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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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TRADEMARK INFRINGEMENT

Many school districts, including Illinois State's University High School use team logos and insignias which are direct copies or reasonable facsimiles' of trademarked logos and insignias from university or professional teams. University High school uses the University of Miami "U." As the financial stakes surround the rights to these logos has increased, so has the vigilance being shown by institutions in protecting those logos. Some institutions have been less willing than others—Wisconsin, Florida, Florida State—in allowing the use of their trademarks. For a school district to change their logo could cost tens of thousands, if not hundreds of thousands of dollars. On the flip side, NFL teams allow high school and youth football teams to freely use their NFL insignias stating that "it is inspirational for young players to play football under the same name as NFL teams." This is something to be aware of for those districts who have been using trademarked logos, even if they have been used for decades. There is no sunset on a trademark and if the owner of the trademark orders you to desist in its use, the law is on their side regardless of how long you have been using the trademark.

HIGH TECH TRACKING OF STUDENTS

It appears that Big Brother is here. School districts now have the capability to track the movement of students through the use of student identification badges containing radio frequency tracking technology. Not surprisingly this has alarmed some parents and privacy advocates, but not the way that you might imagine. The concern has been that hackers might be able to find a way to track students once they have left school which has raised stalking concerns. Administrators say that the technology improves security and attendance. What will be next?

SPECIAL EDUCATION

***Doe v Todd County Sch. Dist.*, No. 09-3221 (8th Cir. Nov. 12, 2010):** Doe, a special education student, was suspended for fighting and bringing a knife to school. Cognizant that Doe had a IEP, with the permission of Doe's guardian, his IEP was amended to change his placement to the alternative high school and then working to transition him back into the general education high school. When his placement was change, the district lifted his suspension. Doe's guardian then alleged that the change in placement denied Doe FAPE, even though the guardian had agreed to the change in placement. Doe was transitioned back into the regular high school, but was soon suspended again for fighting at which point his guardian removed him from school and filed suit alleging that the district had denied Doe due process by placing him in an alternative high school for 38 days. The federal district court found that the school district's action amounted to a "constructive" long term suspension and granted summary judgment for Doe. The 8th Circuit revised, stating the lower court had misidentified the "decision-maker" who was responsible for providing due process—the district or the IEP team?

Once Doe's behavior was determined not to be a manifestation of Doe's disability, if the decision maker was the district then it would have been a simple disciplinary matter governed by the due process requirements of *Goss v Lopes*, 419 U.S. 565 (1975). However, it was the IEP team which acted affirmative to change Doe's placement to the Alternative High School, and at that time became the decision maker. The court stated, "Given the IDEA's stay-put mandate, even if

the District had held a *Goss* hearing at which Doe persuaded the school board that a long-term suspension was not warranted, the board could not have ordered Doe's reinstatement at TCHS." This meant that the due process protections afforded by *Goss* were not applicable because the district could not change a decision made by an IDEA decision-maker. The appropriate course of action at that time for Doe would have been to raise an IDEA complaint requesting that Doe be returned immediately to TCHS. Doe was not attempting to overturn a disciplinary action, but rather to overrule an educational decision under the IDEA, for which specific administrative remedies are available.

STUDENTS' RIGHTS

***Defoe v Spiva*, No. 09-6080 (6th Cir. Nov. 18, 2010):** Relying on the Supreme Court's decision in *Morse v Frederick*, 551 U.S. 393 (2007), the 6th Circuit ruled that a school district's ban on displaying the Confederate Flag was not a violation of the students' right to free speech. Twice Defoe wore clothing decorated with the Confederate Flag, for which he was ultimately suspended. He sued alleging violation of his freedom of speech. Defoe claimed that he wore the flag to express pride in his southern heritage. The school based their policy on past racial incidents which involved display of the Confederate flag; that the African-American students found its display offensive. Two opinions were issued by the court. In the main opinion, the court relied on the "material and substantial disruption" standard set forth in *Tinker v Des Moines*. Based on the transcripts from the lower court, the 6th circuit concluded that school officials could reasonably forecast would lead to the ultimate disruption of the educational environment. "*Tinker* does not require that displays of the Confederate Flag in fact cause substantial disruption or interference, but rather that school officials reasonably forecasted that such displays could cause substantial disruption or materially interfere with the learning environment." The main opinion found that *Morse* applied only to student speech which conveyed a "pro-drug" message. It also rejected the student's allegation that the policy constituted viewpoint discrimination, stating that the policy forbid the wearing of all racial divisive symbols. "With regard to Plaintiffs' assertion that displays of the confederate flag are banned based on their offensiveness rather than a reasonable forecast of disruption, that school officials "determined the Confederate flag to be offensive to African-American and other students . . . does not negate [their] reasonable belief that the flag was also disruptive and would cause substantial and material interference with schoolwork and school discipline."

The concurring opinion did rely on the reasoning in *Morse*, giving the Supreme Court's ruling a much broader reading. Specifically, "[schools have a] custodial and tutelary responsibility for children" which gives them, not only the ability but the responsibility, to shield students from harmful ideas including both promotion of drug use and racial tension. "A fair reading of *Morse*, then, in connection with a recognition that racial tension in today's public schools is a concern on the order of the problem of drug abuse, leads to the conclusion that a dress code that forbids racially hostile slogans and symbols—if fairly applied—comports with the First Amendment even without a so-call *Tinker* showing of a reasonable forecast of substantial disruption...the general rule is that school administrators can limit speech in a reasonable fashion to further important policies at the heart of public education."

***Griffith v Butte Sch. Dist. No. 1*, No. 10-0109 (Mont. Nov. 19, 2010):** The Butte School district had a policy of prior review of student graduation speeches. After submitting her speech for

review, valedictorian Griffith was told that she needed to remove references to God and Christ. When she refused to remove the references, she was not allowed to give her speech. She sued. The trial court found for the school district, stating that the district's policy of banning all religious speech during graduation ceremonies was a constitutional attempt to maintain neutrality as required by the Establishment Clause. In a 6–1 vote, the Montana Supreme Court reversed stating that “cursory references to her personal religious beliefs could not be viewed by those in attendance at the BHS graduation ceremony as a religious endorsement by the School District.” The case on which the lower court had based its decision dealt with speech that was proselytizing in nature. In that context, the court agreed that a school district could maintain a policy forbidding such proselytizing speech. “[A] reasonable dissenter or nonbeliever could believe that the school district was compelling implicit participation in the proselytizing, which amounts to unconstitutional governmental sponsorship of religion and a clear Establishment Clause violation.” The court's opinion that the speech in question did not bear “the imprimatur of the school district,” was the fact that a disclaimer was printed in every program explicitly disassociating the district from the actual student speech.

***King v Beaufort County Bd. of Educ.*, No. 480A09 (N.C. Oct. 8, 2010):** There is no fundamental right to alternative education under the North Carolina Constitution. King received a long term suspension for fighting without alternative education. After exhausting her administrative remedies, King filed suit alleging that the failure to provide alternative education violated her constitutional right to a sound basic education. The trial court dismissed King's suit. The Court of Appeals affirmed. The North Carolina Supreme Court reversed and remanded, recognizing that state constitutional requirement for school officials to provide a reason for not providing alternative education, but did not go so far as the find a constitutional right to alternative education. “Because exclusion from alternative education potentially infringes on a student's state constitutional right to equal educational access, school administrators must articulate a reason when the exclude a long-term suspended student from alternative education.”

***Parker v Indiana High Sch. Athletic Ass'n*, No. 09-885 (S.D. Ind. Oct. 6, 2010):** Disparity in scheduling does not rise to the level of a Title IX violation. The mothers of two female basketball players filed suit against 14 school districts in Indiana alleging that boys were given more preferred playing dates (Fridays and Saturdays) than the girls. Regarding the Title IX claim, the court said that disparities in scheduling did not arise to same level as requiring girls to play outside of their regular season or being deprived of competing in state championship tournaments.

EMPLOYEE RIGHTS

***Doe v Flaherty*, No. 09-2535 (8th Cir. Oct. 19, 2010):** Smith was the girls basketball coach. After receiving complaints from parents that Smith was sending inappropriate text messages and making inappropriate comments to their daughters, Principal Wilcher reprimanded him and told him to make no further comments. About this same time rumors started to circulate that Smith was having a sexual relationship with one of his players, Jane Doe. Wilcher investigated every rumor but could find no evidence of a relationship. After continued investigation evidence was uncovered and Smith was suspended. Doe's parents sued under section 1983 and Title IX alleging a violation of due process by failing to investigate allegations; that this failure amounted to deliberate indifference resulting in injury to Doe. The lower court dismissed the case against all defendants except Wilcher, because she was the only one who arguably had actual notice of the

sexual relationship. The 8th Circuit reversed and remanded, saying that Wilcher was entitled to qualified immunity because no proof had been presented to show that Wilcher had actual notice of Smith's misconduct. When the allegations were brought to Wilcher's attention, she had a duty to investigate, which she did. None of the investigation uncovered proof of the sexual relationship, therefore Wilcher did not have actual notice of the affair. Once it was found that there was not actual notice, the Title IX claim failed because it, too, required actual notice and then deliberate indifference on the part of the administrator.

Evans-Marshall v Board of Educ. Of the Tipp City Exempted Village Sch. Dist., No. 09-3775 (6th Cir. Oct. 21, 2010): The First Amendment right to freedom of speech does not extend to in-class curricular speech, made by teachers as part of their official duties. Evans-Marshall was a language arts teacher, about whom many parents had complained regarding her choice of texts and teaching methods. The principal had advised her that, "[a]ny material containing graphic violence, sexual themes, profanity, suicide, drugs and alcohol need [sic] to be discussed with your department chairs before being used in class." Evans-Marshall responded that none of her books contained inappropriate content and had been approved by the school board. Ultimately Evans-Marshall's contract was not renewed, at which time she filed suit alleging retaliation for exercising her freed speech rights to select class materials. Upon reaching the 6th Circuit, the court saw two competing claims: (1) the First Amendment rights of the teacher to choose her own reading assignments and teaching methods; and (2) the authority of the school board to dictate curriculum. The court applied a test which required the public employee to show that (1) the employee's speech involved a matter of public concern; (2) the interest of the employee as a "citizen" must outweigh the interests of the state as "employer"; and (3) that the speech must not be made as part of the employee's official duties. As stated in the United States Supreme Court opinion in *Garcetti*, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the constitution does not insulate their communications from employer discipline." Consequently, although the first two criteria to prove retaliation had been met, Evans-Marshall was unable to overcome the Court's words in *Garcetti*. While the court did recognize that the Court had specifically reserved the question as to whether teachers' classroom speech enjoy academic freedom and therefore are protected by the First Amendment, the panel concluded, "Even to the extent academic freedom, as a constitutional rule, could somehow apply to primary and secondary schools, that does not insulate a teacher's curricular and pedagogical choices from the school board's oversight, as opposed to the teacher's right to speak and write publicly about academic issues outside of the classroom."

RELIGION

Croft v Perry, No. 09-10347 (5th Cir. Oct. 13, 2010): Since 2007, the Texas Pledge of Allegiance has included the phrase, "one state under God." Under the school laws of Texas, recitation of the Texas Pledge of Allegiance is mandatory. Students may opt-out only by written request of their parents or guardians. A group of parents sued, alleging that the state law violated the Establishment Clause because (1) the pledge's use of the singular "God" impermissibly favors monotheistic over polytheistic beliefs; (2) the amendment does not have a secular purpose or effect, as any stated purpose is pretext for a religious motivation; (3) the pledge impermissibly

endorses religious belief by affirming that Texas is organized “under God”; and (4) the pledge’s recitation in schools pursuant to § 25.082 of the Texas Education Code impermissibly coerces religious belief.” The parents’ suit was dismissed. The court reviewed current precedent on the constitutionality of the national pledge. The Supreme Court has never addressed the constitutionality, but has suggested on several occasions that it is constitutional. Moreover, the Fourth, Seventh, and Ninth Circuits have all found the national pledge to be constitutional. The court used this precedent to determine whether a secular purpose existed. The court found the Texas pledge’s use of the term God to be “adequately generic to acknowledge a wide range of religious belief, monotheistic and polytheistic alike . . . at acknowledging religion without favoring a particular sect of belief.” A reasonable observer would not find the primary effect of the pledge to endorse religion. The use of the word “God” “simply acknowledges, within a broader patriotic statement, a basic historic fact about our Nation: that religion was significant to our Founders and to their enduring political philosophy.” The court also found no coercion because there was no “formal religious exercise.” “[A] pledge of allegiance to a flag is not a prototypical religious activity...the pledge’s effect remains patriotic; its religious component is minimal and when contextualized, clearly understandable as an acknowledgment of the state’s religious heritage.”

***Sherman v Koch*, No. 09-1455 (7th Cir. Oct. 15, 2010):** In a 2–1 ruling, the 7th Circuit has ruled that the Illinois Moment of Silence law, which as finally written allows but does not mandate teachers to observe a period of silence at the beginning of the day, does not violate the Religion Clause of the First Amendment. The original 1969 law allowed, but did not mandate, a period of silence for silent prayer or reflection. In 1990 it was amended by adding a provision clarifying the right of students to voluntarily initiate prayer so long as it was done in a non-disruptive manner “consistent with the Free Exercise and Establishment Clauses of the United States and Illinois Constitutions, is not sponsored, promoted or endorsed in any manner by the school or any school employee.” In 2007 the observation of a period of silence was made mandatory, at which time Sherman challenged the law in federal court. A federal district court ruled that the 2007 amendment violated the Establishment Clause and was unconstitutionally vague. In reversing and remanding the 7th Circuit distinguished the Illinois law from the law in *Wallace v Jaffree*, 472 U.S. 38 (1985), which the Supreme Court had determined lacked a secular purpose. The court, after reviewing the legislative history of the Illinois law, concluded, “throughout the debates no one in either the House or Senate spoke of using the period of silence as a mechanism to return prayer to the school...In short, then, the debate of the initial bill and the veto override overwhelmingly supports Illinois’s stated secular purpose and provides a stark contrast to the *Wallace* case.” The dissent, which would have upheld the lower court, stated “[W]hile I recognize that we assess a legislature’s stated purpose with some deference let’s call a spade a spade—statutes like these are about prayer in schools...In my view, the legislature’s decision to make the Act mandatory represents an effort to introduce religion into Illinois public schools, couched in the ‘hollow guise’ of a mandated period of silence.”

LEGISLATIVE UPDATE

Both House and Senate both voted to override Governor’s Quinn veto on HB 5154 which will amend the Personnel Records Review Act to prohibit the disclosure of performance evaluations of all public employees, include school district employees. Quinn had wanted to exempt only police officers from the requirement of disclosure.

Effective immediately, school district need to have a diabetes care plan for student and designated care aids to perform the duties necessary to assist the student in accordance with his or her diabetes care plan. (HB 6065)