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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

School Board

Kennedy v Board of Education of the City of Sea Isle City, No. A-37-07 (NJ July 21, 2008): According to the New Jersey Supreme Court being a board member on a board which you are suing is not allowable. Kennedy was elected to the Sea Isle City school board but resigned when he and his wife filed a special education due process claim against the district. That case was settled and Kennedy was elected for another term. During this second term, Kennedy claimed that the district breached the terms of the former settlement and so he filed another due process claim against the district. This time Kennedy also sue for compensatory education services and attorneys' fees, experts' fees, costs and disbursements. By the time of the suit, Kennedy was the president of the board and offered to recuse himself on any and all items which had to do with his son or the pending lawsuit, but the board was not receptive to the offer. Instead it petitioned the New Jersey Commissioner of Education (NJCOE) to remove Kennedy from the board on the ground that his claim created a conflict of interest incompatible with his continued service.

The administrative law judge found in favor of Kennedy stating that his actions were permissible under the state School Ethics Act. The NJCOE disagreed and, citing another state law which prohibited school board members from having a direct or indirect interest in any claim against their board, found Kennedy's behavior had created a disqualifying conflict and moved for his removal. Upon reaching the New Jersey Supreme Court, the decision of the NJOCE was affirmed but for different reasons. Looking at the state conflict of interest statute, the court stated that the law was mute on the topic of removal of school board members. As stated by the court after looking at the actual wording of the law which allowed immediate removal for other circumstances, that it was "textually uncertain whether the Legislature meant for removal of a seated school board member to be similarly absolute and immediately required, whenever the member has an interest in any kind of claim that may arise during the course of the members' term."

In fact, the court continued that in the past the NJCOE was loathe to demand immediate removal, choosing instead to look at each instance on a case by case basis while applying the terms of the School Ethics Law and the conflict of interest law. In an attempt to "harmonize" the two laws, the court concluded "that a board member should not be removed from office merely because he or she has advanced any claim 'in a proceeding' against a school district involving that individual or an immediate family member's interests" but that "[s]ubstantial, disqualifying conflicts of interest should be identified either by type of claim (i.e. specific monetary claims by the member or a family member as in a tort claim), or by type of proceeding." Looking at the instant case, the specific facts of Kennedy's lawsuit was examined. In this case the fact that specific monetary damages were requested the court felt that the line had been crossed which demanded removal. The court could not "reconcile that claim for substantial monetary relief with a board member's continued service on a local board. For that reason, we have no hesitancy in approving the relief ordered in this matter."

Student Rights

Gonzalez v Sch. Bd. of Okeechobee County, No. 06-14320 (S.D. Fla. July 29, 2008): The Gay-Straight Alliance (GSA) tried to get recognition first from the school principal and then, when turned down, by the school board. The GSA sued citing violation of the Equal Access Act and

requesting recognition as a non-curricular group on the same footing as all other recognized non-curricular groups. The board relied on the following policy to deny the recognition of the GSA: "To assure that student clubs and organizations do not interfere with the School Board's abstinence only sex education policy and the school Board's obligation to promote the well-being of all students, no club or organization which is sex-based or based upon any kind of sexual grouping, orientation, or activity of any kind shall be permitted." In upholding the GSA's request for a summary judgment, the court first rejected the board's argument that allowing the GSA to be recognized as a non-curricular group would jeopardize federal and state funding for abstinence only education. Not only had the district not provided any evidence of such happening in similar circumstances, the court found that the mission of the GSA was not inconsistent with the abstinence-only message. The court also rejected the district's attempt to use an exception under the Equal Access Act which allows schools to deny equal access to groups if such is necessary to "maintain order and discipline on school premises, to protect the well being of students and faculty, and to assure the attendance of students at meetings is voluntary." As to the students' Free Speech claim, the court determined that the "material and substantial disruption" test formulated in Tinker v Des Moines Independent School District, 393 U.S. 503 (1969), was controlling because the message of tolerance for gay students is a political speech therefore protected under the First Amendment. The court decided that this message did not "materially or substantially interfere with discipline in the operation of the school."

Jonathan L. v Superior Court of Los Angeles County, B192878 (Cal. App. Aug. 8, 2008): The next step in the continuing saga of the right of parents in California to home school their children comes with the decision of the California Court of Appeals which ruled that parents have a right under California state law to home school their children, but the state also has the power and responsibility to mandate children be educated outside of the home if it deems that such is in the best interest of the child. Such an order, should it be made, is not a violation of the parents' constitutional right to direct the education of their children. In making its decision the appellate court found that home schools could fall within the private school exception to the state compulsory education law. In the words of the court, "parents possess a constitutional liberty interest in directing the education of their children, but the right must yield to state interests in certain circumstances."

Combs v Homer-Center Sch. Dist., Nos. 06-3090, 06-3091, 06-3092, 06-3093, 06-3094, 06-3095 (3d Cir. Aug. 21, 2008): The 3rd Circuit has ruled that the Pennsylvania compulsory education law which imposes reporting and review requirements on those parents who chose to home school their children does not violate the Religion Clause of the First Amendment, nor does it inhibit their right to direct the education of their children. Problems started to occur after the passage of a state law, the Pennsylvania Religious Freedom Protection Act (RFPA) in 2002. Before that time compliance with the state compulsory education laws had not been issue. After passage of the RFPA home school parents contacted their districts and asked for an exemption for the reporting and review requirements claiming that those requirements substantially burdened their free exercise of religion. The district refused and started treating the children as truants so the parents sued. Looking first at the federal claims, the 3rd Circuit found that Pennsylvania's compulsory education law is a neutral law that "neither targets religious practice nor selectively imposes burdens on religiously motivated conduct." Since the law is a neutral law of general accountability it needs only to be rationally related to a legitimate government

objective. According to the court, the state "has a legitimate interest in ensuring children taught under home education programs are achieving minimum educational standards, and are demonstrating sustained progress in their educational program," and the current law rationally furthers this legitimate objective. The court also dismissed that claim that the parents had raised a "hybrid claim" of free exercise of religion coupled with a right to direct the education of their children, or that they fell under the Supreme Court ruling in *Wisconsin v Yoder*, 406-U.S 205 (1972). Having dispatched with the federal claims the court declined to take jurisdiction over the state claim, reversed, and remanded.

Riehm v Engelking, No. 07-1517 (8th Cir. Aug. 15, 2008): Be careful what you write in creative writing class because it might be determined to be a "true threat." Riehm was a student in a creative writing class who wrote three essays in creative writing class, the first one of which his teacher found too offensive, full of violence and sexual images. In the second essay Riehm's narrator complained about his "old fashioned, narrow minded, uncreative, paranoid, jealous English teacher." Always a fan of poetic license and creative freedom of speech, the creative writing teacher called Riehm's mother. It was Riehm's third essay which really caused the stir when it depicted the shooting of an English teacher by a student expelled from her class and the student's subsequent suicide. The teacher felt threatened so she went to the principal to complain. Riehm was suspended and the essays were given to the police which resulted in Riehm being involuntary committed for mental health evaluation. Not surprisingly the psychiatrist found that there was nothing wrong with Riehm and he was released – and filed suit claiming violation of First Amendment rights. In reviewing Riehm's First Amendment rights, the 8th Circuit it found that the First Amendment does not protect a "true threat"; a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another. *Editor's Note: This is a very scary case. A "true threat" doesn't fall under either current tests for limiting freedom of speech – clear and present danger or material and substantial disruption. This new "true threat" test actually punishes people because of actions which the state thinks that person "might" commit. The logical extension of this would be for police to be able to give you a traffic ticket because, since you were driving a sports car capable of exceeding the speed limit, they decided that there was a "threat" that you would exceed the speed limit and cause an accident. Or it might be that a new offense may be codified where citizens are profiled by their conformance (or non-conformance) to perceived societal norms and punished after being profiled a "threat" NOT because they had actually done something. To have a state punish a person for speech without more evidence that actual actions are going to follow the words is so absolutely, horrifyingly, against everything our Constitution stands for that it is terrifying!*

Springer v Durflinger, 518 F.3d 479 (7th Cir. 2008): The bottom line of this suit is that if a parent is going to complain about unfair treatment from a coach, that parent better have specific evidence. In the instant case two sets of parents complained to school officials that their daughters' play time was limited after they complained about the coach's performance. The parents also claimed that they were not asked to participate in the booster club and that in the end the administration turned a deaf ear to their complaints about the coach. They filed suit claiming retaliation for exercising their free speech rights. In granting a summary judgment to the district, the court found that the parents' claims were unsupported by evidence and ordered that the parents show cause as to why they should not be sanction for filing a frivolous law suit.

Thomas v Evansville-Vanderburgh Sch. Corp., 258 F. App'x 50 (7th Cir. 2007): Very similar to the Springer v Durflinger case, once again a parent claimed retaliation and then did not present sufficient evidence to support that claim. In Thomas, a mother sued after school officials made several reports to Child Protective Services about a student who they suspected was being abused. Two of these reports came back founded. The mother claimed that the reports were racially motivated and that the district retaliated against her when they questioned her daughter about the abuse without allowing her to be present and when the district placed her other children at a different school. In granting summary judgment, the 7th Circuit found that the mother had failed to present sufficient evidence to support her burden of proof of racial motivation and retaliation.

Coronado v Valleyview Pub. Sch. Dist. 365-U, No. 08-1850 (7th Cir. Aug. 12, 2008): The 7th Circuit court seems to have lessened the level of due process required when a district expels a student. General legal knowledge recognizes two levels of due process: (1) minimal due process consisting of notice, opportunity to be heard, and a fair and impartial hearing for minimal deprivation of property of suspensions of 10 days or fewer; and (2) maximum due process consisting of written notice containing specific charges provided in a timely manner, right to counsel, right to confront and cross-exam witnesses, and right against self-incrimination for maximum deprivation of property of suspensions and expulsions lasting longer than 10 days. In the Coronado case, although the punishment being sought was expulsion, the 7th Circuit ruled that only minimal due process – notice of the charges against him, notice of date and time of hearing, and a full opportunity to be heard – was all the due process to which the student was entitled. Coronado was facing possible expulsion for a verbal exchange between rival gang members in the school lunch room. The original notice charged him with violation the high school's "Subversive Organization" policy. When he arrived at the scheduled hearing, however, he was informed that he was also being charged under the "Fighting/Mob Action" policy. He was allowed time to testify and present evidence but was not allowed to cross-examine the district's witnesses. No transcripts of the hearing were maintained and no sign language interpreter was provided for his parents. In making its decision that the Goss v Lopez minimal due process was all that was required, the 7th Circuit relied on an earlier 7th Circuit decision, *Remer v Burlington Area School District*, 286 F.3d 1007 (7th Cir. 2002) which stated that expulsion "does not require a more elaborate hearing in order to comport with due process so long as the student receives the 'fundamentally fair procedures' set out in Goss."

Barr v LaFon, No. 07-5743 (6th Cir. Aug. 20, 2008): In the instant case coming out of Tennessee, the local school district's dress code prohibits clothing that "causes disruption to the educational process." When some students came to school wearing t-shirts with the Confederate Flag on the front they were told to change the shirt or face suspension. The students sued claiming content discrimination and violation of their freedom of speech because the school dress code did allow other controversial symbols such as foreign flags, Malcolm X symbols, and political slogans. Moreover that stated that no disruption occurred from their wearing of the Confederate Flag shirts, therefore the test elaborated in *Tinker v Des Moines* was not applicable to limit their speech. The decision of the court hinged upon two points: (1) Does the Tinker case require that the speech ACTUALLY DISRUPTS the educational environment or whether there is a reasonable belief by the administration that IT WILL disrupt; and (2) if there is a difference between content discrimination and viewpoint discrimination, and if so whether it

makes a difference as to the constitutionality of the action. As regard to the first issue, the 6th Circuit, as with many other courts recently decided that the mere possibility of disruption was sufficient to limit student speech. The court read Tinker (*and the author believes read it in error – just read the actual words of the Supreme Court*) to state that the administration need only to reasonably forecast that the speech in question would cause material and substantial disruption. As regarding the second issue, the court looked to the Supreme Court case of *R.A.V. v City of St. Paul*, 505 U.S. 377 (1992) in which the Court stated that a "blanket ban on odious racial epithets by proponents of all views constitutes mere content-based regulation, while a ban on the use of racial slurs by one group of speakers but not those speakers opponents constitutes viewpoint-discrimination." From that the 6th Circuit somehow decided that policies based on content are allowable although policies based on viewpoints are not.

J.S. v Blue Mountain Sch. Dist., No. 07-585 (M.D. Pa. Sept. 11, 2008): It appears that the courts in Pennsylvania also believe that students can be disciplined for Internet use outside of school. A middle school student in Pennsylvania created a parody online profile of her principal on MySpace in which, among other things, she described his interests as ". . . f***ing in my office, hitting on students and their parents. . ." When the online profile became known to school officials, the student was given a 10-day suspension. In her suit against the school, the student relied on the standard set forth in *Tinker v Des Moines*, 393 U.S. 503 (1969) stating that the district had unconstitutionally restricted her freedom of speech because it had been unable to demonstrate the profile caused or was likely to cause a substantial and material disruption to the educational atmosphere at the school. In deciding the case in favor of the school, the court did not rely on Tinker, but rather turned to another United States Supreme Court case, *Bethel v Fraser*, 478 U.S. 675 (1986) stating that the student's lewd and vulgar speech was not protected under the First Amendment. The court found that the profile did not make any type of political statement and, even in the absence of any on-campus disruption, the facts taken as a whole did show that the "lewd and vulgar off-campus speech had an effect on-campus." Looking at other Third Circuit cases which seemed to be on point, the district court distinguished them from the instant case by the degree of vulgarity used by the student in this instance.

Teacher's Rights

Bellevue John Does 1-11 v Bellevue Sch. Dist. #405, No. 78603-8 (Wash. July 31, 2008): In 2002 the Seattle Times filed public disclosure requests to obtain records regarding allegations of teacher sexual misconduct over the past 10 years. Of the 55 teachers who would have fallen under the request, 37 sued to block the release of their documents. Upon reaching the Washington Supreme Court, the court decided that the identities of teachers against whom unsubstantiated allegations of sexual misconduct have been made have the right to keep their names from being disclosed. In those instances where a "letter of direction" has been put in the teacher's file are generally free to be released. If, however, the letter is general in nature without stating an incident of substantiated misconduct and the teacher is not subject to any restriction or discipline, the name of the teacher and other identifying information must be redacted.

Johnson v Poway Unified Sch. Dist., No. 07-783 (Cal. S.D. Sept. 4, 2008): For two years Johnson, a high school teacher, had displayed two banners in his classroom. One had the

phrases "In God we Trust," "One Nation Under God," "God Bless America," and "God Shed His Grace on Thee." The other contained the phrase, "All Men Are Created Equal, They Are Endowed By Their Creator." The district had a policy that allowed teachers to display personal messages on classroom walls. Items such as rock band posters, posers of professional athletes, posters with Buddhist and Islamic messages, and Tibetan prayer flags were some of the personal messages displayed by teachers under this policy. Because of concern over the religious content in Johnson's banners, the principal ordered Johnson to take them down. Johnson sued. When looking at the case, the U.S. District Court in California did not agree with the argument provided by the school district that Johnson, as an employee of the district, had no free speech claim because he was a governmental employee. Instead, the court looked at the ruling in Tinker at found that constitutional rights do extend into the educational environment, even for employees. That having been said, the court stated that Johnson's speech claim was subject to the "forum analysis." The court found that the classroom was a "limited open forum" because the district had "intentionally opened its property to expressive conduct by its faculty" by having a policy on the display of personal messages by teachers. Once a limited open forum was found to exist, then decisions on whether to allow or disallow a message could not be determined by its content; by the viewpoint of the speech. Since the policy had allowed a wide variety of comments, to disallow Johnson's banners was a violation of his constitutional right to free speech.

Plock v Bd. of Educ. of Freeport Sch. Dist. No. 145, 545 F. Supp. 2d 755 (N.D. Ill. 2007): The school district installed audio/visual recording devices in a special education classroom after receiving reports of alleged child abuse in the rooms. The teachers in the rooms filed suit claiming a violation of their 4th Amendment right to be free of unreasonable searches. The federal court held that the teachers had no reasonable expectation of privacy in their rooms therefore had no grounds to bring a challenge.

Samuelson v LaPorte Cmty, Sch. Corp., 526 F.3d 1046 (7th Cir. 2008): A teacher brought suit against the school district after being dismissed as a basketball coach. He alleged that he was dismissed in retaliation for his complaining about inequitable treatment of the girl's basketball team and for questioning the hiring practices used in selecting a principal. The board stated that his contract was not renewed because of his poor performance in fundraising, his negative relationship with parents, and his failure to follow the correct chain of command when voicing complaints. The court found in favor of the board stating that a policy establishing a chain of command in dealing with complaints did not constitute an unconstitutional prior restraint on speech. Moreover, the court found that even if the teacher's freedom of speech was an issue, the board had sufficient other reasons to not renew his contract.

Bryant v Gardner, 454 F. Supp. 2d 791 (N.D. Ill. 2008): The case arose out of a conflict involving a highly competitive school sports program. The individual filing the suit had been the head varsity basketball coach but was relieved of his duties after an argument with the principal and the athletic director who also happened to be the head coach of the girls' basketball team. The disagreement dealt with the alleged disparate treatment of the boys' and girls' basketball teams, specifically the fact that pre-season open-gym restrictions were only placed on the boys' team. He claimed that his dismissal was in retaliation and deprived him of a liberty interest. The federal court found that the dismissal from head varsity coach and reassignment to gym teacher

showed a change in his employment status sufficient to cause a constitutionally protect liberty interest. In addition, when the court reviewed statements of the athletic director to players, parents, and alumni stating that the plaintiff had cursed at bus drivers, threatened and failed to protect players, disrespected fellow coaches, and failed to follow the chain of command, combined with the athletic director calling the plaintiff a "liar" in the local newspaper was sufficiently stigmatizing to be considered a deprivation of liberty causing a tangible loss of employment opportunities.

Special Education

Thompson R2-J Sch. Dist. V Luke P., No. 07-1304 (10th Cir. Aug. 29, 2008): This case reaffirms that the 1982 United States Supreme Court case of *Board of Education v Rowley*, 458 U.S. 176 (1982) continues to be controlling on issues of "free and appropriate public education" or FAPE. Luke P. was an autistic student at Berthoud Elementary school. While he was making progress under his IEP, his parents were concerned that "progress" was not apparent outside of the school setting. Looking for something different Luke's parents found an alternative program at a private school. At the next IEP meeting, Luke's parents submitted a list of goals that they wanted included in Luke's new IEP. They also admitted up-front that they didn't think the public school could attain those goals so they wanted the school to pay for a private placement in the school which they had found. Two days after the meeting they enrolled their son in the private school. The school district sent the parents an updated IEP including almost all of their requests, but keeping the placement in the public school. As the case made its way through the proper channels, judgments continued to be in favor of the parents – until it reached the 10th Circuit. In overturning the lower court, the 10th Circuit found that the public school had provided Luke with FAPE. In making that the decision, the court relied on Rowley stating that the salient question was whether the IEP in place when Luke was removed from the public school was "reasonably calculated to enable him to receive educational benefits." As stated in Rowley as that is necessary is a "basic floor of opportunity, aimed at providing individualized services sufficient to provide every eligible child with some education benefit." The court agreed with the district that the IDEA did not require proof that the benefit received at school must be able to be generalized to settings outside of the school.

N.B. v Hellgate Elementary Sch. Dist., No. 07-35018 (9th Cir. Sept. 4, 2008): This case stands at a warning that referring a parent to an agency for assistance with his or handicapped child is not the same as assuring that proper testing is done as required by the IDEA. The student, C.B. received special education services at Hellgate Elementary School. During an IEP meeting the parents suggested to the school that C.B. be tested for autism. In response the IEP team referred the parents to the Missoula Child Development Center which reported that the child did exhibit symptoms consistent with autism spectrum disorder. In a subsequent IEP the school determined that C.B. did not qualify for extended school year services. The parents disagreed and requested a due process hearing. The hearing officer found for the school so the parents sued in U.S. District Court. The court upheld the hearing officer as did the Ninth Circuit upon appeal as to substantive claims but vacated the lower court decision as to procedural claims. In looking at the procedures used, the Ninth Circuit found that the school had failed it obligation under the IDEA to "test in all areas of suspected disability." Merely referring the parents was not sufficient to

meet this obligation. Rather in order to assure a "free and appropriate public education" it was the duty of the district to obtain a timely evaluation of all possible disabilities. In the words of the court, "without evaluative information that C.B. has autism spectrum disorder, it was not possible for the IEP team to develop a plan reasonably calculated to provide C.B. with a meaningful education benefit throughout the 2003-04 school year." The bottom line is that it is better to err on over evaluation than under evaluation because the cost of the evaluation pales in comparison to the legal fees to defend a due process claim and possible subsequent court case.