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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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Parental Rights

***Schmidt V Des Moines Pub. Sch.*, No. 08-477 (S.D. Iowa Sept. 23, 2010):** Access of non-custodial parents to their children during school hours is dictated by the terms of the relevant legal documents, not by the wishes of the non-custodial parents. In the Schmidt case, although the parents shared legal custody, Mr. Schmidt had primary physical custody of the child. Mrs. Schmidt had specific times for visitation. In addition, Mrs. Schmidt could visit with the child at times "mutually agreed upon" by the two parents. Despite the terms of the divorce decree, Mrs. Schmidt attempted to visit with the child during school hours—at times not provided for in the decree and not mutually agreed upon with Mr. Schmidt. The school refused Mrs. Schmidt access to the child, so Mrs. Schmidt sued claiming a violation of her substantive due process. The test used by the court when reviewing Mrs. Schmidt's claim was whether the school's refusal of access to her child "deprived her of a constitutionally protected liberty interest; and whether the Des Moines Public School's conduct shock(ed) the conscious." While the court recognized a parent's liberty interest in his or her child's education, under "certain circumstances the parental right to control the upbringing of a child must vie way to a school's ability to control curriculum and the school environment." The court could find no authority which would mandate that schools allow parents, custodial or non-custodial, visit children during school hours; definitely no constitutionally protected rights. The court found in favor of the school district.

***Meadows v Lake Travis Indep. Sch. Dist.*, No. 09-50850 (5th Cir. Sept. 8, 2010):** It is not a violation of the constitutional rights of parents to be required to submit to a background check before volunteering in the schools. The suit arose from a dispute between a parent, Meadows, and the elementary school where she wished to volunteer. Before being able to do so, she was told she needed to give school officials her driver's license when checking in at the front-office so that an electronic background check to be run. She refused to do so and filed suit claiming a violation of her right to direct her child's education. While the court agreed that parents have the right to direct their children's education, secured by the Due Process Clause of the 14th Amendment, that right does not extend to an "unfettered right of a parent to visit all areas of a school campus while students are present." Moreover, the court found that the school has a compelling state interest in protecting students by determining if a visitor is a registered sex offender prior to allowing them access to the students. The minimal electronic search was appropriate tailored to protect that compelling interest while also protecting the rights of the parents.

School District Liability

***Stoddard v Pocatello Sch. Dist. #25*, No. 36434 (Idaho Sept. 20, 2010):** Under the legal theory of negligence, how far off of school property does the school's "duty to supervise" extend? In 2006, Stoddard was a middle school student at Irving Middle School in Idaho. Two years earlier, two other students, Draper and Adamcik, were investigated after the school received reports that he was planning a "Columbine" type of school shooting. After investigating, the school determined that it was not a serious threat and did not discipline Draper. In 2006 the school received a report that Draper and Adamcik were passing threatening notes. The school did nothing in response. That same month Draper and Adamcik made a video stating that they were going to kill Stoddard. That was exactly what they did, entering Stoddard's home and murdering her. Stoddard's parents filed a wrongful death suit against the school district, Draper and his parents,

and Adamcik and his parents. The trial court dismissed the suit against the school district stating that, since the murder took place off of school grounds, that the school had no duty to supervise. Moreover, the court found that even if duty had been established, under state tort immunity laws the school district was immune from suit in state court. The Idaho Supreme Court agreed with the trial court that the district owed no duty of care to Stoddard. The court stated that in Idaho, to succeed on a negligence claim, the plaintiff must prove: "(1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual loss or damage." These are the basic criteria needed to succeed in a negligence case. Stoddard's parents stated that the was a duty both under common law and under Idaho Code's statement that schools are required to protect the health and morals of its students. The court did not rely on the place (off-campus) or time (after school hours) to determine whether there was a duty. It stated that Idaho courts have "recognized that a school district may owe a duty to its students, despite the fact that injury occurred off of school grounds and outside of school hours." According to the court, the appropriate question to ask was "whether the scope of this general duty should be extended to require that a school district take reasonable steps to prevent a violent criminal act against a student by a fellow student away from school grounds and not in connection with a school-sponsored activity." The court found that there was no duty because of a lack of foreseeability, and because of the "enormous burden that would be imposed upon school districts if we were to find that a duty exists in this case."

***School Union No. 37 v United National Insurance Co.*, No. 09-2040 (1st Cir. Aug. 19, 2010):** The school district had an educator's liability policy through United National Insurance Co. (UNI). When it was sued under the IDEA by a parent for reimbursement of non-tuition expenses, the school asked UNI to defend under the terms of the policy. Coverage was denied by UNI for two reasons: "(1) if IDEA indeed required SU 37 to pay for the student's education expenses, SU37 would be liable for reimbursement by virtue of its statutory obligation and not as a result of wrongful act that would trigger coverage under the Policy; and (2) the willful violation of a statute, ordinance or law was excluded from coverage under the Policy." Ultimately the district won the IDEA suit and the sued UNI for breach of duty to provide coverage. Upon reaching the First Circuit, the court saw one main issue: Is a third party claim for reimbursement under IDEA, which is equitable relief, covered under the terms of the Policy as a claim for "monetary damages?" Monetary damages are not available under the IDEA. However, if the ultimate outcome is that the district has to provide a monetary reimbursement as the "equitable relief" allowed under the IDEA, can that be relief that seeks "money damages" so as to be covered by the UNI insurance policy? It was the opinion of the court, that an ordinary insured would believe that if it had to pay out money for reimbursement, that such money would be included under "money damages" and would be covered by the policy. Since there was no specific wording stating otherwise in within the contract, the court found in favor of the district.

***Purvis v Oest,* Nos. 09-1098/09-1101 (7th Cir. Aug. 2, 2010):** Purvis was employed as a biology teacher. Upon hearing rumors, Principal Lunn and Superintendent Oest organized an investigation to be carried out by Lunn, and Dean of Students Vicini. Ironically but unknown to Oest, Purvis had previously accused Vicini of sexually harassing a student. Vicini coerced the student to claim that he had a sexual relationship with Purvis. Ultimately Purvis was criminally indicted by a grand jury and arrested. Although she was acquitted on all criminal charges, Purvis agreed

to resign in exchange for $43,000. Purvis sued Oest, Lunn, and Vicini for violation of due process by running a corrupt investigation. Although the Seventh Circuit upheld the lower court's denial of summary judgment, finding that a genuine issue of material fact had been raised, the court found that the defendants were entitled to qualified immunity. A two-part test was employed: (1) whether plaintiff showed that defendant had violated a constitutional right; and (2) whether that right was clearly established at the time the violation occurred. Did the administrators know that they were violating Purvis' constitutional rights? Oest had immunity because he lacked knowledge of the former complaint by Purvis against Vicini, thus was unaware when he appointed the investigators that there might be a problem. Even though the same could not be said for Lunn and Vicini, the court found they also had qualified immunity because, "there was no federal law clearly establishing that a biased person causing a teacher to be reported to the policy, DCFS or similar entity would violate her constitutional rights when that entity would conduct and independent investigation to determine the validity of the accusation against her."

Discrimination

***Mumid v Abraham Lincoln High Sch.*, No. 08-3041 (8th Cir. Aug, 25, 2010):** In this case the students were refugees from Somalia and Ethiopia who had ended up in Minnesota. Because of their lack of previous education and low English proficiency, they were all assigned to the same high school. Only 5 of the 13 students ended up graduating, with the other 8 failing because they were unable to pass the required state exams. A complaint was filed with the Minnesota Department of Education (MDE) alleging that the school was not meeting their educational needs. The MDE determined that the school was failing to meet the educational needs of the students because of failure to have appropriate methods to identify students with disabilities, failing to have remediation plans for students who had failed required state exams which were needed for graduation. The students then filed suit in district court alleging violation of the Title VI. The district court granted summary judgment for the school. The Eighth Circuit affirmed the decision of the district court stating that the students had failed to prove that the school had intentionally discriminated against them based on national origin. The MDE had found deficiencies with policies and procedures, but they were equally deficient for all students; not just for these students because of their national origin. Therefore, recourse was not through discrimination statutes.

Student Rights

***Brown v Shasta Union High Sch. Dist.*, No. CO61972 (Cal. App. Ct. Sept. 2, 2010):** The United States Supreme Court has ruled that suspicionless drug testing of students who wish to participate in extra-curricular activities is not a violation of the 4th Amendment protection against unreasonable searches. In California, however, the Third Appellate District upheld a trial court's preliminary injunction prohibiting Shasta Union High School from conducting random drug testing of student athletes stating a violation of the search and seizure provisions of the California Constitution. Shasta's policy required all students who participated in "competitive representational activities" to submit to mandatory drug testing. The appellate court stated, that to establish a privacy interest students must show, "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest." These were the threshold elements. Next, the court would "weigh and balance the justifica-

tion for the conduct in question against the intrusion on privacy." To justify the policy, Shasta had "not shown a specialized need to target students participating in CRA's for drug and alcohol testing" and that "the effectiveness of random drug testing to deter drug use is subject to sharp dispute." Therefore, upon balance, the intrusion on privacy was more onerous and the injunction was upheld.

***Pounds v Katy Indep. Sch. Dist.*, No. 06-527 (S.D. Tex. July 30, 2010):** Is the speech contained in "pre-packaged" fundraising materials government speech or school-sponsored speech such that it can be regulated by the school? According to a federal district court in Texas, the answer is "no." The question arose during a fundraising project for art supplies at Pattison Elementary school. The school contracted with "Its My Artwork" to present student artwork to be made available to the parents in "holiday card" form. The student would illustrate the card. Then on the order form were several preset messages for parents to chose among to be the message included in the holiday card. One of the messages was religious in nature. In a good faith attempt to avoid an Establishment Clause violation, the school blacked out that message so as to make in unavailable through the fundraiser. The question ended up in court. The district court stated that, the first question that needed to be answered was whether that preset religious holiday card message was government speech or private speech; government speech could be regulated but private speech could not. In the words of the court, "The order form invited parents and children to create holiday cards that would be sent privately, with no evident connection to the school. This is far removed from the "traditional mission" of a public school exemplified in such activities as choosing textbooks or a commencement speaker. . . .[t]here is simply too loose and attenuated a connection between the order form, the cards it was used to create, and school's role to make the art-card form pure government speech exempt from First Amendment analysis." Once it was determined that the speech was not governmental speech, the ability to control allowed by the Supreme Court in *Hazelwood Sch. Dist. V Kuhlmeier*, 484 U.S. 260 (1988) was not applicable. Neither was the concern of a violation of the Establishment Clause of the First Amendment viable. "For reasons similar to those explaining why the order form, viewed in the context of the art-card program, was neither pure government speech nor school-sponsored speech, the unredacted form could not fairly have been characterized as a government endorsement of any of the messages, including the message containing religious content."

***Patterson v Hudson Area Sch.*, 07-74439 (E.D. Mich. July 1, 2010):** In order to sustain a lawsuit under Title IX, more than just acts of harassment must be proven. In the instant case, the jury had found in favor of a student who had be subjected to student-on-student harassment throughout middle school and on into high school. The harassment consisted of name calling, other acts such as offensive drawings, and one locker room assault. While there was no question that the acts were inappropriate, to sustain a Title IX sexual harassment suit it must be proven that the objection behavior was committed on the basis of sex, sexual orientation, or perceived sexual orientation. General bullying is not actionable under Title IX. Then, even if the elements of Title IX sexual harassment had been proven, the plaintiff must also prove that the school district was deliberately indifferent to known acts of harassment. In the instant case, school officials had reacted proactively to every known incident. Motion for summary judgment for the school was upheld.

State Government

***Griswold v Discroll,* No. 09-2002 (1st Cir. Aug. 11, 2010):** Are the contents of curricular guides published by the state subject to free speech claims under the First Amendment? In Massachusetts, the state drafted recommendation for curriculum which talked of "the Armenian genocide." This was in reference to materials that stated the "Muslim Turkish Ottoman Empire destroyed large portions of its Christian Armenian minority population" in the late nineteenth and early twentieth centuries'. Turkish groups took offense and asked for a more "objective" curricular guide. They wanted "contra-genocide" material included which called into question the Turks participation in any type of genocide. When the final draft did not include the contra-genocide material, a suit was filed by Turkish groups alleging that the failure to include the contra-genocide material violated their First Amendment freedom of speech. The First Circuit upheld the lower court's determination that the curricular guide was governmental speech and therefore the First Amendment scrutiny was not applicable. The court tried to determine whether the materials in question were established for the benefit of the students as a virtual library, or as an element of the curriculum itself. Neither definition really fit, but the court felt that treating the guide as part of the curriculum was a closer fit. The purpose of the guide was "to provide teachers with a framework and sources of materials for teaching genocide and human rights issues as a subpart of the existing curriculum, for which no standard text or anthology is assumed to be available or sufficient." It was totally within the purview of the state to determine what to include or exclude from its suggested state curriculum. Even looking at the United States Supreme Court decision in *Board of Education, Island Trees Union Free School District No. 26 v Pico*, 457 U.S. 853 (1982), the Court refused to extend the same protection to curricular choices by the school district that it had extended to library materials. Where there was a constitutional need for non-interference by the board of education with the selection of library materials, the Court was clear that the school board did have the final say in dictating what was included in the school curriculum. The state curricular guide was government speech not subject to scrutiny under the First Amendment.

Employee Rights

***Lansing Sch. Educ. Ass'n. v Lansing Bd. of Educ.*, No. 138401 (Mich. Jul. 31, 2010):** Teachers who are physically assaulted by students can bring suit against the school district for failing to expel those students as mandated by statutory law. A previous case in Michigan, *Lee v Macomb Co Bd. of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001) had ruled that teachers who had been assaulted did not have standing to sue the school district, following the federal standard of standing to sue. The Michigan Supreme Court found a lack of support in Michigan case law to accept the limitation of the federal precedent followed in Lee, and returned instead to the standing doctrine historically developed in Michigan: "a limited, prudential doctrine that was intended to ensure sincere and vigorous advocacy" by litigants. In short, the Michigan precedent gives the court the ability to look at the specific cases and determine the effect on the citizenry at large as compared to the litigants, and by that determine standing. In the instant case, the court went on to find that the teachers had standing to sue because they had a significant interest – the ability to protect their safety and ability to effectively do their job – which was separate and apart from the general population.

***Heutzenroeder v Mesa County Valley Sch. Dist. 51,* No. 09-1331 (10th Cir. Aug 3, 2010):** Heutzenroeder was a middle school principal, starting in 2004. At the start of the 2007–08 school year she got into a conflict with her supervisor, which resulted with her being placed on a performance improvement plan. Seeing the handwriting on the wall, Heutzenroeder started to look for another job. When she failed to make a meeting on her performance improvement plan which was called at short notice, she was place on administrative leave for insubordination. The district tried to negotiate a settlement, without telling her that she was being terminated. Settlement negotiations were unsuccessful and she was reassigned as Dean of Students at the High School. She was told that if she renewed her teaching certificate she would be assigned as a teacher for the next school year at a reduced salary. Heutzenroeder then informed her supervisor that she believed she had been terminated. Her supervisor told her she had not been terminated and told her to report to her new assignment. When she did not report. When her supervisor contacted her, Heutzenroeder told her she had accepted a position in the private sector because she believed she had been fired. The district stated that Heutzenroeder had abandoned her job and breached her employment contract and thereby had voluntarily terminated her employment with the district. Heutzenroeder filed suit alleging breach of contract and violation of due process. The lower court granted summary judgment for the school district because it found Heutzenroeder had failed to prove constructive discharge. On appeal the lower court decision was affirmed since Heutzenroeder could only prove that her property interest extended only to the 2007–08 academic year at a promised salary. Against she failed to provide sufficient evidence of constructive discharge. "The evidence does not give rise to a reasonable inference that a constructive discharge occurred . . .[it] overwhelmingly supports the conclusion that Ms. Heutzenroeder voluntarily resigned."

Special Education

***Marshall Joint Sch. Dist. No. 2 v C.D.,* Nos 09-1319/09-2499 (7th Cir. Aug. 2, 2010):** To be eligible for special education services, the disability must adversely affect the educational performance of the student. C.D. suffered from Ehlers-Danlos Syndrome (EDS). Using a two part test: (1) whether the child has a disability recognized by the statute; and (2) as a result needs special education it was determined that C.D. did not qualify for services because his educational performance was not adversely affected. Rather it was determined that he "did not need special education because his needs could be met in a regular education setting with some slight modifications for his medical and safety needs." C.D.'s parents disagreed and took it to due process. The administrative law judge found that C.D.'s educational performance in P.E. and recess were adversely affected. Federal district court affirmed the ALJ. The Seventh Circuit reversed stating that "[T]he ALJ applied the wrong legal standard in determining whether the EDS adversely affected C.D.'s educational performance, and while there is evidence that the EDS can affect C.D.'s educational performance, there is no substantial evidence to support the ALJ's finding that it has an adverse affect." Physician statements alone that something might occur are insufficient. If the child is performing at grade level and progressing, that is what determines the "educational affect."