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IN THIS ISSUE

STUDENTS' RIGHTS	<i>page 2</i>
SPECIAL EDUCATION	<i>page 4</i>
RELIGION AND EDUCATION	<i>page 5</i>
NEW LAWS TAKING EFFECT JANUARY 1, 2010	<i>page 6</i>

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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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STUDENTS' RIGHTS

King v. Beaufort County Bd. of Educ., No. 08-1038 (N.C. App. Oct. 20, 2009): According to the North Carolina Court of Appeals, providing an alternative education program to a student suspended for misconduct is not required under the North Carolina State Constitution. King had been suspended from high school for fighting. She then filed suit in state court against the Beaufort County School District alleging that her state constitutional right to a free public education had been violated because, once suspended, the school district did not provide her with an alternative educational program. The basis of her argument that the North Carolina Supreme Court had ruled in earlier cases, *Leandro v. State of North Carolina*, S.E.2d 249 (1997), and *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365 (2004), that students in the state of North Carolina have a “fundamental right” to education. Therefore, being suspended from participating in the “fundamental right” was a violation of the state constitution.

Ultimately ruling on behalf of the school district, the appellate court began its review of *King's* argument by reviewing the cited North Carolina Supreme Court cases. While acknowledging the “fundamental right” to an education, the court distinguished the cases on the basis of their facts. *Hoke* dealt with the quality of public education in light of state funding, not on the topic of school discipline and concluded that neither decision provided “any guidance on how the fundamental right for an opportunity to receive a sound basic education applies in the context of student discipline.” The court went on to state that, “There is nothing in either *Leandro* or *Hoke* that indicates that the Supreme Court intended to disturb precedent or change the standard of review regarding school discipline.” In the view of the court, the regulation of local district’s administrative decisions such as school disciplinary codes, are issues of policies better left to the state legislature than be dealt with by the judiciary.

Morgan v. Plano Indep. Sch. Dist., No. 08-40707 (5th Cir. Dec. 1, 2009): Texas has reaffirmed a local district’s ability to impose time, place, and manner restrictions on communications within its school. In the *Morgan* case, parents had filed suit claiming that the district’s materials distribution policy, which prohibited the distribution of religious materials, violated the free speech rights of the students. Specifically, the students were not allowed to distribute “Jesus is the reason for the season” pencils, candy canes with attached cards explaining their religious symbolism, and tickets to religious musical programs and plays. While the case was pending, the Plano schools amended their policy making it a more clear-cut “time, place, and manner” policy. Materials could now be distributed during the 30 minutes before and after school, during three annual parties, and during recess. During school hours, any materials must be placed at a designated table. Any limitations based on content were removed.

While lower courts found that the *Morgan's* case, given the amendment to the policy, was now moot, the Fifth Circuit disagreed and heard the case. Reviewing the policy under the concept of time, place, and manner restriction the court stated “[t]he regulation need not be the least restrictive alternative, but it must avoid burdening substantially more speech than is necessary to achieve the government’s interest.” The court rejected the parent’s argument that the “speech” in question was “pure speech” and that time, place, and manner restrictions applied to “expressive” conduct; “pure speech” needed to be judged under the “material and substantial disruption” test from the United State Supreme Court case of *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). Applying the time, place, and manner test to the amended policy the court

found it acceptable as it was content neutral and the school district had shown a legitimate interest that was furthered by the regulation, that being the orderly administration of the school.

According to a study conducted by the Pew Research Center's Internet and American Life Project, 15% of children between 12 and 17 who own a cell phone have received nude or nearly nude photos on their phones. Only about 4% admitted to having sent such messages. An earlier MTV/AP study's numbers were just a little higher when looking at students between the ages of 14 and 24. In that age range about one-third claimed to receive e-mails or text messages with sexual content. About 10% of the sample admitted to sending nude photos of themselves. What is perhaps more disturbing is the "pass-around" phenomenon among those receiving the sexual messages and then just sending them on to a friend. There was no significant difference between genders. Although some teens participating in focus groups claimed to have felt pressured into the activity in order to maintain a relationship, three major types of "sexting" were noted: (1) just between romantic partners; (2) when those "private" exchanges are shared with others; and (3) "sexting" between non-romantically related partners but when the individual wishes to establish such a relationship. In response, in 2009 at least 11 states introduced legislation aimed at "sexting," six states enacted laws in 2009, and more states are planning to introduce legislation in 2010.

J.C. v. Beverly Hills Unified Sch. Dist., No. 08-03824 (C.D. Cal. Nov. 16, 2009): Another court has found that "cyber bullying" done off-campus cannot easily be disciplined by the school. J.C. was a student at Beverly Vista High School. She and several other students got together after school and videotaped a conversation about another student, C.C. that was vulgar and derogatory. J.C. then posted the video on YouTube from her home computer, contacted a half-dozen students telling them to watch it, and, believe it or not, told the subject of the video, C.C. about it. On the advice of her mother, C.C. told J.C. to leave the video up on-line. J.C. claimed to have heard about 10 people discussing the video at school the next day. When C.C. complained to administration they suspended J.C. for two days even though they had no evidence that students were accessing the video at school. J.C. sued the school district for a violation of her First Amendment right to free speech and her Fourteenth Amendment right to due process.

In granting J.C.'s summary judgment on the freedom of speech issue, the court reviewed legal precedent regarding the ability of the school district to discipline students for behavior that occurred wholly off campus. Based on its review, the court listed three principles regarding the application of Supreme Court precedent to these types of off-campus speech cases. First, in cases where the speech in question is brought back into the school environment by the author of the speech most courts apply the Tinker "material and substantial disruption" test. In cases where the speech finds its way onto campus, but is not brought to school by the author of the speech, courts need to find a significant connection between the off-campus speech and the school. Finally, where the speech never makes its way into the school or onto the campus, or the author makes every attempt to keep the speech from reaching the school setting, the speech seems to enjoy fairly strong constitutional protection.

Once established, the court applied those three principles to J.C.'s case. The court concluded that it when J.C. chose to post the video on the Internet it was reasonably foreseeable that the video would make its way into the school. The contents of the video only increased the "foreseeability" of it appearing on-campus. Even with that being said, the court could find no substantial disruption to the educational atmosphere of the school as a result of the video.

Though vulgar, the video was neither violent nor threatening. The mere belief that the school administrator feared disruption was not sufficient to place a prior restraint on the speech using the Tinker “material and substantial” test. That all being said, and a finding that J.C.’s free speech had been violated, the court found that the school officials enjoyed a qualified immunity that protected them from suit.

Kalbfleisch v. Columbia Comm. Unit Sch. Dist. No. 4, No. 09-0447 (Ill.App. Dec. 16, 2009): A decision has been reached in the ongoing saga of whether the service dog of an autistic student must be allowed into the school. The Appellate Court for the 5th District of Illinois has issued a preliminary injunction requiring the school district to allow Carter Kalbfleisch to bring his service dog to school. In denying access to that dog, the school district relied on the wording of the state statute covering service animals which states in part that, “... service animals such as guide dogs, signal dogs, or any other service animal individually trained to perform tasks for the benefit of a student with a disability shall be permitted to accompany that student at all school functions, whether in or outside the classroom.” The school district alleged that the dog was used as a means to “comfort” Carter, not to “perform tasks” for Carter’s benefit. In issuing the injunction the court found that a question of fact as to whether the dog was a “service dog” under the terms of the state statute, combined with the irreparable harm that was likely to occur should Carter and his dog be separated warranted the granting of the injunction pending litigation.

SPECIAL EDUCATION

P.P. v. West Chester Area Sch. Dist., No.s 08-2874/08-2940 (3d Cir. Nov. 2, 2009): The Third Circuit Court of Appeals has ruled that the two-year statute of limitation that was included in the IDEA as of July 1, 2005 also applies to lawsuits brought under § 504 of the Rehabilitation Act. The parents of P.P., a private school student, claimed that they first requested that their child be evaluated for special education services in January 2003. When the district refused, however, no evidence of that initial request could be found. In late 2004 P.P.’s private school requested that he be evaluated. The actual evaluation was not finished until July 2005 and the district presented a special education plan in September 2005. The parents rejected the plan and filed a due process action under both the IDEA and § 504 claiming a failure to provide a free appropriate education and asking for reimbursement of tuition to the private school where P.P. was still attending and for the costs of P.P.’s therapy.

After the hearing, neither side was pleased with the result. The school district felt that it should not be liable for compensatory education and the parents felt that earlier costs should not have been barred by the statute of limitations. The dispute continued up through the Appeals Panel, Pennsylvania Federal District Court, and to the Third Circuit. Upon reaching the Third Circuit, the court stated that the question as to whether the IDEA’s statute of limitations applied to § 504 was one of first impression in the Third Circuit. The court went on to state that the IDEA and § 504 are so similar in their protection of disabled students that the logical conclusion is that the statute of limitation should also be the same. The appeals court stated: “It does not make sense that the virtually identical claims made under these two statutes would be treated differently from a statute-of-limitations perspective: Congress has expressed an interest in promptly resolving disputes under the IDEA, as evidenced by its passage of the statute-of-limitations amendment.” The court did, however, admit that other circuit courts have not come to the same conclusion.

Ashland Sch. Dist. v. E.H., No. 08-35926 (9th Cir. Dec. 7, 2009): This case answered the question as to the proper standard of review that should be used by the courts on appeal from an administrative hearing. The parents of E.H. had received a favorable ruling from an administrative law judge awarding them reimbursement for the tuition which they had paid to a private school in which they had unilaterally placed their child. They received the award even though they had not complained of the IEP which had been developed for their child by the Ashland School District. Upon appeal, the district court conducted a *de novo* review of the hearing officer's decision and reversed the decision of the hearing officer.

The Ninth Circuit affirmed the decision of the lower court. It rejected the parents' argument that the IDEA required review to be limited to an abuse of discretion by the hearing officer. While the court acknowledged that the wording of the IDEA required the court to give deference to the hearing officer's findings and avoid substituting its own idea of sound educational policy, it also found that such a mandate did not remove the authority of the court to "determine independently how much weight to give the state hearing officer's determinations." This level of review would logically extend a mere review of abuse of discretion and instead allow a *de novo* review.

Weissburg v. Lancaster Sch. Dist., No. 08-55660 (9th Cir. Jan. 14, 2010): Under a ruling by the Ninth Circuit, parents may be entitled to attorneys' fees even if their child received a free and appropriate public education if they prevail in a suit brought under the IDEA. The Weissburgs had attempted several times to have their son's classification changed from mentally retarded to autistic. They finally took the issue to due process. The administrative law judge found that although the assessment was appropriate, the classification was flawed because the child should have been classified as autistic. It was also found that the child had received FAPE. On appeal, the district court defined to find that the parents were a prevailing party because changing the special education designation did not change the student's relationship with the school district. Moreover, the attorney representing the child was his grandmother.

The Ninth Circuit Court reversed the lower court stating that a finding of a denial of a free and appropriate public education was not required before parents could be considered a "prevailing party." The court also disagreed that the relationship had not changed stating that had the classification not changed then the student would not have been entitled to receive instruction by a teacher qualified to teach both the mentally retarded and the autistic.

RELIGION AND EDUCATION

Stratechuk v. Board of Educ. South Orange-Maplewood Sch. Dist., No. 08-3826 (3d Cir. Nov. 24, 2009): When does the performing, or the prohibition from performing, religious music at school concerts run afoul of the First Amendment of the Constitution? After receiving numerous complaints about the performance of music with religious content at school concerts, South Orange-Maplewood School District adopted a policy which prohibited the performance of musical selections "that are celebratory holiday music" although it still allowed for the teaching about such music. In response, a parent filed suit in federal district court alleging two constitutional violations. First he alleged that the policy was "hostile toward religion" in violation of the Establishment Clause of the First Amendment. Second he alleged that the policy violated the academic freedom of his son by limiting the information to which he would have access. The district court dismissed the lawsuit stating there existed no claim upon which relief could be granted.

Upon appeal, the Third Circuit vacated the district court ruling, and remanded the case stating that because the board's interpretation of the policy varied so widely from the actual wording of the policy that it did raise a possible First Amendment question. The lower court then granted summary judgment to the school district and when it was appealed back to the Third Circuit, the lower court's judgment was affirmed. The courts affirmance was based on the fact that no evidence had been presented that would show that the school district was forbidden from enacting a policy banning the performance of all religious music therefore no Establishment Clause violation had occurred. Using the Lemon Test the court found that it passed the first prong because the policy had plausible secular purposes for the policy. Moreover, the policy also passed the second prong because the policy neither advanced nor inhibited religion because the ban only applied to performances while still allowed the teaching of religious pieces in the curriculum. Finally, as to excessive entanglement, the court found that there was no greater entanglement in this area of the curriculum than in any other area of the curriculum where the district reviews what to include to insure that the curriculum retains a secular nature.

The court then turned to the "endorsement test" which it defined as a combination of the first and second prongs of the Lemon Test (the purpose and effect prongs) to determine whether the state action would lead a "reasonable observer familiar with the history and context of [a religious] display [to] perceive [it] as a government endorsement of religion. ... whether the government action has the 'effect of communicating a message of government endorsement or disapproval of religion.'" Once again the court found that the school district's policy did not exhibit endorsement or hostility toward religion. Finally, as to the allegation that the policy restricted the student's academic freedom by restricting access to ideas, the court found the argument without merit because nothing in the policy restricted access by banning the performance of the music. Drawing a parallel to the United States Supreme Court case of *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), the court stated that just as with the nonpublic forum established in school newspapers, school authorities had the ability to "exercis[e] editorial control over the style and content of student speech in school sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns,"

NEW LAWS TAKING EFFECT JAUNARY 1, 2010

Below are listed some state laws enacted by the General Assembly that will take effect on January 1, 2010 or later:

Public Act 96-0559: Denotes February 5th as Adlai Stevenson day to honor the public service of Adlai Stevenson II.

Public Act 96-0437: When a school district awards a work contract without going through the bidding process, the district is responsible for informing the contractor that not less than prevailing wage must be paid to all workers on the project.

Public Act 96-0655: All newly purchased bus signs must state "TO COMMENT ON MY DRIVING CALL (area code and telephone number of school bus owner).

Public Act 96-0748: Changes the requirement that a physical fitness facility have a trained AED staffer present during all physical fitness activities to a requirement that one be present only during “staffed business hours.”

Public Act 96-0191: Requires that school district provide instruction on disability history, people with disabilities, and the disability rights movement

Public Act 96-0513: Flags flown at the school must be manufactured in the United States

Public Act 96-0266: The school district, university, or community college are required to report the base salary and benefits of all administrators and teachers to the ISBE or the IBHE

Public Act 96-0814: Limits the jurisdiction of the Department of Human Rights in instances of the exercise of free speech by removing such situations from the definition of a civil right violation. Specifically, the limitations include the failure to enroll an individual, the denial of access to facilities, goods, or services, harassment, bullying, or similar acts against an individual, or the failure of a covered entity to take corrective action to stop harassment

Public Act 96-0419 [Effective July 1, 2010]: Students may no longer be transported in vans; they must be transported in a “multifunction school-activity bus” manufactured specifically for the purpose of transporting up to 15 persons including the driver

Public Act 96-0542: The Freedom of Information Act (FOIA) was re-written. Some of the requirements include:

- Establishes a presumption that all records held by a public body are open for inspection and copying
- Expands the definition of “Public Records” to include electronic communications and materials pertaining to the transaction of public business
- All records related to the use of public funds are considered public records
- Establishes a section for proper disclosure of arrest reports and criminal history records
- Requires all settlement agreements entered into by the public body to be available for public inspections and copying
- Record request must be made in writing and directed to the public body but no specific form is required
- Request must be forwarded to the newly appointed Freedom of Information Officer or designee
- Request must be complied with within 5 business days of receipt, even if delivery occurs during a school holiday such as Winter break; either information provided, denial provided, or request for extension of time to comply and a date upon which records will be provided
- Prohibits the imposition of a fee if the response is not within the required time period

Public Act 96-0629: The contributions of Hispanics must be included in the United States history curriculum including the study of the events related to the forceful removal and illegal deportation of Mexican-American U.S. citizens during the Great Depression

Public Act 96-0128: The Comprehensive Health Education Program is required to include information about cancer and requires IHSA to include a question asking whether a student has a family history of cancer on any pre-participation examination form given to students participating in interscholastic athletics

Public Act 96-0385: Written notification by the Department of Children and Family Services shall be provided to the subjects of a report, both “indicated” or “unfounded” reports issued by Child Protective Services, to the alleged perpetrator, parents, personal guardian or legal guardian of the alleged child victim listed in the report

Public Act 96-0056: Provides the granting of a CSBO endorsement if, among other conditions, the certificate holder has two years of university-approved practical experience

Public Act 96-0616: Allows district to increase the fees for school bus driver training from the current \$4 to \$6 per person in 2010–2012, \$8 per person in 2013–2015, and \$10 per person thereafter

Public Act 96-0131: Bans the use of cell phones while operating a motor vehicle in a school zone or a construction zone

Public Act 96-0772: Increases penalties for knowingly transmitting a threat of destruction of a school building or school property, a threat of violence, death, or bodily harm directed against persons at a school, school function, or school event, whether or not a school is in session.

Public Act 96-0311: Adds additional relief under Civil No Contact Orders such as prohibiting the respondent from knowingly coming within a specified distance from the petitioner’s residence, school, or day care. When the petitioner and respondent attend the same school the court shall consider any continuing physical danger or emotional distress to the petitioner, and the expense, difficulty, and educational disruption that would be caused by a transfer of the respondent to another school; respondent may be ordered to not attend the same school as the petitioner; if the respondent is ordered to transfer the parents of the respondent are responsible of all costs associated with the transfer

Performance Evaluation Reform Act of 2010: As one part of the state of Illinois submission to receive a “Race to the Top” grant from the federal government some significant changes were made in the manner in which teachers and administrators are evaluated. Specifically:

- Rankings of “satisfactory” and “unsatisfactory” are broadened to include “excellent”, “proficient”, “needs improvement”, or “unsatisfactory.”
- Evaluators no longer must be an individual holding a Type 75 administrative certificate, they may be any individual qualified under Section 24A-3, including a member of the bargaining unit

- Evaluation training changes so that evaluators shall participate in an in-service training prior to undertaking any evaluation and at least once during each certificate renewal cycle; training must be approved by the ISBE
- Teacher evaluations will be required to incorporate the use of data and indicators on student growth as a significant factor in rating teacher performance, both tenured and non-tenured
- A principal shall not be prohibited from evaluating any teachers within a school during his or her first year as principal of such school
- Within 30 school days after the completion of an evaluation rating a teacher in contractual continued service as “needs improvement,” development by the evaluator, in consultation with the teacher, and taking into account the teacher’s on-going professional responsibilities including his or her regular teaching assignments, or a professional development plan directed to the areas that need improvement and any supports that the district will provide to address the areas identified as needing improvement
- Prohibits teacher, principal, and superintendent performance evaluations from disclosure under applicable FOIA laws
- Evaluations of principals must provide for the use of data and indicators on student growth as a significant factor in rating performance