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# Editor

**Elizabeth Timmerman Lugg, J.D., Ph.D.**

**Publications Manager**

**Andrea J. Rediger**

## 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 Court

### SEXUAL HARASSMENT

*Fitzgerald v Barnstable Sch. Comm.* No. 07-1125 (U.S. Jan. 21, 2009): Traditionally there have been two avenues through which a victim of sexual harassment in the public schools could pursue a claim. Title IX prohibits gender based discrimination in federally funded education and is one method by which a student may sue a public school for student-on-student harassment. Remedies under this statute are the withholding of federal funds from the offending institution. The other remedy is a Section 1983 action which allows a student to sue a public official who, acting under the color of state law, violates that student's constitutional or statutory rights. A Section 1983 action allows recovery of damages, attorney's fees, and court costs. What has not been consistently decided is whether bringing an action under one statute (Title IX or Section 1983) precludes an individual from pursuing a lawsuit under the other statute as well. More specifically, the question before the Court in *Fitzgerald* was whether Title IX was intended to be the exclusive remedy for students claiming gender discrimination, which includes sexual harassment, in the public school setting.

Fitzgerald was a kindergarten student in the Barnstable schools. She told her parents that she was being sexually harassed by an older student on the school bus. When the school district was finally able to identify the accused student, he denied the allegations. No one else was able to corroborate Fitzgerald's story; neither the bus driver nor other students on the bus. Therefore, the school declined to institute formal disciplinary actions against the alleged harasser. The police department conducted a separate investigation but found insufficient evidence to press charges so closed the case. What the school district did offer to the family in an attempt to deal with the situation was an offer to move Fitzgerald to a different bus or alter the seating arrangement on her current bus so that there were several empty rows left between the kindergartners and the older students. Fitzgerald's parents were unhappy with these options and ultimately filed suit under Title IX for peer sexual harassment and under Section 1983 for violations of Fitzgerald's Title IX and 14<sup>th</sup> Amendment Equal Protection rights. Both the federal district and circuit courts dismissed the case stating the Title IX precluded the child's parents from bringing the Section 1983 claim.

Justice Alito wrote the opinion of the Court which overturned the decision of the First Circuit Court. In the rational, the Court distinguished three previous cases – *Middlesex County Sewerage Authority v National Sea Clammers Assn.*, 453 U.S. 1 (1981); *Smith v Robinson*, 468 U.S. 922 (2004); and *Rancho Palos Verdes v Abrams*, 544 U.S. 113 (2005) – upon which the First Circuit had relied in making its decision. In all three of these cases the Court had stressed that the law requires plaintiffs to exhaust all administrative remedies before filing a law suit. To allow immediate direct access through a Section 1983 action would be equivalent to doing an “end run” around statutes, thereby giving access to benefits such as damages, attorney's fees, and court costs; benefits not allowed under the other statutes. Unlike the statutes in the cited cases, however, Title IX has no requirement that administrative remedies be exhausted before filing suit. Moreover, the only express enforcement provision in Title IX is the withholding of federal funds. The private right of action to sue under Title IX is only an implied right determined by the court rather than one written into the statute by Congress. The Court stated that such an implied right of action has never been interpreted to preclude a suit under Section 1983. The Court stated “Title IX's protections are narrower in some respects and broader in others . . .

[b]ecause the protections guaranteed by the two sources of law diverge in this way, we cannot agree with the Court of Appeals that Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions.”

*Hansen v Board of Trustees of Hamilton Southeastern Sch. Corp.*, No. 08-1205 (7<sup>th</sup> cir. Dec. 23, 2008): This case, although a Title IX case, deals with teacher-to-student sexual harassment rather than student-to-student sexual harassment. Alano was an assistant band director at the high school. He engaged in a sexual relationship with Hansen who was a student at the school. When the relationship was discovered, Alano was suspended and he resigned to avoid termination. The investigation related to this situation uncovered that this was not the first time Alano had been sexually involved with his students. His first relationship ended up with him marrying the student involved. The second relationship, although started when the student was still enrolled was not “consummated” until after the student had graduated. Hansen’s parents sued under Title IX, Section 1983 and several state laws. The district court granted summary judgment to the school district on all counts.

The major issue when the case reached the Seventh Circuit court was regarding the standard of liability to be used. Hansen’s parents argued that the standard was whether the school “knew or should have known” of the misconduct. Their stance that the standard was something less than actual knowledge relied upon an earlier Seventh Circuit decision, *Delgado v Stegall*, 367 F.3d 668 (7<sup>th</sup> Cir. 2004). The school’s position was that an earlier case decided by the United States Supreme Court, *Gebser v Lago Vista Independent School District*, 524 U.S. 274 (1998) set the following standard: “When a Title IX claim for damages against the education institution is based on a teacher’s conduct, the plaintiff must prove that . . . an official of the school district who at a minimum has authority to institute corrective measures . . . has actual notice of, and is deliberately indifferent to, the teacher’s misconduct.” In affirming the lower court, the circuit court found that Hansen failed to “establish a genuine issue of fact as to whether an appropriate official had (1) actual knowledge of misconduct by Alano that created a serious risk to its students, and (2) responded with deliberate indifference to the misconduct.” In reality, Hansen had willfully concealed her relationship with Alano and the court was unwilling to interpret the fact that Alano married a former student as proof of previous misconduct.

*Patterson v Hudson Area Sch.*, No. 08-1008 (6<sup>th</sup> Cir. Jan. 6, 2009): Patterson was a student in Michigan who was subjected to bullying through-out middle school and on into 9<sup>th</sup> grade because of his perceived orientation. He was subjected to questions about his orientation, graphic sexual language, and even an assault. His parents finally filed suit under Title IX claiming that the school district had “failed to implement and enforce meaningful procedures to ensure compliance with federal law and the policies . . . failed to ensure the proper education and training of staff as to harassment issues. The question before the court was whether a Title IX action could be maintained for the lack of a comprehensive school policy on harassment even if the school had attempted to deal with each instance of harassment as it occurred; whether such would be considered “deliberate indifference.”

The lower court found that, given the facts presented, that Patterson had failed to show that the school district was deliberately indifferent to the harassment. The Sixth Circuit reversed and remanded, relying on prior Sixth Circuit decisions of *Theno v Tonganoxie Unified Sch.*

*Dist. No. 464*, 337 F. Supp. 2d 952 (D. Kan. 2005) and *Vance v Spencer County Public School District*, 231 F.3d 253 (6<sup>th</sup> Cir. 2000). The court stated, “We believe . . . that, even though a school district takes some action in response to known harassment, if further harassment continues, a jury is not precluded by law from finding that the school district’s response is clearly unreasonable. . . . Given that Hudson knew that its methods were ineffective, but did not change those methods, a reasonable jury certainly could conclude that at some point during the . . . period of harassment, the school district’s standard and ineffective response to the known harassment became clearly unreasonable.”

*Lehto v Board of Educ. of the Caesar Rodney Sch. Dist.*, No. 175, 2008 (Del. Dec. 2, 2008): Lehto was an elementary school teacher who was dismissed after becoming involved with the 17-year old former student. Although the prosecutor declined to pursue charges of fourth-degree-rape against Lehto the school board did terminate him on the grounds of immorality. Lehto appealed the decision to the courts. The trial court upheld the decision of the board and the state supreme court affirmed. The court found that although the term “immorality” was not defined in the statute, there was a definition in common law stating that immorality is behavior “as may reasonably be found to impair the teacher’s effectiveness by reason of his unfitness or otherwise.” The court also concluded that there must be connection between the teachers “immoral” off-duty conduct and the teacher’s duties; there must be an impact in the classroom. Even though there was no evidence of a direct effect, the court found that the simple fact that Lehto had been involved in a known relationship with an underage former student was sufficient to so damage his ability to serve as a role model for students that it had a sufficiently detrimental impact on the “moral and social fabric of the school environment” that the termination was justified.

## **STUDENT RIGHTS**

*Bellevue Sch. Dist. v E.S.*, No. 60528-3-1 (Wash. App. Jan. 12, 2009): The right to due process does not only appear during expulsion hearings. According to the courts in Washington State, students also have due process rights, including a right to legal counsel, at truancy proceedings. At an initial juvenile court proceeding over a truancy petition, E.S. was ordered to attend school. If she failed to comply the school could bring a motion for contempt involving sanctions including evaluations, community service, book reports, house arrest, work crew, and detention. To no one’s surprise, E.S. failed to attend school, a contempt motion was filed, and then finally at this time E.S. was assigned an attorney. Among other actions, E.S.’s attorney moved to set aside the original truancy finding, arguing the E.S. had been denied right to counsel at that time. The court denied his motion.

In reversing the lower court and setting aside the original truancy finding, the appellate court discussed the three constitutionally protected interests that were protected by due process and required legal counsel. Although the court did not agree with E.S. that she had a liberty interest in the truancy determination, the court did see a significant difference between a hearing where the respondent is an adult and one where the respondent is a child: “Expecting a child to represent herself in truancy proceedings is to expect her to exercise judgment the law presumes she does not have, in a proceeding that may lead to her incarceration.” Consequently, the court concluded that the child’s liberty interest does require access to legal counsel, as does the child’s rights to privacy and education.

## MISCELLANEOUS

The National School Board Association's Council of School Attorneys listed the following in the American School Board Journal as the top ten legal issues in K-12 education: (1) employee discrimination/termination; (2) finance adequacy and equity issues; (3) student discipline; (4) collective bargaining; (5) employment issues related to changes in the Americans with Disabilities Act and the Family Medical Leave Act; (6) private placement issues related to special education; (7) disputes regarding attorney fees in special education cases; (8) free speech; (9) educator sexual misconduct; and (10) No Child Left Behind Act interventions.

## NO CHILD LEFT BEHIND

Educators are still attempting to determine what will be the fate of NCLB under the new administration. Some clues may have been given during the confirmation hearing of the new Secretary of Education, Arne Duncan, former superintendent of the Chicago Public Schools where he stated that NCLB should stop punishing entire school districts when only one subgroup fails to make AYP. The example that he used was cases where students with disabilities or English language learners struggled in an otherwise high performing school. "Let's not take too blunt an instrument to an entire school. . . . Those teachers are doing a Herculean job, and we need to recognize that. We need to reward that." While this view matches that held by the major teachers unions, his view on the efficacy of teacher pay raises tied to student performance would not.

*California Sch. Boards Ass'n v Calif. State Bd. of Educ.*, No. 2008-00021188 (Cal. Sup. Ct. Dec. 19, 2008): A blow to proponents of standardized testing, a state superior court has issued an injunction barring the California State Board of Education from requiring all eighth graders to take a standardized Algebra I test. In making a decision on the motion for injunctive relief brought by the California School Boards Association and the Association of California School Administrators, the court concluded that the associations had a high probability of prevailing in their lawsuit against the State Board of Education because the CBE had failed to comply to the notice provisions of the California Open Meetings law of proposed changes. The court also found that the relative harm of attempting to comply with the new test far outweighed any possible harm to the CBE or the state of California.

## SCHOOL FINANCE

*Sublette County Sch. Dist. No. Nine v McBride*, No. S-08-0073 (Wyo. Dec. 19, 2008): A rather interesting school funding case came in front of the Wyoming Supreme Court. In 1980 there was a Wyoming Supreme Court ruling in the case of *Washakie County Sch. Dist. No. One v Herschler*, 606 P.2d 310 (Wyo. 1980) declaring the states funding system unconstitutional. In response, the voters amended the state constitution in 1982 to allow the legislature to redistribute to other districts up to 75% of any revenues collected by a local district which are in excess of the state average. Enabling legislation was passed in 1983. Numerous other lawsuits followed with the final pronouncement being a re-emphasis on the decision that school funding is a function of state wealth, not local wealth. Consequently, in 2006 the voters went once again to the polls and this time amended the state constitution to remove the limitation of 75% of excess revenues thus allowing redistribution of 100% of excess revenues. This time, however, enabling legislation was not passed until 2008. Despite the lag between the passing of the constitutional



amendment and the enabling legislation, the Wyoming Department of Education ordered five districts to pay the 25% difference for the 2006-07 school year. Upon reaching the Wyoming Supreme Court, the court decided that the 2006 constitutional amendment permitted, but did not require, the state legislature to redistribute any school district revenues and since the legislature had never adopted enabling legislation stating otherwise, the five districts who retained the additional 25% could not be compelled to pay those monies after the fact.

#### **EMPLOYMENT**

*American Fed'n of Teachers v Kanawha County Bd. of Educ.* No. 08-1406 (S.D.W.Va. Dec. 29, 2008): A school district in West Virginia has been enjoined from instituting suspicionless drug testing of its teaching faculty under the new employee drug use prevention policy. The teachers' union was successful in proving to the court that such testing would likely cause irreparable harm because damages are an inadequate remedy for an unconstitutional drug test while the school district would suffer no harm.

*New Jersey Ass'n of Sch. Administrators v Davy*, Civ. Action No. 08-4086 (D.N.J. Nov. 25, 2008): The New Jersey Commissioner of Education (NJCE) implemented new regulations establishing standards with which to review new employment contracts for public school superintendents, assistant superintendents, and school business administrators. These regulations were in response to reform attempts started in the 1990s to curb possible abuses in the lifetime tenure system for district administrators. In place of tenure, administrators could enter into multiple year contracts. What happened, however, is that the administrators basically became free agents – without tenure they were not tied to a specific district because a move no longer might cost them tenure. Instead, districts started to compete by offering elaborate “perqs” such as compensation packages layered with payments at retirement or departure for years of unused or accumulated sick and vacation days, payments made on account of FICA or disability insurance, and payments to their estates for benefits accrued upon death. The New Jersey Association of School Administrators (NJASA) challenged the new regulations claiming they violated administrators' due process and equal protection rights under the 14<sup>th</sup> Amendment. In dismissing the suit, the court basically held that the complaint was premature since “new, or yet-to-be negotiated, contracts, anticipated employment terms are not protected by due process because there would be no taking of a recognized property interest.”

*Crawford v Metropolitan Gov't of Nashville and Davidson County, Tenn.*, No. 06-1595 (Jan 26, 2009): In 2002, Vicki Crawford was interviewed during an investigation of harassment charges against her supervisor, Gene Hughes. During the interview Crawford, for the first time, revealed that Hughes had harassed her. No action was taken against Hughes, however, Crawford along with two other female employees who had been interviewed were fired. Crawford sued alleging retaliation for her speaking to investigators. In a unanimous decision, the Supreme Court ruled that the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964 extend to all employees, even those who speak out about discrimination during an employer-initiated internal investigation. It had already been decided in previous cases that individuals who had claimed discrimination against themselves were protected from retaliatory behavior, in *Crawford* the Court extended the scope of that provision.

*Dean Transportation v NLRB*, No. 07-1262 (D.C. Cir. Jan 9, 2009): The question before the U.S. Court of Appeals in the instant case is whether, when a school district out-sources its transportation to a private company, and the company absorbs most of the district's former bus drivers, are those bus drivers absorbed into the existing union representing the drivers in the private transportation company or do they remain under the representation of the union which covered them when they were employed with the school district? The court ruled in favor of the public sector union finding that there was insufficient contact between the two sets of drivers to conclude that there was accretion; a shared community of interest.

#### **SPECIAL EDUCATION**

*King v Pioneer Reg. Educ. Service Agency*, No. 06-3323 (Ga. Super. Ct. Jan. 2, 2009): King suffered from behavioral and emotional disorders. On the day of his death, upon arrival at school King had been given a length of rope to use as a belt to hold up his pants. Later in the day, after exhibiting threatening behavior against another student, King was placed in a seclusion room. While in the room he used the rope to hang himself. King's parents sued the educational institution under Section 1983. They claimed that the failure of the institution to train employees and provide appropriate policies and procedures on the topic of suicide prevention amounted to deliberate indifference to and deprivation of his constitutional rights under the 14<sup>th</sup> Amendment Due Process clause.

To find in favor of King's parents, the court would need to find that King's death was caused by deprivation of a constitutional right. The court declined to find that the placement of King in a seclusion room created a special relationship analogous to the relationship between the police and a prisoner. Moreover, the court found no legal authority which imposed an affirmative duty on a public school system to protect students from self-inflicted harm. Finally, the court found that King's parents failed to identify policies, practices, or customs that violated any of King's constitutional rights.

#### **RELIGION**

*Smith v Jefferson County Sch. Bd. of Comm'rs*, No. 06-6533 (6<sup>th</sup> Cir. Nov. 24, 2008): In an attempt to save money through budget cuts, Jefferson County decided to eliminate the district's alternative school and contract that service out to Kingswood, a nondenominational private religious schools. The former principal and several teachers from the district alternative school filed suit claiming that their substantive and procedure due process rights under the 14<sup>th</sup> Amendment and their rights under the Religion Clause of the First Amendment. The lower court dismissed the suit. Upon reaching the Sixth Circuit, in a 2-1 decision, the court reversed the lower court on the First Amendment claim and on its decision to deny legislative immunity to the board members, but affirmed its dismissal of the 14<sup>th</sup> Amendment Due Process claims. As regarding the First Amendment claim, the court concluded that there was a genuine issue of material fact to present to a court because, even though the district's incentive (lack of money) in making the decision to out-source the choice of Kingswood whose day program was as "infused with the same focus on Christianity as the residential program, a reasonable person could believe that the Board was endorsing religion by delegating all of its duties to Kingswood."



*Sherman v Township High Sch. Dist. 214*, No. 07-6048 (N.D. Ill. Jan 21, 2009): The 2007 amendment to the state Moment of Reflection and Silent Prayer Act, making the activity mandatory was found to be an unconstitutional establishment of religion by the state of Illinois as well as being unconstitutionally vague. In 1990, the state legislature amended the law by adding a provision allowing voluntary student-initiated prayer so long as it was “consistent with the Free Exercise and Establishment Clauses of the United States and Illinois Constitutions, is not sponsored, promoted or endorsed in any manner by the school or any school employee.” In 2007 this practice was made mandatory.

In analyzing the statute the court applied the Lemon Test – (1) secular purpose; (2) secular effect; and (3) excessive entanglement. The court stated that the law was limited to purposes, those being prayer and reflection therefore could clear even the first hurdle under the Lemon Test. The court also found that the legislative history revealed a sham secular purpose, beginning in 2002 when the legislature changed its title from “The Silent Reflection Act” to “The Silent Reflection and Student Prayer Act.” In short, the court was unmoved at what it saw as a thinly veiled attempt to introduce the concept of prayer to a captive public school audience, and as such it was an unconstitutional establishment of religion.

## **LEGISLATIVE ACTION**

It should be a surprise to no one in the state of Illinois that not much business has been conducted over the past several weeks as the Illinois General Assembly has been focusing on the impeachment of Governor Rod Blagojevich following his December 9<sup>th</sup> arrest on corruption charges. Here are some items which may be of interest to educators:

A new bill dealing with information covered by the federal Family Educational Rights and Privacy Act (FERPA) was passed. Public Act 95-1016, which will be effective July 1, 2009, now allows attendance information about students to be sent directly from school districts to the police without concerns of FERPA confidentiality requirements IF the school board decides that the information will help the police and the juvenile justice system better serve the student whose information is released. This information, however, can only be used by the juvenile justice system which will be required to certify that they will not release this information to any other third party without the proper consent of the parents and/or student.

Public Act 95-0172, effective January 1, 2009, requires that an Automated External Defibrillator (AED) must be located in a building which is within 300 feet of any outdoor athletic facility where an event or an activity is being held by the school district. If there is not building that can be used, the person supervising the activity (i.e. the coach) must make sure that there is access to an AED during the activity and be trained in its use.

Public Act 95-0754, effective January 1, 2009, requires sexual assault awareness be included in the high school curriculum under the Critical Health Problems and Comprehensive Health Education Act

Public Act 95-0714 requires that as of July 1, 2009 all school districts must go green and use recycled, reusable, or durable supplies whenever financially feasible.

Public Act 95-0908, which was effective starting August 26, 2008, requires a school district to disclose to another school district during a reference check any information regarding a report made to DCFS under the Mandated Reporters Act by one employee about another employee of the district.

Under Public Act 95-0805, a public school district may own and operate a wind farm either alone or jointly with another unit of local government.

Public Act 95-0914, effective January 1, 2009, amends the Parental Responsibility Law to allow a plaintiff school district to collect reasonable attorney's fees up to \$15,000.

Public Act 95-0863, effective January 1, 2009, requires a curriculum change in consumer education to include homeownership, including the basic process of obtaining a mortgage and the concepts of fixed and adjustable rate mortgages, sub-prime loans, and predatory lending.

Public Act 95-0869, effective January 1, 2009, requires school district to provide yearly instruction in Internet safety for grades 3 through 12. It will be up to the local school board to decide the actual content and length of the unit and whether it should be incorporated into a portion of the existing curriculum.

Public Act 95-0947, which was effective August 29, 2008, provides that if a public school employee who has been placed on administrative leave pending a criminal investigation is ultimately terminated for one or more reasons directly related to that criminal investigation, the terminated employee must repay the school district for all salary and benefits paid by the district during the terminated employee's administrative leave.

Public Act 95-0969 requires teacher institutes to include instruction on student chronic health conditions starting with the 2009-2010 school year.

Public Act 95-0819, effective January 1, 2009, clarifies the terms of the law that states that a child sex offender must not reside or loiter within 500 feet of a school. The 500 feet is to be measured from the edge of the property of the school to the edge of the property of the sex offender's residence or where he or she is loitering.

Public Act 95-0849 is a "cyberbullying" law which defines cyberstalking as including knowingly and without legal justification harassing another person through the use of electronic communication on at least 2 separate occasions, or soliciting another person to do the same to the targeted person or a member of his or her family.