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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

Freedom of Information Act

DesPain v The City of Collinsville, No. 5-07-0300 (May 9, 2008): The municipality, when requested under the Freedom of Information Act, refused the citizen the ability to listen to the tape of the public meeting. It claimed concerns over the preservation of the tape, so it was only willing to make a copy of the tape for the citizen, at the citizen's expense. The court stated that the municipality's behavior was contrary to the intent of the Act. By its very wording, citizens have the right to inspect and copy public records. Just because the municipality lacked space for listening to the tape did not make it immune from the requirements of the act.

Family Education Rights and Privacy Act (FERPA)

In response to the relatively recent events at Virginia Tech University a wave of amendments to the Family Education Rights and Privacy Act has been proposed by the Department of Education. Instead of construing existing exemptions narrowly, the wording of FERPA would allow a school to "take into account the totality of the circumstances and establish a 'safe harbor' whereby if the school determines that there is an articulable and significant threat to the health and safety of a student or [others], it may disclose information from education records to any person whose knowledge is necessary" to protect those individuals. In addition the proposed regulations would (1) codify the United States Supreme Court rulings in *Owasso Indep. Sch. Dist. No. I-011 v Falvo,* 534 U.S. 426 (2002) and *Gonzaga Univ. v Doe,* 536 U.S. 273 (2002); (2) implement statutory changes made under the USA Patriot Act and the Campus Sex Crimes Prevention Act; (3) update the regulations to address distance learning; (4) restrict disclosure of student social security numbers; (5) clarify requirements as to alumni organizations use of student names; and (6) clarify what constitutes a "legitimate education interest" allowing access to the records.

Religion and Education

Truth v Kent Sch. Dist., No. 04-35876 (9th Cir. Apr. 25, 2008): School districts often make compliance with district non-discrimination policies a pre-requisite for the recognizing of student groups. In the instant case, two students requested the recognition of a student organized and led religious group named "Truth." The district denied the request on the basis that the group's charter appeared to violate the non-discrimination policy in that it required members to affirm certain beliefs, one of which was the belief that homosexuality is a sin. In the past waivers had been granted to other student groups allowing violation of the non-discrimination policy – for example restricting membership to a single gender – so Truth applied for a waiver but was denied. The 9th Circuit's decision was extremely narrow, only vacating the summary judgment granted below on the grounds that whether the district had committed content discrimination in the granting of waivers to student groups was a triable issue of fact and should be heard in court.
Editor's Note: *What this says to administrators is that they must always remain cognizant of the fact that similarly situated individuals must be treated similarly. Decision may never be made on the content of the speech but rather must be made uniformly for reasonable educational and/or administrative reasons.*

Borden v East Brunswick School District, No. 06-3890 (3d Cir. Apr. 15, 2008): For 23 years Borden, head varsity football coach, had participated in prayer with the team before the pre-game meal and again before the team took the field. The behavior included bowing his head and kneeling. When parents complained the school district reminded Borden of its policy and warned him that continuing to join in prayer would be considered insubordination and grounds for dismissal. At first Borden resigned as head coach, but after thinking it over he returned and agreed to refrain from joining in prayer while filing suit at the same time. Upon ultimately reaching the 3rd Circuit Court of Appeals, Borden learned that the school policy was neither unconstitutional broad on its face nor in its application to him. To reach this decision the court relied on the test found in the United States Supreme Court case of Connick v Myers, 461 U.S. 138 (1983). Looking at the first prong of that test, the court found that Borden's actions were not protected speech because they did not address a "matter of public concern" but rather were expressions of belief personal to the coach. As to Borden's academic freedom claim, Borden admitted that his acts were pedagogical in nature therefore open to regulation by his employing school district. Moreover the court failed to find a relationship between a coach and his team that would give rise to a right of academic freedom. The court concluded that "the school district has a legitimate educational interest in avoiding Establishment Clause violations," and that this policy reasonable related to that interest. It was decided that the coach's actions over the last 23 years could be interpreted by a reasonable observer as an endorsement of religion forbidden by the Establishment Clause.

Student Rights

Jacobs v Clark County Sch. Dist., No. 05-16434 (9th Cir. May 12, 2008): Clark County instituted a general dress code policy for the district. This policy allowed for individual attendance centers to enact more stringent policies if they so desired. The purpose of the uniform policy was for "increasing student achievement, promoting safety, and enhancing a positive school environment." Several families filed suit, alleging that the new policy violated their freedom of speech. The district court, while granting summary judgment to the school district, did strike down two provisions in the policy as unconstitutional. The first provision gave the administration sole discretion to determine whether wearing the uniform violated the free exercise of religion of a student. The district court struck down this provision stating that such absolute discretion could result in the administration favoring one religion over another thereby violating the Establishment Clause of the First Amendment. The second provision found improper by the district court was the administration's ability to grant an exception to the policy for "designated spirit days, special occasions, or special conditions." The court stated that this provision lacked procedural safeguards to ensure that the uniform policy would be viewpoint neutral.

In affirming the lower court's granting of summary judgment for the school district, the 9th Circuit broke the free speech violations, which had caused the lower court to strike down two provisions, into three separate parts. First, whether the district's policy which prohibited students from displaying any printed message on their clothing unconstitutionally restricted the students' right to "pure speech while in school." Second, whether the policy also unconstitutionally restricted the students' right to engage in "expressive conduct." Finally, the court examined whether the uniform policy amounted to unconstitutional compelled speech. Turning to the idea of pure speech and expression, the court found that the policy withstood scrutiny because the

policy only limited one type of expression and was written narrowly enough that it fit with the stated purpose of the policy. As to compelled speech, the court stated that wearing a solid color shirt and khaki pants did not amount to speech because there was no understandable message.

Naperville and the Neuqua Valley High School continue to be in the news regarding the wearing of a t-shirt with the anti-gay message "Be Happy, Not Gay" as the case continues through the appellate courts. The Alliance Defense Fund, a conservative Christian litigation group has stepped in on behalf of the students. The American Civil Liberties Union has filed an amicus brief which supports neither side but which urges the court to follow the "material and substantial disruption" precedent set forth in *Tinker v Des Moines,* 393 U.S. 503 (1969) and modify that test by considering whether the expression "impinges on the rights of others" ONLY if that speech is considered harassment under existing law. **Editor's Note:** *I agree completely with the ACLU in its attempt to keep current courts from altering the Court's meaning in Tinker. The Court in Tinker stated that a school could only exert a prior restraint on speech if that speech was proven to cause a material and substantial disruption to the educational atmosphere. The wording dealing with "impinging on the rights of others" was included in the dicta but not in the test itself. In an attempt to reach the result they desire, several courts today have bastardized the actual wording, and thereby the intent, of the Court in Tinker which limited schools from enacting policies limiting student speech because the school was afraid something "might" happen or because someone may not like hearing the message of the speech. This case will be worth watching!*

Brown v Plainfield Cmty. Consol. Dist. 202, 522 F. Supp. 2d 1068 (N.D. Ill 2007): It has long been held that in cases of student expulsion that students have a due process right to cross-examine witnesses against them. After the decision in Brown this may not be the case. Brown was expelled for allegedly touching a teacher in an inappropriate manner. During the hearing he was represented by counsel who was allowed to cross-examine the teacher who made the claim of inappropriate touching, but was not allowed to cross-examine student witnesses. In making its decision the court employed a balancing test and decided that the lack of probative value of cross examination, along with the need to protect students who come forward to report misconduct by their peers outweighed any potential damage to the accused student's reputation or right to an education.

No Child Left Behind (NCLB)

The data is in and currently 411 schools in 27 states are failing to meet NCLB accountability standards and are facing intervention under the terms of the law. California, with 97 school districts failing to meet standards for 4 consecutive years ranks at the top of the failure list. Kentucky, with 47 schools comes in second.

Litigation questioning whether NCLB is guilty of imposing unfunded mandates continues to live in the Sixth Circuit after the federal court as a whole agreed to reexamine a ruling of a three-judge panel which found that states had not been provided clear notice for their financial obligations when they agreed to accept federal funds under the provisions of the NCLB; that there was no "meeting of the minds" as required by basic contract law. The rehearing was requested by United States Secretary of Education Spellings and was opposed by the National Education Association which had filed the original suit on behalf of nine school districts in Michigan, Texas, and Vermont.

Dropouts are the new focus of reform in the NCLB. At the end of April Secretary Spellings announced a new requirement relating to the calculation of graduation rates. By 2012-13 all states will need to calculate their graduation rates in a uniform manner. Currently, every state can use their own method for calculating graduation rates, thereby allowing many states to hide the true drop-out rate as well as the number of students who take longer than 4 years to graduate or end up with a GED rather than a high school diploma. Under the proposed changes, graduates would only be those students who graduate with a high school diploma in four years. Unfortunately for Spellings, updates to the NCLB still seem to be unable to make it out of Congress as law. So, even though the current updates contain the most comprehensive set of administrative changes so far, because of its failure to pass, school districts continue to only be required to comply with the old law.

Special Education

Forest Grove Sch. Dist. v T.A., No. 05-35641 (9th Cir. Apr. 28, 2008): In a split 2-1 decision the 9th Circuit has ruled that school districts may be required to pay private school tuition of the special education students, even if the student has never received special education services from the public school. The plaintiff, T.A. was a student at Forest Grove from kindergarten through 11th grade. Although he was evaluated for a disability, he never received special education services from the school. When he began to use marijuana and manifest self-destructive behavior his parents removed him from Forest Grove, enrolled him in a private school, and then sought reimbursement under the IDEA from Forest Grove for the cost of the private school. Forest Grove refused so the case went to hearing where the Hearing Officer found that Forest Grove was required to pay for the private schooling. Forest Grove appealed and the Hearing Officer's decision was reversed.

Upon reaching the 9th Circuit, the case was reversed and remanded for reconsideration on the topic of providing private school reimbursement for a student who has never received services from his or her public schools. The court reviewed the history of the IDEA focusing on the decisions regarding the obligation to pay for private school tuition. In 1977 the IDEA was amended to specifically require the payment of private school tuition for students who had previously received services from their public schools but were then unilaterally placed in a private school if it was later determined that the public school had failed to provide FAPE. The question then before the court was whether this amendment required the student to have been served by the public school before this requirement attached. Agreeing with a previous decision from the 2nd Circuit, the court found that to require prior public school services would defeat the purpose of the IDEA to provide students with FAPE and could cause unnecessary delay in receiving those services if the student must first spend time in an inappropriate placement. Therefore, according to the court the IDEA required payment by Forest Grove.

The dissent argued that the majority was expanding the availability of tuition reimbursement beyond circumstances where FAPE was an issue. Prior to being placed in a private school, T.A. had never been found to need special education services. Therefore, he was not placed in a private school for FAPE reasons because of an inadequate public school placement. Drug abuse issues, not special education was the reason that T.A.'s parents unilaterally removed him from Forest Grove and place him in a residential facility. Yet now, without ever being able to show the ability to provide FAPE now that T.A. has been deemed eligible for special education services, Forest Grove is still required to pay T.A.'s private school tuition.

Editor's Note: *I agree with the dissent that this is a dangerous precedent to set. For parents in the 9th Circuit which is comprised of Arkansas, Arizona, California, Hawai'i, Idaho, Montana, Nevada, Oregon, and Washington, this opens an enormous loophole to be used for children, who have never been identified as needing special education services, but because of substance abuse are subsequently identified. This allows the parent to essentially get school districts to pay for the kid's rehab if they play their cards right. Thankfully this is just the 9th Circuit – a circuit which often comes out with decisions not agreed with by any other circuits in the country.*

School Finance

Bonner v Daniels, No. 49A02-0702-CV-188 (Ind. App. May 2, 2008): The Indiana Court of Appeals has bucked the trend by reinstating a school funding suit against the executive branch of state government which was brought by families whose children were alleged to be failing to meet State academic standards and therefore not acquiring the minimum knowledge and skills mandated by the Education Clause of the Indiana Constitution. The lower court had dismissed the suit stating that school funding is a political decision and that the courts are not an appropriate forum for the resolution of issues surrounding the state school funding formula and adequacy. **Editor's Note:** *This has been the position of the courts in Illinois.* In reversing the lower court, the Court of Appeals looked at two issues: (1) whether funding is open to judicial review; and (2) whether the Indiana Constitution contains judicially enforceable guidelines as regarding public education. The court found that the state courts do have the authority to determine whether the executive and legislative branches are adequately fulfilling the requirements of the constitution's education clause which, in Indiana, requires the legislature to provide a general and uniform system of schools "by all suitable means."

Employee Rights

Milligan-Hitt v Board of Trustees of Sheridan County Sch. Dist. No. 2, No. 06-8086/06-8087 (10th Cir. Apr. 22, 2008): Two employees of the school district, Milligan-Hitt and Roberts were in a relationship which pre-dated their employment by the school district. They were called into the superintendent's office after he received a complaint from a parent that the two women were seen holding hands on a field trip. While nothing more was done at the time, after a new school building was constructed causing reorganization of grades, the positions of both women were eliminated. They both applied for positions at the new school but did not receive them. The women filed a Section 1983 action in federal court alleging they were terminated because of their sexual orientation against the school board and the superintendent in his individual and official capacity. After a rather circuitous route, the case ended up in front of the 10th Circuit which ruled that neither the school district nor its superintendent are liable under Section 1983 for employment discrimination based on sexual orientation.

Lewis v School District #70, No. 06-4435 (7th Cir. Apr. 17, 2008): Lewis was a bookkeeper and treasurer in District #70 who, because of the need to care for her terminally ill parents began taking time off. After her father's death, she ended up taking off 72 out of 242 workdays in 2004. This was done with the knowledge and permission of the superintendent and with stipulation about doing her work at home. When the board felt that her continuing absences were hurting her job performance, despite the recommendation of board counsel that she had FMLA rights,

the board chose to terminate her employment. Lewis filed a suit alleging retaliation. After having summary judgment being awarded the school district in the lower court, upon appeal to the 7th Circuit, the court found that sufficient evidence had been presented to suggest retaliation and therefore that summary judgment was inappropriate. Consequently it was a judiciable issue and should be presented to a jury.

Almontaser v New York City Dep't. of Educ., No. 07-5468 (2d Cir. Mar. 20, 2008): The 4th Circuit used the facts of this case to make a distinction between the right of school employees to speak as members of the community in a recognized public forum such as a letter to the editor, and the free speech rights of school employees speaking within the framework of their position. Almontaser was named interim principal of a new Arab language and culture high school in New York City. Soon rumors began to circulate that Almontaser was affiliated with radical Islam groups and was supporting the selling of a t-shirt with "Intifada NYC" printed on them. In an attempt to stop the misinformation, Almontaser was instructed by the NYCDE's press office to agree to an interview. Regardless of what was actually said, Almontaser's interview was reported in such a way as to make it seem the rumors of her radical Islam connection were true. Ultimately another individual was appointed as permanent principal of the Arab language school and Almontaser sued claiming she was a victim of retaliation. In making its decision in favor of the school, the court relied on a United States Supreme Court case, Garcetti v Ceballos, 547 U.S. 410 (2006) which had established that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the constitution does not insulate their communications from employer discipline." Since Almontaser's interview was done in her role as interim principal her speech therein was not protected speech. Therefore, her retaliation suit could not stand.

Samuelson v LaPorte Cmty. Sch. Corp., 06-4351 (7th Cir. May 22, 2008): Another application of the theory espoused in *Garcetti v Ceballos,* 547 U.S. 410 (2006) is seen in the Samuelson case which dealt with the non-renewal of the coaching duties of Gregory Samuelson. The reasons given by the principal and athletic director for his non-renewal were complaints from parents, players, and coaches, poor fundraising, unauthorized expenditures of team funds, and his coaching ability. Samuelson claimed that the non-renewal was retaliation for his exercising his freedom of speech by voicing Title IX concerns to a school board member, voicing disapproval of the selection and hiring of the middle school principal, and speaking to boards members regarding concerns he had about the computer platform used by the school and about a proposed school districting plan. It should be noted that all of Samuelson's communications directly with school board members violated a "chain of command" policy in place at the school district; a policy which Samuelson claimed was an unconstitutional prior restraint on his freedom of speech. In finding for the school district, the 7th Circuit found that the "chain of command" policy was not an unconstitutional prior restraint because it only covered speech "grounded in the public employee's professional duties." Relying on the Garcetti case, the court stated that such speech is not protected. In addition, even if the policy was unconstitutional, Samuelson had failed to meet his burden of proof to show that the reasons listed for his non-renewal were pre-textual; that the non-renewal was, in fact, retaliation for his exercise of speech.

Developments in Legislation

State Legislation

As the Illinois General Assembly moves toward adjournment, several bills of interest continue to be active:

HB 4646 has been sent to the Senate floor after being approved by the Senate Local Government committee. This bill would allow school districts and local government entities to enter into cooperative agreements for the purpose of running wind farms.

HB 4180 is an attempt to deal with the "silent prayer" statute. Under this bill, which still remains in committee at this time, the observation of a brief period of silence at the beginning of the school day would be left to the discretion of individual teachers.

HB 4252 is in response to the incident in the Unit 5/Normal and Urban school districts where an elementary teacher was passed from one district to another without warning of the potential of his inappropriate activity toward children. Ultimately the teacher was charged with child molestation and has been sentenced to over 50 years in prison. In this bill, which was approved by the Senate Education Committee and sent to the Senate floor, if an employee of a school district has made a report to DCFS involving the conduct of a current or former employee, and another school requests information regarding the conduct of that employee, the school district from which the report was made must disclose to the requesting district that a report was made about the employee.

HB 4309 has been sent to the Senate floor after being approved by the Senate Education Committee. This bill allows a school district to count a full day of attendance for any day that a school building must be closed prior to fulfilling the minimum hours of attendance if the closure is because of a hazardous condition which threatens the health and/or safety of the students.

SB 2170 has been sent to the House for consideration and allows all educators, teachers and administrators alike, to inspect and/or search school premises.

SB 2500 is also being considered by the House. This bill establishes a new superintendent mentoring program.