the principal, when removing her from class, was executing an official board policy or was acting as a policy-maker on the board's behalf. Moreover, upon learning of the removal, there was no proof that the board acted with "deliberate indifference" in investigating her complaint.

Harper v Poway Unified Sch. Dist., No. 04-1103 (S.D. Cal. Feb. 11, 2008): This was the case that appears to have greatly expanded the United States Supreme Court's words from *Tinker v Des Moines*, 393 U.S. 503 (1969) when it established the "material and substantial disruption of the educational environment test" as a compelling state interest sufficient to limit students' freedom of speech. In the instant case, the Ninth Circuit has expanded the second prong of the test by taking "intrudes upon...the rights of other students" out of context. In *Tinker* the entire statement was the rights of other students to obtain an education, whence the "material and substantial disruption of the educational environment test" to go far beyond the intent of the Court. The Ninth Circuit broadened that statement by finding the anti-gay t-shirt worn by the disciplined student fell under the *Tinker* test because "harassment on the basis of sexual orientation adversely affects the rights of public high school students and because the T-shirt worn by [the student] fell under the category of T-shirts that flaunt demeaning slogans, phrases, or aphorisms relating to a core characteristic of particularly vulnerable students...that may cause them significant injury." *Author's Note: But does it cause a material and substantial disruption of the educational environment?*

The Ninth Circuit took extra courage from the recent Supreme Court decision in *Morse v Frederick*, 127 S.Ct. 2618 (2007) which stated that schools may restrict speech promoting drug use. *Author's Note: This is comparing apples and oranges. Who is being harassed and hurt by a drug message? If any one it would be the state and so using Morse and further evidence to support its decision the district court is actually saying that student speech which bothers the state can be controlled—I would say that is a direct and pure violation of the First Amendment Freedom of Speech. Morse was using the more narrow reading of Tinker which talks about "material and substantial disruption of the educational atmosphere" which further a drug message is claimed to do. In Harper the California courts are changing Tinker to apply to "material and substantial disruption of a person's psyche." As I said, apples and oranges!*

Brannum v Overton County Sch. Bd., No. 06-5931 (6th Cir. Feb. 20, 2008): Officials at a middle school in Tennessee had the bright idea to put surveillance equipment in the boys' and girls' locker rooms as an attempt to heighten overall security. It didn't take long for the school to get sued for violating the students' constitutional right to privacy. In the lower courts, the school board members and superintendent were found to have qualified immunity from suit because they were not aware of the surveillance equipment in the locker rooms. The building administrators were not so lucky because the decision to install the cameras, the viewing of the tapes, and the possession of the tapes started and ended with them. In determining whether there was a constitutional violation the court relied on United States Supreme Court decisions in *Vernonia Sch. Dist. 47J v Acton*, and *New Jersey v T.L.O.*, 469 U.S. 325 (1985) and concluded that "the ultimate measure of the constitutionality of such searches is one of reasonableness." Was in reasonable

for a student to believe that he or she would not be video taped while undressing and dressing in a locker room? The answer is unequivocally, yes! The use of video surveillance equipment in locker rooms is a violation of the Fourth Amendment right to privacy. What were the administrators thinking?

R.D.S. v State, No. M2005-00213-SC-R11-JV (Tenn. Feb. 6, 2007): The Tennessee Supreme Court has weighed in the status of school police resources officers when it comes to searches at school. In short, are they law enforcement officers who need probable cause or are the school district employees who merely need reasonable suspicion? In the instant case, the school resource officer questioned a high school student who appeared intoxicated. During the investigation she found that the student had been in the vehicle of another student. She found the other student, who did not appear intoxicated, and the vehicle. She searched the vehicle and found a bag of marijuana. During his trial in juvenile court he asked the evidence be suppressed as having been gained during an illegal search. While the court ended up finding that the evidence was not “fruit of the poisonous tree,” it also gave some insight as to which standard applies to school resource officers.

Which standard is to be applied depends on whether the individual was acting in the capacity of a law enforcement officer or as a school official. The court concluded that the “reasonable suspicion” standard applies to officers who are assigned to the school on a regular basis and are assigned duties at the school beyond those of an ordinary law enforcement officer such that he or she may be considered as a school official as well. To make this determination the court may look at policies relevant to the position, by whom the officer is paid, who is the officer’s direct supervisor, whether the officer teaches a class, whether the officer counsels students, and whether the officer is in uniform.

Home Schooling

In re Rachel L. No. B192878 (Cal. App. Feb. 28, 2008): In a potentially far reaching decision, the California Court of Appeals, Second Appellate District, ruled that parents do not have a constitutional right to home school their children. Ever since the United States Supreme Court decisions in *Pierce v Society of Sisters*, 268 U.S. 510 (1925) and *Wisconsin v Yoder*, 406 U.S. 205 (1972) individuals have argued that parents have a “right” to home school their children without intrusion of the state. California law requires enrollment and attendance in a public full-time day school for minor children unless: (1) the child is enrolled in a private full-time day school and actually attends that private school; (2) the child is tutored by a person holding a valid state teaching credential for the grade being taught; or (3) one of the other few statutory exemptions to compulsory public school attendance (Ed. Code Sec. 48220 *et seq*). During an investigation of the plaintiff’s family, the Los Angeles County Department of Children and Family Services discovered that all eight children in the family were being home schooled. Upon a request from the attorney of two of the children that they be enrolled in school, the lower court found that although the home schooling was inadequate and that the children would benefit socially and emotionally from contact with other people, that parents have a constitutional right to home school their children. Upon appeal the appeals court found no such constitutional right, reversed the lower court, and ordered that the children be enrolled in public schools.

Curriculum

Parker v Hurley, No. 07-1528 (1st Cir. Jan. 31, 2008): When Parker, a kindergartner, brought home a book from school which depicted a gay family his parents sued the school district. The Wirthlins joined the suit after a second-grade teacher read the fairy tale, “King and King,” a story of two princes falling in love, to her class. Both family alleged that the exposure to pro-homosexuality messages violated their First Amendment Free Exercise of religion and their right to teach morals to their children at home. The First Circuit affirmed the lower courts summary judgment for the schools district using the analysis employed by the United States Supreme Court in *Wisconsin v Yoder*, 406 U.S. 205 (1972); the court considered the parents’ due process and free exercise claims “interdependently.” The court found no religious or social similarity between the Amish in *Yoder* and the families in the instant case. The Parker family and the Wirthlin family had voluntarily chosen to send their children to public school; they did not belong to a sect whose religious views directly contradicted with public schooling. The court could find no precedent which would demand an exception for children to prevent their exposure to certain books used in public schools.

As to their Free Exercise claim—claim of “indoctrination”—the court noted that the United States Supreme Court had never applied the indoctrination test to the Free Exercise Clause or to the public school context. The closest case it could find was *Board of Education v Barnette*, 319 U.S. 624 (1943) which was a case dealing with compulsory flag salute. In that case the Court held the “state could not coerce acquiescence through compelled statements of belief, such as the mandatory recital of the pledge of allegiance in public schools” but “did not hold that the state could not attempt to inculcate values by instruction, and in fact carefully distinguished the two approaches.” The mere fact of exposure did not amount to an unconstitutional burden on the free exercise of religion.

Citizens for a Responsible Curriculum v Montgomery County Pub. Sch., No. 284980 (Md. Cir. Ct. Jan. 31, 2008): The Montgomery County public school’s sex education curriculum came under attack from two groups—Citizens for a Responsible Curriculum (CRC) and Parents and Friends of Ex-Gays and Gays (PFOX)—on the grounds that instruction of “erotic techniques” (i.e. anal intercourse) is prohibited under Maryland law and that teaching that homosexuality is innate is factually inaccurate therefore such instruction is also illegal. The court started its review by stating that Maryland law does not define “erotic techniques” therefore it was reasonable to allow such definition up to the Maryland State Board of Education or the local school board’s definition. The court also applied the same reasoning as to the curriculum dealing with the success rate of condoms, and the “origin” of homosexuality.

Teachers’ Rights

Policastro v Kontogiannis, No. 06-1471 (3rd Cir. Jan. 24, 2008): The Court of Appeals for the Third Circuit has ruled that a school board policy restricting the use of teacher mailboxes to school business is not a violation of the teachers’ freedom of speech. Policastro, a teacher in the school, had used the mailboxes to distribute a memo dealing with a labor dispute over a proposed collective bargaining agreement. After receiving complaints, Principal Konogiannis removed all the memos from the mailboxes. A teacher put them back in. The principal had them removed and then locked the door. The teacher sued claiming a violation of his freedom of

speech. In determining whether the policy was overbroad, the court stated that a “regulation is unconstitutionally overbroad where there is a likelihood that [it]s very existence will inhibit free expression’ by inhibiting the speech of third parties who are not before the Court.” Applying this to the instant case, the court found that the policy had no potential chilling effect and was, instead, a legitimate time/place/manner restriction on the use of school facilities.

DEVELOPMENTS IN LEGISLATION

Federal Legislation

Senate Bill 2554 sponsored by Edward Kennedy (D-MA) and H.R. 2159 sponsored by John Lewis (D-GA), known as the Civil Rights Act of 2008, would limit the ruling in two United States Supreme Court cases dealing with sexual harassment in K-12 schools. In the case of *Gebser v Lago Vista Independent School District* the Court stated that a school district could not be held liable for an employee’s harassing behavior unless an official of the district had actual notice that such harassment was occurring. In *Davis v Monroe County Board of Education* the Court held that, although Title IX covered student-on-student sexual harassment, the harassment needed to be “severe, pervasive, and objectively offensive” for damages to be recoverable. Under the proposed legislation, the standard that the harassment must be known would be broadened back to the standard prior to *Gebser* that the school “knew or should have known,” a standard which the Court found unrealistic and unworkable in the school environment. In addition, the proposed legislation makes changes in fee-shifting, changes in standards under the Age Discrimination in Employment Act and the Equal Pay Act, allow compensatory and punitive damages in addition to already existing remedies under the Fair Labor Standards Act, and stipulates that a state’s receipt of federal funds constitutes a waiver of the state’s sovereign immunity against individual claims for monetary damages under various federal statutes. In short, it would substantially change and enhance the ability of individuals to successfully sue educational institutions for heretofore reasonable, rational, and legal behavior.

State Legislation

The Illinois General Assembly is back at work. Here is some legislation which has been introduced:

House of Representatives

- HB 4309 If, for reasons beyond its control, a school district is forced to close one or more school buildings prior to providing any instruction, the district can count those days as full days of attendance for a maximum of 2 days
- HB 4387 All cars used for Driver Education must be American made
- HB 4437 Student athletes must undergo an EKG
- HB 4727 If a student becomes a non-resident during a grading period (shortened from a school term) shall not be charged tuition for the remainder of that grading period
- HB 4822 Once a student turns 14 ½ his or her IEP must include measurable postsecondary goals and transition services need to obtain those goals

- HB 5240 A school board may require a doctor's certification in order for a teacher to continue to receive pay after an absence of 30 days for child birth. As regarding adoption, if paid sick leave is to be used a school board may require that evidence that a formal adoption is underway be provided and limited pay leave to 30 days

Senate

- SB 1997 Prevents the IHSA from allowing exclusive coverage of any sporting event
- SB 2387 Adds the processes of homeownership to the curriculum of consumer education
- SB 2500 Creates a new superintendent mentoring program
- SB 2858 Would require the ISBE to enact rules to eliminate trans fat from school cafeteria menus
- SB 2892 Implements a sales tax holiday for nine days from the first Friday in August for school supplies including clothing, footwear, or a computer