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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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School Reform

The President has come out with his extensive reform package for public education despite the fact that the federal government has no constitutional power to "reform" education as it is one of the powers left to the purview of individual states. First, Obama plans to pour approximately five billion dollars into Head Start. *Note: Even though research has shown that early gains attributable to head start essentially disappear by the time the child reaches fourth grade.* Included in this outlay will be money to 55,000 first-time parents for "regular visits from trained nurses to help make sure their children are healthy and prepare them for school and life," and "Early Learning Challenge" grants which will be available to states if they promise to strengthen early childhood education programs. Also included in his reform package he is offering money to states to develop standards "that don't simply measure whether students can fill in a bubble on a test but whether they possess 21st century skills like problem-solving and critical thinking, entrepreneurship and creativity." This will be done by insuring that funding under NCLB is effectively tied to results. *Query: Will the state get money if they have students fill in "bubbles" on assessments to measure skills like problem-solving and critical thinking? Also, how does one assess something as subjective as creativity? Finally, isn't the whole concept of NCLB "outcomes based education?"* Obama has also set aside money to avert lay-offs in local districts, although by the Department of Education's own admission this money will disappear in two years *(so what, the teachers will be pink slipped in 2011 rather than 2009?)* Obama also expressed an opinion on decidedly state matters such as merit pay, length of the school day, and charter school legislation. *(Sort of like "star light, star bright, first star I see tonight, I wish I may, I wish I might …)* In short, it is nice to know the President's views on education, but without attaching that agenda to some sort of categorical aid, which thanks to the failures of NCLB states have become wary of accepting, his "reform package", legally, is nothing more than an ideological wish list. Like the rest of his "reforms" generalities are in abundance but details are in short supply. In the case of education, however, this is understandable because the federal government has no legal power to dictate education policy to the states. It can only do so if the state accepts categorical aid. Therefore, I would not advise any school district to make plans dependent upon "stimulus money" unless they want to divest themselves of their rights under the constitution.

Developments in the Court

Students Rights

BWA v Farmington R-7 Sch. Dist., No. 07-3099 (8th Circ. Jan. 30, 2009): This case dealt with a student who wore items displaying the Confederate Flag to school in Missouri. On two different occasions he was told to remove or obscure the symbol and he refused. After his parents withdrew him from school, two other students imitated his behavior to show solidarity and were also disciplined. All three families sued the school district claiming a violation of their First Amendment right to Freedom of Speech. The school district moved for the case to be dismissed on the argument that its actions were justified because they had reason to believe that the display of the Confederate Flag "would cause" material and substantial disruption to the educational environment of the school. Under the district's dress code it states that: "Dress that materially disrupts the educational environment will be prohibited." The district court, agreeing with the school district, dismissed the case. The Eighth Circuit affirmed stating that, given prior race-related

incidents, the school district had "substantial evidence of actual and potential disruptions." The court also took notice that "no other circuit has required the administration to wait for an actual disruption before acting" to restrict student speech. In response to the claim of viewpoint discrimination, the court explained that once the Tinker Test of "material and substantial disruption" is met, then any viewpoint discrimination flowing from the restricted speech does not violate the First Amendment.

Dempsey v Alston, A-4975-06T34975-06T3 (N.J. Super., App.Div. Mar. 5, 2009): Like the state of Illinois, New Jersey has a state law that allows school districts to adopt a uniform policy. In the Dempsey case, the law was challenged on the grounds that it was unconstitutional on its face because it did not include an "opt out" provision thereby violating their rights to privacy and freedom of expression. The appellate court reviewed the constitutionality of the statute both on its face and as applied. The court, while recognizing the fundamental right of parents to control their child's education, stated that the Supreme Court has never held that right to absolute. Instead, the court referred to a 3rd Circuit case, *C.N. v Ridgewood Bd. of Educ.*, 430 F.3d 159 (3d Cir. 2005) in which the court stated: "[I]n certain circumstances the parental right to control the upbringing of a child must give way to a school's ability to control curriculum and the school environment." Since in New Jersey the Legislature had provided a rational basis for the limitation—"to assist in controlling the environment in public schools, to facilitate and maintain an effective learning environment, and to keep the focus of the classroom on learning"—the court found that the law was constitutional on its face.

Turning to the question of freedom of expression, the court stated that in order for the student's dress to qualify as speech protected by the First Amendment it "must reflect an intent to convey a particularized message and the likelihood must be great that the expressive conduct would be understood as conveying the particular message." When the plaintiff student admitted that he was not attempting to convey a particular message, the court found that his "expression" was not constitutionally protected; therefore there was no First Amendment violation.

TORT

Noffke v Bakke, No. 06-1886 (Wis. Jan. 27, 2009): Noffke was a cheerleader at a Wisconsin high school. After suffering a head injury while performing a cheerleading stunt without floor mats, she sued the high school for negligence, as well as the cheerleader who was alleged to have been out of position when she fell off the top of the pyramid. The State of Wisconsin has a law which grants immunity if injuries occur during participation "in a recreational activity that includes physical contact between persons in a sport involving amateur teams." The trial court found both the school and the student immune from suit under that statute. The Wisconsin intermediate appellate court conferred immunity on the school district, but found that the student was not immune from suit because cheerleading was not the type of "contact sport" intended by the state statute. Upon reaching the Wisconsin Supreme Court, immunity was conferred once again on both the school district and the fellow cheerleader. After analyzing the relevant statute, the court listed the following requirements which must be present to grant immunity: (1) the defendant must be participating in a recreational activity; (2) the recreational activity must include physical contact between persons; (3) the persons must be engaging in a sport; and (4) the sport must involve amateur teams. In finding that all criteria had been met, the court rejected the plaintiff's

argument that the statute was intended to cover sports such as football and hockey stating that if the legislature had intended for the statute to cover just a few "traditional " contact sports they could easily have listed those sports specifically. Instead, the definition was left open and the court found that cheerleading, with pyramids, tossing, and catching did indeed include sufficient contact to fall under the criteria of the statute.

Davis v Carter, No. 08-10162 (11th Cir. Jan. 23, 2009): This lawsuit arose out of the death of a football player. During a voluntary workout session, Davis became dehydrated and collapsed. He died the next day. His parents sued the three football coaches supervising the workout and the school district alleging that the coaches had violated the student's substantive due process by failing to provide water, ignoring his complaints, and failing to attend to him until the session was over. The District Court conferred immunity on the school district but not the coaches. The Eleventh Circuit disagreed and granted a qualified immunity to the coaches by applying a two-prong test enumerated in the Supreme Court case of *Saucier v Katz*, 533 U.S. 194 (2001). First the court had to determine whether there had been a violation of constitutional rights. To be a violation of substantive due process the state must have acted in an arbitrary manner or in a manner that would "shock the conscience" and thereby cause injury. In the instant case, the court found that the coaches did not behave "willfully or maliciously with an intent to injure" and therefore did not "rise to the conscience-shocking level required for a constitutional violation."

Levesque v Doocy, No. 08-1814 (1st Cir. Mar. 19, 2009): It is well known in circles that claims of defamation of character are hard to prove. The superintendent at Lewiston, Maine found that to be true when his defamation suit was dismissed by the U.S. Court of Appeals for the First Circuit. The suit arose out of the reporting on Fox News Channel of an incident in the middle school where some students had place a bag of ham on the lunch table occupied by a group of Somali Muslim students. After investigation by both the school and local law enforcement, the offending student was suspended for 10 days and the incident was classified as a "Hate Crime/Bias" by the school district and as "Crime: Harassment/Hate Bias" by the police. When the superintendent was interviewed about the incident he was quoted as describing the student's act as "a hate incident" and stating "We've got some work to do to turn this around and bring the school community back together…All our students should feel welcome and safe in our schools."

Several days later a blog was posted by Nicholas Plagman describing the incident, but mischaracterizing some of the facts. Two of the false statements that formed the basis of the superintendent's lawsuit were (1) a quote attributed to the superintendent that "[t]hese children have got to learn that ham is not a toy," and (2) a quote attributed to Stephen Wessler of the Center for the Prevention of Hate Violence that "[t]hey probably felt like they were back in Mogadishu starving and being shot at." The way Fox News became involved was by finding the Plagman article by conducting a Google search. Additional research on the truth of the story was done, but the bottom line was that the story complete with the misstatements made it on air on Doocy and Kilmeade's morning show "Fox & Friends." Superintendent Levesque called the cable channel and complained at which time "Fox & Friends" issued a retraction and apologies, stating that various statements attributed to Levesque were indeed fictitious and if the show had known that the article was not credible it would never have aired the information. Levesque filed a defamation suit anyway. In dismissing his suit, the court found that Levesque had been unable to prove "actual malice" as is required in claims of defamation against public officials.

Funding

State ex rel Board of Educ. of the Memphis City Schools v City of Memphis, CH-08-1139-3 (Ch. Ct. Shelby County Feb. 17, 2009): The issue in this case centered around the correct definition and application of the wording of a state education statute which requires "maintenance of effort" in the funding of public schools. When the City of Memphis cut the funding to the Memphis Public Schools, the district filed suit claiming that the law required the city to fund the schools at, at least, the same level as they had been funded in the previous year. Upon examination of the statute, and with no guiding precedent, the Tennessee Chancery Court sided with the school district and has ordered the city to provide the school system with $57,490,947 in additional funding for the 2008-09 school year.

Employment

Ysursa v Pocatello Educ. Ass'n., No. 07-869 (U.S. Feb. 24, 2009): The State of Idaho was sued by various state labor organizations, including the state teachers' union, for the implementation of a state law—the Voluntary Contributions Act (VCA)—which bans payroll deductions of union dues. The plaintiffs claimed that the VCA violated their First Amendment rights to free speech and their Fourteenth Amendment rights of Equal Protection. The U.S. District Court held that the law was constitutional as applied to state government, but could not be used as to private and local government employers. The state of Idaho appealed arguing that the VCA should be applied to local governments (i.e. school districts) as well. The U.S. Court of Appeals for the Ninth Circuit affirmed the lower court.

Upon reaching the United States Supreme Court, in a 6-3 decision with the opinion being written by Chief Justice Roberts joined by Justices Scalia, Kennedy, Thomas, and Alito reversed the decision of the Ninth Circuit and found that the VCA did not violate the free speech of the labor unions. The court held that although the government may, at times, be required to "accommodate expression, it is not required to assist others in funding the expression of particular ideas, including political ones."

Religion

Pleasant Grove City, Utah v Summum, No. 07-665 (U.S. Feb. 25, 2009): In a unanimous decision, the Supreme Court ruled that the decision to place a permanent monument in a public park is a form of government speech, therefore the government can make the decision was to which donated monuments shall be permanently erected without a concern that an individual's freedom of speech has been violated. This case arose when Pleasant Grove City rejected a request by the religious organization, Summum, to erect a monument displaying its "Seven Aphorisms" in a city park. Summum sued claiming a violation of its freedom of speech because the city had accepted a monument containing the Ten Commandments. The Supreme Court framed the issue of one of whether the city was engaging in government speech which choosing to accept or reject donated monuments or was providing a public forum for private speech. In making that determination, the Court started by recognizing that traditionally public parks are considered a public forum wherein the public retains a strong right to free speech. On the other hand, government entities traditionally have exercised a great deal of control in deciding what monuments to erect and where such should be placed: "The monuments that are accepted, therefore, are meant to

convey and have the effect of conveying a government message, and they thus constitute government speech." If this is the case, then choosing which monument to accept or reject, the government entity runs the risk of claims of viewpoint discrimination (i.e. why the Ten Commandments and not the Seven Aphorisms?)

In reaching a decision, the Court established the difference between individual expression and permanent monuments. Individuals speaking in a public park are transient with several hundred or thousand individuals exercising their right over a given season. Monuments are permanent and therefore there is a finite ability of the forum to provide for the inclusion of monuments. In the words of the Court, "It is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression…The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations." Editor's Note: It should be noted that the concurring opinions tended to focus on, if the choice to accept a donated monument is government speech, whether the acceptance of a monument of the Ten Commandments wasn't then a violation of the Establishment Clause of the First Amendment. Using the Court's "space limitation" rationale combined with the decision that it is government speech, then to avoid unconstitutional viewpoint discrimination government entities would need to establish unbiased rules and regulations based solely on space and size requirements to guide decisions on whether to accept donated monuments. In short, the Court has engaged in an indefensible boot-strapping argument to exclude a monument containing a religious message with which the Court disagreed while allowing a monument containing a religious message with which the Court did agree—isn't that unconstitutional?

Croft v Perry, No. 08-10092 (5th Cir. Mar. 16, 2009): It is not surprising that the 5th Circuit has once again found a way to go around the Supreme Court's ruling regarding "moments of silence" law unconstitutional, thereby also make its stance in direct opposition to the one recently handed down in Illinois. Texas has a law requiring the mandatory observance of a moment of silence "to reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere with or distract another student." In affirming the lower court's decision, the 5th Circuit said that one Supreme Court case and three circuit court cases from other federal circuits had based their rulings on whether the statutes had a valid secular purpose (the first prong of the Lemon Test used by the lower court.) The state of Texas had advanced three secular purposes: (1) fostering patriotism; (2) providing a period for thoughtful contemplation; and (3) protecting religious freedom. The court chose to focus on the first two, ignore the third, and therefore found no violation of the First Amendment. Editor's Note: If this were not Texas, where plaintiffs complaining about Southern Baptist prayers over the loud-speaker before football games had to have an order of protection entered by the Court because of the lawless and threatening behavior of those "good Christian folk" I would have been knocked off guard by this ruling. How does engaging in ANY silent activity foster patriotism or thoughtful contemplation? There is no reason for this law other than to encourage prayer. If it is to foster patriotism then such should be stated in the law—or make them read a patriotic passage from literature, or take that time to read information from the Iraq Conflict. This is a prime example of a court manipulating the law to advance a specific agenda – making policy.

Discrimination

Levy v Lexington County Sch. Dist. Three, No. 03-3093 (D.S.C. Feb. 19, 2009): Lexington County School District's "at-large" method of electing school board members was challenged on the ground that it violated Section 2 of the Voting Rights Act of 1965. The court found that all three parts of the test established in Thornburg v Gingles, 478 U.S. 30 (1986)—(1) that the minority group is sufficiently large and geographically compact to constitute a majority in one or more single members districts; (2) the minority is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it usually o defeat the minority's preferred candidate—were met. The court went on to consider whether, given the current system, minorities were denied equal protection in the voting process. There are eight factors from Gingles to be considered, and the court found that four of those factors had been impacted and therefore found in-favor of the plaintiffs in declaring the voting method discriminatory.