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# Editor

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

**Publications Manager**

**Andrea J. Rediger**

## 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

***Kuhr v Millard Pub. Sch. Dist., No. 09-363 (D. Neb. Nov. 8, 2011):*** Several gangs had been causing problems at the Millard Public School District since the 1990s. After Kuhr's friend was killed as a victim of the gang violence, Kuhr created a memorial t-shirt and wristband. He and his siblings began wearing them to school. School district officials decided that they were gang-related apparel, and were banned under the school policy. All siblings were suspended. They filed suit alleging a violation of their First Amendment right to freedom of speech. The school district moved for summary judgment. The district court denied the motion, stating that the case was not moot because all three students were no longer in attendance at the school. Looking at the free speech claim, the court found that the symbolic speech involved fell under the material and substantial disruption test established in *Tinker*. Since the shirts were worn for several days with no incidents, the court found that the *Tinker* requirement had not been met and that the suspensions were in error.

***Dariano v Morgan Hill Unified Sch. Dist., No. 10-02745 (N.D. Cal. Nov. 8, 2011):*** Three students were forbidden to wear shirts with a picture of the American flag/pro-USA message on Cinco de Mayo day. They and their parents were told that they could wear the shirts on any day except Cinco de Mayo day. The principals based their decision on a school policy which stated in part, "Clothing...or actions which...disrupt school activities will not be tolerated." When the Superintendent did not support their decision, the principals left their employment with the school district. The parents filed suit against the principals alleging a violation of their rights to free speech, due process, and equal protection. The court determined that the speech fell under the *Tinker* substantial and material disruption test, but did not find that actual disruption needed to have occurred in order for the test to be met. Based on the facts of the instant case, the court concluded that "the school officials reasonably forecast that the clothing could cause a substantial disruption with school activities and therefore did not violate the standard set forth in *Tinker* by requiring that the shirts be changed." Although this was a case of first impression for the Ninth Circuit, the court stated that other circuits which had addressed the issue had shown great deference to the decisions of school officials on the issue of student safety.

***K.A. v Pocono Mountain Sch. Dist., No. 11-347 (M.D. Pa. Oct. 20, 2011):*** Plaintiff wanted to distribute flyers advertising her church's Christmas party to her classmates via their school mailboxes. The principal was required to approve the flyer before they were distributed. Since it was a non-school related flyer, it had to also be approved by the superintendent. The superintendent did not approve Plaintiff's flyer as it violated school policy regarding requests from civic organizations or special interest groups. Plaintiff's father filed suit alleging a violation of his First and Fourteenth Amendment rights, and requested a preliminary injunction. The district court granted the injunction allowing Plaintiff to distribute the flyers. The court stated that Plaintiff was likely to prevail on her free speech claim because the student speech involved is not subject to a forum analysis. Although the court conceded that the flyer was a hybrid of personal and commercial speech, the court continued to affirm that *Tinker*'s material and substantial disruption test controlled, because it could be reasonably viewed as an attempt to proselytize Plaintiff's personal religious beliefs. The court was not persuaded by the defendant's purported concerns about student safety and possible disruption of the educational atmosphere. Moreover, although districts have the power to control the time, place, and manner of communication so long as such restrictions are viewpoint neutral, the fact that the superintendent had final authority to approve or deny the

communication was simply too broad and vague to be considered reasonable, and would be ripe for abuse.

***Sapp v School Bd. Of Alachua Cnty.*, No. 09-242 (N.D. Fla. Sept. 30, 2011):** Seven students wore t-shirts bearing the caption “Islam is of the Devil.” They were found to be in violation of the dress code and were sent home. The dress code was also enforced when the shirt was worn to a football game. The students filed suit alleging violation of their Freedom of Speech and for a preliminary injunction. The court declined to grant the injunction in light of the fact that the school now required students to wear school uniforms, so the purpose of the injunction would be moot. The updated dress code also stated that clothing and accessories worn after school at school sponsored activities could not “have slogans, signs, images, or symbols that denigrate or promote discrimination for or against an individual or group on the basis of age, color, disability, national origin, sexual orientation, race, religion, or gender.” Both sides filed for summary judgment. The court granted summary judgment to the school district. The court looked at various Supreme Court freedom of speech cases and concluded that, under *Tinker*, school officials had the authority to restrict student speech when there exists a reasonable forecast that the speech will cause “appreciable” disruption to school discipline, and under *Bethel* when the speech includes the “use of vulgar and offensive terms and the use of terms that are highly offensive or highly threatening to others.” Since there were several documented incidences where the t-shirts in question had caused actual disruptions, “school officials had a reasonable fear that the t-shirts were likely to interrupt school activities and appreciably disrupt appropriate discipline in the school.”

## DISCRIMINATION

***Lewis v Ascension Parish Sch. Bd.*, No. 09-3971 (5th Cir. Nov. 3, 2011):** After achieving “unitary status” and therefore being released from a court desegregation order, Ascension Parish started to experience severe overcrowding at one of its middle schools. Wanting to maintain unitary status while addressing the overcrowding issue, the district established a plan which would maintain the current racial balance, but resulted in a disproportionate number of “at risk” students being assigned to predominantly minority schools. Lewis filed suit saying that, by overloading high-minority population schools with “at risk” students, the district was discriminating against those minority students. The suit was removed to federal district court and summary judgment was granted for the school district. The district court found that Lewis lacked standing to sue on behalf of one of the children, and that his claims were barred by the statute of limitations. As regarding the plan, the district court declined to apply strict scrutiny. Instead, it found that the plan was race-neutral on its face. Since no evidence was presented as to disparate impact, the court upheld the student assignment plan as a means to reach the legitimate government interest in alleviating overcrowding. On appeal, the Fifth Circuit upheld the lower court’s decisions as regarding standing and that the feeder plan was facially neutral, but reversed as to the issue of equal protection. The court stated that review of the student assignment plan should have been subject to strict scrutiny because it employed racial classifications as part of the plan. Even if a race-neutral government action has a “disproportionately adverse effect” strict scrutiny review should be triggered. Under strict scrutiny the court would automatically look at both racially discriminatory intent and disparate impact. Therefore, material and triable issues of fact did indeed exist and the granting of summary judgment was in error.

***Blunt v Lower Merion Sch. Dist., No. 07-3100 (E.D. Pa. Oct. 20, 2011):*** A group of African-American students filed a Title VI lawsuit alleging that they were not disabled but were incorrectly identified in special education programs because of their race, and that because of this action by the school district that they were denied equal educational opportunity. Specifically, because of their placement they were unable to take more challenging college preparatory courses. Their case relied heavily on general statistical evidence regarding the disproportionate number of African-American students receiving special education services. The court granted summary judgment for the Defendant School District. Reliance on statistical evidence is insufficient, by itself, to establish a prima facie case of intentional discrimination. The further claim that there were irregularities in the district's method of identifying and placing special education students, without specific evidence relating those irregularities to race, were also insufficient to create a prima facie case. Unlike a claim under the IDEA, Title VI requires plaintiffs to "raise at least some reasonable inference that they were placed in classes and offered services by the School District due to intentional discrimination based on their race and not simply due to errors in evaluation."

***Fell v Jefferson Cnty. Bd. Educ., No. 10-1830 (Ky. App. Ct. Sept. 30, 2011):*** After having its race-conscious student assignment plan struck down by the Supreme court, Jefferson County developed a new plan that did not take race into consideration. Under the new plan, parents could list attendance at the neighborhood school as one of four preferences, there was no guarantee that such assignment would occur. A group of parents whose children were not assigned to their neighborhood school filed suit alleging violation of a Kentucky law favoring attendance at neighborhood schools. Jefferson County filed a motion to dismiss stating that no such right to attend a neighborhood school existed under Kentucky law and, in order to achieve diversity, that the school district had the ability to bus children within the district. The trial court granted the motion. On appeal the lower court decision was reversed. The appellate court found that, under Kentucky law, that the legislature clearly "declared the right of every parent or legal guardian to enroll his or her child in the school nearest his or her home." It reject the school district's claim that enroll meant register and not attend.

## **EMPLOYEE RIGHTS**

***Lange v Diercks, No. 11-0191 (Iowa App. Ct. Nov. 9, 2011):*** Lange was both the journalism teacher and the faculty advisory for the student newspaper at Waukon High School. He was reprimanded twice for allowing students to publish articles which the administration found to be inappropriate in a school publication. Lange filed suit request a declaratory judgment that the publications did not violate Iowa law. Specifically, after the Supreme Court decision regarding student publications, the state of Iowa had passed legislation known as the Student Free Expression law. Iowa Code section 280.22 states:

1. Except as limited by this section, students of the public schools have the right to exercise freedom of speech, including the right of expression in official school publications
2. Students shall not express, publish, or distribute any of the following:
  - (a) Materials which are obscene;
  - (b) Materials which are libelous or slanderous under chapter 659;
  - (c) Materials which encourage students to do any of the following:

- (1) Commit unlawful acts;
  - (2) Violate lawful school regulations;
  - (3) Cause the material and substantial disruption of the orderly operation of the school.
3. There shall be no prior restraint of material prepared for official school publications except when the material violates this section
5. Student editors of official school publications shall assign and edit the news, editorial, and feature content of their publications subject to the limitations of this section. Journalism advisors of students producing official publications shall supervise the production of the student staff, to maintain professional standards of English and journalism, and to comply with this section.

The trial court granted summary judgment to the school because it believed that the articles in question, although not libelous, did violate Iowa law by encouraging students to potentially commit unlawful acts, violate school regulations, or cause material and substantial disruption to the orderly operation of the school. Lange appealed. The Iowa Court of Appeals reversed the trial court's decision and remanded the case with directions to remove the reprimands from Lange's personnel file. The court specifically rejected that the legislature, in enacting the law, was attempting to codify the holding in *Hazelwood v Kuhlmeier*. To the contrary, the court concluded that the law was enacted as a reaction to the Hazelwood decision to ensure that public school students in the state of Iowa were guaranteed more extensive free-expression rights than those allowed by the holding of the Supreme Court.

***Dellapenna v Tredyffrin Easttown Sch. Dist., No. 11-1394 (11th Cir. Oct. 28, 2011):*** Dellapenna was employed as director of finance. Suspecting that Dellapenna had committed fraud, the Chief Operations Office, Azzara, hired an outside auditor to conduct an investigation. While no fraud was found, the auditor did say that conventional accounting practices were not being used, and the office was dysfunctional with poor communication and personality conflicts. Dellapenna complained to the district that she was being subjected to a hostile work environment because of her age, gender, race, and/or ethnic background. After investigation no evidence of discrimination was found. Dellapenna was terminated for cause based on her "willful, wanton and gross misconduct as well as material and substantial dishonesty. She waived her right to a hearing and filed suit in federal district court under Title VII and state law. The district court found for the school district, holding that Dellapenna failed to establish a prima facie case. The Third Circuit reaffirmed the lower court, stating that the evidence presented did not support an action of Title VII discrimination or retaliation.

***Cypert v Indep. Sch. Dist. No. I-050 of Osage Cnty., No. 10-5122 (10th Cir. Oct. 19, 2011):*** Plaintiff was the high school secretary. She was terminated when the board determined that the district was in a financial crisis and that 11 staff positions needed to be eliminated. Plaintiff requested a nonrenewal hearing. She was the only one to do so. She was also the only one who was ultimately not renewed, even though her position was retained and another person was hired to fill it. She filed suit against the district and four board members alleging that her nonrenewal was retaliation for exercising her freedom of speech because she had signed a state-court petition calling for a grand jury investigation into the activities of board members. The defendants moved and were granted summary judgment. On appeal, the Tenth Circuit affirmed the lower court. The court applied the five-step framework established by the Supreme Court in *Garcetti v Ceballos*, 547 U.S. 410 (2006) and *Pickering v Board of Education*, 391 U.S. 563 (1968). Specifically,



the court looked to whether the speech was the motivating factor for the nonrenewal. The court found no causal connection between Plaintiff's speech and the decision for nonrenewal.

***American Civil Liberties Union Foundation of Iowa v Records Custodian, Atlantic Cmty. Sch. Dist., No. 11-0095 (Iowa App. Ct. Oct. 19, 2011):*** The Iowa Court of Appeals ruled 2 to 1 that a school district was not required under the state's open records act to disclose disciplinary records. In August 2009, two employees of the Atlantic School District conducted an investigation to recover \$100 which went missing. The investigation involved a strip search of five teenage girls. In November 2009, the Superintendent announced that the two employees would be disciplined but did not name the employees nor elaborate on the discipline. The ACLU filed a Freedom of Information request seeking "more information about the discipline of two Atlantic Community School staff members in response to the locker room strip search incident." The school district provided the names of the employees but did not give any additional information as to the discipline, stating that such was confidential information. The ACLU filed suit in state court. The court granted summary judgment to the school district. The ACLU appealed, claiming error by the court in not conducting a balancing test to determine whether such information should be kept confidential. The Iowa Court of Appeals affirmed the decision of the lower court, stating that no balancing test was required because "discipline reports are job performance records that are clearly confidential under Iowa law." The court pointed to recent amendatory legislation that was added to clarify legislative intent regarding confidentiality of employee records.

***Smith Cnty Sch. Dist. V Barnes, No. 10-681 (Miss. App. Ct. Sept 20, 2011):*** Barnes was an elementary school teacher. Principal Dees received reports from other teachers that Barnes was laying on the floor of her darkened classroom while students were present. Barnes claimed she was in severe pain because of an ovarian cyst. After discussion among the administration, Barnes was requested to submit to drug testing. Barnes agreed to the drug testing, but before it could be administered Barnes asked if she could resign. Before she signed the resignation letter, however, she decided that she didn't want to resign and would go through with the drug testing. After being told by her attorney to not submit to the testing, Barnes refused to be tested. She left the center but then came back and said she wanted to be tested. She was told it was too late since she had left. Barnes went and had a private drug test conducted, but before the results were given to the school board, she voluntarily admitted that she had tested positive for opiates and that she was on Xanax and Ambien. She claimed to have doctor's prescriptions for all medications. Barnes was then informed that she was being terminated for refusing to submit to a drug test, neglect of duty, and insubordination. She requested and was given a hearing before the board, which confirmed her termination. Barnes sued and the trial court found in her favor, ordering Barnes to be reinstated. The trial court found the board's decision to be arbitrary and capricious. The school district appealed. On appeal the trial court's decision was reversed. The court found that the evidence showed that the board's decision was reasonable and was not arbitrary and capricious; that district policy had been followed.

## **SPECIAL EDUCATION**

***Doe v Dublin City Sch. Dist., No. 10-3492 (6th Cir. Oct. 28, 2011):*** When Doe began to encounter academic and behavioral difficulties, his parents requested that the district conduct a Multi-Factored Evaluation and establish an IEP to meet his needs. The principal refused to do

so, stating that it was too late in the year. Doe's parents then pursued a private evaluation which resulted in a diagnosis of Asperger's Disorder, ADHAD, Anxiety Disorder, and Major Depressive Disorder. The parents once again asked that a Multi-Factor Evaluation be done and an IEP established. The principal failed to timely inform the parents of a staffing meeting, so they were not in attendance when it was decided that Doe did not have a disability. The school did provide the parents with a written notice of the decision. The school continued to drag its feet with obtaining appropriate assessments, but did provide a behavior intervention plan that could be used in the meantime. Doe's parents alleged that the plan was inadequate. After making more requests for an evaluation and being met by a reluctant district, the parents filed suit in federal district court alleging violation of the IDEA. An interim agreed order was reached and an appropriate IEP and services were provided. The district then moved for dismissal of the suit stating that the parents had failed to exhaust administrative remedies. The parents filed a motion for over \$40,000 in attorneys' fees stating that they were the prevailing party because the district had agreed to the terms of the agreed order. The district court granted the motion to dismiss and denied award of attorneys' fees. The Sixth Circuit affirmed the lower court's decision, stating that a party must exhaust its administrative remedies before turning to the courts under the IDEA, unless doing so would be futile or inadequate to protect the plaintiff's rights. The parents had not requested a due process hearing, therefore could not show that such would have been futile or inadequate.

***S.S. v Princeton House Charter Sch., No. 11-1145 (M.D. Fla. Sept. 20, 2011):*** S.S. was an autistic child attending Princeton House Charter School. On two separate occasions, it was alleged that S.S. was physically and/or verbally abused. One incident involved confining S.S. in a fabric tunnel, shoving, and then forcibly dragging her. The second incident involved S.S. being dragged and restrained in a chair. The parents of S.S. alleged physical and emotional damages. Princeton House filed a motion to dismiss because a valid claim under Section 1983 had not been filed because the allegations did not "shock the conscience" and Princeton House was not acting under color of state law. The district court denied the motion to dismiss stating that the parents had stated claims valid to sustain a Section 1983 action for violation of due process but alleging psychological and physical harm. Because Princeton House was a charter school under Florida state law, it was acting under color of state law.