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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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DID YOU KNOW?

Employee Dress Codes: It is undisputed that school districts have the legal ability to institute reasonable dress codes for their employees. According to an article in the New Hampshire Union Leader, the Board of the Manchester School Committee did just that. In an attempt to encourage its teachers to project a more “professional” image the wearing of jeans, shorts, flip-flops, and some tennis shoes is no longer allowed. Other items which made the “Banned 15 Items” list include some t-shirts, Spandex, and short skirts. Exceptions were made for physical education teachers who have a bona fide job related reason for wearing athletic gear. One motion that was defeated was a requirement for men to wear ties. Source: New Hampshire Union Leader, 5/16/10, by Beth Lamontagne Hall

United States Supreme Court Nominee Elena Kagan: What do we know about Solicitor General Kagan’s views on educational issues? Not much because she has never sat as a federal judge. She was a clerk for Justice Thurgood Marshall when the Court handed down its decision on student publications in *Hazelwood School District v. Kuhlmeier*. From 1991 to 1995 Kagan was on the faculty of the University of Chicago College of Law making her a colleague of Obama who served as an adjunct instructor. In 1995 she joined the Clinton administration as associate White House counsel, later being promoted to the Deputy Director of the Domestic Policy Council. Still not much of a record on educational issues to be found. From there she moved to the faculty of Harvard Law School in 1999 and was appointed Dean of the school in 2003. Upon the threat of withdrawal of federal funding to the law school, Kagan allowed the military to conduct interviews on campus even though she was on record as opposing the “don’t ask, don’t tell” policy of the military—instituted by her former employer President Clinton. Her last act in the education law arena was filing a brief with the Supreme Court in the case of *School District of the City of Pontiac v. Duncan* (Case No. 09-852), a case filed by the NEA claiming that NCLB constitutes an unfunded mandate. In short, it appears the closest that Kagan has been to education law is that her mother was a teacher. Source: Education Week, 5/10/10, by Mark Walsh

Arizona is Just Staying in the News: After making a stir with its new law on checking documentation of illegal aliens, Arizona continues to make news by new state laws and policies. In April, the Arizona legislature fast-tracked legislation that would prohibit districts from basing teacher rehiring decisions on seniority and would exempt districts from state-set deadlines for notifying teachers of rehire. The purpose of the legislation would be to allow districts to hire back the best teachers, not just those with seniority. Source: Education Week, 4/14/10, By Associated Press

Also in April, the Arizona Department of Education issued a statement that ELL teachers who spoke grammatically incorrect or highly accented English would be removed from the classroom. The intent of this policy is to ensure that those students who are still learning the English language should only be taught by individuals who speak the language without error. In the 1990s, in order to staff a massive bilingual-education program hundreds of teachers whose first language was Spanish were hired. In 2000 the voters passed a bill stating that all education must be in English. This forced the Spanish speaking teachers to start instructing in English rather than in their native language. Fluency was often an issue. With the enactment of NCLB, in order to continue to receive federal funds, students learning English had to be taught by teachers fluent in

English. To that end, the ADE has sent out evaluators to districts across the state to audit teachers' fluency on things such as comprehensible pronunciation, and correct grammar in both speaking and writing. Teachers will be given a chance to improve but if they are either unwilling or unable to do so, the district will have the ability to terminate their employment or reassignment them to non-ELL classes. Source: Wall Street Journal, 4/30/10, By Miriam Jordan

In May, Governor Brewer signed a bill banning schools from teaching classes for students of a particular ethnic group, or classes that promote resentment among ethnic groups, encourage the overthrow of the United State government, or advocate ethnic solidarity over treating each pupil as an individual. If this seems confusing, it becomes clearer when one realizes that this bill was written to eliminate the Chicano/Mexican American studies program in the Tucson schools. The mandate will go into effect December 31. Source: Los Angeles Times, 5/12/10, By Nicole Santa Cruz

Then, if a flurry of new legislation was not enough to digest, the Arizona State Superintendent of School, Tom Horne, is attempting to recover \$1.2 million dollars from the Ajo Unified School District because he alleges that the district has been using state funds to educate residents of Mexico since 2007. Horne says that he began the investigation in 2004 after a new expose from CNN and numerous complaints from residents. According to the results of the investigation, 105 students attending the schools were, in reality, residents of Mexico. Robert Dooley, the superintendent of the Ajo schools states that Horne's figures are too high and it is something which has been going on for 50 years—but he never denied that it has been going on. Students cross over from Mexico in the morning and are picked up by Pima County School's buses. The issue is ongoing. Source: Arizona Republic, 5/5/10, By Craig Harris

Student Test Scores and Teacher Evaluations: In an apparent response to the administrations "Race to the Top" funding competition, numerous states are passing laws linking teacher evaluations to students' test scores. Tennessee, Delaware, and Illinois are among those states. Other states considering such laws are Oklahoma, Louisiana, Colorado, and Minnesota. Unions have opposed such laws in Georgia and Florida. Florida's Governor Crist vetoed a bill in Florida that would allow such a link. He stated that his concern was about the children of the state, but acknowledged that he had been receiving a great deal of pressure to oppose the bill by teachers, parents, and local school officials. The article in Business Weeks cites the statistics as being 65,259 against the bill while only 3,090 showed support. The bill would have eliminated tenure for newly hired teachers and establish merit pay for all teachers and administrators. Source: Business Week, 4/15/10, By Bill Kaczor (Associated Press)

A Roman Catholic Charter School?: Indianapolis has proposed a plan for the Roman Catholic archdiocese in Indianapolis to run the first public charter school in the nation. The mayor of Indianapolis sees the plan as a perfect compromise to keep schools open and meet the needs of families. Under the plan, St. Anthony's and St. Andrew & St. Rita Academies to charter schools so that they would qualify for close to \$1 million in state funding in the first year alone. Of course, crucifixes, Bibles, and statutes of saints would be removed and religious education classes as part of the curriculum would end. Should this plan be approved, it would be taking the Supreme Court's recent decisions on separation of Church and State under the Establishment Clause of the First Amendment to all new heights! Source: Associated Press, 4/14/10, By Carly Everson

Just so Long as the Policy is not Content Related: When senior, Ceara Sturgis' picture was omitted from the school yearbook because she refused to follow the dress policy for the photos (Ceara was a Lesbian who wanted to wear a tuxedo like the boys rather than a drape like the girls) her mother contacted the Mississippi chapter of the ACLU. The district was basing its refusal on the 2004 settlement of *Youngblood v. School Board of Hillsborough County, Fla.* which had a similar dress code for yearbook photos. While neither of these specific instances have been tried in court, it is fairly well established that school districts have the administrative power to make policies for the orderly administration of their districts so long as the policies are neither arbitrary or capricious nor discriminatory. The dress code for senior yearbook photos never mentioned sexual orientation, but rather was done for the visual uniformity of a school publication—something well within the administrative decision making power of the district. Source: Jackson Free Press, 4/26/10, By Adam Lynch

Separate is STILL Inherently Unequal: The Ann Arbor, Michigan school board found themselves in an indefensible situation when news that African-American pupils from one of the elementary schools were the only ones allowed to attend a school trip to a talk by a rocket scientist at the University of Michigan. The group, known as the African American Lunch Bunch" was started as an attempt to motivate African-American students to improve their test scores. The superintendent tried to defend the exclusive trip by saying that the groups was run by teacher volunteers and no school money was used to finance the excursion. Not only does this not immediately smack of reverse discrimination by anyone's standard, in 2006 a law was passed in Michigan—Proposal 2—that amended the state constitution to expressly ban discriminatory or preferential treatment of students on the basis of race, sex, and other characteristics. Eventually, the school board did publicly acknowledge that the "African American Lunch Bunch" did violate state law AND the district's own anti-discrimination policy. Source: Detroit News, 5/5/10, By Karen Bouffard

The Right to Confront your Accuser: Under a new law supported by the Iowa State Education Association, the largest union in the state of Iowa, teachers now have the right to know the names of their accusers before an investigation for wrongdoing is complete. Teachers will be the only state licensed individuals with that right. Opponents of the law say that it will have a chilling effect on whistle-blowers. However, the law simply codifies what has been the past practice of the Board of Educational Examiners which is the licensing and disciplinary board for teachers in the state of Iowa. Supporters of the law state, because of the public nature of a teacher's job, they are open to countless false accusations from students and parents. This law will take away the protection of anonymity for false accusers and eliminate witch-hunts. Source: Des Moines Register, 5/6/10, By Staci Hupp

School Funding is an Issue for the Legislature: Illinois taxpayers continue to attempt relief through the courts for what they see as inequitable funding for public education because of reliance on property taxes. According to an article in the Chicago Tribune, individuals from Cairo in southern Illinois and Chicago Heights in the suburbs of Chicago are filing suit alleging that homeowners in poorer districts face higher property tax rates than those in wealthier districts just to obtain the same amount of funding per pupil and that is in violation of the state's constitution. This issue has been litigated before in the Illinois courts. Each time, however, the courts have held that school funding is a policy issue more properly addressed by the state legislature, not a

matter of law for the courts to decide. It waits to be seen whether this most recent suit will elicit a different response from the Illinois court. Source: Chicago Tribune, 3/23/10, By Kristen Mack and Tara Malone

Student Photos and FERPA: The Michigan Attorney General, in response to a request from a state representative, has gone on record as stating that photos and videos of students participating in school activities fall under the definition of “directory information” so long as appropriate notice has been given to parents as to their right to not have such information released. Under the terms of FERPA, directory information may be released without the explicit consent of students and parents. This is the exact opposite of all other educational records which fall under the purview of FERPA. The statement was made even though no formal position, although requested, has been taken by the Family Policy Compliance Office which is the regulatory arm of FERPA. The immediate videos in question are surveillance tapes from hallways and school buses which are used to monitor and possibly discipline students for incidents on school property. Source: Michigan AG opinion letter March 29, 2010

Intra-district e-mails educational records?: The Kentucky Attorney General has concluded that e-mails exchanged between teachers and administrators discussing a specific student are educational records under the definition of FERPA and therefore parents have an absolute right to inspect those e-mails. To refuse access would be a violation of the act. Source: Louisville Courier-Journal, 4/12/10, By Roger Alford

SPECIAL EDUCATION

Compton Unified Sch. Dist. v Addison, Nos. 07-55751/07-56013 (9th Cir. Mar. 22, 2010): If a school district fails to identify a student as in need of services, the parents of that student have a valid claim under the “child find” provisions of the IDEA. Addison, as a 9th grader, was a very poor student both as demonstrated by low classroom grades and performance below the 1st percentile on standardized tests. Her counselor attributed the extremely poor academic performance (essentially performance on a 4th grade level) to a difficult “transition year.” In 10th grade, Addison not only failed every class but her teacher reported work that was “gibberish and incomprehensible” and that she seemed to prefer to play with dolls in class. Addison’s mother didn’t want her evaluated so the school did not push to do so. She was promoted to 11th grade even after an outside third party recommended evaluation for learning disabilities. It was at this point that Addison’s mother requested an IEP. Addison was staffed, was found eligible for services, and was provided with an IEP. Addison’s mother then sued claiming that the school district was in violation of FAPE because they had not provided services earlier. The district took the position that it could only be found liable for not providing FAPE if it had refused to do so; that the district’s failure to take action was not an affirmative refusal, therefore the notice requirement did not apply. The court disagreed, stating that the “child find” and the “notice” requirement were two separate requirements under the IDEA. Quoting the United States Supreme Court decision in *Forest Grove School Dist. v. T.A.*, 129 S.Ct. 2484 (2009), “reading of the Act that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress’ [intent.]” The IDEA allows a party to present a complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child.”

N. D. of State of Hawai'i Dept. of Educ., 09-17543 (9th Cir. Apr. 5, 2010): This case stems from the severe financial difficulty faced by the State of Hawai'i's school district. Because of a lack of funds, the State of Hawaii decided to shut its public schools on 17 Fridays and furlough teachers on those days during the 2009–2010 school year. The shut down applied to all students, both disabled and non-disabled. N.D., a disabled student, filed for a preliminary injunction stating that the decision to shut on 17 Fridays was in effect a unilateral change in placement in violation of the IDEA. While there was no doubt that a shortened school week would likely have a adverse effect on N. D. causing irreparable harm, looking at the equities involved the court agreed that it was “the least bad of all the bad choices you can make.” The court then looked at the purpose of the “stay-put” provision which it found to be a mechanism to “strip schools of the ‘unilateral authority they had traditionally employed to exclude disabled students. . . from school’ and to protect children from any retaliatory action by the agency. The court found the stated intent of Congress to be the prevention of isolation and exclusion of disabled children; to provide them with a classroom setting as similar to non-disabled children as possible. The facts of the instant case did not violate that intent. The schools were going to close for ALL children, not just to exclude disabled children. Therefore there was no impermissible unilateral exclusion.

D. D. v Chilton County Bd. of Educ., No. 09-691 (M.D. Ala. Apr. 6, 2010): Teachers still have the right to reasonable restrain disruptive students. D.D. was a pre-school student who was receiving services under an IEP. His diagnosis was pervasive development disorder, attention deficit/hyperactivity disorder, impulse control disorder, and mood disorder. One day during class, D. D. starting kicking students and teachers, so his classroom teacher removed his shoes. During nap time he refused to settle down so he was given the option of sitting in a chair which he accepted. He sat there but continued to be verbally abusive so his classroom teacher attached the lap belt of the chair around his waist and moved his chair to the hallway. When his mother arrived she saw D. D. sitting in the hallway with restraints around his waist and feet. Although the mother had requested a behavioral plan be included in the IEP, none was. The mother requested that D.D. be moved to another teacher which he was. His former classroom teacher was not disciplined. The mother filed a due process complaint and later sued alleging a violation of D. D.'s substantive due process rights to bodily integrity and a violation of his procedural due process rights to notice and a hearing before being deprived of liberty and bodily integrity.

Addressing the substantive due process allegation first, the court stated that the mother must establish that an official acting under color of state law engaged in conduct that was arbitrary or conscience-shocking in a constitutional sense; that the behavior must be “intended to injure in some way unjustifiable by any government interest.” The court looked to see if the force was excessive as a matter of law; whether the school official intentionally used an amount of force that was obviously excessive and that the force presented a reasonably foreseeable risk of serious bodily injury. United States Supreme Court precedent had already established that student discipline, classroom control, and self-defense are legitimate government ends. The court found that the force used fell far short of anything that would be considered excessive. “[C]onsidering the totality of the circumstances including that D. D. had previously been disruptive, had engaged in kicking behaviors, that D. D. had accepted the option to sit in the Rifton chair, and that he did not sustain any physical injury as a result of the restraint, the court concludes that Alford's actions were not excessive as a matter of law and were a reasonable response to D. D.'s behavior.” As for the procedural due process claim, the court found that in Alabama it

had already been decided by the court that no procedural due process right attaches to the use of corporal punishment. Since the facts of the instant case were less severe, but otherwise comparable to corporal punishment, the court found no procedural due process right had attached.

D. S. v Bayonne Bd. of Educ., No. 08-4730 (3d Cir. Apr. 22, 2010): In a unanimous decision, the U.S. Court of Appeals for the Third Circuit held that if a school district denies FAPE, under the IDEA that school district is responsible for the cost of a private school placement. Because of his slow academic progress, the parents of D. S. requested a due process hearing alleging a failure to provide FAPE. The administrative law judge found for the parents stating that D.S.'s IEP did not incorporate any of the recommendations of the experts hired by the parents. The ALJ gave more weight to his poor standardized test scores than to his high classroom grades. The district was successful on appeal in getting the ALJ's decision overturned stating that benefit was being shown by D. S.'s classroom grades, therefore FAPE had been provided. The 3rd Circuit Court reversed and remanded. The court held that D. S. was not making appropriate academic progress, that his IEP did not include enough supports to adequately meet his needs, and that the standardized test scores should carry greater weight because the high classroom grades were obtained in a self-contained special education classroom rather than in a general education classroom. Therefore, because FAPE was not provided, the district was responsible for the cost of placement in a private school.

CIVIL PROCEDURE

T. E. v Grindle, No. 09-2920 (7th Cir. Mar. 17, 2010): A principal should never ignore, much less attempt to cover up, the reported sexual abuse of a student by one of the teachers in his or her building. Grindle was an elementary school principal. She became aware of allegations from a student passed on to her by a counselor that the band teacher, Sperlik, was sexually abusing several female students in his class. Grindle met with Sperlik and the met with the students and their parents. In the meeting with parents she downplayed the sexual nature of Sperlik's behavior. Grindle wrote a memo to Sperlik stating that his behavior could be considered sexual harassment and directing him to avoid physical contact with students and refrain from making comments about the appearance of students. When Grindle received more complaints she went to the superintendent. While she told the superintendent about the complaints, she categorized the first three complaints as a pedagogical issue rather than sexual harassment. As a result, the superintendent proceeded with the matter as if it were a teaching issue rather than sexual harassment. The final incident was when a student reported to her mother that Sperlik and bound her with duct tape during class. The mother reported it to police who conducted an investigation and ended up arresting Sperlik. The parents sued everyone. The suit was dismissed against everyone except Grindle and Sperlik. Grindle asserted immunity because she was working within the discretionary decision making boundaries of her position as principal. The court rejected her argument for immunity under a prior court decision and stated that the instant case was nothing more than "a straightforward application of the standard of supervisory liability articulated in *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988), that supervisors can violate the Constitution themselves if they 'know about the [unconstitutional] conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see.'" The court found that the students had "offered evidence that would allow a jury to conclude that Grindle knew about Sperlik's abuse

of the girls and deliberately helped cover it up by misleading the girls' parents, the superintendent, and other administrators." It concluded: "From this evidence, a jury could reasonably infer, though it would not be required to infer, that Grindle also had a purpose of discriminating against the girls based on their gender...by characterizing the students' claims of sexual abuse by Sperlik as complaints about teaching methods, Grindle treated the girls' complaints differently because of their sex."

Sandra T. E. v South Berwyn Sch. Dist. 100, No. 08-3344 (7th Cir. Mar. 30, 2010): Attorney client privilege does cover the notes prepared by district attorneys during the investigation of an alleged sexual molestation of a student by a teacher. This means those notes are not open to discovery by opposing counsel. This case arose from the incident described above in *T. E. v Grindle*. After Sperlik's arrest, the district hired Sidley Austin LLP, a large law firm out of Chicago to conduct an internal investigation and provide legal advice to the school board. After preparing and presenting their findings and legal advice to the board, the district used different lawyers to defend it in court. During discovery the parents sought the information, including the notes taken during the interviews, from the internal investigation. The federal district court ruled that Sidley Austin was employed as an investigator rather than as legal counsel by the district and therefore there was no attorney client privilege protecting the communications. On appeal, the Seventh Circuit reversed the lower court stating that under the terms of the engagement letter it was clear that the district had hired Sidley Austin to provide legal advice based on the findings of its internal investigation and that "factual investigations performed by attorneys as attorneys fall comfortably within the protection of the attorney-client privilege."

Tarek ibn Ziyad Academy, No. 09-138 (D. Minn. May 7, 2010): Charter schools are not immune from lawsuit under the 11th Amendment sovereign immunity clause. The ACLU of Minnesota filed suit against the Tarek ibn Ziyad Academy, a charter school, for violation of the Establishment Clause of the First Amendment and the Minnesota Constitution. It was alleged that the school was a sectarian school that violated the Establishment Clause by promoting the religion of Islam. Both the school and the directors in their individual capacity were included in the lawsuit. The court noted that qualified immunity would shield the directors from monetary damages, but not from the equitable claims which were the basis of the lawsuit filed by the ACLU. Next the court found that the school was not an arm of the state and therefore not entitled to immunity under the 11th Amendment. This determination was made because of the relationship of the school to the state under Minnesota state law which categorizes charter schools as school districts, thus as municipalities rather than arms of the state.

DISCRIMINATION

Williams v Port Huron Area Sch. Dist., No. 06-14556 (E.D. Mich. Mar. 31, 2010): This is a case of student-on-student racial harassment. The suit brought by several African-American students against the district, the superintendent, the principal, and the school board alleged that they had been subjected to racial harassment from 2003 through 2006. The harassment involved graffiti, racial slurs, and threats of physical harm, the use of the "n" word, Ku Klux Klan paraphernalia, and Confederate Flags. The district had realized that they had a race problem at the high school and had drafted new policies and had even brought in an outside consultant to attempt to rectify the situation. Unfortunately racial incidents continued to occur. The students claimed

“deliberate indifference” by an administration in which minorities were underrepresented. The court determined that the students had sustained their burden of proof by establishing a prima facie case of student-on-student racial harassment as required by Title VI. Relying on *Vance v Spencer County Public School District*, 231 F.3d 253 (6th Cir. 2000) the court stated that “where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.” Consequently, the court found that the case should go to the jury on grounds of deliberate indifference. The question was “whether [d]efendants’ efforts to remediate were ineffective, and whether they continued to use ineffective methods to no avail.”

EMPLOYMENT

***Reno v East Baton Rouge Parish Sch. Bd.*, 09-794 (M.D. La. Mar. 23, 2010):** Reno was a teacher employed by East Baton Rouge Parish Schools. She was assaulted by a student and sustained injuries. Under district policy, any employee injured at work was required to undergo drug testing. Reno filed suit alleging that the districts suspicionless drug testing policy violated her 4th Amendment rights. The district moved for dismissal. In denying the motion to dismiss, the court turned to precedent under *United Teachers of New Orleans v. Orleans Parish School Board* which clearly established Reno’s right to be free from suspicionless drug and alcohol testing under the circumstances alleged. “As the court in *United Teachers* makes clear, there is an insufficient nexus between merely suffering an injury at work and drug impairment.”

***School Committee of Lowell v Robishaw*, No. SJC-10512 (Mass. May 4, 2010):** Failure to demonstrate fluency in English is not grounds under Massachusetts law to terminate a teacher. Robishaw was a first grade teacher who, for the last ten years, had received satisfactory evaluations. When observed by a new principal she received an unsatisfactory evaluation and her English fluency was called into question. Robishaw went on medical leave exhibiting symptoms of post traumatic stress syndrome. Because of her leave, she requested a delay in taking English proficiency tests. Her request was refused. When she took them, she failed. When she returned to work she was terminated on the basis of her unsatisfactory evaluation and her failure of the English proficiency tests. An arbitrator found that there was no just cause for her termination and ordered her reinstated. The Superior Court reversed the decision of the arbitrator. In reversing the lower court, the Supreme Judicial Court found that the lower court had erred by submitting its own findings of fact and conclusions of law for those of the arbitrator. In a court’s review of an arbitrator’s decision, those only items that can be reviewed are whether the arbitrator exceeded his scope of reference, ordered conduct prohibited by law, or acted against clearly defined public policy. The court is bound by the arbitrator’s findings of fact and conclusions of law. Therefore, the arbitrator’s ruling was allowed to stand.

***Whitfield v Chartiers Valley Sch. Dist.*, No. 09-1084 (W.D.Pa. Apr. 15, 2010):** Whitfield was an assistant superintendent at the Chartiers Valley School District. She was asked to testify at a disciplinary hearing for the Dean of Students. The hearing became quite contentious, with board members who supported the Dean verbally harassing Whitfield during her testimony. When Whitfield’s contract came up for renewal, board members who had supported the Dean approved a motion opening up her contract and considering other individuals for the position. Whitfield hired an attorney and filed suit alleging retaliation for her exercise of her freedom of speech dur-

ing the testimony at the hearing. She asked for an injunction to keep the district from eliminating her job during the pendency of the lawsuit. The question before the court was whether testimony given at a disciplinary hearing on the request of district counsel is protected under the First Amendment. The controlling case was the recent Supreme Court decision in *Garcetti v Ceballos*, 547 U.S. 410 (2006) which held that speech given pursuant to a public employee's official duties is not entitled to First Amendment protection. After *Garcetti*, however, the 3rd Circuit ruled in *Reilly v City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008) that courtroom testimony given pursuant to a government employee's official duties is still protected by the First Amendment. This is true regardless of whether the employee is compelled to testify or whether the testimony is voluntarily provided. The court found *Reilly* controlling. The court also found that Whitfield's speech addressed a matter of public concern, "McConnell's suspension was a contentious and divisive issue within the school district community and implicated the ongoing use of public funds." Therefore, the court found that the board had acted in a retaliatory manner, that her testimony was protected by the First Amendment, and granted the preliminary injunction.

RELIGION AND EDUCATION

***Cavielzel v Great Neck Pub. Sch.*, No. 10-0652:** Under New York law, parents are required to have their children vaccinated before enrolling them in public schools unless the parents hold genuine and sincere religious beliefs which are contrary to vaccination. The Cavielzels sought an exemption for religious beliefs for their daughter. The school denied their request and the Cavielzels filed suit and asked for a preliminary injunction to allow them to enroll their daughter during the pendency of the action. The court denied the injunction on the grounds that the Cavielzels failed to provide evidence that they were likely to succeed on the merits of the case. The court stated that the parents had the burden to prove that their request was based on a sincere and genuine religious belief. "[T]he statutory exception must be restricted to persons whose opposition to immunization stems from "religious" belief; not views founded upon medical, personal, philosophical or even moral considerations." Evidence presented by the parents, including testimony by the girl's mother, showed that their objection to vaccinations were not religious but stemmed from a belief that they were not safe and may cause autism.

STUDENTS' RIGHTS

***C. H. v Bridgeton Bd. of Educ.*, No. 09-5815 (D.N.J. Apr. 22, 2010):** C. H. was a high school student who held pro-life views. She asked the school principal for permission to join the national Pro-Life Day of Silent Solidarity by (1) staying silent during class; (2) staying silent for the entire school day; (3) handing out flyers to other students explaining why she was staying silent; and (4) wearing red duct tape over her mouth or around her arm with the word "LIFE" written in black marker on it. Her request was denied on the grounds that it violated school policy. C. H. filed suit alleging a violation of her freedom of speech because it was not shown that it would materially and substantially disrupt the educational environment. Moreover, "...the school's literature distribution policy, dress code policy, harassment/anti-bullying policy, and the equal education policy are unconstitutional as overbroad and vague." The district defended by alleging that C. H.'s speech would violate the school's harassment/anti-bullying policy and its equal education policy. The district offered three arguments, pled in the alternative. First it argued that

the speech would have caused a material and substantial disruption. Second, the district argued that the *Tinker* standard did not apply because the district policies are viewpoint and content neutral time, place, and manner restrictions which are properly scrutinized under a forum analysis. Finally, the district argued that the policies are not unconstitutionally overbroad or vague but rather provide “clear guidance.”

In finding in favor of C. H., the court dispensed with the district’s arguments. Regarding the applicability of *Tinker*, the court relied on the Third Circuit ruling in *Saxe v State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001) in finding that the argument that *Tinker* only applied to viewpoint discrimination was incorrect. *Tinker* is the general, or the default, standard to be used. Subsequent decisions in cases such as *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), and *Morse v. Frederick*, 551 U.S. 393 (2007), are “carveouts” or exceptions to the general rule. Therefore, “[S]peech falling outside of the above categories...” is subject to *Tinker*’s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the rights of others,”” or “[i]n other words, if student speech is not lewd [*Fraser*], school-sponsored [*Hazelwood*], or advocating drug use [*Morse*], the speech can only be prohibited if it is likely to cause a disruption.” The district’s fear that armbands might cause a disruption was insufficient under *Tinker*. The court noted that a past SADD demonstration where students came dressed as the Grim Reaper, in robes and white face paint, did not cause a disruption. It characterized the district’s attempt at control as “unfounded fear-mongering.”

Reviewing the policy concerning the distribution of flyers was not as clear cut as to whether *Tinker* or a forum analysis was appropriate. Ultimately, the court held that a *Tinker* analysis was appropriate because “Nothing about the general rule discussed in *Saxe* seems to limit its standards to just armbands, t-shirts, or button wearing.” Again, the district did not produce evidence sufficient to establish a reasonable belief of substantial disruption. “Just because the flyers would have caused discomfort, does not mean that they could be prohibited.”

Doe v School Bd. of Broward County, No. 09-10394: Hoever was a high school math teacher. His contract was not renewed by his first principal because of unsatisfactory performance. The next year, a second principal was assigned to the high school and he had Hoever reinstated. During the school year, two students reported to the principal that Hoever had inappropriately touched them and made inappropriate comments to them. Every time a complaint was made, the principal conducted an informal investigation but his conclusion always was that there was insufficient evidence to suggest that inappropriate conduct had occurred. The second principal ultimately was reassigned, but never informed the third principal of the allegations against Hoever until after Hoever assaulted Jane Doe. Following the assault, the third principal ordered a formal investigation that ultimately resulted in the termination of Hoever’s contract. Doe filed suit against the school district and the second principal alleging (1) sexual discrimination under Title IX exhibiting deliberate indifference to known prior harassment; (2) violation of her constitutional right not to be sexually abused by an official acting under the color of state law under Sec. 1983; and (3) deliberate indifference by the second principal as to the welfare of the students at the school. The district court granted summary judgment for the district stating that the evidence presented did not support the claim of deliberate indifference. The 11th Circuit reversed the lower court stating that Doe had met her burden of proof because she (1) identified an “appropriate person” under Title IX (an appropriate person being a school official with the authority

to take corrective measures); (2) provided sufficient notice to the district that sexual harassment under Title IX was potentially occurring; and (3) that the official notified (the second principal) exhibited deliberate indifference to the harassment. The court was unpersuaded by the district's argument that the court could only look at the way that Doe's case was handled, not the handling of prior complaints, because the other alleged victims were not parties to the suit and almost two years had elapsed between the complaints. The court stated, "The simple fact that these prior incidents were unconfirmed and did not escalate to a violent sexual assault akin to Doe's cannot as a matter of law absolve the School Board of Title IX liability.... [L]esser harassment may still provide actual notice of sexually violent conduct, for it is the risk of such conduct that the Title IX recipient has the duty to deter."

Regarding the claim of deliberate indifference, the court found that "[o]nce Scavella [the second principal] had actual notice of a second complaint, his failure to institute any corrective measures aimed at ferreting out the possibility of Hoever's sexual harassment of his students could constitute deliberate indifference.... The incoming principal was never informed of Hoever's history, no informal warning was issued for Hoever to avoid female students, and no recommendation was made to monitor Hoever's classroom." Summarizing its Title IX analysis, the panel concluded, "[W]e cannot say that as a matter of law it was reasonable for Scavella to ignore an alleged pattern of sexual misconduct by one of Blanche Ely's teachers, failing to even inform the SIU of Hoever's identity in relation to S. W.'s complaint. Nor can we accept the district court's conclusion that merely because school officials "confronted Hoever," "obtained statements" from the complaining students, and "informed the SIU of the sexual misconduct allegations" (while omitting material details), the School Board's response was reasonable." The summary judgment was reversed.

Knisley v Pike County Joint Vocational Sch. Dist., No. 08-3082 (6th Cir. May 14, 2010): One would think that after the Supreme Court ruling in *Safford Unified School District #1 v. Redding*, 557 U.S. ___, 129 S. Ct. 2633 (2009) dealing with strip searches that school officials would be more careful and chose not to institute such searches. Such was not the case at the Vern Riffe Career Technology Center when some cash, a credit card, and other items of value were reported missing. All of the students in the class were female so they were taken to the first aid room where everyone had their purses, shoes, socks, and pockets searched. When a student stated that another student was hiding the items in her bra, the accused student was taken to the restroom by a female teacher where she had them unhook and shake their bras underneath their tops and take their pants halfway down their thighs. The students involved file suit against the school and the officials involved in the searches alleging a violation of their Fourth Amendment rights against unreasonable searches.

In finding in favor of the students, the court ruled that the officials were not entitled to qualified immunity. The students had not, just by being students in the pre-nursing program, consented to an extremely intrusive search of their unclothed bodies where "individualized suspicion" was lacking and where the threat to the safety and welfare of the students as whole was minimal (the search was for cash, not for weapons or drugs.) Targeting an entire classroom does not rise to the level of "individualized suspicion." "Individualized suspicion" is limited to "a particular person...suspected of wrongdoing rather than a group of persons who happen to be in the same place." Perhaps most important, in light of *Redding*, the law surrounding strip searches of students had been clearly delineated by the Supreme Court. School officials knew or should

have known that their behavior was inappropriate, therefore no immunity attached to them for those actions.

LEGISLATION OF INTEREST

New Principal Preparation Requirements: SB 226 was sent to the Governor. This bill now allows principal certificates to be issued by EITHER an institution of higher learning or a not-for-profit entity approved by the ISBE (IPA? IASA?) However, only individuals with at least four years of teaching experience may be certified as principals, unless they apply for and are granted an exception by the ISBE.

Criminal Background Checks: HB 5340, should it be signed by the Governor, will expand the list to whom the board president or the regional superintendent may transmit criminal background information. Added to the list would be the Department of State Police and the Statewide Sex Offender Database. This new law will also require student teachers to undergo a fingerprint-based criminal background check.

Approval of Minutes: HB 5483 amends the Open Meetings Act to provide different time lines for approval and posting of minutes of open meetings. It also requires that public officials are required to allow an opportunity for people to address the body at the meeting, something that is not often allowed at this time in many school districts.

As for funding, schools continue to remain in limbo as the parties fight over the budget. Numerous finance related bills have been introduced, passed in one or both chambers. You can access a detailed list from the Legislative Alliance Report on the Illinois Principal Association, the Illinois Association of School Administrators, or the Illinois School Board Association websites.