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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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STUDENTS' RIGHTS

***Heyne v Metropolitan Nashville Bd. of Pub. Educ.*, No. 10-237 (Tenn. App. May 6, 2011):**

The Tennessee appellate court upheld a well established rule set by the United States Supreme Court in the case of *Goss v Lopez*, 419 U.S. 565 (1975) when it ruled that a student's due process rights were not violated when a school official served as both the investigator and the decision maker for the student's short term suspension. Heyne injured one student when he drove his car into a crowd of students on campus, and the injured student's foot became trapped under the wheel of Heyne's car. The principal suspended Heyne for two days while he investigated the incident. He then changed it to a 10 day suspension pending a discipline hearing. Heyne was found guilty of violating the Student-Parent code of conduct. When Heyne exhausted his internal appeals he filed suit alleging violation of his due process because he administrators operated as both the investigator and the "judge and jury." The trial court found for Hayne, finding that the school district had violated his procedural due process by failing to provide an "impartial hearing."

Upon appeal, the Tennessee Court of Appeals reversed stating that the school district had provided more due process than required by the Supreme Court under their *Goss* decision which provides that for short term suspensions (10 days or fewer) "the student [must] be given oral or written notice of the charges against him, and if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." The court stated "[A]lthough participation by the investigating administrators in the deliberation process can be problematic, any form of function combination, occurring alone and without other exacerbating biasing influences, is very unlikely to run afoul of procedural due process and to succeed on a violation of due process claim based on an impermissible combination of functions argument the claimant must demonstrate that a risk of actual bias is intolerably high, not merely that a combination of functions exists." In other words, when talking about a short term suspension, the court will operate under the rebuttable presumption that administrators will be fair and impartial when dealing with the discipline of a student. School administrators go into the profession to benefit children, not hurt them. Therefore, absent convincing and compelling evidence to the contrary, combining the functions of both "prosecutor and decision maker" is not necessarily a fatal flaw which automatically denies an accused student of his or her due process.

***R. O. v Ithaca City Sch. Dist.*, No. 09-1651 (2d Cir. May 18, 2011):** More United States Supreme Court cases – *Bethel School District No. 403 v Fraser*, 478 U.S. 675 (1986) and *Hazelwood School District v Kuhlmeier*, 484 U.S. 260 (1988) – were the basis of a decision by the U.S. Court of Appeals for the Second Circuit when it ruled that school officials had not violated the free speech of a student journalist. The student editors of the high school newspaper wanted to run a rather sexually explicit cartoon to accompany an article entitled, "How is Sex Being Taught In Our Health Class." The faculty advisor felt that the cartoon was inappropriate so deleted it, but allowed the story to run. The students then tried to distribute an underground newspaper with both the cartoon and the story, but school officials denied the students permission to distribute it. The students filed suit claiming violation of their First and Fourteenth Amendment rights. The students claimed that the guidelines for the student newspaper were unconstitutionally vague and overbroad. While the district court ruled that the school had not violated the students' free speech rights, it did find that the newspaper guidelines were unconstitutionally overbroad and it was on this issue that the case was appealed.

In affirming the lower court's decision, the Second Circuit declined to label the school newspaper a "limited public forum." The court found that there was "no evidence that ICSD invited all types of expressive activity in *The Tattle*, including speech otherwise inappropriate for a student audience. . . [or] that the school permitted indiscriminate use by the general public." Such would be necessary to create a public or a limited public forum. Therefore, following the guide of the Supreme Court, the Second Circuit listed two circumstances under which school officials may censor student speech without running afoul of the Constitution, which applied in the instant case: (1) vulgar, lewd, indecent or plainly offensive speech under *Fraser*; (2) speech which is reasonably related to legitimate pedagogical concerns under *Hazelwood*.

***Herrera v Santa Fe Pub. Sch.*, No. 11-0422 (D. N.M. May 20, 2011):** It appears that what might pass muster for the TSA at an airport, is not appropriate at a school prom. Prior to entering her high school prom, Herrera was subjected to a pat down by the security individuals hired by the school district. The search included Herrera being instructed to spread her arms and legs, touching of her arms, stomach, legs, and breasts, as well as the lifting of her prom dress to mid-thigh level. In addition, the contents of her purse were dumped out and various items were confiscated. Herrera filed suit including a request for a temporary injunction. The district court found that the personal searches by the security officials were likely to be found to be a violation of the Fourth Amendment so issued an injunction against such searches, but refused to issue an injunction against the search of possessions. Because Herrera would be unable to attend her graduation without undergoing a pat-down which she considered unconstitutional, the court found that she would suffer irreparable injury if a temporary restraining order was not issued. The court went on to state that "because of the intrusive nature of the pat-down searches, because of the general character of the prom and graduation events, and because there is no evidence that less intrusive alternatives would not adequately accomplish the purposes of the intrusive pat-down searches not employed or that non engaging in pat-down searches would unnecessarily jeopardize the governmental interests" the court it likely that Herrera would prevail on her Fourth Amendment claims. The district court concluded that there existed "a substantial likelihood that the practice of patting down students, without any individualized reasonable suspicion, is unreasonably intrusive." The court went on to say that it did not see the same problem with intrusiveness with a wand search, but under past legal precedent, to go beyond a wand search there would need to be individualized reasonable suspicion.

As regarding possession, however, the court did not have the same concern of intrusiveness. "Given the decreased expectation of privacy, minimal intrusion, and governmental interests met through the searches, the court does not believe there is a substantial likelihood that the Plaintiffs will show that all searches of possessions, and that seizures of weapons, drugs, and alcohol for all school events, and, in addition, distracting contraband for graduations, violates the Fourth Amendment."

***Victory Through Jesus Sports Ministry v Lee's Summit R-7 Sch. Dist.*, No. 10-2296 (8th Cir., May 20, 2011):** After receiving complaints from parents that too many non-school related flyers were coming home in the backpacks of their elementary school children, the school district adopted a policy regulating the time, place, and manner of distribution. The school limited distribution to "not-for-profit organizations and approved events sponsored by civic groups that directly benefit R-7." The one exception to the policy was for community youth organizations; it gave them a one time opportunity to distribute programs flyers at the beginning of the school year. In

the spring, Victory Through Jesus Sports Ministry asked permission to hand out flyers promoting their summer soccer camp. The school district informed them that they had missed the “beginning of the year” opportunity, but that if the group would show proof of its not-for-profit status, that the school would post the flyer on its web site. That summer, on the advice of counsel, the school changed its policy to state: “Flyers that have been approved will be sent home with students and/or posted on the district’s website.” The policy then listed the groups/organizations approved for distribution. Community youth organizations were again given a one-time exception. VTJSM once again asked to distribute its flyers and asked that the district policy be changed to include them in the list of approved groups. VTJSM ultimately filed suit, but it was dismissed by the district court after the school district further amended its policy. The district court found that the school had not created a designated public forum. Rather, the court found that the district’s “sole purpose in adopting the KI-AP was to limit the volume of promotional materials sent home with students; that in limiting this service the District allocated most of its flyer distribution efforts to community-based groups with which it had reciprocal agreements or that had provided longstanding support the District; that the District’s decisions limiting distribution of Victory’s flyers were not based upon Victory’s religious orientation; and that Victory had no present intent or financial ability to distribute flyers at anytime other than in April.”

The Eighth Circuit unanimously affirmed the lower court. The court agreed that no designated public forum had been created. Instead, the district had created a non-public or a limited public forum which could be “limited to use by certain groups or dedicated solely to the discussion of certain subjects.” Reasonable and view-point neutral rules and regulations could be imposed by the creator of the forum. As regarding “reasonableness,” the forum must be “reasonable in light of the purpose which the forum at issue serves but need not be the most reasonable or the only reasonable limitation.”

H. v Easton Area Sch. Dist., No. 10-6283 (E.D. Pa. Apr. 12, 2011): Students were found to be in violation of the school’s code of conduct when they insisted upon wearing bracelets which contained the message “I [heart] boobies” which had been purchased from a website purporting to give a portion of its profits to the fight against breast cancer. The school had found the bracelets to be vulgar and had disciplined the students, although no disruption to the educational atmosphere occurred. The students filed suit claiming a violation of their First Amendment Rights. The court issued a preliminary injunction preventing the school district from preventing the students from wearing the bracelets. The court looked toward an early *Third Circuit case, Saxe v State College Area School District*, 240 F.3d 200 (2001) to provide guidance as to the applicability of the Supreme Court decision in *Bethel Sch. Dist. v Fraser*, 478 U.S. 675 (1986). In *Saxe*, the district court found a “proper *Fraser* analysis involves the narrow inquiry as to whether the speech at issue is lewd, vulgar, or otherwise offends for the same reason that obscenity offends.... A public school’s decision to censor lewd or vulgar speech under *Fraser* is permissible if the school’s determination is an objectively reasonable application of *Fraser*.” In the instant case, the court failed to find the word “boobies” to be vulgar. Moreover, given the context in which the word was used – a bracelet designed to raise awareness about breast cancer – the court found *Fraser* to be inapplicable. Turning to whether the school district was justified under Tinker Material and Substantial Disruption Test, the court found no evidence “of any incidents that caused the type of disruption required by *Tinker*.”

SPECIAL EDUCATION

T. K. v New York City Dept. of Educ., No. 10-752 (E.D.N.Y., Apr. 26, 2011): Peer bullying and harassment can be a denial of FAPE. T.K. was a special education student who was subject to continued and pervasive physical, verbal, and psychological bully by classmates. When the parents tried to address the bullying during an IEP meeting, they were informed by the principal that this meeting was not the appropriate place to address those concerns. Yet, when the parents attempted to address the issue at other times, they were ignored. Finally, the parents pulled T.K. from public schools, placed her in private school, and filed an administrative complaint seeking reimbursement for tuition and expenses. The parents were unsuccessful at all levels so appealed those decisions to the federal district court, alleging that the bullying made the child's educational environment hostile and that such should have been taken into account when determining FAPE in the administrative hearings. While other issues were in the suit which was filed, the court focused on whether peer bullying could serve as a basis for denial of FAPE. While the court concluded that both Title IX and Section 504 of the Rehabilitation Act, IDEA impose an affirmative duty on schools to address bullying and harassment, it found the question of whether such can be used as grounds for a finding of denial of FAPE was a question of first impression in the second circuit. "The court found that the Third, Seventh, and Ninth Circuits have held that bullying can be a basis for denial of a FAPE, but those circuits had not established any rule or standard for determining when bullying constitutes such a denial. So, the court announced the applicable rule which requires that once bullying and harassment incidents which may affect the education of a special education student are known by a school district, they must be investigated and, if found to have occurred, be affirmatively prevented from happening in the future. In the instant case, the court found that the applicable rule had not be met. "Where bullying reaches a level where a student is substantially restricted in learning opportunities she has been deprived of a FAPE."

EMPLOYEE RIGHTS

United States v New York City Dept. of Educ., Nos. 08-5171/08-5172/08-5173/08-5375/08-5149/08-4639 (2d Cir. May 5, 2011): This cases directly relates to a 1996 case where discrimination under Title VII was alleged because of the weight given to a civil service examination which was shown to discriminate against Black, Hispanics, Asians, and women. As part of a settlement of that suit, 63 black, Hispanic, Asian or female custodial employees were given retroactive seniority. A group of primarily white male custodial employees who were disadvantaged by the terms of the settlement intervened in the granting of a consent decree and were able to appeal to the Second Circuit. They alleged that portions of the settlement awarding the retroactive seniority violated Title VII and/or the Equal Protection Clause. By the time that the appeal was made, the United States Supreme Court had decided *Ricci v DeStefano*, 129 S.Ct. 2658 (2009) which addressed the relationship between Title VII's disparate treatment and disparate impact prohibitions. The Court in *Ricci* held that "under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action." The court found *Ricci* to be directly applicable to this case. The granting of retroactive seniority would be

a clearly discriminatory race-based and gender-based action which could only be avoid being seen as violating Title VII's disparate impact prohibition if it qualified as (1) an valid affirmative action plan; or (2) could be justified as a remedy for a disparate impact violation. The idea of an affirmative action plan was immediately dismissed because prospective benefits to specific individuals were being provided. Because insufficient evidence was provided that a disparate impact claim would follow concerning the use of the alleged discriminatory civil service exams, the court could find no justification under *Ricci* for the clearly discriminatory race-based and gender-based actions included in the settlement. "We hold that, under *Ricci*, a strong basis in evidence of non-job-relatedness or of a less discriminatory alternative requires more than speculation, more than a few scattered statements in the record, and more than a mere fear of litigation, but less than the preponderance of the evidence that would be necessary for actual liability."

RELIGION AND THE SCHOOLS

Roman Catholic Archdiocese of Indianapolis v Metro Sch. Dist. of Lawrence Twp., 49A02-1004-PL-427 (Ind. App. Mar. 28, 2011): Just like many school districts around the country, the Metropolitan School District of Lawrence Township (MSDLT) has been providing transportation to local Catholic school students. Students would be picked up and taken to the middle school. From there, buses would take them to their individual Catholic schools. As money became tighter in 2009, MSDLT decided to start charging the Catholic schools for this service. The Archdiocese refused to enter into the agreement and filed suit, seeking a temporary restraining order to keep the service in place. While the temporary restraining order was granted, MSDLT ultimately prevailed. The trial court found no legal requirement for MSDLT to provide the bus service. On appeal, the Indiana Court of Appeals affirmed the lower courts' decisions. Looking at the actual wording of the controlling statute, specifically the wording which authorized a school district to drop off nonpublic students at either the nonpublic school or "the point on the regular route that is nearest or most easily accessible to the nonpublic school," the court determined that alternative drop-off points were already contemplated by the statute therefore it could not be reasonably "construed as mandating the School District to deliver the nonpublic school students to the nonpublic schools." A 1933 Indiana Attorney General's opinion stated, "Apparently the legislature only intended to extend the privilege of free transportation to parochial pupils where they could be accommodated in the bus or conveyance already in use on such regular route, as otherwise there would have been no purpose in inserting the limiting phrase, 'by means of such school bus or conveyance.'" A 1980 Attorney General's opinion stated, "It is not required that the school corporation revise the bus route to accommodate the parochial school children." *Editor's Note: While this case is out of Indiana, the law is essentially the same in Illinois. It is not a violation of the Establishment Clause of the Federal Constitution for public schools to provide transportation to parochial school students. It is not required, however, that public school establish new routes, incur additional costs, or go into debt in order to provide such transportation.*

Moss v Spartanburg County Sch. Dist. No. 7, No. 09-1586 (D.S.C. Mar. 5, 2011): A long standing practice in South Carolina was to release students during the school day to receive religious instruction from the religious institution of their choice. In 2006 the state legislature adopted the South Carolina Release Time Credit Act (SCRTCA) which allowed local high schools to award elective academic credit for such off-campus religious instruction. The Spartanburg County School District was one district which chose to award such credit. It began

offering religious instruction through the Spartanburg County Bible Education in School Time at a local private religious school. Although the school district attempted to distance itself from the religious instruction program, the program continued to be given a table at Parent-Teacher Open House and religious program instructors were allowed to recruit students in the middle school and attend professional development opportunities with district teachers. Eventually a lawsuit was filed, not attacking the state law, but alleging that Spartanburg's implementation was unconstitutional as (1) lacking a predominately secular purpose (2) having a principal effect of advancing religion; (3) fostering excessive entanglement. In finding on behalf of the school district, the court found no violation of the Establishment Clause. The court applied the Lemon Test from *Lemon v Kurtzman*, 403 U.S. 602 (1971), as well as reviewing the Supreme Court cases of *McCullum v Board of Education*, 333 U.S. 203 (1948) and *Zorach v Clauson*, 343 U.S. 306 (1952)

Applying the "purpose" prong of the Lemon Test, the court found that the school district's express purpose for adopting the policy was to accommodate parents' and students' request for religious instruction. Given the historically "low hurdle" to clear this prong, the court found this purpose acceptable. "The text of the policy, cast in neutral terms, evidences no facial intent on the part of the School District to favor religion in general or a particular religious sect." As to the "effect" prong of the Lemon Test, the court found that "None of Plaintiffs' allegations of cooperation between SCBEST and the School District rise to the systemic and intricate relationship formed between a public school and religion found unconstitutional in *McCullum*...Based on the foregoing, Plaintiffs have failed to show that the School District's cooperation with SCBEST was anything more than a passive response to the development of a neutral released time policy that comports with the First Amendment." As regarding excessive entanglement, the third prong of the Lemon Test, the Plaintiffs alleged that by allowing public school credit to be granted for religious instruction the school unavoidably becomes impermissibly entangled with the religious institution providing the instruction. The court dismissed this prong with little explanation.

LEGISLATION

FERPA: A period of public comment on proposed amendments to the Family Educational Rights and Privacy Act (FERPA) is now underway. The proposed regulations would "give states the flexibility to share data to ensure that taxpayer funds are invested wisely in effective programs." The majority of the proposed changes go toward the sharing of information during the evaluation of programs subject to the confidentiality provisions of FERPA.

The following are bills which have received final approval from the Illinois General Assembly and are headed to the Governor:

- HB 200 Protocols established by IHSA for student athletes suspected of having sustained concussions.
- HB 1216 Establishes a School District Realignment and consolidation Commission
- SB 1578 Requires that 2 of the required 4 yearly teacher institute days must be used as a teacher's and educational support personnel workshop.
- SB 1686 Changes publication requirements for certain units of local government

- SB 1794 Changes that statutes to align with the “Corey H” case out of Chicago. Special education teachers will no longer be certified by categorical designation; makes permanent changes to special education teacher training curriculum
- SB 2170 Allows counties to impose a sales tax specifically earmarked for school construction
- HB 3171 Adds the position of Assistant Principal in the School Code
- HB 3222 Provides for the CSBO endorsement to be affixed to the administrative certificate of any certificate holder who has a Master’s Degree in Public Administration
- HB 12 Makes school energy efficiency grants available to special education cooperatives
- HB 189 The definition of a general education classroom under any state or administrative rule, which requires a certain percentage of special education students in the classroom to meet the definition, students who only receive speech services outside of the classroom may not longer be counted in the special education percentage
- HB 1130 Requires a policy on how to deal with the safety issues surrounding movable soccer goals
- HB 1706 A child qualifies for home or hospital instruction if it is anticipated that, for medical reasons, the child will be unable to attend school for a period of 2 or more consecutive weeks or on an ongoing intermittent basis and personnel reimbursement for home instruction will be calculated accordingly
- HB 3179 Habitual truant is now a student who missed 5% of the previous 180 regular attendance days
- HB 3489 Allows school board to adopt a substitute authorization program for substitute teachers who do not hold a certificate valid for teaching in the common schools as shown on the face of the certificate