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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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STUDENT RIGHTS

The courts are back making decisions concerning the reach of school districts to discipline students for actions taken off-campus.

Layshock v Hermitage Sch. Dist., No. 07-4465 (3rd Cir. Feb 4, 2010): Sitting in his grandmother's home after school, Layshock created a MySpace profile for the school principal – without his permission of course. Layshock used the principal's picture from the school's website in the profile which was a parody of the principal. Once the existence of the profile became known among the students, some students started to access it on school computers. Layshock was placed in an alternative school by the school district as discipline for his actions. His parents filed suit in Federal District Court alleging a violation of Layshock's freedom of speech and due process. The district court concluded "that school officials' authority over off-campus expression is much more limited than expression on school grounds." Under the terms of the *Tinker v Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) and *Bethel Sch. Dist. No. 403 v Fraser*, 478 U.S. 675 (1986) the court concluded that there was just not the nexus drawn between those cases and the off-campus behavior to find a right to discipline on behalf of the school district.

In affirming the lower court, the Third Circuit rejected the argument of the school district that Layshock's using the principal's photo off of the school's official website did not amount to entering the school thereby making Layshock's behavior "on-campus" behavior. Rather, the court found the connection so strained that it was unreasonable for the school to believe that it had the ability to discipline Layshock for activities conducted while sitting in his grandmother's living room. "It would be an unseemly and dangerous precedent to allow the state in the guise of school authorities to reach into a child's home and control his/her actions there to the same extent that they can control that child when he/she participates in school sponsored activities." The court also reject the school district's claim that since the profile was accessed on school computers at school that it (the district) had the ability to discipline Layshock under *Bethel*; that the speech was not protected under the First Amendment.

Evans v Bayer, No. 08-61952 (S.D. Fla. Feb. 12, 2010): Evans, a high school student, created a Facebook group after school hours and off school property entitled "Ms. Sarah Phelps is the worst teacher I've ever met." The purpose of the group was for students to voice their dislike of Ms Phelps. Evans removed the page two days after she posted it and before it was ever seen by Ms Phelps or before it caused any disruption at school. It wasn't until after the page was removed that the principal learned of it and suspended Evans for three days and kicked her out of the AP courses which she was taking. Evans filed suit in federal district court alleging a violation of her First and Fourteenth Amendment rights and requesting injunctive relief. The court stated that the question before it was whether the fact that Evans' speech was arguably aimed at a particular audience at the school was sufficient to label the speech on-campus speech which could be disciplined by the school district. The court found insufficient evidence to label the speech "on-campus" because it was made off-campus, was never accessed on-campus, and was no longer accessible when the administration learned of its existence.

J.S. v Blue Mountain Sch. Dist., No. 08-4138 (3d Cir. Feb. 4, 2010): In an on-line parody, J.S. created a MySpace profile of her principal, James McGonigle, from her computer at home. Though it did not name McGonigle, it identified him as principal and included his picture. In

the profile she depicted him as a pedophile and sex addict. Word of the profile quickly spread throughout the school the day after it was posted. J.S. received a 10 day suspension for the use of copyrighted material (the picture from the school web site.) She sued alleging a violation of her First Amendment rights. In finding for the district, the court found that *Tinker v Des Moines Independent Community School District*, 393 U.S. 503 (1969), rather than *Bethel School District v Fraser*, 478 U.S. 675 (1986) was controlling. Therefore, the court needed to determine whether the speech had created a significant threat of substantial disruption of the educational environment of the school. The court stated that the substantial disruption did not need to actually have occurred, only that the facts would lead one to reasonably forecast such disruption. If actual disruption was needed, the school district would not prevail. However, the court determined that the profile's potential to cause a substantial disruption of the school was reasonably foreseeable. "We simply cannot agree that a principal may not regulate student speech rising to this level of vulgarity and containing such reckless and damaging information so as to undermine the principal's authority within the school, and potentially arouse suspicions among the school community about his character."

Of the three recently decided cases, the 3rd Circuit seems to be the odd man out by its liberal interpretation of the "material and substantial disruption" test put forth in *Tinker*.

Miller v Mitchell, No. 09-2144 (3d Cir. Mar. 17, 2010): Gradually state prosecutors and legislators are beginning to realize that current laws governing child pornography are not successfully applicable to the rise in "sexting" among school children. In 2008 several students in Tunkhannock School District were found to have sexting photos on their phones. Upon turning the information over to the County Attorney, the students were threatened with prosecution unless they attended "re-education" classes and each wrote an essay about why their behavior was wrong. Most of the students agreed to the terms, however, three families refused and obtained an injunction from federal district court prevent the county attorney from either forcing them to take the class or charging the students with child pornography.

In obtaining the injunction three claims were raised, all based on retaliation: (1) retaliation in violation of the students' First Amendment right to free expression, the expression being their appearing in the sexting photographs; (2) retaliation in violation of the students' First Amendment right to be free from compelled speech, the speech being the education program; and (3) retaliation in violation of the parents' Fourteenth Amendment substantive due process right to direct their children's upbringing, the interference being certain items in the education program that fall within the domain of the parents, not the state. The Third Circuit agreed with the parents that the prosecutor "may not coerce parents into permitting him to impose on their children his ideas of morality and gender roles." The court found that the education program included in the prosecutor's deal did impermissibly usurp the parents' substantive due process rights and did force compelled speech upon the students. The prosecutor's threat to prosecute was retaliatory.

Bullying: Bullying is a serious business and now under Title IX can cause a major dent in the school district's budget. A federal district court in Michigan has ordered the Hudson Area Schools to pay \$800,000 for failing to protect a student from years of bullying, some of which had a sexual nature. It is not enough to stop isolated incidents. The law also requires that school districts exert a concentrated effort to stop systematic bullying as well. The student in this

instance, Patterson, first experienced name calling in middle school. The bullying escalated as he moved into high school—first name calling, then being pushed into lockers, and then finally being sexually molested in the locker room in high school. The family continuously complained, however, the bullying didn't end. An insight as to why may be gained from the statement of school district counsel after losing the case, "You're never going to completely stop kids from being mean to kids. . . If somebody writes dirty names on a boy's locker and you can't identify who it is, you can't punish the whole school." To not understand the difference between vandalism and systematic sexual harassment shows a certain lack of insight and understanding of the situation—and ends up costing your client an \$800,000 jury award! The attorney for Patterson claimed that the district failed to stop a pattern of abuse when it could have done more through anti-bullying education or more monitors.

Hinterlong v Arlington Indep. Sch. Dist., 09-050 (Tex. App. Feb. 11, 2010): After an anonymous tip, school officials found a small amount of alcohol in Hinterlong's car which was parked on school property. Under the district's zero-tolerance policy, officials were required to remove Hinterlong from the high school and place him in an alternative school. Hinterlong filed suit alleging a violation of his due process because the district's zero-tolerance policy subjects students to discipline even if they did not knowingly or consciously possess alcohol. The court used a two-tier analysis of Hinterlong's claim. First, in order to facially challenge the constitutionality of a policy, the complainant has the burden of proof to show that the policy was unconstitutional as applied to him. Second, looking at whether the zero-tolerance policy was unconstitutional as applied, the court agreed that such policies to not consider intent which would appear to render procedural due process meaningless. "Strict adherence to zero tolerance policies without consideration of the student's [intent] would appear to run afoul of substantive due process norms." This would be a theoretical concern. In reality, Hinterlong had had an opportunity to present evidence that he lacked any knowledge of the bottle in his car but chose not to do so. Hinterlong's challenge failed.

State v Best, No. A-77-08 (N.J. Feb. 3, 2010): Acting on a tip that a student was under the influence of drugs, the principal of Egg harbor Township High School questioned the student. The student admitted drug use and said he received the pill from Thomas Best. A search of Best turned up no pills that looked like the one the student took. The principal told Best that he was going to search his car but refused Best's request to call his father. A search of the car turned up drugs. The school resource officer, who was also a town policeman, was told of the situation and took control of what was found in Best's car. At his criminal trial Best tried to suppress the evidence found in the search conducted by the principal. It was Best's argument that the "reasonable suspicion" standard used by school officials to conduct searches does not extend to vehicles in the parking lot, rather cars should be treated similarly to purses, book bags, or lockers. The New Jersey Supreme Court was unimpressed. It stated that the need "for school officials to maintain safety, order, and discipline is necessary whether school officials are addressing concerns inside the school building or outside on the school parking lot." The court applied to the two-prong test from *New Jersey v T.L.O.*, 469 U.S. 325 (1985) and found that both criteria—reasonable suspicion and reasonable scope—existed in the principal's search which was determined to be constitutional.

GOVERNANCE

No Child Left Behind: The Obama Administration has suggested major changes to NCLB during its upcoming authorization. Staying would be the requirement for annual tests in reading and math. Disappearing would be, among other things, the name of the law. There are five key changes suggested. First, the goal of “proficiency” in reading and math by 2014 would change to “college and career readiness” by 2020. Instead of focusing on grade level attainment, the focus would shift to skills needed to proceed on to college or into the work world. Second, additional subjects would be included, along with math and reading, in the yearly assessments. Third, the method of punishment would change to a system of “positive reinforcement” through rewards for schools. Schools would be split into tiers and only those schools in the bottom tier—the bottom 5% of schools in attainment of goals—would be targeted for intensive remediation. Fourth, federal funding would shift from formula based allocations to competitive grants. Finally, the requirement for providing tutoring and/or transfer would be removed for schools failing to perform.

Closed Session: Just a reminder from Rhode Island that if you go into close session it must be for an actual reason, not a fictitious one. The American Civil Liberties Union has filed suit against the East Providence School Committee alleging that it illegally went into executive session by stating that it was going into closed session to discuss a pending “public comment” lawsuit. There was no lawsuit. Rather the committee wanted to discuss when and how the public can talk to them—not a valid reason for executive session. Under the laws of Illinois specific reasons are listed for going into closed session. All other matters, for purposes of transparency and accountability, must be done in front of the voting public. Someone should have explained that to the East Providence School Committee!

School Bd. of the City of Newport News v Virginia, No. 090313 (Va. Feb. 25, 2010): An action filed in state or federal court pursuant to the IDEA, following the exhaustion of state administrative procedures, does not remain an administration action but becomes civil litigation for which the school district’s insurance carrier should step in to defend. Newport News had insurance coverage for monetary liability arising from lawsuits. The family of a disabled student filed a due process hearing claiming that the district had failed to provide the student with FAPE. The hearing officer found in favor of the family and ordered the district to reimburse the parents for legal and educational costs. The district appealed and the lower decision was affirmed but reduced the amount of recovery. The family, having exhausted administrative remedies, filed suit in federal district court to reinstate the original recovery amount. Newport News’ insurance company refused to step in and defend stating that administrative hearings were not covered under the policy. Upon reaching the Virginia Supreme Court, it was found that the procedure instituted in federal district court by the family was a “civil action” not an administrative action and was coverable under the district’s insurance policy.

Common Core State Standards Initiative: President Obama’s proposal that Title I funds be incumbent upon states agreeing to adopt federal reading and math standards is drawing criticism from both educators and state lawmakers. Under the Obama proposal, in order to obtain Title I funds states would be required to either join with other states under the Common Core State Standards Initiative or with institutions of higher education to develop standards aimed at college

and/or career readiness. It is seen by many at the state level as unconstitutional federal encroachment on a right guaranteed to the states.

Fairchild v Liberty Indep. Sch. Dist., No. 08-40833 (5th Cir. Feb 22, 2010): Fairchild was employed as a teacher's aide by Liberty Independent School District. She had difficulty working with the teacher to whom she had been assigned and Fairchild was ultimately terminated. She filed a post-termination grievance alleging retaliation for accusing the teacher of misconduct and mistreatment of students. According to district policies, grievances were to be held in closed session unless the target of the concern (Fairchild) a public hearing. Fairchild requested a public hearing, but was denied, because part of the hearing were charges she was filing against her former supervising teacher.

Before it could make a decision, the court first had to determine the type of forum which the board had established by its meeting policies. It was the decision of the court that a limited public forum had been established because the policies "exclude from public discourse certain topics of speech, including individualized personnel matters, which the Board channels into more effective dispute resolution arenas, before it hears the matter and resolves it." The court found the district's policies to be appropriate and within the discretion of the governing board to develop.

Cameras in Laptops: Installing cameras in laptop computers which can be activated by remote control, and then giving those computers to students and activating the cameras while the computers are in the students' possession is not a good idea. Yet that is exactly Lower Merion School District outside of Philadelphia did. The intent was to make sure that student would have access to school based resources at school and at home. What the students and parents were not told is that the access was two-way; the school district would also have access at all times to activate the camera and intercept images "from the webcam or anyone or anything appearing in front of the camera." Students became aware of the school's capability when an assistant principal at one of the high schools used a photo embedded in the student's lap top as evidence that the student was engaged in improper behavior at home. The district has since settled the lawsuit.

EMPLOYEES

Cowan v Board of Educ. of the Borough of Carteret, No. 06-5459 (D.N.J. Feb. 22, 2010): Robert Cowan was a teacher and president of the teachers' union at Carteret High School. When he was first elected president of the union, the administration provided him three back-to-back prep periods during which he could engage in union activity. After becoming involved in a union-related incident in 2005, a new building principal in 2006 changed his schedule which not only required him to teach a class which he had never taught before but for which he was certified but also cut down his three back-to-back prep periods to one. Cowan filed a grievance. It was denied. Instead the administration chose to investigate an earlier altercation between Cowan and another teacher, and determined that Cowan had left students in his classroom unattended for 10 minutes.

Upon the denial of his grievance, Cowan filed suit citing the above incidences as well as additional retaliation by the superintendent including a suspension with pay for the alleged leaving of his room unsupervised. In the Spring of 2008, when three union members passed through union information picket line, Cowan place copies of Jack London's essay "The Scab" into their school mailboxes. Cowan was charged with violating school policy prohibiting teachers from

engaging in union activity in the presence of students while on school property and was given a one week suspension with pay.

In looking at the facts of the case, the court concluded as regarding the change in schedule and class load, "Altering a schedule is clearly within the discretionary functions of the principal, and there is no evidence that a reasonable person in the principal's position would believe that altering a teacher's schedule and subjects taught would violate a clearly established right held by Cowan." As for the distributing of the essay, however, the court found the distribution to be an exercise of protected speech. Using the balancing test from *Pickering v Bd. of Educ. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968) was something that should be left to the jury and the district's motion for summary judgment was denied.

RELIGION

Newdow v Rio Linda Union Sch. Dist., Nos. 05-17257/05-17344/06-15093 (9th Cir. Mar. 11, 2010): It has finally been resolved and ". . .one Nation under God . . ." is not a violation of the Establishment Clause of the First Amendment. As in Illinois, students in California are required to recite the Pledge of Allegiance every morning. Since the time of the Cold War, ". . .one Nation under God . . ." is one of the lines in the Pledge. Michael Newdow, the noncustodial father of a public school student, filed suit stating that the Pledge of Allegiance and the California statute requiring the recitation of the Pledge of Allegiance with that stanza included violated the Establishment Clause of the First Amendment. The Ninth Circuit agreed with Newdow originally and then, upon rehearing *en banc*, reversed its original ruling. Upon reaching the Supreme Court of the United States the case was dismissed for lack of standing; as the non-custodial parent of the affected student Newdow lacked the ability to sue on the child's behalf. Eventually the issue ended up, once again, in front of the Ninth Circuit.

The court started its review by applying the Lemon Test to the school policy requiring the Pledge of Allegiance. As regarding the first prong, secular purpose, the court acknowledged that both parties has agreed that there did exist a possible "secular purpose" that being patriotism. Neither the California code nor the school policy mandated the Pledge but gave it as one approved alternative. Turning to the second prong, whether the primary effect advances or inhibits religion, the court found that since the Pledge was just one of several possible alternatives that that fact that it was included neither advanced nor inhibited religion. Finally, the third prong of excessive entanglement was determined to not have been violated in that there was really no entanglement under either the code or the policy between religion and the state.

The court also found that the Pledge did not violate the "Endorsement Test" because it has neither the purpose nor effect of endorsing religion. It passed the "Coercion Test" because students were not coerced into supporting or participating in a religious activity because students can decline to participate in the pledge with no penalty. The dissent, in an opinion twice as long as the majority, strenuously disagreed with the conclusions of the majority. In the words of the dissenting judges, "To put it bluntly, no judge familiar with the history of the Pledge could in good conscience believe, as today's majority purports to do, that the words "under God" were inserted into the Pledge for any purpose other than an explicitly and predominantly religious one: "to recognize the power and the universality of god in our pledge of allegiance; " to "acknowledge the dependence of our people, and our government upon the moral direction and the restraints of religion," "and to indoctrinate school children in the belief that god exists."

Griffith v Butte Sch. Dist. No. 1, No. 09-0530 (Mont. Dist. Ct. Feb. 24): Griffith was valedictorian of her graduating class. As such she had the opportunity to speak at graduation. However, after she submitted her speech she was told by administration that she had to remove references to God and Christ from her speech if she wanted to speak at graduation. She refused and was not allowed to speak. After exhausting her administrative remedies, she filed the suit in court. Ruling that the actions of the school district did not violate Griffith's First Amendment rights, the court relied on the 9th Circuit decision in *Cole v Oroville Union High School Dist.*, 228 F.3d 1092 (9th Cir. 2000) where the court had upheld the decision of the school district to bar a religious speech in order to avoid violating the Establishment Clause. Since the school district's policy applied equally to all students the court found that "the policy was drafted with the specific intent of maintaining neutrality toward religion, as is required by the Establishment clause." The sole purpose of the policy was to avoid the appearance of endorsement. "High school graduation ceremony is not intended to be a forum for expression of individual student's religious views."

Johnson v Poway Unified Sch. Dist., No. 07-783 (S.D. Cal. Feb. 25, 2010): The Poway Unified School District had a long standing policy allowing teachers to display personal messages on classroom walls so long as they were not disruptive to the educational atmosphere. Over time teachers had posted such things as rock band posters, posters of professional athletes, posters with Buddhist and Islamic messages and Tibetan prayer flags. When Johnson posted two banners—one with the phrase "In God we Trust," "One Nation under God," "God Bless America," and "God Shed His Grace on Thee;" the other with "All Men Are Created Equal, They Are Endowed By Their CREATOR"—he was ordered to remove them by the building principal. The issue ended up in front of the federal court. In reviewing the case, the court determined that the district policy had created a limited public forum for teacher speech because it "intentionally opened its high schools to expressive conduct by its faculty on non-curricular subjects." That being the case, once a limited public forum has been created "it must respect the lawful boundaries it has itself set." In this case the only criteria was that the material could not "materially disrupt school work or cause substantial disorder or interference in the classroom." The court concluded that the district had engaged in unconstitutional viewpoint discrimination when it ordered Johnson to remove his banners.

Doe v Indian River Sch. Dist., No. 05-120 (D. Del. Feb. 21, 2010): Two families sue the school district over its practice of including prayer at school board meetings, athletic events, banquets, and graduation ceremonies. The families claimed that the practice facilitated "an environment of religious exclusion" and promoted Christianity over all other religions. In making its decision the federal district court held that the U.S. Supreme Court decision in *Marsh v Chambers*, 463 U.S. 783 (1983) was controlling on whether deliberative bodies may open their sessions with prayer. The court concluded that the school board was the type of "deliberative body" contemplated in *Marsh*. Since the prayer was not proselytizing, the court found that it did not violate the Establishment Clause but rather was solely for the purpose of solemnizing the board meeting. So, at least as to prayer at school board meetings, the court found no constitutional violations.

LEGISLATIVE UPDATE

Below is listed legislation of interest to educators:

With lightening speed, the General Assembly approved a bill on March 24, 2010 which substantially reforms state pensions. Changes under SB 1946 only affect new hires after January 1, 2011; those already covered by a state pension are not included in the changes. For teachers the bill:

- Averages 8 of the last 10 years rather than 4 for the last 10 years in calculating pensions
- Increases the age to realize full pension to 67 with 10 years of service credit
- Allows early retirement with lower annuity at age 62
- Limits the annual average salary for pension calculation to \$106,800
- Reduces the survivor annuity
- Reduces the cost of living adjustment

The bill now heads to Governor Quinn for his signature.

Both the House and the Senate moved legislation to stop unfunded mandates. HB 4711 would not require schools to comply with any mandated program passed after the bill was enacted unless it was specifically funded. Those unfunded mandates already on the books would stay. In addition, school districts could not waive requirements relating to the “Race to the Top” or any new requirements dealing with labor issues including the Minimum Wage Law, the Prevailing Wage Act, Workers Compensation, or the Unemployment Insurance Act. SB 2980 allows district to waive curricular mandate for which the district does not receive specific funding, except for physical education, drivers’ education and courses required for high school graduation.

Approved by the House and sent to the Senate:

- HB 4674 provides an alternate method to deal with the transitional needs of students of military families
- HB 5515 allows life safety taxes and interest earning thereon to be transferred to the Operations and Maintenance Fund so that it can be used to repair buildings
- HB 5838 lessens mandates regarding the availability of AEDs and remotes sites
- HB 6041 creates more flexibility with the working cash fund including making it available to be used as needed by the school board
- HB 4672 requires school social workers to attend the same in-service as teachers regarding identification of the warning signs of suicidal behavior in teenagers
- HB 4780 lengths the time allowed for transfer of funds among the education fund, the operations and maintenance fund, and the transportation fund
- HB 4797 extends property valuations for wind farms for another 4 years (from 2011 to 2016)
- HB 5340 allows school board to provide criminal records to the Department of State Police or Statewide Sex Offender Database

- HB 5863 deals with new rules for criminal background checks and certification of substitute teachers
- HB 6112 expands the Prevailing Wage Act
- HB 6368 makes changes in state pension

Approved by the Senate and sent to the House:

- SB 2494 creates a voucher program for Chicago
- SB 615 deals with the purchase of fresh produce and food products by schools
- SB 2499 states that, for the purpose of state aid, for districts covering more than one county the county containing the majority of the school district's equalized assessed valuation will be used for computations
- SB 2810 concerns the awarding of contracts under the Local Government Energy Conservation Act
- SB 2879 allows non-public schools to use a multifunction school activity bus to transport non-public school students between non-public schools for curriculum-related school activity
- SB 3332 requires sex education to teach students about the dangers associated with drug and alcohol consumption during pregnancy if the course discusses sexual intercourse
- SB 3681 includes the likelihood that the district will fail to fully meet any regularly scheduled payroll obligations or debt services payments as a "trigger" for intervention by the state

More detailed information on pending legislation can be obtained from the website of the Illinois Association of School boards at www.iasb.com/govrel