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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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WHAT'S HAPPENING AROUND THE USA?

The school board of Stafford County, Virginia voted to resume opening meetings with a prayer. The superintendent is arranging a legal in-service for the board on the topic of prayer in schools. Source: Free Lance-Star, 9/23/09, By Jeff Branscome

The Michigan senate narrowly defeated a bill that would require school districts to adopt a policy to deal with bullying in the school. The opposition to this bill consisted of two major groups, one which did not like sexual orientation or perceived sexual orientation being included as a protected group and one which felt that the wording of the legislation would open up districts to additional legal liability by encouraging law suits. Source: Michigan Messenger, 9/23/09, By Todd A. Heywood

A school district in Texas has said that it was willing to be the test case when it adopted a policy requiring that ALL students in grades 6 through 12 had to submit to random suspicionless drug testing as a condition for attendance at school. If a student refuses to submit to the test it will be deemed a "positive" result and the student will be suspended for 3 days for the first refusal, assigned to an Disciplinary Alternative Education Program for 30 days for the second refusal, and assigned to the Disciplinary Alternative Education Program for the remainder of the year for the third refusal. The results do not affect the student's grades nor are they kept with the students records. Source: Rosebud News, 9/25/09, By Curtis Chubb

A middle school student in Pennsylvania was told to change his shirt which read "Abortion is not Healthcare" because it might insult someone. District policy forbids wearing "clothing which creates a hostile educational environment or evidences discriminatory bias or animus." Another policy bans speech which "seek[s] to establish the supremacy of a particular religious denomination, sect, or point of view." The student claims that the shirt was a comment on the healthcare debate. His father stated that the boy's "sincerely held religious beliefs compel him to share his faith and beliefs and to address relevant subjects from a Biblical point of view with his friends and classmates at school." Are the policies in violation of the First and Fourteenth Amendments? Source: Courthouse News Service, 10/8/09, By Tim Hull [Editor's Note: Eleven days later the York Daily Record reported that the school district had dropped its ban of the t-shirt in a settlement worked out to avoid a lawsuit by the student's father. Under the settlement the student can wear the t-shirt and other anti-abortion messages so long as there is no disruption to the educational environment.]

A second grade teacher in Tucson is in trouble with his board after a parent complained that the teacher was teaching about Jesus, God, and the devil in his classroom. The parent stated that her child had told her that the teacher taught the children that the Devil rapes little boys and "touches them where they don't want to be touched." The child also claimed that the teacher had told them to not tell the principal what they were learning because he would be fired. Upon investigation while the teacher was on paid administrative leave, 10 other students corroborated the child's story. Source: Arizona Daily Star, 10/15/09, By Alexis Hulcochea

The ACLU of Mississippi has threatened to file a First Amendment speech/expression lawsuit if the district continues to disallow the senior portrait of a lesbian student in a tuxedo to be printed in the school yearbook. Male students were instructed to wear tuxedos and female students to wear drapes in a letter from the principal. Source: Brookhaven Daily Leader, 10/15/09, By Adam Northam

It appears that the Ohio Department of Education is going to have to start cleaning up the way it deals with special education students in the state of Ohio. It seems that within the last year the Ohio Department of Education has reviewed 440 complaints about districts not providing appropriate special education services. The consent order issued by the court will require Ohio school districts to comply with federal law as well as replace their overly complex and opaque system with one that is more easily understood and accessible to parents. In addition, the Ohio Department of Education will need to post the performance of individual school districts in providing appropriate services, conduct more thorough investigations and issue findings within 60 days. If school districts don't provide appropriate services, it will be the duty of the Ohio Department of Education to step in and do so. Source: The Columbus Dispatch, 10/21/09 By Catherine Cankisky

Bucking the trend, a city task force in Manchester, New Hampshire recommended that the city should not enact a policy restricting the residency of registered sex offenders. The report urged less drastic measures be used to fight sex crimes such as publicizing the state's on-line sex offender registry. Police have suggested that if the city does draft a policy that it focus on Tier III offenders who are those who have committed the most serious crimes against victims less than 18 years of age. If such a narrow policy, however, could have the adverse effects seen when offenders cannot find housing. In such cases many fail to register thereby making it extremely difficult for police to monitor their movements. Source: New Hampshire Union Leader, 11/3/09, By Scott Brooks

The on-going disagreement as to whether an autistic boy in Illinois may bring his service dog to school with him has finally been resolved. An Illinois court has ruled that the dog falls under the definition of service dog in Illinois law and as such must be allowed into the school. The school had argued that it wasn't a true "service dog" as intended by state law but rather a comforting device for the boy. Source: Associated Press, 11/10/09. By Staff

The Champaign school district in Illinois has been released from a court ordered desegregation consent decree. Although the African-American plaintiffs wanted the consent decree to remain in effect in the areas of student assignment, special education, and alternative education, the judge who released the district from the decree held that the settlement which had been reached was sufficient to handle all areas included in the original decree. Source: News-Gazette, 11/5/09, By Jodi Heckel. Editor's Note: Only time will tell.

A teacher in Texas came up with a novel reason to avoid fingerprint checking as required by law. Pam McLaurin, a self professed Evangelical Christian claims that "fingerprinting is the Mark of the Beast foretold in the Book of Revelations" and that only those teachers with "the mark on his forehead or finger" will be able to earn a living through teaching. Because fingerprinting is

the only method to comply with the statutory requirement to go through a background check, McLaurin claims that the law is an unconstitutional violation of her Free Exercise of Religion. The case has not yet gone to court. Source: Courthouse News Service, 11/5/09, By Dan McCue

SPECIAL EDUCATION

Houston Indep. Sch. Dist. v. V.P., No. 07-20817 (5th Cir. Sept. 9, 2009): V.P. was a special education student in the Houston public schools. In accordance with the IDEA, V.P. had an IEP. The parents rejected the IEP, placed V.P. in private school, and took the school district to due process alleging that V.P. had been denied a free and appropriate public education (FAPE) because an education benefit was not the result of the IEP proposed and implemented by the school district. V.P.'s parents also requested that the cost of the private school be reimbursed by the school district. The hearing officer found for the parents. On appeal to the district court, the hearing officer's decision was affirmed, but the school district was required to pay for only one year of private schooling, not for the second year that occurred during the pendency of the litigation. The Fifth Circuit also found that V.P. had been denied FAPE because there was no "meaningful" education benefit from the program implemented by the Houston Schools. To make this determination, the court listed four factors that served as "indicators of whether an IEP is reasonably calculated to provide a meaningful educational benefit: (1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders'; and (4) positive academic and non-academic benefits are demonstrated." The Fifth circuit found the fourth factor, positive academic and non-academic benefits to be the most crucial in the determination. Using improved test scores and advancement to the next grade level can only be used as a positive academic benefit if they are achieved because of the IEP, not because of outside and/or unrelated efforts.

Geffre v. Leola Sch. Dist. 44-2, No. 06-1047 (D. S.D. Sept. 25, 2009): S.G. had been diagnosed with ADHD and a behavioral disorder so was receiving special education under an IEP at Aberdeen High School. When he transferred from Aberdeen to Leola High School his parents chose to discontinue the IEP. Not surprisingly, S.G. became involved in several altercations including fighting and threats of violence. In response to his behavior, S.G. was transferred to the Dakota School, a school of children with behavioral disorders and was provided an IEP. The IEP required S.G. to remain at the Dakota School for the remainder of the year. However, shortly after arriving at the Dakota School S.G.'s behavior improved dramatically so a new assessment was made which called for S.G. to be transitioned back into his home high school the following year. His parents objected to the partial transition and wanted S.G. to be wholly integrated back at Leola School by the start of second semester. The Leola school district withdrew the plan when S.G. was involved in an incident at a football game and decided to keep him at the Dakota School until he graduated. The question before the district court was whether S.G. had been provided FAPE in the least restrictive environment (LRE). In making its decision, the court stated that the presumption is that disabled students will be mainstreamed into their home school as the LRE unless "the services that make segregated placement superior cannot be feasibly provided in a non-segregated setting." Given the facts in the instant case, the court stated that while S.G.'s original placement in the Dakota School had been appropriate, once his behavior had improved he should have been mainstreamed back into his home high school.

T. Y. v New York City Dept. of Educ., 08-3527 (2d Cir. Oct. 9, 2009): T.Y., an autistic student, received special education services from the New York Public Schools. When his IEP was developed the services were specified but a particular attendance center was not named. When his parents did receive a school placement they objected and enrolled him in a private school, notifying the New York Public Schools and asking for reimbursement. During a hearing T.Y.'s parents raised the following two issues: (1) that T.Y. had been denied FAPE because it did not provide speech services or parental training; and (2) that T.Y. had been denied FAPE because a particular attendance center was not named in the IEP. All levels of the hearing and appeals processes found for the parents on the first issue—that speech services were not provided. As to the requirement that a particular school must be named in the IEP, the court found that the wording in the IEP stating that the “location” must be named didn’t mean the name of the particular school, rather “the location of services in the context of an IEP generally refers to the type of environment that is the appropriate place for provision of the service.”

King v. Beaufort County Bd. of Educ., No. 08-1038 (N.C. App. Oct. 20, 2009): King, a high school student, was given a long term suspension for her participation in a fight. She sued in state court alleging that she was being denied a free public education as guaranteed in the state constitution because the school district refused to provide her with an alternative education program. The trial court dismissed her suit. The North Carolina Court of Appeals affirmed the dismissal stating that “[r]easonable regulations punishable by suspension do not deny the right to an education but rather deny the right to engage in the prohibited behavior.”

RELIGION AND EDUCATION

Freedom from Religion Foundation v. Hanover Sch. Dist., No. 07-356 (D.N.H. Sept. 30, 2009): New Hampshire has a state law, the New Hampshire Patriot Act which had been passed after the bombings on 9/11, that requires students to recite the Pledge of Allegiance daily at school. There was the ability to opt out of participation. Parents of three public school students complained that they and their children, who are atheist or agnostic, had been denied their rights under the Religion Clause of the First Amendment because of the phrase “under God” in the pledge. They also raised Fourteenth Amendment due process and equal protection claims. The parents filed suit seeking a declaratory ruling that the state’s pledge law was unconstitutional. In resolving the case, the court applied the three-prong Lemon Test. In finding that the first prong, secular purpose, had been cleared the court looked to the purpose stated by the state legislature when passing the law, specifically “continuing “the policy of teaching [the] country’s history to the elementary and secondary pupils of [the] state.” The law was passed for patriotic, not religious reasons. Next came the “primary effect” prong and upon review the court found no coercive effect, distinguished the instant case from the Supreme Court ruling in *Lee v. Weisman*, 505 U.S. 577 (1992), because students may opt out and the pledge is not a prayer. The court did not discuss the third-prong, “excessive entanglement” because the parents had not argued that excessive entanglement had occurred. Turning to the Free Exercise half of the First Amendment Religion Clause, the court, relying on past precedent found that mere exposure to differing ideas did not infringe an individual’s ability to freely believe or practice the religion of his or her choice. Without some allegation of forced participation, the Free Exercise Clause of the First Amendment had not been violated. The case was dismissed.

STUDENTS' RIGHTS

A.M. v. Cash, No.08-10477 (5th Cir. Oct. 9, 2009): Yet another court has ruled that dress codes banning the wearing of images of the Confederate Flag are constitution. In the instant case, A.M. and A.T. brought purses to school displaying Confederate Flag symbols. They were sent home. They sued claiming a violation of their free speech, due process, and equal protection. A policy forbidding the display of the Confederate Flag had been adopted after some racial incidents, some of which involved the Confederate Flag. Using the material and substantial disruption test from *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the dismissed by the lower court. In upholding the lower court's decision, the Fifth Circuit stated that the Tinker material and substantial disruption test was appropriately applied since there existed ample evidence of racial tensions which could be exacerbated by the display of the Confederate Flag.

EMPLOYEES' RIGHTS

Ekstrand v. School Dist. of Somerset, No. 09-1853 (7th Cir. Oct. 6, 2009): Seasonal Affective Disorder (SAD) is a disability under the ADA. Ekstrand, a teacher in Wisconsin, worked in a room with no exterior windows. She informed the principal that she suffered from SAD and needed a room with natural light. Although the district worked with her, the one thing it wouldn't do was transfer her to a room with natural light even though two were available. As a result she eventually went out on medical leave for the rest of the year and the following year as well. She sued for violation of the ADA and unlawful discharge. The Seventh Circuit found that Ekstrand had satisfied the three elements of discrimination under the ADA: (1) that she was otherwise qualified; (2) that the district was aware of her disability; and (3) the district failed to provide reasonable accommodations. The court, however, did not uphold her claim of unlawful discharge because she failed to carry her burden of proof of a hostile work environment which left her with only the choice to quit.

Gianforte v. Whitehead, No. 06-1368 (Iowa Oct. 9, 2009): Gianforte was as teacher at College Community School District and a basketball coach at Prairie High School when he was told by Superintendent Whitehead that he was going to recommend termination of Gianforte's teaching contract. Under Iowa law Gianforte had a right to a hearing and pre-hearing discovery. Gianforte, in conducting his discovery, subpoenaed the superintendent and board for 75 documents. Upon reaching the Iowa Supreme Court, it was decided that such documents needed to be produced, but only if such could be done "consistent with the statutory goal of a prompt hearing." In the instant case the court found that, when balancing Gianforte's need for the documents to ensure a fair trial and the district's interest in a prompt, informal, and summary hearing that the teacher had gone too far.

Baker v. Riverside County Office of Educ., No. 07-56313 (9th Cir. Oct. 23, 2009): Baker was employed as a Resource Specialist Program teacher at the Riverside County Office of Education. She disagreed with the manner in which the RCOE was providing services to the students in its service area. Eventually she filed a complaint with the U.S. Department of Education's Office for Civil Rights alleging that the RCOE was failing to provide FAPE as required by federal law. After doing so she alleged that her employer retaliated against her making her working conditions intolerable, eventually causing her to resign. The lower court dismissed Baker's suit claim-

ing that only disabled individuals had the right to sue for retaliation. The 9th Circuit reversed and remanded finding that the anti-retaliation provisions of both § 504 and ADA grant “standing to non-disabled people who are retaliated against for attempting to protect the rights of the disabled.”

Alexander v. Opelika City Sch., No. 08-11014 (11th Cir, Nov. 10, 2009): Alexander was employed by the Opelika City Schools. During his two years at the school, his supervisor and two coworkers had called him “boy” and his supervisor had once made a reference to a “noose.” He filed suit in federal district court alleging a hostile work environment. The case was dismissed by the lower court and the dismissal was upheld by the U.S. Court of Appeals for the Eleventh Circuit. In an unpublished opinion, the court stated that while the use of the work “boy” may, depending on the circumstances, suggest discrimination, Alexander had failed to meet his burden of proof to show that the behavior was sufficiently severe or persuasive enough to constitute a hostile work environment.

NO CHILD LEFT BEHIND (NCLB)

School Dist. of City of Pontiac v Secretary of the United States Dep’t of Educ., No. 05-2708 (6th Cir. Oct. 16, 2009): In a rather odd way, the 6th Circuit let stand a lower court decision that dismissed a suit questioning whether the standardized testing required under the NCLB was an unlawful unfunded mandates by the terms of the NCLB legislation. On appeal, the 6th circuit split 8 to 8 on the issue of unfunded mandates, ultimately drafting four separate opinions. Judge Cole, joined by seven judges wrote an opinion in favor of the school districts. Relying on U.S. Supreme Court precedent in *Arlington Central School District Board of Education v Murphy*, 548 U.S. 291 (2006) stated that the states lacked sufficient notice that taking federal funds under NCLB would obligate them to paying additional state money to comply with standardized testing provisions. Judge Sutton, joined by five judges, at least in part, affirmed the district court’s decision that the “ambiguous” provision, when read in context, was not ambiguous and instead clearly required states to comply with the mandates of NCLB regardless of the costs.

SCHOOL BOARDS

Lowery v. Jefferson County Bd. of Educ., No. 07-6324 (6th Cir. Nov. 12, 2009): The U.S. Court of Appeals for the Sixth Circuit has ruled that limiting public comment at school board meetings is an appropriate use of the board’s ability to place time, place, and manner restrictions on speech at school sponsored events. Several parents, Lowery being one, attempted to address their concerns surrounding the circumstances of their sons being dismissed from the high school football team. The parents felt that the boys had been dismissed because they challenged the coach’s leadership. The parents had attempted to voice their concerns through the chain of command listed in district policy, but upon failing to be successful they decided to take their grievances to the board. The parents followed appropriate procedures to be placed on the board agenda. At the meeting the parents’ attorney spoke on their behalf and while he “was polite in tone, he criticized several school officials and threatened legal action if his clients’ concerns were not addressed.” When the parents attempted to be placed on the agenda for a subsequent meeting, their request was refused. The board felt that further communications would be harassing and repetitive and as such, under board policy, they did not have the right to address the board a second time.

The parents filed suit in federal district court which denied the school district's request for a summary judgment. Upon reaching the U.S. Court of Appeals for the Sixth Circuit, however, the lower court's judgment was reversed. The court found that the board's policy limiting public comment was not a violation of the parents' right to free speech. The court stated that an individual's right to free speech was not absolute, and in the instant case a forum analysis was in order. After doing such an analysis, the court concluded that board meetings are a "designated limited forum" because "[w]hile this type of meeting offers citizens a chance to express their views to the board, it cannot accommodate the sort of uninhibited, unstructured speech that characterizes" a public forum, "...the government may regulate the time, place and manner of speech so long as the regulation is (1) content-neutral, (2) narrowly tailored to serve a significant governmental interest and (3) leave[s] open ample alternative channels for communication of the information." In that light, the court found that the requirements which the board had placed in its policy were content-neutral and aimed solely at the orderly administration of the meetings.