

ILLINOIS STATE
UNIVERSITY



Volume 28, No. 4
July 2008

ILLINOIS STATE
EDUCATION LAW AND POLICY
JOURNAL

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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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Illinois State Education Law and Policy Journal is published as a service of the Center for the Study of Educational Policy, Department of Educational Administration and Foundations, College of Education, Illinois State University, Campus Box 5900, Normal, IL 61790-5900.

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Developments in the Courts

STUDENT RIGHTS

Doniger v Niehoff, No. 07-3885 (2d Cir. May 29, 2008): Using the “material and substantial disruption test” from *Tinker v Des Moines*, 393 U.S. 503 (1969) the U.S. Court of Appeals for the 2nd Circuit found that a school district may have the ability to punish students for speech occurring off-campus. Doniger was secretary of the junior class. Upon learning that a student council sponsored event, JamFest, was postponed for the third time Doniger and three other council members sent out a mass e-mail urging student to contact the Superintendent in support of holding JamFest. This tactic was extremely effective causing a disruption in the administration’s regular schedule. The principal, Niehoff, expressed displeasure that the students had resorted to this tactic rather than coming to her in person with their concerns and for that reason she cancelled JamFest altogether.

This action on behalf of Niehoff upset Doniger even further so that evening, on her publicly accessible but unaffiliated blog, Doniger reported that JamFest had been cancelled by the administration, called the administration “douchbags” and encouraged blog readers to continue to contact the superintendent “to piss her off more.” Ultimately JamFest was held, but when Doniger’s blog entry was discovered, she was banned from running for senior class secretary based on Doniger’s inability to follow Niehoff’s suggestion for proper communication, the profanity used on the blog, and the incitation to the blog readers to continue the campaign so as to “piss off” the superintendent.

Upon reaching the 2nd Circuit, the court used its own precedent in the case of *Wisniewski v Bd. of Educ.*, 494 F.3d 34 (2d Cir. 2007), cert. denied, 128 S. Ct. ___ (2008) “a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct ‘would foreseeably create a risk of substantial disruption within the school environment,’ at least when it was similarly foreseeable that the off-campus expression might also reach campus. . . As in *Wisniewski* the *Tinker* standard has been adequately established here.” In the opinion of the court, even though the communication was made off-campus, it was reasonable foreseeable that the posting would reach campus, it dealt with a school related event, and it even encouraged behavior that in itself could be substantially disruptive. The posting used vulgarity, included inaccurate and inflammatory information about the cancelling of JamFest, and therefore was able to be punished by the school district affected.

Redding v Safford Unified Sch. Dist. #1, No. 05-15759 (9th Cir. July 11, 2008): Redding was a middle school student in Arizona. The school’s drug policy prohibited the “nonmedical use, possession, or sale of drugs on school property or at school events.” At a school dance school officials noticed Redding, along with several other girls, behaving in an “unusually rowdy” manner. Staff smelled smoke and alcohol on the girls as well. Later in the night cigarettes and alcohol were found in the girl’s bathroom. Shortly thereafter a student informed the administration that Redding and her friend were handing out prescription drugs and handed the administrators one of the pills that had been given to him. When Redding’s friend was searched drugs were found on her person and she said that Redding had given them to her. In a subsequent strip search no other drugs were found. When Redding was questioned she denied all knowledge of the drugs. No drugs were found in a search of her backpack and a strip search. Redding sued the school district for an illegal search.

The controlling case on student searches continues to be the United State Supreme Court opinion of *New Jersey v T.L.O.*, 469 U.S. 325 (1985) in which the Court stated that for a search to be legal it must be reasonable at its inception and reasonable in scope. The case does not give school officials unfettered discretion in searching students. Given the facts of the instant case – that the strip search was based on information gained from a student who had everything to gain from taking suspicion off of herself and placing it on another person – the 9th Circuit found that the strip search had not be reasonable at its inception and therefore unconstitutional. The court stated, “Approving such a strip search would eviscerate the Supreme Court’s stated goal of developing a standard that ‘ensure[s] that the interest of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.” Moreover, because the court found that there was no reasonable purpose for conducting a strip search it found that the principal who authorized the search was not entitled to qualified immunity. The school nurse and assistant principal who were acting solely pursuant to the assistant principal’s instructions were granted immunity for their actions. **Editor’s Note:** *Two things that practicing administrators can learn from this case. First, there is really no justifiable reason to strip search a child. If the infraction is serious enough that a strip search by a school official would be upheld in court, then it is serious enough that law enforcement should be notified and they should conduct the search if they deem it is necessary. Second, if as a subordinate you believe your superior is acting in an illegal manner you should voice your objection. If that is not enough to get the individual to cease his or her behavior and you are forced (if you want to keep your job that is) to obey a directive, the court will take into consideration the fact that you tried to stop the behavior.*

Frazier v Winn, No. 06-14462 (11th Cir. July 23, 2008): High school student Frazier challenged a Florida law which required that all students stand at attention during the Pledge of Allegiance. After mixed decisions in the lower court, on the topic of a requirement to stand during the Pledge, the court found that such a requirement was an unconstitutional restriction of the student’s freedom of speech. Turning to the provision of the law that required parental permission to be excused from participating in the Pledge, the court distinguished this case from the controlling Supreme Court case of *West Virginia State Bd. v Barnette*, 319 U.S. 624 (1943). Unlike *Barnette*, the Florida parental permission clause did not amount to state compulsion, but rather was a permissible protection of the right of parents to decide on how they wish to have their children educated in the area of civics.

Gillman v Sch. Bd. for Holmes County, Fla., No. 08-34 (N.D. Fla. July 24, 2008): Jane Doe went to the principal of Ponce de Leon High School (PLHS) and complained that she was being harassed by other students because she was a lesbian. The principal was unsympathetic informing her that homosexuality was “wrong” and that he should call her parents to make sure that they knew that she was a lesbian. He also warned her to stay away from the middle school students or she would be suspended. When Jane missed school the next day for unrelated reasons a rumor circulated around school that she had been suspended for being a lesbian. In response to the rumor, several students wore gay pride t-shirts in support of Jane. The principal conducted an investigation into the “gay pride movement” at PLHS and as a result banned the wearing of rainbow belts or writing “Gay Pride” or “GP” on their bodies or notebooks. He also suspended 11 students on the grounds that they belonged to a secret society, membership in which was banned by school policy. When challenged, the school board supported the rules instituted by the principal. A lawsuit followed.

The court found that the student speech in support of gay pride was protected speech and was governed by the “material and substantial disruption” test outlined in *Tinker v Des Moines Ind. Comm. School Dist.*, 393 U.S. 503 (1969). Looking at that test, the court said that before student speech could be limited there needed to be a “real or substantial threat of disorder, as opposed to the mere possibility of one.” Therefore the threatening of a walk-out did not equal an “actual” disruption. The court went on to state that “in a school setting, the silencing of a political message because of disagreement with that message is particularly offensive to the Constitution because, as the Supreme Court observed in *Tinker*, the classroom is peculiarly the marketplace of ideas.”

NO CHILD LEFT BEHIND (NCLB)

Six states, including Illinois, have been chosen by the United States Department of Education to participate in a pilot program in administering their failing schools under NCLB. Instead of having to follow the preset improvement steps under the NCLB, the schools in these six states can now individually tailor improvement plans to more closely respond to the conditions in their failing schools. This opportunity came about after criticism that the NCLB “one size fits all” mind-set when it came to struggling schools was both ineffective and a waste of limited financial resources.

DESEGREGATION

Samnorwood Indep. Sch. Dist. V Texas Educ. Agency, No. 06-41347 (Jun. 24, 2008): In 1970 the United States government brought suit against several school districts in the state of Texas along with the Texas Education Authority alleging that they were guilty of maintaining a dual school system with the acquiescence of the TEA. The desegregation order there could be no student transfer system between school districts if the end effect reinforced the segregative intent of former school policies. Under Texas school law, any student may transfer from his or her home district to another district if all parties agree. In the instant case two small rural school districts, Samnorwood and Harrold, depended on transfers to maintain financial viability. In 2004 they ran afoul of the government desegregation order when they failed to report some transfers as was required by the rules promulgated by the TEA. The districts filed suit challenging the fines imposed by TEA for the reporting error and challenged the desegregation order on its face stating that they had never intentionally segregated therefore the desegregation order would improperly impose restrictions without any showing of a constitutional violation.

The district court found against the school districts stating that since the state of Texas had statewide *de jure* segregation prior to 1960, that the order of desegregation leveled against the TEA was appropriately applied statewide. Upon appeal, the 5th Circuit reversed finding that the lower court’s ruling that the desegregation order was appropriately applied statewide rested on an assumption of guilt. According to the 5th Circuit, past decisions had set precedent that a federal court cannot impose liability on individual school districts on a presumption that racial imbalance were the results of unconstitutional discriminatory acts. In the instant case such a presumption proved to be false, therefore applying a desegregation order to Samnorwood and Harrold was improper. Upon making this ruling, however, the court emphasized that its decision should not be taken as a green light to discriminate and that every suit would be looked at on its individual merits and judicial remedies would be applied if the facts so dictated.

VOUCHERS

Joyce v State of Maine, No. 08-24-(Me. July 1, 2008): In past litigation the Maine Supreme Court ruled that state law allowed the use of state money, in school districts with no public high school, to pay tuition for children attending a private non-religious school but forbade the use of state funds for tuition payments to private religious schools. In 2006, the town of Swan's Island adopted a "Nondiscrimination Family Subsidy Policy" to allow parents who chose to enroll their children in private religious schools could have the costs of their tuition reimbursed from municipal funds. The intent was to close what the town saw as a loop-hole that allowed parents to receive reimbursement for tuition paid to non-religious schools but not for tuition to religious schools. In 2007 the Maine Attorney General issued an opinion that sound similar to the Supreme Court's announcement in the landmark voucher case of *Nyquist*, stating that it didn't matter whether the reimbursements were named subsidies, grants, or tuition reimbursements, public funds could not be used for tuition to private religious schools. The Attorney General also took aim at the more recent Supreme Court voucher case of *Zelman* stating that paying the money directly to the parent rather than to the school did not rectify the illegality of using public money to support a private religious institutions.

The parents filed suit arguing that Swan's Island municipal ordinance did not fall under the state statute in question that established a state program for paying private school tuition for districts with no public high school. In addition the parents claimed that the subsidy was paid to the parents, was not directly tied to the amount of tuition paid, and so therefore was not actually dealing with education funding. All of the parents arguments were unpersuasive to the Maine Supreme Court. The court found the language in the legislation was unambiguous and clearly prohibited the use of "public funds" without any limitations. The court found that the municipal subsidy was merely a "straw man" for tuition payments by the town to private religious schools. Simple word play and smoke and mirrors did not make illegal behavior legal – the state of Maine had been very clear that its policy forbid the use of public funds going to the support of private religious schools, in any form.

TECHNOLOGY

Page v Lexington County Sch. Dist. One, No. 07-1697 (4th Cir. Jun. 23, 2008): Vouchers were a hot topic in the Lexington Schools, so the district used various means including the district website and the PTA newsletter to voice its opposition to the proposed voucher legislation entitled "Put Parents in Charge Act" (PPIC). Voucher proponent Page, upon seeing the anti-voucher information on the school website requested "equal access" for pro-voucher information. The district said no because no right of equal access had been created. Page filed suit claiming that the district had created one or more political fora and by refusing him access had engaged in unconstitutional viewpoint discrimination. Upon reaching the 4th Circuit, the question before the court was whether the school district's campaign was "government speech" that was "exempt from First Amendment scrutiny." The answer to this question depended on the government's ownership and control of the message measured by several facts. The first factor was the "establishment of the message" which was done when the school board decided its opposition to the voucher legislation and communicated this position to school district officials, employees, legislators, students, and the public at large. The second factor "control of the message" the court found that, even when using articles authored by a third party, the school district exercised

absolute control over the message being disseminated. Therefore in the opinion of the court no limited open forum to which Page would have been guaranteed access had been created.

ACLU v Mukasey, No. 07-2539 (3d Cir. July 22, 2008): Upon remand from the United States Supreme Court, the 3rd Circuit found that the federal Child Online Protection Act (COPA) is unconstitutional because it fails to withstand strict scrutiny, and is vague and overbroad. More specifically COPA fails because (1) it is not narrowly tailored to the compelling interest of Congress thereby limiting constitutionally protected speech; (2) the federal government has failed to meet its burden of proof that COPA is the least restrictive and most effective means to achieve the state's compelling interest; and (3) that is impermissibly vague and overbroad thereby running the risk of "chilling" protect speech. For example, the court brought up the lack of evidence produced by the state to show why COPA is more effective and less effective than the use of filters to reach the compelling interest of protecting minors from exposure to harmful material on the Web.

EMPLPOYMENT

The United States Supreme Court has been busy handing down several decisions impacting the employment rights of public employees.

Enquist v Oregon Dept. of Agriculture, No. 07-474 (U.S. June 9, 2008): This case dealt with the concept of a "class of one" in regards to litigation. Enquist had been employed by the Oregon Department of Agriculture but was laid off due to budget cuts. During her employment she had been the target of harassment by a male co-worker. When she had complained to her supervisor, the co-worker had been required to attend diversity and anger management training and a new supervisor, John Szczepanski, was assigned to Enquist and the co-worker. Szczepanski was heard to have told a client that he was unable to control Enquist and that she would soon be gotten rid of. No surprisingly, then, when a position opened for which both Enquist and the co-worker applied, the co-worker was hired even though Enquist was more qualified. Enquist sued both the ODA and her co-worker for discrimination and violation of her 14th Amendment rights. Among her claims, she brought something known as a "class-of-one" equal protection claim which alleged that she had been treated differently because of her race, gender, or national origin from similarly situated individuals with respect to promotion, termination, and exercising her seniority rights; that the decisions were arbitrary and capricious, lacking any reasonable basis.

On the topic of a "class-of-one" equal protection claim, the Supreme Court began by agreeing with the lower court in its interpretation of a previous Supreme Court decision in the case of *Village of Willowbrook v Olech*, 528 U.S. 562 (2000) in that (1) the Equal Protection Clause protects individuals, not classes; (2) that the Clause protects behavior arising from both a legislative act and the behavior of an administrative official; and (3) that the United States Constitution applies to the state both in its role as a regulator and an employer. That having been said, however, in the context of public employment there is a great difference between the state exercising its power as a lawmaker to regulate and the state acting as an employer managing its internal operations. The state has a great deal more discretion on how it chooses to deal with civilian employees than it does when dealing with citizens as an outside group. In finding against Enquist, the Court established two major principles in the public employment context. First, although employees do not lose their constitutional rights when they agree to employment with the federal government, those rights must be balanced with the realities of being employed in a

governmental context. Second, in determining the appropriate balance the Court must consider whether the employee right deals with the basic constitutional right, or whether the claimed right can more readily give way to the requirements of the government as employer. Applying those principles in the instant case, the Court found that the “class-of-one” argument went more to the application of that principal rather than to the actual governmental classification. It was not whether a governmental classification ended up singling out specific individuals, but rather whether a “neutral” governmental policy as applied in an individual case was arbitrary. Bottom line is that the “class-of-one” theory is a poor fit in the public employment context.

Meacham v Knolls Atomic Power Laboratory, No. 06-1505 (U.S. Jun. 19, 2008): The issue in question in this employment rights case was who bears the burden of proof under the Age Discrimination in Employment Act (ADEA) in claims of disparate impact. Because of changes in the times, the Knolls Atomic Power Laboratory found itself needing to downsize. The criteria used in making decisions regarding who to terminate revolved around the realization that the employer’s place in the markets of the 21st Century was going to be far different than during the Cold War of the 1950s. Therefore the company used nondiscriminatory evaluations of which employees would be best able to contribute in the future. Not surprisingly of the 31 employees let go, 30 were over the age of 40. Up to this point, the test used in these type of employment cases was the “business necessity” test. The person claiming discrimination (in this case age discrimination) would have the burden to prove that the decision of the employer to terminate the employee was not based on business necessity, but rather was based on discriminatory reasons. The burden would then shift to the employer who would raise the defense that the decision was based on permissible “reasonable factors other than age” (RFOA) which would then shift the burden back to the plaintiff to show that there were no other reasonable factors. It was the decision of the Supreme Court that the RFOA was an affirmative defense which placed the burden on the employer to prove that its reasons were indeed “reasonable.” This decision could be unduly burdensome upon employers; however the Supreme Court assured employers that a plaintiff employee would need to much more than just allege a disparate impact. The employee would need to identify the specific test, requirement, or practice that had a disparate impact.

Kentucky Retirement Systems v EEOC, No. 06-1037 (U.S. Jun. 19, 2008): The Kentucky retirement system handles individuals who are retiring for disabilities reasons somewhat differently than individuals retiring based on age in combination with years of service. A 61 year old employee in the sheriff’s department sought disability retirement. Because of his age and years of service he was eligible for regular retirement as was told he would need to take regular retirement. Unfortunately the benefits he would receive under regular retirement than those he would receive under disability retirement so he sued claiming age discrimination. In holding against the plaintiff, the Court stated that just because age was used in determining retirement eligibility, and just because benefits under regular retirement were lower, were not a prima facie case of discrimination. The reason for the different premiums was because disability retirement was calculated under the assumption that the individual was not yet eligible for retirement and therefore would need payouts for a longer time. Therefore, the Court ruled in a split 5-4 decision that Kentucky’s public retirement system did not violate the federal Age Discrimination in Employment Act (ADEA) by forcing an eligible employee to take regular rather than disability retirement.

Russell v Bd. of Educ. Of City of Chi., 883 N.E.2d 9 (Ill. App. 2008): The belief that it is impossible to fire a tenured teacher in the state of Illinois seems to be confirmed by this ruling. Over a period of 13 years Russell, a special education teacher, was suspended from work on several occasions. In 2000, she was discharged for failure to observe an earlier warning but was reinstated upon the order of an administrative hearing officer. It was also ordered that all records be expunged. The school board and Russell continued to have problems and eventually she was ordered to undergo a psychological evaluation. She was deemed fit to go back to the classroom so long as she followed up with further care. When it came to the attention of the board that Russell was conducting follow-up via telephone, the board requested another evaluation. Russell refused and was discharged for insubordination and in light of her extensive disciplinary record – including that part of the record which was ordered expunged. Upon reaching the appellate court it was determined that Russell's behavior was remediable and that she be reinstated.

Niles Twp. High Sch. Dist. 219 v Ill. Educ. Labor Relations Bd., 883 N.E.2d 29 (Ill. App. Ct., First Dist., 2007): The story for non-tenured teachers is very different. Three non-tenured teachers were non-renewed with proper notice. A grievance was filed claiming that the board did not follow the terms of the collective bargaining agreement pertaining to evaluation and maintenance of personnel files. The school district refused to honor the grievance claiming that the non-renewal of probationary teachers was in the sole discretion of the district. Although losing in-front of the IELRB, the appellate court found for the district stating that Illinois state statutes grant schools the right to non-renew probationary teachers at their discretion and does not require complicity with collective bargained agreements pertaining to evaluation and personnel files.

FUNDING

Faith Builders Church, Inc. v The Dep't of Revenue of State, 882 N.E.2d 1256 (Ill. App. 2008): Faith Builders Church decided to start a school including a childcare center, preschool, kindergarten, and school. The institution sought property tax exemption for the building claiming that all the children enrolled in all of the programs received religious instruction regardless of their age. The Illinois appellate court ruled that, contrary to the claims of the church, the children in the childcare center and the preschool were in attendance primarily for supervision, not for religious education. In addition, the court decided that the childcare and the preschool did not offer course work such as to qualify as a not-for-profit school. Consequently tax exemption was denied the childcare center and the preschool, and granted for the kindergarten and school.

Hall v Nalco Co., No. 06-3684 (July 16, 2008): Hall was fired shortly after a failed IVF procedure and just before she was scheduled for another IVF procedure. The reason given was excess absenteeism because of fertility treatments. She sued under Title VII claiming gender discrimination. The district court held that her allegations did not constitute a Title VII claim because infertility is a gender neutral condition – both men and women can be infertile. The 7th Circuit reversed stating that the focus of any Title VII claim is whether a person is treated differently than other because of his or her gender. In the opinion of the court, although both men and women can be infertile, it is only women who must undergo surgical fertility treatment that necessitate missing work. The item under consideration is not the infertility, but rather than employer's behavior to medical conditions which arise because of that infertility.

FREEDOM OF INFORMATION ACT

Stern v Wheaton-Warrenville Community Unit School District 200, No. 20-07-0424 (June 9, 2008): According to the 2nd District court of Illinois, a superintendent's contract is a public document falling under the jurisdiction of the Freedom of Information Act (FOIA). The questions present upon appeal were (1) whether the superintendent's employment contract was exempt from the FOIA because it was part of the personnel file; and (2) if the contract was an exempt confidential personnel document, whether the superintendent had waived that confidentiality when he disclosed the contents to other third parties. The court held that just because a document is included in an employee's personnel file does not make that document automatically exempt from disclosure under the FOIA. Only those portions of the contract which contain personal information should be redacted before release. The question of disclosure was not reached because it was determined that the contract was not *pro se* exempt.