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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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NEW SUPREME COURT JUSTICE

It appears that there might be a new Supreme Court justice shortly—Sonia Sotomayor. While there are many facets to any federal judge, of concern to the educational community is how this individual may rule on cases relating to public and private education. For this determination, the past behavior of a judge is the most predictive of future behavior and Judge Sotomayor as weighed in on various educational issues. Most recently is the case of *Ricci v DeStefano* (Case No. 07-1428) in which Sotomayor joined with the majority in upholding the actions of the city of New Haven, Connecticut in getting rid of an “entrance test” because no black or Hispanic firefighters has scored high enough to be hired. This case is currently being considered by the Supreme Court on appeal and could have a large impact on race-conscious actions by schools. Judge Sotomayor has also joined in on opinions favoring public reimbursement for private school tuition for special education students even when those students had never been in attendance at his or her resident public school. A similar case is currently on review by the Supreme Court. Another ruling which touches on a case currently before the Court deals with strip-searches. Judge Sotomayor was among the three Second Circuit judges in the case of *N.G. ex rel. S.C. v Connecticut* involving the strip-search of adolescent girls at a juvenile-detention center. The court upheld strip-searches and in her concurring opinion, Sotomayor wrote, “[o]ur case law consistently has recognized the severely intrusive nature of strip searches and has placed strict limits on their use. The concerns animating our prior rulings in this area should be only heightened when the privacy interests of emotionally troubled children are at stake.” Finally, a decision with a great deal of impact on school administration was *Donniger v Niehoff*. In that case, Sotomayor joined with two other judges to find that a student’s off-campus blog remarks created a “foreseeable risk of substantial disruption” such that the school could discipline the student for the off-campus act.

STUDENTS RIGHTS

Plamp v Mitchell Sch. Dist. No. 17-2, No. 08-2700 (May 12, 2009): The main question to be answered in this case is what constitutes an “appropriate school official” under Title IX so as to attach liability. Brittany Plamp was a high school student who had been unarguably sexually harassed by her American government teacher. He had made sexually suggestive comments to her and touched her inappropriately. During that time Brittany had told only her friend, boyfriend, and mother about the incident. When, however, he asked to weigh her without her clothes on (she had an eating disorder), her parents reported his conduct to the superintendent. The superintendent immediately called the police, suspended the teacher and ultimately fired him.

Regardless of this prompt response, Brittany’s parents sued the school district and the superintendent under Title IX and Section 1983. They also brought a state law battery suit based on South Dakota law. The court entered summary judgment in favor of the school district in both the Title IX and the Section 1983 action. In addition, although the court found the teacher liable under the state battery law, the school district was not implicated. Looking at the Title IX claim, the 8th Circuit found that the district was not liable as a matter of law because “no appropriate school official had knowledge of Tate’s discriminatory actions, and it did not act with deliberate indifference once it became aware of those actions.” It is well established under federal law that building principals are “appropriate officials” under the law because they exercise “substantial control over teachers and school staff and have authority to take steps to remedy the harassment.”

In the instant case the evidence showed that the building principal never had actual knowledge of the harassment. The evidence also showed that once the district became aware of the behavior action to rectify the behavior was swift. The court did not accept Brittany's argument that teachers and school counselors should also be considered "appropriate school officials" under the law.

In finding for the school district under the Section 1983 allegation, while the court found that the teacher had engaged in unconstitutional conduct, she "failed to raise an issue of material fact as to whether the relevant policymaking officials had knowledge of a fact as to whether the relevant policymaking officials had knowledge of a continuing, widespread, persistent pattern of unconstitutional misconduct." The court did not agree with Brittany's argument that the building administration was a policymaking body, stating instead that such power rested with the school board.

Blunt v Lower Merion Sch. Dist., No. 07-3100 (E.D. Pa. May 7, 2009): It appears, according to the U.S. District Court in Pennsylvania, that rules of evidence in the form of discovery takes precedent over the confidentiality provisions under the Federal Education Right to Privacy Act (FERPA.) The school district was the defendant in a class action suit alleging racial discrimination by the district and the Pennsylvania Department of Education (PDE). It was alleged that both had failed to provide appropriate special education to African-American students. Through discovery, the plaintiffs had requested the educational records and data for students enrolled in the district. Although ordered to provide redacted information so that students could not be identified, the court ordered the PDE to provide such documents. Now it is true that the court made a very narrow ruling, ordered that the confidential documents be safely handled to maintain their confidentiality and that the order extended only for use in the lawsuit. However, to allow court rules to trump FERPA is significant in our understanding of the "hierarchy" of various student rights.

Brown v Shasta Union High Sch. Dist., No. 164933 (Cal. Super. Ct. May 6, 2009): The right for school districts to require suspicionless drug testing is not unlimited. Shasta Union High School was enjoined by the California courts from enforcing a policy that would require all students participating in "competitive representational activities" to submit to drug testing. These activities included not only extracurricular activities, but also mandated curricular and co-curricular activities required and used for grading purposed in educational classes. The district wanted to limit the debated to 4th Amendment search and seizure issues as was done in applicable state law. The students argued that appropriate precedent to use was that contained in California state cases dealing with the right to privacy under the California Constitution. The court looked at right to privacy and determined that the students had a reasonable right to privacy that was abridged by the collecting of a urine sample and the demand to provide that sample within earshot of another individual. The court saw a vast difference in the expectation of privacy of student athletes, where close scrutiny of bodily condition and physical fitness is expected, and the privacy interest of members of non-athletic activities stating that "It is not a reasonably expected part of the life of a member of the choir or math club." The court also found that often there was not sufficient notice as to what was considered an activity falling under the testing policy. Rather, decisions seemed to be made on an ad hoc and arbitrary basis.

Ollier v Sweetwater Union High Sch. Dist., No. 07-714 (S.D. Cal. Mar. 30, 2009): The female students at Castle Park High School sued the district under Title IX alleging unequal participation opportunities for females. According to the filing, the girls experience inequality in practice and competitive facilities, locker rooms, training facilities, equipment and supplies, travel and transportation, coaches and coaching facilities, scheduling of games and practice times, publicity, funding, and participation options. In looking at this final claim, inequality in participation options, the court turned to an OCR policy from 1979 which set out three part test for determining institutional compliance with Title IX. First, are intercollegiate (or interscholastic) level participation opportunities for male and female students provided in numbers substantially proportionate to their respective enrollment? Second, have the member of one sex been, or are they currently being, underrepresented among intercollegiate athletes, and can the institution show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex? Finally, where the members of one sex are underrepresented among intercollegiate athletes and the institution cannot show a continuing practice of program expansion such as that cited above, can it be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

In applying this test to the instant case, the court found that the district failed the first test. Specifically the opportunities available to female athletes were severely out of proportion to the proportion of female athletes at the institution. That having been decided, the court then looked to see what the institution was doing to rectify that situation. The court found no “history of expansion” of the girls program. The district failed the third part of the test as well when the court found that interest far outstripped the capacity of the girl’s sports program.

Brown v Cabell County Bd. of Educ., No. 09-0279 (S.D.W.Va. Mar. 30, 2009): Huntington High School had been experiencing gang problems including members of the gang Black East Thugs threatening other students. A-Train, a high school student, had been accused of shooting a police officer. He was a member of the Black East Thugs. Shortly after his arrest some students started wearing t-shirts saying “Free A-Train.” After numerous student and parental complaints the school banned the wearing of the slogan. Another student, AB arrived at school with a message written on his hand “Free-A-Train.” He was told to remove the writing and when he refused to do so he was suspended for 10 days. He filed suit to obtain an injunction against the school so that it could not enforce the suspension on the grounds that its actions had violated his constitutionally protected freedom of expression.

In denying the injunction, the court relied on the Supreme Court decision *Tinker v Des Moines Independent Community School District*, 393 U.S. 503 (1969) that allowed school districts to restrict student speech that materially and substantially disrupts the educational atmosphere of the school. Although officials cannot enact policies out of some “remote apprehension of disruption but rather they must demonstrate specific and significant fear of disruption,” the court found such existed in the instant case. The ban was in response to the disruption, not to the content of the message and therefore was a constitutionally acceptable limitation of the students’ freedom of expression.

Figueroa v Somerset Indep. Sch. Dist., No. 09-212 (W.D. Tex. Mar. 30, 2009): The Somerset school district had a policy which states that males’ hair must not touch their shirt collar. In order

to settle a federal lawsuit in which an injunction had already been granted in favor of the student, the school board voted unanimously to grant Figueroa a waiver from the policy on the grounds of religious beliefs. Figueroa had stated in court documents that he believed that his hair was a gift from the Great Spirit and should be cut only to mourn the death of a loved one.

R.O. v Ithaca City Sch. Dist., No. 05-695 (N.D. N.Y. Mar.23, 2009): The student editors of the high school newspaper wanted to run a cartoon depicting a teacher pointing to a blackboard drawing of stick figures in sexual positions and the phrase “Test on Monday” under the drawing to accompany an article titled, “How Sex is Being Taught in Our Health Class.” The faculty advisor said “no” to the cartoon but allowed the article to run. The student editors then established an “independent” newspaper which included the cartoon, but school officials denied them permission to hand out their newspaper on school grounds. The students sued alleging violation of their First Amendment rights and that the guidelines for the school newspaper were unconstitutionally vague and overbroad.

The court began its decision by examining the type of forum which had been established. It determined that the high school had established a limited public forum for the distribution of written materials in the newspaper and therefore was permitted to make reasonable viewpoint neutral rules governing its content. Relying on the Supreme Court reasoning in both *Bethel Sch. Dist. v Fraser*, 478 U.S. 675 (1986) and *Hazelwood Sch. Dist. v Kuhlmeier*, 484 U.S. 260 (1988) the court found that the cartoon could be rejected as lewd, vulgar, indecent, or plainly offensive and therefore did not constitute constitutionally protected speech. Moreover, even if *Fraser* was not applicable the fact that the newspaper was school funded and supervised, under *Hazelwood* the district still had the power for final editorial control to ensure that the content was age appropriate. Turning to the question of viewpoint neutrality, the court found based on evidence presented, that the decision was viewpoint neutral.

On the topic of vagueness and over-breadth, however, the court sided with the students. Since the guidelines were “prior restraint on speech” they had to be (1) content neutral; (2) narrowly tailored to serve a significant governmental interest; and (3) permit alternative channels for expression. The district failed to cite any evidence that the guidelines were narrowly tailored to serve “defendants’ interests and pedagogical concerns.”

RELIGION AND EDUCATION

C.F. v Capistrano Unified Sch. Dist., No. 07-1434 (C.D. Cal. May 1, 2009): Disparaging creationism in the classroom in California could cause a teacher to end up on the wrong side of the law. James Corbett taught an AP History course at Capistrano Unified School District. During the course of the class, he made several comments that a student, C.F., found to be hostile to his religion (i.e. Christianity.) As a result C.F. and his parents sued Corbett, the teacher’s union, and the school district alleging that the district had violated C.F.’s right to freely exercise his religion by having practices and policies hostile toward religion and favoring non-religion over religion.

The suit focused on specific statements made by Corbett during class. While many of the “offensive” statements were found not to touch upon First Amendment rights, the court did apply the Lemon Test to others to see if there had been a constitutional violation. First, the court found that Corbett’s statement to the effect that creationism was “superstitious nonsense” lacked any secular purpose and therefore did violate the Establishment Clause of the First Amendment

by favoring non-religion over religion. As to the second statement, which quoting Mark Twain, the court was unable to determine whether Corbett was espousing a belief of simply quoting a famous author. Third, regarding the comment made by Corbett of looking at an event through “Jesus Glasses” the court found that the “primary purpose of the statement was to illustrate the specific historical point regarding the peasants in the discussion and to make the general point that religion can cause people to make political choices which are not in their best interest.” In the end, the court could find only one arguably unconstitutional statement and failed to find the school district or the teacher’s union in violation of the Religion Clause of the Constitution.

In short, one statement made by a teacher does not convey a “governmental message that students holding religious beliefs are outsiders and are not full members of the community.” In an afterword the court took notice of the “tension between the constitutional rights of a student and the demands of higher education as reflected in the Advanced Placement European History course in which C.F. enrolled.” The court stated that it was attempting to reach a decision which protected the constitutional interests of the students which also protecting the academic freedom of the instructor.

Gold v Wilson County Bd. of Educ., No. 09-0211 (M.D. Tenn. May 1, 2009): At Lakeview Elementary school there is a parent organization known as the “Praying Parents.” This group had been involved in previous litigation in 2008 where the court had held that administrators and teachers had become excessively entangled with the group’s religious activities causing the appearance of the unconstitutional endorsement of religion. After subsequent policy changes by the School Board “outside” posters were limited to announcing the name, date, time, and location of an event and forbid any religious speech. The Praying Parents had already prepared posters inviting students to “See You at the Pole” as part of a national prayer event and they contained religious speech. To remain in compliance with Board policy, the Praying Parents covered the religious language before hanging the posters. Some of the parents, however, filed another lawsuit stating that the new Board policy was unconstitutional on its face and as applied.

The parents requested a preliminary injunction against the new policy. In order to obtain a preliminary injunction the moving party must convince the court as to the likelihood that they would prevail on the legal question upon reaching court. In trying to determine this likelihood, the court first had to determine the type of forum that had been created by the school district. It was decided that a limited open forum had been created. Having created such a forum, and drawn distinctions as to the kinds of subject matter that may be addressed in light of the forum’s purpose, the district was required to maintain viewpoint neutrality. This meant that unless the viewpoint fell under one of the content restrictions specifically listed in the policy—(1) likely to cause material and substantial disruption of the educational atmosphere; (2) would violate the rights of others; (3) are obscene, lewd, or sexually explicit; or (4) would reasonably cause students to believe that activities are sponsored or endorsed by the school—no further content restrictions could be imposed. The posters in question fit none of the above mentioned restrictions. Consequently, the court stated that “a school may regulate the specific content of the posters only if the regulation of the speech is reasonable to preserve the purpose for which the forum was opened and the regulation is viewpoint neutral, i.e., it does not suppress expression merely because the school officials oppose the speaker’s point of view.” The injunction was granted to the “Praying Parents.”

Croft v Perry, No. 07-1362 (N.D. Tex. Mar. 26, 2009): After claiming that it could secede from the union, it shouldn't be surprising that the state of Texas also a "Texas Pledge of Allegiance." Under the Texas Education Code, schools are required to recite both the United States Pledge of Allegiance AND the Texas Pledge of Allegiance every day. In 2007 the Texas Pledge of Allegiance was amended to include the phrase "one state under God." Although students could opt out if the parents so requested, a group of parents filed suit alleging that the 2007 amendment violated the Establishment Clause of the First Amendment to the federal Constitution.

Since it was a facial challenge, the U.S. District Court for the Northern District of Texas applied the Lemon Test. Since the challenge was against only the "secular purpose" first prong of the test, that is all the court considered along with three other questions raised by the parents: (1) whether the statute unconstitutionally endorsed religion; (2) whether the statute favored one religion over another; and (3) whether school children were coerced into affirming a religious belief. In considering the wording of the amendment, the court first found that there was substantial federal law holding that the words "under God" in the United States Pledge of Allegiance was constitutional, including dicta from the Supreme Court itself. That having been said, the court could find a secular purpose, that purpose being to have the Texas Pledge mirror the wording of the U.S. Pledge. The court also found that the pledge did not endorse religion either through effect or purpose (thereby clearing the second hurdle under Lemon.) The court also stated that the reference to "God" was only the "broad acknowledgment of a divine being" not an endorsement of a Judeo-Christian God. Finally, following the opinion of the United States Supreme Court in *West Virginia State Bd. of Educ. v Barnette*, the court also found no coercive effect from the amended wording.

Comer v Scott, No. 08-511 (W.D. Tex. Mar. 31, 2009): In another Texas federal court case, the Establishment Clause of the First Amendment to the federal Constitution was under scrutiny. Plaintiff Comer was employed by the Texas Education Agency (TEA) as Director of Science for the Curriculum Division. As such she received an announcement about an upcoming presentation by an opponent of creationism which she forwarded to two science educator organizations and seven science-education professionals. Almost immediately she was told by her superiors to issue a disclaimer or face possible termination. About two weeks later Comer was told that she need to resign and if she didn't she would be terminated for violating the TEA's neutrality policy which required that staff did not take positions on matters to be decided by the Texas Board of Education (TBE). The next day she tendered her resignation, and then turned around and sued the TEA for unlawful termination alleging that it was based on a violation of the Establishment Clause. Comer asked for reinstatement and injunction against the enforcement of the neutrality policy.

Once again it was an Establishment Clause challenge so the District Court used the Lemon Test to examine the allegations put forth by Comer. In particular, the court focused on the second prong dealing with the effect of the governmental action, whether such action either advanced or inhibited religion and whether a reasonable observer would view the government's action as endorsing religion. In distinguishing the *Edwards v Aguillard*, 482 U.S. 578 (1986) case which essentially mandated the teaching of creationism, the court found that the neutrality policy designed to prevent staff from taking any action that favors any particular TBE member's position. Any benefit which might flow to religion would be merely incidental. The court also concluded that a reasonable observer would come to this same conclusion and would not see the neutrality policy as endorsing creationism. As a result, Comer's suit was dismissed.

S.D. v St. Johns County Sch. Dist., No. 09-250 (M.D. Fla. Apr. 15, 2009): One of the songs on the program for the third grade end of year assembly was a song titled “In God We Still Trust.” Students were allowed to opt-out of performing the song, but if they chose to do so they would be excluded from the entire assembly. Parents of two children sued for a preliminary injunction on the grounds that the district’s action was a violation of the Religion Clause of the First Amendment. In granting the injunction the court stated that “the playing, practicing, and scheduled performance of the Song fails to pass constitutional muster under any of the established tests” formulated for gauging First Amendment violations. In making its decision, the court also relied on settled law that songs of a religious nature may be included in public school programs if the songs have recognized musical value apart from the lyrics. The song in the instant case, however, was found to “endorse a specific viewpoint of preference for religious sectarianism and unlike the songs performed by the high school and middle school choirs, this song antagonizes and degrades those whose beliefs differ from the ones espoused by its lyrics...[the song] is a patently religious and proselytizing piece.”