

ILLINOIS STATE
UNIVERSITY



Volume 29, No. 4
July 2009

ILLINOIS STATE
EDUCATION LAW AND POLICY
JOURNAL

IN THIS ISSUE

EDUCATIONAL REFORM	<i>page 26</i>
RELIGION	<i>page 26</i>
STUDENT RIGHTS	<i>page 27</i>
SCHOOL EMPLOYEE	<i>page 28</i>
SPECIAL EDUCATION	<i>page 29</i>

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.

Illinois State University is an Equal Opportunity/Affirmative Action institution in accordance with Civil Rights legislation and does not discriminate on the basis of race, religion, national origin, sex, age, handicap, or other factors prohibited by law in any of its educational programs, activities, admissions or employment policies. University policy prohibits discrimination based on sexual orientation. Concerns regarding this policy should be referred to Affirmative Action Office, Illinois State University, Campus Box 1280, Normal, IL 61790-1280, phone 309/438-3383. The Title IX Coordinator and the 504 Coordinator may be reached at the same address.

Illinois State Education Law and Policy Journal is published as a service of the Center for the Study of Educational Policy, Department of Educational Administration and Foundations, College of Education, Illinois State University, Campus Box 5900, Normal, IL 61790-5900.

If you quote or paraphrase, please credit author and *Illinois State Education Law and Policy Journal* in an appropriate manner. This publication is not produced for the purpose of rendering legal advice or services. Expressed points of view of the Editor and contributors represent personal opinion and not that of the University, College, or Department. All inquiries should be directed to Editor, *Illinois State Education Law and Policy Journal*, Illinois State University, Campus Box 5900, Normal, IL 61790-5900., phone 309/438-8989.

EDUCATIONAL REFORM

Governors of 46 states have taken educational reform into their own hands by agreeing to collaborate on common academic standards for math and English/language arts. The only states not signing on are Alaska, Missouri, South Carolina, and Texas. In the 46 states participating in the project, a memorandum of agreement was signed by both the governor and the chief education officer committing themselves to the development of voluntary, common standards. Also in the sights of the group are the development of uniform standards as to “what every high school graduate should know” and “learning progression standards” which are grade by grade standards.

The standards will actually be developed by a working group composed of representative from the Washington-based group Achieve, the New York City based College Board, and ACT Inc. based in Iowa City, Iowa (the home of the University of Iowa.) The drafts will then be reviewed by a “validation” committee made up of independent national and international experts chosen by the National Governors Association and the Council of Chief State School Officers. Once finalized, the standards will be adopted by all the participating states.

Perhaps the underlying motive in this reform is access to \$4.35 billion federal stimulus dollars. The “Race to the Top” fund, a grant program authorized as part of the American Recovery and Reinvestment Act was even named as a possible funding source for this reform.

Common standards are not the only reform on Arne Duncan’s agenda for which stimulus dollars may be used. Later this year states and school districts will be able to compete for a piece of \$5 billion for innovations which the Obama administration endorses. Some of the favorites of Arne Duncan are charter schools and merit pay.

The inevitable has finally occurred to voucher recipients under the Milwaukee Parental Choice program—the state of Wisconsin has cut funding and attached additional strings to the money which it does pay to private schools, primarily religious schools, under the program. The new rules cut funding per voucher student by 2.5% and require a voucher school with more than 10% of its students of limited English proficiency to have a “bilingual-bicultural education program, beginning in the 2010-11 school year.” Brother Bob Smith of Messmer Catholic Schools claims that “When the adverse impact of these changes begins to be felt, we must be on record against funding cuts and regulatory changes that fundamentally undermine our mission and the choice program.” When religious schools start relying on the state to fund their educational programs, both the state and religion suffer because with state money come strings. If the religious schools don’t want to have the state “intruding” on their religious mission then they should go to their parishioners for money, not the state of Wisconsin.

RELIGION

Busch v Marple Newtown Sch. Dist., No. 07-2967 (3d Cir. June 1, 2009): According to the 3rd Circuit, it is not a violation of a parent’s free exercise of religion when a school tells the parent that he or she may not read the Bible to a kindergarten class. Mrs. Busch wanted to read a passage from the Bible to her son’s class during a unit entitled “All About Me.” In this unit parents and children help the children get to know each other by, among other things, reading the child’s favorite book(s). When Mrs. Busch was told that she needed to pick another book, she sued.

In making its ruling each judge wrote a separate opinion. Chief Judge Scirica based his decision on the fact that during school hours during curricular time the classroom is a nonpublic forum, therefore greater discretion rest with the school to determine what is appropriate without running afoul of the First Amendment. Judge Barry, in her separate opinion, went on to elaborate by saying the “children of kindergarten age [are] simply too young and the responsibilities of their teachers too special to elevate to a constitutional dispute cognizable in federal court any disagreement over what a child can and cannot say and can and cannot do and what a classmate can and cannot be subjected to by that child or his or her champion.” Although agreeing that there was no Establishment Clause question, in his separate opinion Judge Hardiman, did believe that there was a violation of freedom of speech. Looking at Chief Judge Scirica’s opinion, he found that Mrs. Busch’s speech did not bear the imprimatur of the school but rather was private speech. Therefore it was his opinion that *Tinker v Des Moines*, 393 U.S. 503 (1969) would be the controlling case rather than *Hazelwood v Kuhlmeier*, 484 U.S. 260 (1988).

Roark v South Iron R-1 Sch. Dist., No. 08-1847 (8th Cir. July 16, 2009): This case stands as a warning to school boards that when the superintendent, the school board attorney, and the school’s insurance carrier all warn it that a given practice is illegal, the board should listen. Because the school board of the South Iron R-1 School District ignored such warnings about their policy of allowing the distribution of Bibles on school property during the school day, the district ended up in court where a permanent injunction was granted against the district. In short, there is no constitutional way to allow the distribution of Bibles to students on school ground during the school day. Just don’t do it!

STUDENT RIGHTS

Schools do have the right to require that valedictorian speeches be turned in for prior review and if that policy is ignored to withhold the diploma until an apology is given. In *Corder v Lewis Palmer Sch. Dist.*, No 38, No. 08-1293 (10th Cir. May 29, 2009), the school had an unwritten policy that proposed graduation speeches had to be submitted to the principal for prior review. While the speech submitted by Corder passed review, the speech which she actually gave at the graduation differed dramatically. The speech actually given was proselytizing, in violation of school rules. The school refused to give Corder her diploma until she publicly apologized. She apologized, she received her diploma, and then she sued for violation of her First Amendment right to freedom of speech and freedom of religion as well as a violation of her 14th Amendment right to equal protection and violation of Colorado laws on student publications.

In upholding the summary judgment granted to the school district by the lower court, the 10th Circuit court found the United States Supreme Court case of *Hazelwood v Kuhlmeier*, 484 U.S. 260 (1988) to be controlling. Because of the control that the school exerts over the selection of the valedictorian and the review of the content of the speeches prior to graduation, the speeches constituted school-sponsored speech bearing the imprimatur of the school. The court found, “[a] graduation ceremony is an opportunity for the School District to impart lessons on discipline, courtesy, and respect for authority” therefore prior editorial control over the content of speeches bore a legitimate pedagogical concern as required by *Hazelwood*. As for the Free Exercise claim, the prior review was not specific to religion but rather in a neutral manner.

Doran v Contoocook Valley Sch. Dist., No. 07-307 (D.N.H. Mar. 25, 2009): According to the court, it is legal to hold students on the football field while drug sniffing dogs sweep the school, including students' backpacks and purses which were required to be left behind. The Contoocook Valley school district had become increasingly concerned that they had a drug problem that was escalating. In response, the school invited the police to bring through drug sniffing dogs in an attempt to find contraband. Just before the police arrived students were ordered to leave all personal items in the building and assemble on the football field. The dogs were brought in and during the sweep the dogs alerted to eight bags which law enforcement turned over to school officials. Upon being searched, no illegal substances were found.

Several parents sued alleging a violation of their children's 4th Amendment rights against unreasonable searches and seizures. Relying on previous federal court decisions, the New Hampshire District Court found that "the mere use of trained drug dogs on school grounds to sniff students' personal items does not qualify as a search within the meaning of the Fourth Amendment" therefore the incident did not implicate any 4th Amendment rights. A summary judgment was granted to the school district.

Safford Unified Sch. Dist. #1 v Redding, No. 08-479 (U.S. June 25, 2009): When Redding was a student at Safford Middle School she and a friend, Marissa, were accused of distributing prescription drugs on campus. A search of Marissa's pockets and wallet turned up some pills which she said she received from Redding. When confronted by school officials, Redding denied everything and therefore was forced to submit to a strip search by the school nurse. Nothing was found. Redding sued and upon reaching the United States Supreme Court, in an 8-1 decision the court found that under the circumstances the search was unreasonable. Citing a prior Supreme Court case, *New Jersey v T.L.O.*, 469 U.S. 325 (1985) the Court stated that for a search to be constitutional it need to be reasonable at its inception and reasonable in scope. To determine whether something is reasonable in scope depends upon the age and gender of the student and the nature of the infraction. In the instant case, while the Court found that the school did have reasonable suspicion to conduct a search of Redding's backpack and outer-clothing, because of the limited threat posed by the infraction, and lack of reason to believe that Redding was concealing pills in her undergarments, the scope of the search was found to be unreasonable and therefore unconstitutional.

SCHOOL EMPLOYEE

Gross v FBL Financial Services, Inc., No. 08-441 (U.S. June 18, 2009): Gross filed suit claiming that his employer, FBL Financial Services demoted him because of his age in violation of the Age Discrimination in Employment Act (ADEA). Upon reaching the United States Supreme Court, in a 5-4 decision, the Court ruled that an individual bringing a suit under the ADEA had the burden to prove, beyond a preponderance of the evidence, that age was the "but-for" cause of the adverse employer's action, rather than just a motivating factor. This makes the burden of proof, and ultimate success, for someone claiming age discrimination much more difficult to obtain.

Ricci v DeStefano, Nos. 07-1428 and 089-328 (U.S. June 29, 2009): The City of New Haven, Connecticut conducted an objective test to determine which firefighters should be promoted to

vacant lieutenant and captain positions. When white candidates passed the exam at an almost 2 to 1 rate over African-American candidates, the African-American community started to claim that the test was racially biased so the city refused to certify the test choosing instead to discard it over fear that it would cause African-American's to sue the city for disparate impact discrimination. A group of white firefighters who had scored high enough to make them eligible for promotion, including a man who was severely dyslexic and had been studying for months to overcome that handicap, sued the city for reverse discrimination.

The U.S. Court of Appeals for the Second Circuit (including Supreme Court nominee Sonia Sotomayor) upheld the action of the city. Upon reaching the Supreme Court, the appellate court ruling was overturned in a 5-4 decision. The Court stated that before an employer can't engage in intentional discrimination under Title VII of the Civil Rights Act of 1964 because it fears that it might be sued for unintentional disparate impact discrimination. In resolving the case, the Court adopted a standard used in equal protection cases, i.e. "government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a strong basis in evidence." Addressing the case in front of it, the Court found, based on the record, that the city had failed to demonstrate by an objective, strong basis in evidence that the tests were inadequate thus leaving the city open to liability. The court stated that the city would only incur liability if the tests used were not job-related and consistent with business necessity, a test which the Court had set in the early case of *Mt. Healthy City School District Board of Education v Doyle*, 429 U.S. 274 (1977).

Milholland v Sumner County Bd. of Educ., No. 08-5568 (6th Cir. July 2, 2009): A middle school assistant principal, who suffered from arthritis, alleged that the school district demoted her to a teaching position because it considered her disabled. It was well known that Miholland had arthritis, but when the friction between her and the other assistant principal made it clear that both could not stay at the middle school it was decided she should be transferred. Both Miholland, and her supervising principal, recommended that she be placed in a principal position at the elementary school but the superintendent chose to place her in a teaching position at the high school. Milholland sued claiming a violation of the ADA. She tried to sue under 2008 amendments to the ADA, claiming that congressional intent would support her situation being grandfathered in under the new wording but the court disagreed. Instead, the court set Milholland's burden to prove that the school district viewed her as impaired. She could not meet this burden and judgment was made for the school district.

SPECIAL EDUCATION

Fuentes v Board of Educ. of City of New York, No. 06-4715 (2d Cir. June 15, 2009): In the opinion of the New York Appellate Court, only parents with custody or non-custodial parents with the specific right to share in the educational decision of their children have standing under the IDEA. Jesus Fuentes, the non-custodial biological father of Matthew Fuentes attempted to challenge the adequacy of the services which Matthew, a special education student, was receiving under the IDEA his challenge was rejected because he had no legal right to participate in the educational decisions affecting his son.

Forest Grove School District v T.A., No. 08-305 (U.S. June 22, 2009): The parents of T.A. had tried, unsuccessfully, for years to get their child identified as being in need of special education. They had requested testing by the school district as well as having outside testing done but all to no avail. The school refused to identify T.A. as in need of services and therefore no IEP was ever developed. As a last resort T.A. was placed in a private facility and the parents sued the district. In a 6-3 decision the United States Supreme Court ruled that the IDEA authorizes reimbursement for private school placement when a public school fails to provide a free and appropriate public education (FAPE), even if special education services had never actually been provided by the public school. In other words, it has often been argued by school districts that they cannot be in violation of the IDEA unless the special education student has received services by the district and those services were found not to be appropriate; that another placement such as a private school would be the appropriate setting.

The majority relied on prior precedent in *School Comm. Of Burlington v Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District Four v Carter*, 510 U.S. 7 (1994) which established that school district that failed to provide FAPE, can be found to have done so either by implementing an inadequate IEP or failing to implement an IEP at all. In such cases parents have the right to unilaterally place their children in an alternate place at the district's expense. What brought this precedent into question were amendments to the IDEA made in 1997 which stated that private school reimbursement may be allowed to "a child with a disability, who previously received special education and related services under the authority of a public agency." The Court, however, did not find that this amended wording changed the ability of the Court to grant "appropriate" relief and did not alter the Court's decisions in *Burlington* or *Florence County*.

Ellenberg v New Mexico Military Inst., No. 08-2112 (10th Cir. July 10, 2009): Being found eligible for an IEP and special education services does not automatically translate into a finding of a disability under Section 504 or the ADA. *Ellenberg* was denied admittance into the New Mexico Military Institute because she had documented behavioral problems, admitted past drug use, and the continuing need for a certain level of medication and counseling. At the time *Ellenberg* had an IEP. After circulating through the levels of the court, it was finally decided by the 10th Circuit Court that the existence of an IEP on its own did not satisfy the burden to provide a prima facie case of discrimination under Section 504 or the ADA; it did not establish that the disability impaired a "major life activity."