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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

Now that a new president has been elected, how will that event affect the rules and regulations under NCLB? If Obama stays true to his campaign platform, pre-school programs will be expanded, scholarships will be provided to college students who promise to pursue a career in teaching, especially in the high needs areas of math and science, federal funding will be increased to Head Start and Early Head Start programs, and efforts will be made to develop new teacher pay plans based on criteria other than seniority and levels of education currently seen in most traditional pay scales. Many on Capitol Hill, however, are skeptical given the budget deficits that Obama will inherit that he will be able to gain much momentum for his ambitious and costly proposals.

The more immediate task once Obama takes office is the reauthorization of the NCLB law. What changes may be proposed are anyone's guess but experts in the field are postulating that Obama and the democratically controlled legislature will push for even greater federal governmental control while the embattled Republicans will revert back to a more traditional conservative stance and push for reduced federal government intrusion into public education.

With the transition between administrations looming, Secretary Spellings has announced the final regulations that would increase NCLB influence at the senior high level by requiring uniform methods for tracking the graduation rates of all students, including minorities and students with disabilities. Currently, the states have a great deal of flexibility in dealing with high school students. The new rules would focus on the rising drop-out rate by requiring states to track dropouts, along with graduates and transfers, under one unified reporting system. In addition, by 2012, schools must expand targets currently aimed at the general education population, to apply as well to minority and special needs students.

EMPLOYEE RIGHTS

Posey v Lake Pend Oreile Sch. Dist.No. 84, No. 07-35188 (9th Cir. Oct. 15, 2008): When is employee speech protected speech and when is the employee just speaking as an "arm" of his or her employer? Posey was a security specialist at the Lake Pend Oreile School District. After getting into a disagreement with the principal of the high school where he worked regarding the safety and security of the high school building and campus, he wrote a letter to school officials discussing both security issues and his personal grievances. Later he met at home with officials of the district to discuss his concerns. At the end of the school year, Posey was informed that his job was being eliminated and was being absorbed into a new position. He applied for the new position but did not get the job so he filed a grievance claiming retaliation for discussing his concerns about security. Originally the district found that Posey had faced retaliation for his letter, but that decision was overridden by the district governing board. A lawsuit ensued.

Upon reaching the Ninth Circuit, the court applied the *Garcetti* Test which had been handed down by the United States Supreme Court in *Garcetti v Ceballos*, 547 U.S. 410 (2006). The test for determining whether an employer is guilty of retaliation, established in the United States Supreme Court case of *Mt. Healthy City School District Board of Education v Doyle*, 429 U.S. 274 (1977) is to determine: (1) whether the employee engaged in constitutionally protected speech; (2) whether the employer took adverse action against the employee; and (3) whether the

employee's speech was the substantial or motivating factor in the adverse action. After *Garcetti*, to determine whether the employee's speech is protected the court must determine whether (1) the speech touched on a matter of public concern, (2) the interests of the employee as a citizen in commenting on the matter of public concern outweighed the efficiency of the public service, and (3) the employee spoke as a public employee or a private citizen.

The question before the Ninth Circuit was whether the decisions of whether the employee spoke as a public employee or a private citizen was a matter of law or fact. The Fifth, Tenth, and D.C. circuits have held that the determination is a matter of law. The Third, Seventh (of which Illinois is part), and Eighth circuits have held that the determination is a matter of fact, which would preclude the granting of summary judgment. The Ninth Circuit sided with the latter and found the issue a question of fact.

Turning to the facts of the Posey case, the court found that Posey's speech did raise matters of public concern and that the district had admitted that his speech had not adversely affected the efficient operation of the district and that he should not be treated any differently than any other member of the general public.

Weingarten v Board of Educ. of the City Dist. of the City of New York, No. 08-8702 (S.D. N.Y. Oct. 17, 2008): With the very contentious presidential campaign that has just ended, it is not surprising that a case involving the wearing of political buttons by public school teachers has arisen. The conflict seems to have heated up with an e-mail message to union leaders sent by Weingarten giving directions on how to distribute Obama campaign materials. In response, principals in New York City received a memo from the city department of education directing them to enforce the longstanding regulation that all staff members show "complete neutrality" while on duty. This would mean no wearing of political buttons in the classroom. The teachers' union, while recognizing that this rule had been on the books for more than twenty years, stated that it had never been enforced and that teachers had routinely worn political buttons in the classroom, even as recently as this year's primaries.

Upon reaching the U.S. District Court, it was held that schools can prohibit the wearing of political buttons by teachers but they can neither prohibit the posting of political materials in areas accessible only by faculty and staff nor the distributing of political material in teachers' mailboxes. In making that decision the court relied on the wording in the United States Supreme Court case of *Hazelwood v Kuhlmeier*, 484 U.S. 260 (1984) which gave schools the right to regulate speech that "members of the public might reasonably perceive to bear the school's imprimatur." The court also relied on the Seventh Circuit decision in *Mayer v Monroe Community School Corp.*, 474 F.3d 477 (7th Cir. 2007) and stated that the governing boards of public schools are constitutionally permitted, within reason, to regulate the speech of teachers in the classroom for legitimate pedagogical reasons, and that the maintenance of neutrality on controversial issues is a legitimate pedagogical reason. The decision for the school was given with the warning that the decision should be read narrowly and to not take it as a blanket approval for the unwarranted limitation of constitutionally protected speech.

Conn v Board of Educ. of the City of Detroit, No. 08-13073 (Mich. E.D. Nov. 6, 2008): Conn and Miller were two teachers in the Detroit Public Schools. When the district planned to close 38 schools because of financial problems, Conn and Miller became vocal critics and ultimately marched in a protest which caused them to be charged with disorderly conduct and violation of a school ordinance. The district put them on temporary unpaid administrative leave for an indefi-

nite period. They filed charges with the Michigan Employment Relations Commission (MERC) alleging a violation of the Michigan Public Employment Relations Act (PERA). The district then filed disciplinary charges against the pair and recommended their dismissal. In response they obtained a temporary restraining order from the state court preventing the board from acting on the recommendation of dismissal.

In the hearing before MERC, the administrative law judge found that the Detroit Public Schools had unlawfully and intentionally retaliated against Conn and Miller for engaging in lawful union activities (the protest march for which they had obtained permission.) In the ruling of the ALJ it was stated that the events in May were used as a pretext for the district to attempt to get rid of two workplace activists and reinstatement was ordered. One week later the board voted to terminate them, but not before they had already filed a motion with the U.S. District Court for a preliminary injunction ordering the Detroit Public Schools to reinstate them to the classroom.

The district court started its analysis by reiterating the three-part test for a First Amendment employment retaliation claim: (1) the employee engaged in protected conduct; (2) the employer took an adverse action against the employee; and (3) that there is a causal connection between the employees' protected activity and the employer's adverse employment action. In the instant case the court stated that the employees' conduct was within the protection afforded by the United State Supreme Court case of *Pickering v Board of Education*, 391 U.S. 563 (1968) in that Miller and Conn were off-duty at the time of their conduct and clearly acting as citizens speaking on an issue of general public concern. Suspension and termination are undeniably "adverse employment consequences" and the fact that a state court had already found a connection, while not binding on the federal court had strong persuasive effect as to the likelihood of Conn and Miller ultimately prevailing on the merits. The injunction was granted.

Martin v Brevard County Pub. Sch., No. 07-11196 (11th Cir. Sept. 30, 2008): Martin was a non-certified employee of the Brevard County Public Schools. For three years he had received the highest possible ratings on his employment reviews. In the fourth year, however, he was placed on an improvement plan after receiving a significantly lower rating on an interim review. During that period he had requested leave under the Family Medical Leave Act to take care of his granddaughter because her mother, his daughter, was being deployed to Iraq and he stood *in loco parentis*. The FMLA leave had been approved through the end of his current contract. When he was informed that he needed to sign an agreement stating that his contract would not be renewed if the FMLA prevented him from completing his improvement plan by the end of the contract, Martin refused to sign. Ultimately he filed suit in federal court alleging interference with and retaliation for using his rights under the FMLA. The district court granted summary judgment to the school district finding that Martin was not entitled to FMLA leave.

The Eleventh Circuit vacated the lower court decision. The first question the court considered was whether Martin stood *in loco parentis* thereby allowing his to qualify for FMLA leave. Normally a person puts himself *in loco parentis* when he assumes the obligations incident to the parental relation without going through the formalities necessary to legal adopt the child. The fact that Martin's daughter never was actually sent overseas, but that he did take over care of his granddaughter was a genuine issue of material of fact that should have been tried in court. Next the court looked at Martin's allegation that the school district had interfered with his taking FMLA leave. In order to prove FMLA interference an employee must show that he was denied a

benefit to which he was entitled under the FMLA. The court also found a genuine issue of material fact that should be presented to a court—would Martin have been retained if he had been able to complete the last three weeks of his improvement plan. Finally, as to retaliation, the court found that the close proximity between the time he took FMLA leave and he was terminated was sufficient to raise another issue which needed to be decided by the court. For those three reasons, the court found that the granting of summary judgment was inappropriate and that Martin was due his day in court.

Spanierman v Hughes, No. 06-1196 (D. Conn. Sept. 16, 2008): This case is another reminder that non-tenure teachers need to be careful to not offend the norms and mores of the community in which they work. Spanierman was a high-school English teacher. He created a MySpace profile page through which he communicated with students about school and non-school matters. After receiving a complaint from another teacher, the school counselor took it upon herself to view Spanierman's MySpace profile and determined that the content was inappropriate. She talked to him and he deactivated the profile. Soon, however, he created a new profile which was also discovered by the "watch-dog" teacher. Eventually all was reported to the principal who placed Spanierman on administrative leave while an investigation was conducted by the state education labor relations specialist. After the investigation was finished, the principal sent Spanierman a letter informing him he had exercised poor judgment. That same day the assistant superintendent informed him that his contract would not be renewed for the following year.

Spanierman sued the district claiming a violation of his due process, equal protection, and freedom of speech. In granting a motion for summary judgment on behalf of the school district the court reaffirmed certain realities of non-tenured employment. First, there is no expectation of continued employment for tenured teachers. This means there is no property right and no requirement of due process prior to non-renewal of the contract. Second, to activate an "equal protection" claim the individual must belong to a suspect class and non-tenured teachers are not a suspect class. Finally, as regarding "freedom of speech" in order for speech to be constitutionally protect it must be of "public concern." The posts on Spanierman's MySpace profile, except possibly for a poem on Iraq, were personal in nature therefore not protected. Morale of the story—If you are a non-tenured teacher watch your Ps and Qs; If you are getting rid of a non-tenured teacher give no reasons just state that you are "not renewing their contract!"

SPECIAL EDUCATION

Cumberland Reg. High Sch. Dist. v Freehold Reg. High Sch. Dist., No. 07-3110 (3rd Cir. Sept. 22, 2008): Who is responsible for paying for the private placement of a special education student when the custody of that student is shared by both parents? According to a non-precedential decision of the Third Circuit, both districts are responsible. In Cumberland, the special education student lived with her mother in Freehold District at the time she was placed in a private residential program. The student's father and Freehold District shared the costs of her placement. When she was discharged from that placement and Freehold District failed to provide an alternate place, her father unilaterally placed her in a different residential hospital program. When the father's insurance ran out he requested a due process hearing to required Freehold District to pay for the hospital program. Freehold requested third party contribution from Cumberland District. Cumberland District claimed that it had no liability because, although the mother now lived in Cumberland District, the student had never lived in Cumberland District. The Third Circuit

held on behalf of Freehold District stating that children of divorced parents who share legal and physical custody can be considered to have two domiciles for the purpose of allocating the cost of education.

P. v Newington Bd. of Educ., No. 07-4652 (2d Cir. Oct. 9, 2008): A student with Down syndrome attended school in a regular elementary classroom. As the ability gap between the student and his general education peers became greater, combined with increasing behavioral issues, behavioral consultants informed the student's parents that it was becoming increasingly difficult to maintain the student in a regular classroom. The student's parents wanted their child to remain in the regular classroom. During the IEP meeting for the 2004-05 academic year, the parents requested that their child remain in the regular classroom 80% of the time. The IEP team recommended that the student remain in the regular classroom 60% of the school day, with pull-out for occupational and speech therapy. The 2005-06 IEP recommended that the student be in the regular classroom for 60% to 74% of the school day. The parents requested a due process hearing to challenge the provisions of both IEPs. In April 2006 it was recommended that the student be in the regular classroom 80% of the school day. The hearing officer, looking at all of the IEPs found substantial compliance. The parents appealed to the federal district court which upheld the hearing officer's decision. The Second Circuit also affirmed the lower court as it explained the two-pronged test for "least restrictive environment" that was currently being used by the Third, Fifth, Ninth, Tenth, and Eleventh Circuits. Under the test, the court must look at (1) whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for the student; and (2) if not, then whether the school has mainstreamed the child to the maximum extent appropriate. The court emphasized that this test must be used with the specific facts of each individual case and not in a mechanistic manner. Doing just that, the Third Circuit found that the finding of facts of the hearing officer were compelling and that the student had been provided LRE as intended by the IDEA.

VOUCHERS

Shortly after the Supreme Court decision in *Zelman v Simmons-Harris*, 536 U.S. 639 (2002) which legalized vouchers as a method to provide choice to students in failing public schools, many hailed the decision as a step in the right direction. Others, however, warned that it was bad public policy to take funding from already underfunded public schools to provide "choice" because inevitably it would cause the collapse of public schools. It seems that the inevitable has started to happen. The first district to make the news was the Milwaukee public schools. In September 2008 the Milwaukee Journal-Sentinel ran an article reporting that the Milwaukee School Board had voted 6-3 to explore the dissolving of the Milwaukee Public Schools. In response Governor Doyle called for "a complete evaluation of exactly where the Milwaukee Public Schools are" to determine whether state action is needed to do more for the district. The article went on to state that the Milwaukee school superintendent and many board members believe that the decline in state funding was the key factor behind the current financial trouble being faced by the district.

Next comes news from Cleveland school officials that they are going to have to cut at least \$18 million from the budget in the next year and perhaps may be facing budget cuts up to \$81 million if state aid is cut. Moreover, even if the funding level stays the same rising expenses, loss of students and falling tax collection will force the closing of schools and the cutting

of programs. While a portion of the financial difficulties being faced by both Milwaukee and Cleveland may indeed be attributable to the failing economy or mismanagement, it seems highly coincidental, that both school districts have the two largest and most comprehensive voucher programs in place. There was never any doubt when the voucher programs were put in place that the schools in both Milwaukee and Cleveland were not educating the majority of their students. How either Wisconsin or Ohio thought, however, that draining those two failing districts of money would spell anything other than disaster is incomprehensible.

STUDENT RIGHTS

Miller v Penn Manor Sch. Dist., No. 08-273 (E.D. Pa. Sept. 30, 2008): Miller, a high school student at Penn Manor, wore a t-shirt with a picture of an automatic handgun on both the front and back of the shirt. On the front were the words, "Volunteer Homeland Security" and on the back the words, "Special Issue-Resident-Lifetime License, United State Terrorist Hunting Permit, Permit No. 91101." Miller had received the shirt as a gift from his uncle who was currently serving in the army stationed in Iraq. After a student complained about the shirt, the principal determined that it was in violation of school policy. As the conflict between student and school continued, the school board declined to assign any discipline to the student but did state that the shirt did not constitute protected speech under the policy and that it couldn't be worn in school. The issue ended up in federal district court where the court began examining the student freedom of speech claim by applying the test from *Tinker v Des Moines Independent Community School District*, 393 U.S. 503 (1969) but quickly turned to the more recent Supreme Court case of *Morse v Frederick*, 127 S.Ct. 2618 (2007). The court read Morse as giving school districts the authority to restrict speech that promotes illegal behavior, especially when safety within the public schools is in question. The court stated that, under *Morse*, the threshold question was whether the speech on Miller's shirt was protected. Upon examination the court decided that the message advocated vigilante violence and was not constitutionally protected. Since the speech was not constitutionally protected, the court said that it did not need to apply the "material and substantial disruption" test from *Tinker*. The court found that Miller had not provided any legal authority which would show the court that he a constitutional right to wear clothing which advocated violence.

Looking at the school policy in general, which forbid "anything that is a distraction of the education environment," the court found that the wording was overbroad because it could apply to both protected and unprotected speech. The court also found the policy to be unconstitutionally vague because it did not provide adequate notice to students as to what constitute inappropriate behavior. Regarding a school policy prohibiting expressions that "seek to establish the supremacy of a particular religious denomination, sect or point of view," the court also found that policy unconstitutionally overbroad as it attempted to restrict all religious speech.

Copper ex rel. Copper v Denlinger, No. COA07-205 (N.C. App. Oct. 21, 2008): The Durham Public Schools have policies forbidding the "(i) wearing, possessing, using, distributing, displaying, or selling any clothing, jewelry, emblems, badges, symbols, signs or other items which may be evidence of membership or affiliation in any gang; (ii) communicating either verbally or nonverbally (gestures, handshakes, slogans, drawings, etc.) to convey membership or affiliation in a gang." Several students had been found in violation of this policy and had received suspensions. The students sued the school district claiming that the policy was unconstitutionally vague and did not give sufficient notice to students as to what conduct was inappropriate. The school

district countered with the argument that since specific examples had been given, the policy was not unconstitutionally vague. In its analysis, the court noted that while the school district did sufficiently define what was considered a “gang,” it did not sufficiently specify what “clothing, jewelry, emblems, badges, symbols, signs or other items” may run afoul of the policy. The same was also true for the policy language concerning “gestures.” In making its decision, it relied on an Eighth Circuit case, *Stephenson v Davenport Community School District*, 110 F.3d 1303 (8th Cir. 1997) which, in holding the district’s anti-gang policies unconstitutionally vague, “[G]ang activity is not relegated to signs and symbols otherwise indecipherable to the uninitiated. In fact, gang symbols include common, seemingly benign jewelry, words and clothing.” Consequently, the Eighth Circuit held that anti-gang policies had to be very specific as to exactly what clothing, words, and gestures were forbidden as signs of prohibited gang activities.

M.A.L. v Kinsland, No. 07-1409 (6th Cir. Oct. 7, 2008): Michael Lucas, a middle-school student, had participated in various pro-life activities at school, including the Third Annual Pro-Life Day of Silent Solidarity in October 2006. Using time/place/manner restrictions, the school did not allow Lucas to hand out anti-abortion literature during the school day on the grounds that the materials were “not age appropriate, were disruptive, and that prior approval had not been obtained.” To avoid a lawsuit, Lucas and the school reached an agreement that he could distribute the material during lunch and post fliers for a January 2007 event on a student bulletin board in the hallway. While Lucas recognized the school’s ability to enact reasonable time/place/manner restrictions, he claimed that the current restrictions did not meet the Tinker “material and substantial disruption” test. He also maintained that the restrictions were vague and overbroad, therefore unreasonable. Lucas was successful in obtaining a permanent injunction from the federal district court preventing the school from forbidding him from distributing literature in the hallway between classes.

Upon appeal to the Sixth Circuit, the lower court’s injunction was overturned. The court found that the United States Supreme Court, as well as prior Sixth Circuit decisions, had established that “the school areas such as hallways constitute nonpublic forums” and therefore that the school did have the right to place time/place/manner restrictions on hallway speech so long as “[the] restrictions are viewpoint neutral and reasonable in light of the school’s interest in the effectiveness of the forum’s intended purpose.” The court found that the school’s restrictions were viewpoint neutral and reasonable. The court also considered Lucas’ contention that the Tinker “material and substantial disruption” threshold had not been met. The court decided that the Tinker test applied to those instances where the school district was attempting to “foreclose particular viewpoints” not in cases where the school was merely deciding on the appropriate use of its facilities through restrictions on the “time, place, and manner of speech irrespective of its content of viewpoint.”

TORT LIABILITY

Green v Carlinville Cmty. Sch. Dist. No. 1, 887 N.E.2d 451 (Ill.App. 4th Dist. 2008): This case dealt with the liability of a school district for acts of a bus driver. A student sued the school district for intentional infliction of emotional distress, assault and battery, per se negligence, negligent hiring, and negligent supervision for sexual abuse she suffered from her school bus driver. The district filed for summary judgment on the theory that since school buses are not “common carriers” that the district could not be held liable for the behavior of the bus driver. While the

appellate court agreed that the school was not a “common carrier” in the technical sense, because it performed the same basic “transportation” service as a common carrier, however, it should be held to a higher standard; that it was reasonable to believe that the student relied on the bus and bus driver of her own personal safety. Therefore, because the school district was held to a higher standard it did not enjoy immunity from vicarious liability for acts of its employees outside the scope of their employment.

Legislation of Interest

Numerous pieces of legislation dealing with insurance mandates were passed in November by the General Assembly:

Public Act 95-0972, effective immediately, mandates health insurance policies cover visits to marriage therapists

Public Act 95-0973, effective January 1, 2009, mandates health insurance policies cover mental disorders such as anorexia and bulimia

Public Act 95-0978, effective January 1, 2009, mandates health insurance policies cover the shingles vaccine.

In other business:

Public Act 95-0969, effective January 1, 2009, requires teachers’ institutes to include instruction on prevalent student chronic health conditions beginning with the 2009-2010 school year

Public Act 95-0976, effective immediately, provides increased grant amounts to public and school libraries.

Public Act 095-0869, effective January 1, 2009, requires school districts to incorporate into the school curriculum a component on Internet Safety to be taught at least once each school year, starting in the 2009-2010 school year, to students in grade 3 or above.