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**IN THIS ISSUE**

**SPECIAL EDUCATION**

*page 2*

**EMPLOYEE RIGHTS**

*page 2*

**STUDENTS' RIGHTS**

*page 4*

# Editor

**Elizabeth Timmerman Lugg, J.D., Ph.D.**

**Publications Manager**

**Andrea J. Rediger**

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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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## SPECIAL EDUCATION

***Hansen v Republic R-III Sch. Dist., No. 10-1514 (Jan. 21, 2011):*** Hansen was a typical elementary school “trouble maker.” By the end of 5th grade he had a variety of disciplinary and academic reports in his file. At that time his father requested that his son be evaluate for special education services. The school district determined that Hansen was not eligible for services. His father requested a due process hearing. The hearing office found for the school. The father appealed to the Missouri federal district court, which found that Hansen was disabled as defined by the IDEA and therefore eligible for special education services. The school district appealed on the grounds that the ruling was not support by the evidence in the administrative hearing file, therefore the court should have remanded the cases for further factual findings. The Eighth Circuit affirmed the lower court decision because, not only had factual evidence not be presented during the administrative hearing, additional evidence was not presented to the district court. No evidence had been presented to the court disputing Hansen’s diagnosis. As an appellate court it was free to review the district’s court legal conclusions de novo. After the de novo review, the court reached the same conclusion as the district court, that Hansen met the eligibility requirement for “emotional disturbance” and “other health impairment.” The court stated, “We agree with the district court that the administrative record supports the conclusion that J.H.’s educational performance is adversely affected by ADHA.” The ADHD diagnosis by itself was not sufficient to trigger application of services under the IDEA, but the fact that it affected his educational performance made Hansen eligible for special education services under the terms of the IDEA.

***T.B. v Bryan Indep. Sch. Dist., No. 08-20201 (5th Cir. Dec. 20, 2010):*** When can a parent recover attorneys’ fees under the terms of the IDEA? Not until their child has been identified as a “child with a disability.” T.B. had been diagnosed with ADHD in third grade but was found not to qualify for special education services. In sixth grade, after multiple discipline, T.B. was assigned to an alternative school. His parents requested a due process hearing geared toward ruling that T.B. was a “child with a disability.” The hearing officer found that only the IEP team could make that determination. The parents appealed the hearing officer’s findings to in Texas state court. The case was removed to federal district court, where the parents were found to be entitled to attorney’s fees under the IDEA since they prevailed on two of their claims during the administrative hearing. Upon appeal to the Fifth Circuit, the award of attorneys’ fees was vacated finding that “the plain language of the IDEA permits a court to award attorneys’ fees only to a parent who is both the ‘prevailing party’ and the parent of a ‘child with a disability.’”

## EMPLOYEE RIGHTS

***Thompson v North American Stainless, LP, No. 09-291 (U.S. Jan. 24, 2011):*** Termination of the fiancée of an individual who has filed a sexual harassment complaint against an employer, can be considered illegal retaliation. Both Thompson and his fiancée, Regalado, were employees of NAS. Three weeks after Regalado filed a sex discrimination complaint with the EEOC against their employer, Thompson was fired. So, Thompson filed his own Title VII lawsuit claiming illegal third-party retaliation. In a unanimous decision, the Supreme Court ruled that an employee who was terminated after his fiancée filed a sex discrimination complaint, had a valid claim for retaliation under title VII. The Court found two major issues: (1) was Thompson’s firing retali-

ation; and (2) if so, does that give Thompson a cause of action? Looking at the facts presented, the Court found that NAS had engaged in retaliation. The Court applied the standard from *Burlington N. & S.F.R. Co. v White*, 548 U.S. 53 (2006), be refused to provide a general rule regarding third-party retaliation. “Title VII’s anti-retaliation provision prohibits any employer action that ‘well might have dissuaded a reasonable worker from making or supporting a charge of discrimination... We expect that firing a close family member will almost always meet the *Burlington* standards, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize.” Looking at the second question, whether that third-party retaliation gave Thompson a cause of action, the Court looked to the standard enunciated in *Lujan v National Wildlife Federation*, 497 U.S. 871 (1990), “A plaintiff may not sue unless he falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.” Applying that to Thompson, Justice Scalia found, “Thompson is not an accidental victim of the retaliation—collateral damage, so to speak, of the employer’s unlawful act. To the contrary, injuring him was the employer’s intended means of harming Regalado. Hurting him was the unlawful act by which the employer punished her. In those circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII. He is a person aggrieved with standing to sue.” This cases makes it very clear, that employers must treat each individually employee on his or her own merits. If it happens that a fiancée or spouse of an employee is terminated after that employee has filed a Title VII action, the personnel file for the individual terminated must independently support valid grounds for termination. Failure to do so could result in the employer facing not one, but two, Title VII actions.

***Mulgrew v Board of Educ. of the City of New York*, No. 10-113813 (N.Y. Sup. Ct Jan 10, 2011):** Nothing appears to be safe from new FOIA (Freedom of Information Act) requests. In 2007–08 the NYCDE started to calculate a new “teacher’s value added” which was calculated by comparing a student’s predicted improvement on state tests to the student’s actual improvement on the state test. In 2010 media request this data under FOIA. When the teacher’s union found out that the district was going to release the information without first removing the names of individual teachers, it filed suit to block the release of the records until names were removed. Once deciding that the teacher’s union did have standing to sue, the trial court found that the district was not acting in an “arbitrary and capricious manner” by deciding that individual teacher names did not fall under a FOIA exception. Regarding the teacher’s union’s claim that releasing the names was an “unwarranted invasion of privacy,” the court found that “courts have repeatedly held that release of job-performance related information, even negative information such as that involving misconduct, does not constitute an unwarranted invasion of privacy...releasing the unredacted TDRs would not be an unwarranted invasion of privacy since the data at issue relates to the teachers’ work and performance and is intimately related to their employment with a city agency and does not relate to their personal lives.” The court was also not persuaded by the argument that the teachers had been promised, with the gathering of the data began, that their names would be confidential. Apparently the NYCDE did not have the power to make that promise.

***Matson v Board of Educ. of the City of New York*, No. 09-3773 (2d Cir, Jan. 11, 2011):** Not all medical conditions enjoy the same level of protection from disclosure. Matson was employed by the New York City schools as a music teacher. She also served as director and conductor of the New York Scandia Symphony outside of her employment with the school district. It was her work with that outside symphony and use of sick leave, which ultimately caused trouble for

Matson culminating in an investigation into an allegation of abuse of her sick leave. During that investigation, a document was found which concluded information from a doctor that Matson suffered from fibromyalgia. At the end of the investigation, the investigative report was posted on the district's website which was accessible by the public. Through that website, and a later newspaper article, it became publicly known that Matson suffered from fibromyalgia. Matson sued under §1983 alleging a violation of her constitutionally protected right to privacy. The lower court granted the school district's motion to dismiss stating, "Unlike the serious medical conditions that courts have recognized as giving rise to a privacy right . . . both of Matson's disclosed conditions are a far cry from the level of seriousness associated with HIV/AIDS and transsexualism. . . Matson cannot point to any history of discrimination against individuals with fibromyalgia that would lead the court to conclude that she is likely to face discrimination, hostility or intolerance because of her condition." In a 2-1 split, the Second Circuit upheld the lower court. While acknowledging that as a general rule there is an constitutional expectation of privacy in medical records, that under its precedent (2nd Circuit) the interest of confidentiality of medical records depends on the condition. The condition must carry with it the "sort of opprobrium that confers upon those who suffer it a constitutional right of privacy." In short, the only two conditions which have met the strict criteria of the Second Circuit are HIV/AIDS and transsexualism. The court found no evidence that Matson would face social stigma or discrimination upon disclosure of her condition.

***Cordray v Internation Prep. Sch., 09-1418 (Ohio Dec. 20, 2010):*** At least in Ohio, public officials can be held personally liable to the state for lost public funds. That was a lesson learned by the treasurer of a community charter school. The International Preparatory School (TIPS) was a charter school under Ohio state law. Shabazz was a member of the board and treasurer of the school. TIPS received funding based on the number of students enrolled. Once the school ceased operations, an audit found that TIPS had been submitting inflated enrollment figures and thus had been over paid about \$1.4 million by the state. The state sued TIPS and Shabazz in his role as treasurer for the school. Shabazz claimed immunity under state law. The trial court found Shabazz liable for the public funds. The Ohio Court of Appeals reversed, holding that Shabazz was not a public official and therefore could not be held personally liable, and since TIPS was established as a non-profit corporation, Shabazz was protected from personal liability as a corporate officer. The court found that she could only be held liable if there was a finding that she had breached her fiduciary duty or if the state could prove personal wrongdoing. The Ohio Supreme Court affirmed the court of appeals, but on different grounds. The supreme court stated that in Ohio public officials are strictly liable for loss of public funds that they have received. Charter schools are public schools established by state law, therefore Shabazz was a public official under state law. The court remanded the case back to the trial court for a determination of whether Shabazz's duties at TIPS would cause culpability under state law.

## **STUDENTS' RIGHTS**

***J.B. v Mead Sch. Dist. No. 354, No. 08-223 (Dec. 10, 2010):*** Not all student-to-student sexual harassment is actionable under Title VII or §1983. J.B. was a special education student who was subjected to ongoing sexual abuse from two other special education students. He did not disclose the abuse to his teacher, other than to say that the other students had told him to hug the principal and touch another student's backpack. It was finally another student who reported

an incident involving J.B. to the school, at which point an investigation was made. The school made appropriate changes and J.B. suffered no other sexual or physical abuse from that point on. After J.B. graduated, his parents filed suit alleging negligence and claims under Title VII and §1983. The federal district court ruled that, under the three-part-test for student-to-student sexual harassment laid out in *Davis v Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, the element of “actual knowledge” by the school district was not shown. Under the three-part test, the individual alleging harassment has the burden of proof to show (1) that he suffered sexual harassment that was so severe, pervasive, and objectively offensive that it could be said to deprive him of access to the educational opportunities or benefits provided by the school; (2) that the school had actual knowledge of the harassment; and (3) the school was deliberately indifferent to the harassment. The court stated, “At most administrators knew that J.B. had kissed [one of the harassers], hugged the principal, and touched another student’s backpack, which does not amount to sexual abuse or harassment.” The fact that upon receiving actual notice, that the school acted and the harassment ended was strong evidence against deliberate indifference on behalf of the school.

***J.W. v DeSoto County Sch. Dist.*, No. 09-00155 (N.D. Miss. Nov. 11, 2010):** Contrary to what many students believe, confiscated cell phones are not immune from search under the Fourth Amendment. R.W. had his phone confiscated after he was caught reading a text message from his father in class. The school’s policy banned cell phone use and allowed teachers and coaches to confiscate phones. After viewing pictures on the phone, the principal concluded that some were “gang pictures” and suspended R.W. with a recommendation for expulsion. The suspension was upheld by a hearing officer and the school board. R.W. filed suit claiming a violation of his Fourth Amendment right to be free from unreasonable searches and seizures. The district court reviewed the behavior of the principal in light of the “reasonableness standard” set forth by the Supreme Court in *New Jersey v T.L.O.*, 469 U.S. 325 (1985). The court stated that “not only was the search in this case not contrary to ‘clearly established’ law; that law is actually quite favorable to the individual defendants in the case.” The reasonableness of the search rested on the fact that R.W. was caught using the phone in school, behavior clearly against school policy. The fact that he would openly violate on school policy, made it reasonable for the principal to believe that he may have violated other school policies, such as using the cell phone to cheat on a test or contact another student. As stated in *T.L.O.*, for a search to be legal it must be reasonable at its inception and reasonable in scope. The search of the confiscated phone met both criteria of a legal search by school officials.