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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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School District Issues

***Slippery Rock Area Sch. Dist. v Pennsylvania Cyber Charter Sch.,* J-22-2011 (Pa. Sup. Ct. Nov. 23, 2011):** Under the terms of the Pennsylvania Charter School Law (PCSL), school districts are responsible to pay the charter school for each student in the charter school who resides in their district. If the school fails to pay for their students, the PCSL authorizes the amount to be deducted from state aid to the district. This is what happened to Slippery Rock Area School District because of their failure to pay Pennsylvania Cyber Charter School (PCCS) for numerous students. Slippery Rock objected to the withholding of money for a four-year-old student enrolled in PCCS's kindergarten program, stating that under Pennsylvania law compulsory education was for children between the age of six and twenty-one. While Slippery Rock provided kindergarten education for children at five years of age, the four year old was too young to be a student at Slippery Rock and therefore was not the responsibility of Slippery Rock to fund at PCCS. Slippery Rock lost at both the administrative hearing and in the lower courts. The only question forwarded to the Pennsylvania State Supreme Court was whether a school district that has exercised its discretion not to provide a kindergarten program for four-year old students within its district is nevertheless obligated to fund a kindergarten program provided by a cyber charter school for a four-year old student residing with that same district. The court found "that the cyber charter school is bound by the policy of the school district in which the student resides." In making that decision, the court relied on the wording of the Pennsylvania Administrative Code: "School age is the period of a child's life from the earliest admission age to the school term in which a student reaches the age of 21 years, whichever occurs first." Therefore, the minimum age for entry into the school district's program took precedent over the entrance age set by the charter school as regarding financial reimbursement.

***Student Doe 1 v Lower Merion Sch. Dist.,* No. 10-3824 (3d Cir. Dec. 14, 2011):** A group of African-American students filed suit against the Lower Merion School District alleging that the new redistricting plan violated their equal protection and Title VI rights. The redistricting plan targeted an area of the district with the highest concentration of African-American students and assigned all students to Harriton High School. The district court held that there was no discrimination in the redistricting plan. The court reviewed the plan under strict scrutiny and found that the goals of the plan—to equalize the populations at the two high schools; minimize transportation time and costs, foster educational community, and fostering walkability—had been achieved with the most narrowly tailored plan as possible. "Because Plan 3R is the only plan the Court is aware of that simultaneously meets these goals, it is narrowly tailored and therefore survives strict scrutiny. The Third Circuit affirmed the lower court's decision but disagreed with the application of strict scrutiny. The court found that, on its face, the plan was racially neutral because the assignment of students was based on geographical rather than racial classifications. "Plan 3R does not treat black students in the Affected Area and a separate neighborhood similarly, nor does it treat white students in either area similarly to other white students or differently from the black students in the same area, and therefore no evidence has been provided indicating assignments based on racial classification here." The court found that rational basis standard should have been applied. Under the rational basis standard, "a challenged classification must be upheld if it is—rationally related to a legitimate state interest."

***Ahlquist v City of Cranston,* No. 11-138 (D.R.I. Jan, 11, 2012):** A banner hung on the wall of the Cranston High School West's auditorium, which contained a Christian prayer calling on "Our

Heavenly Father" to guide students. It has hung on the wall since 1963 when the school opened. When the district refused to remove the banner upon request by Ahlquist and the ACLU-RI, suit was filed. The district court granted Ahlquist's motion for a permanent injunction and ordered the district to remove the banner from the wall immediately. The court concluded that regardless of the test used (*Lemon,* endorsement, or coercion) that the display of the banner could not be justified. Under the *Lemon* Test, the court could find no secular purpose for installing and voting to retain a Prayer Mural. The district failed the endorsement test when, in March 2011, the district "endorsed the position of those who believe that it is acceptable to use Christian prayer to instill values in public schoolchildren; a decision that clearly placed the 'nonadherents' outside of the political community." Finally, although the coercion would be subtle, using the highest scrutiny as mandated by Supreme Court Establishment Clause cases, there could be coercion to appear to support a particular religion.

***Williams v Port Huron Sch. Dist.,* 10-1636 (6th Cir. Jan. 9, 2012):** Plaintiffs, African-American students, alleged that they were subjected to constant peer racial harassment by white students for a three year time period. For the first two years, it was alleged that the principal, Wojitas, did little to investigate allegations of the use of racial slurs even though parents and students reported the incidents. In the final year, after Jones became superintendent and Dahlke became principal, the district began to respond to the complaints, including hiring outside consultants to conduct investigations and provide recommendations. It was alleged, however, that despite the best attempts of Dahlke, the racial harassment continued. Plaintiff's claimed that they were deprived of an equal educational opportunity in violation of Title VI, state law, and §1983. The individual defendants claimed qualified immunity. When that motion was denied by the district court, they filed an interlocutory appeal. In reversing the lower court, the Sixth Circuit stated that in order to determine if the individual defendants were entitled to qualified immunity, two questions must be answered: (1) whether a constitutional right has been violated; and (2) whether that right was clearly established at the time of the alleged violation. As regarding the equal protection allegation, the individual defendants must have been deliberately indifferent to the reports of the harassment. The court found that neither Dahlke nor Jones had been deliberately indifferent to the racial harassment. As regarding the individual school board members, Michigan law imposes duties on the board as whole, not individual members, therefore members did not have any legal obligation to act individually.

Students' Rights

***State of Idaho v Voss,* No. 38366 (Idaho Nov. 23, 2011):** Voss was reported for erratic driving on school grounds. When an assistant principal investigated he smelled cigarette smoke on Voss. Possession of tobacco on school grounds was prohibited, so he searched the car. During the search he and the school resource office found a marijuana pipe with residue and brass knuckles. Voss attempted to suppress the evidence, arguing that the search was illegal. The court concluded that the search did comply with the two-part test established in *T.L.O. v New Jersey.* Despite the fact that Voss was of legal age to possess tobacco, the fact that he was in violation of school district policy provided reasonable suspicion for the search. *T.L.O.* specifically talked of "reasonable suspicion of an infraction of school rules" or of the law. "School officials are entrusted with determining what rules may be necessary to protect the order of schools, and a warrantless search of a student on school grounds may be based on reasonable suspicion that the student is violating either such a school rule or a law; there is no requirement for the infraction to be both."

***Wyatt v Kilgore Indep. Sch. Dist.,* No. 10-674 (E.D. Tex. Nov. 30, 2011):** S.W. was a softball player. Her coaches confronted her about her relationship with an 18 year old woman, and disclosed to S.W.'s mother that S.W. was a lesbian. The district stated that S.W. was openly gay at the time of the incident and only questioned S.W. because the woman with whom she was involved was also alleged to be involved in drinking and drugs. The coaches claim that they just informed S.W.'s mother of the relationship and their concerns. S.W.'s mother reported the incident to the athletic director but no investigation was made so she appealed the lack of action. Still no action was taken. S.W.'s mother filed suit claiming a violation of S.W.'s substantive due process right to privacy by disclosing her sexual orientation. The district filed motions for summary judgment, claiming the defense of qualified immunity. The court denied the motions for summary judgment because the two widely divergent versions of what happened raised "genuine issues of material fact as to whether the Coaches acted in an objectively reasonable manner and violated S.W.'s clearly established right to privacy." Turning to the question of S.W.'s right to privacy, the court determined that the Fourteenth Amendment protection of the "individual interest in avoiding disclosure of personal matters" had been implicated. "Although there is clear precedent that a person has a right to the privacy of sexual information, the Fifth Circuit has not explicitly held that person has a right to prevent the unauthorized disclosure of his or her sexual orientation." The court decided that such matter is subject to confidentiality. As for the Coaches' contention of a legitimate interest in disclosing the information, the court performed a balancing test and decided that S.W.'s right to confidentiality outweighed any interest that the district may have had in disclosure. "A reasonable person could conclude that the Coaches were not motivated by the need to protect S.W. but rather were retaliating against S.W. for spreading a rumor about Coach Fletcher."

***L.A. v Board of Educ. of Twp. of Wayne,* No. 14241-11 (N.J. O.A.L. Dec. 1, 2012):** A group of football players got into a physical fight at an off-campus party. The policy charged them with aggravated assault. As a result, the district suspended them from playing football, but stayed the punishment so that they could play in a playoff game. Once the suspensions were reinstituted, the players filed suit with the Office of Administrative Law (OAL) for their suspensions to be lifted so that they could play in the state championship game. They claimed that they could not be disciplined for off-campus conduct. The court found the law on the issue well settled. State regulation clearly allowed a school district to institute discipline such as suspension from extracurricular activities "where such measures are designed to maintain the order and integrity of the school environment." The OAL found that the policies were clear and that the district had provided ample notice and due process before making the decision to suspend. "These Petitioners have no property interest in playing football, as doing so is a privilege"

***Pruitt v Anderson,* No. 11-2143 (D. Minn. Dec. 9, 2011):** Pruitt, an African-American student complained to the district about what they considered a racially offensive homecoming festivity that designated Wednesday of homecoming week as "Wigger Day" (a white youth who affects the speech patterns, fashion and other manifestations of black youth) or "Wangsta Day" (someone, especially a white person, who poses as a gangsta rapper.) 60 to 70 students wore oversized sports jerseys, low-slung pants, baseball caps cocked to the side and 'doo rags.' When the district did not take immediate action, Pruitt filed a Title VI action. The court stated that to sustain a valid Title VI claim of intentional discrimination based on a racially hostile environment, the defendant must have (1) been deliberately indifferent (2) to known acts of discrimination (3)

which occurred under its control. The court found that sufficient evidence had been provided to move forward on the suit, and therefore denied the district's motion to dismiss.

Power v Gilber Pub. Sch., **No. 10-15149 (9th Cir. Oct. 14, 2011):** Power was a member of the high school girls' basketball team. She reported to the administration that the assistant coach, who was also the husband of the head coach, was making inappropriate sexual comments to the players. After she reported the behavior, she and her teammates claim to have been retaliated against by the head coach. Power filed suit against the district. The district court granted summary judgment to the district for failure to state a genuine issue of material fact; specifically that the school district had failed to respond to her complaints or whether school officials had retaliated against her. The Ninth Circuit upheld the lower court, stating that "Power only presented evidence that Ms. Gonzales made a few snide remarks to her or about her; she presented no evidence that Ms. Gonzales took any adverse action against her or treated her any differently than any other member of the varsity basketball team."

Segar v Kentucky High Sch. Athletic Ass'n, *Nos. 10-5595/10-5597 (6th Cir., December 21, 2011):* The question before the court was whether a high school athletic association can place limits on the amount and type of merit-based scholarship assistance a student can receive and still remain eligible to participate in sanctioned events. The purpose of a Bylaw of the Kentucky High School Athletic Association (KHSAA) which imposed such limits was to prevent and deter recruitment of student athletes. The KHSAA prevailed both in the lower court and on appeal to the Sixth Circuit. The court rejected the argument that the rule was discriminatory or that it interfered with the parents' fundamental right to control the upbringing and education of their children. Using the rational basis test, the court concluded that the limit had "a rational connection to the purpose of deterring the use of financial aid as an improper athletic recruitment tool."

K.L. v Evesham Township Bd. of Educ., **No. L-996-10 (N.J. Super. Ct., App. Div., Dec. 12, 2011):** K.L. was the father of two elementary students who were the target of bullying. He submitted a written request for records related to the bullying events. The district provided a copy of the bullying policy and informed K.L. that while he was entitled to access to the student records of his children, he did not have the right to view the records of the other students involved. K.L. filed suit alleging violations of the New Jersey Open Public Records Act (OPRA). At trial, the school district stated that they did not believe that notes made at the request of the board's attorney, nor records pertaining to other students could be released under OPRA. The documents in question were viewed in camera, and the trial court concluded that they were exempt from disclosure under OPRA. On appeal, the appellate court determined that the staff notes were not protected by attorney-client privilege, but were exempt as attorney work product prepared in anticipation of litigation. In determining whether the records should be released under a "special needs" exception, the court balanced the common law right of access against the school district's interest in maintaining confidentiality. The court found no error in the decision of the lower court that the father had not met his burden to show special need. The court did, however, award attorney's fees to K.L. for the costs incurred in obtaining documents under the OPRA.

Editor's Note: One of the newest areas of litigation is cyber-bullying. Three cases, J.S. v Blue Mountain Sch. Dist., Layschock v Hermitage Sch. Dist., and Kowalksi v Berkeley County Sch. had filed writs of certiorari to be heard by the United States Supreme Court. The United States Supreme Court has denied certiorari for all three cases, leaving the courts to try and determine the rights of the student using Tinker v Des Moines.

***In Re Anthony F.,* No. 2010-665 (N.H. Jan. 13, 2012):** Anthony F. was seen walking away from the school through a parking lot. The parking lot monitor and two assistant principals pursued him and escorted him back to the school. Anthony was informed that he was going to be searched. When Anthony asked why, he was informed that it was district policy to search students who come back to school after leaving an assigned area. Anthony gave them a small bag of marijuana. In juvenile court, Anthony was unsuccessful with his attempt to suppress the evidence on the grounds of an illegal search. On appeal, the Supreme Court of New Hampshire reversed the juvenile court's holding that the search was valid under the state constitution. As regarding the question whether Anthony had been "searched" the court found no difference between Anthony being told twice that he was going to be searched and did he have anything on him, and an actual physical search. Having decided that a search had taken place, the court went on to decide whether it was reasonable at its inception and reasonable in scope. The court found that the search was not reasonable at its inception. School policy mandated a search when a student returns from leaving an assigned area. Anthony was leaving. He only returned because he was forced to do so. There was nothing to link Anthony to any illegal activity; no reasonable suspicion that a school policy or law had been violated.

***Parker v Franklin Cnty. Cmty. Sch. Corp.,* No. 10-3595 (7th Cir. Jan. 31, 2012):** Mothers of two female basketball players in Indiana filed suit alleging discrimination under Title IX based on the fact that boys' basketball games were disproportionately scheduled on the preferred dates of Friday and Saturday nights. Of the 14 defendants, six were part of the Eastern Indiana Athletic Conference (EIAC). The district court granted summary judgment to the districts. The Seventh Circuit vacated the grant of summary judgment on the Title IX claim. The court stated that three areas could be involved: (1) scholarships; (2) equal treatment; and (3) accommodation. The analysis of the Plaintiff's claim should have been focused on whether the difference in scheduling had a negative impact on the female student-athletes. No evidence had been provided that the female athletes received comparably better treatment than male athletes to offset any disadvantage caused by the scheduling. The behavior was systemic, even though it had been brought to the district's attention by the Indiana High School Athletic Association. "Despite Franklin's efforts, a trier of fact could determine that the present disparity in scheduling has the cyclical effect that stifles community support, prevents the development of a fan base, and discourages females from participating in a traditionally male-dominated sport." Consequently, the granting of summary judgment was in appropriate.

***Burlison v Springfield Pub. Sch.,* No. 10-3395 (W.D. Mo. Jan 25, 2012):** Drugs dogs were brought Central High School in Springfield. All of the students were out of the classroom. Two students filed suit alleging a violation of their Fourth Amendment rights. The district court granted summary judgment to the district. The court stated that the use of drug sniffing dogs have been found by the United States Supreme Court to not implicate Fourth Amendment rights by themselves. The Plaintiffs must present evidence of a search occurring beyond the drug sniffing dogs. Plaintiffs had not met their burden of proof that an additional search had occurred.

Teachers' Rights

***Nagle v Marron,* No. 10-1420 (2d Cir. Dec. 12, 2011):** Nagel was employed as a tenure-track special education teacher from 2004 to 2007. In 2007 she was informed that she would not be

rehired for the 2007–08 academic year. Nagel filed suit alleging that her non-renewal was based on retaliation for her exercise of her freedom of speech. She based these allegations on two incidents, one involving an allegation that an assistant principal forging Nagle's signature on a classroom teaching observation report. The other was a report made by Nagel in 2002–03 to the Virginia Department of Child Protective Services that she believed another teacher had physically and verbally abused her students. Her current district had only learned of this second event in 2007. The district court granted summary judgment to the district. The Second Circuit vacated the summary judgment. Regarding Nagle's claim of her exercise of free speech, the court relied on the U.S. Supreme Court decision in Garcett v Ceballos, 547 U.S. 410 (2006) that employee's speech is only entitled to First Amendment protection if it is on a matter of public concern and the employee "speaks as a citizen and not in her role as employee." The court found that the forgery accusation was not protected speech, as it was not of public concern. However, the Virginia abuse report was protected speech. Turning to causation – whether the speech was the cause of her dismissal – the court found that a material fact remained as to whether the employment decision was based on Nagle's speech. For that reason, a summary judgment was improper.

***Johnson v Board of Trustees of Boundary Cnty. Sch. Dist.,* No. 101, No. 10-35233 (9th Cir. Dec. 8, 2011):** Johnson was a special education teacher who suffered from depression and bipolar disorder. In order to retain her license to teach, Johnson was required to obtain a certain amount of professional development, some of which had to be for college credit. Her license was set to expire at the beginning of the 2007–08 school year. By the summer of 2007 she still hadn't taken the college credit professional development. During the summer she had a major depressive episode which made her unable to finish her professional development, which required her to ask the school board to apply for provisional authorization from the Idaho State Board of Education before she could teach. The school board refused to apply to the ISBE stating that Johnson had five years to get the required credits, but didn't approach the board until it was too late. Because there were other special education teachers with valid certification in the district, the board decided to not renew Johnson's contract. Johnson filed suit alleging that she had been fired because of her disability in violation of the ADA. Federal court granted summary judgment to the school district on all counts. The Ninth Circuit affirmed the district court's decision. The court stated that the first thing that Johnson had to prove was that she was a "qualified individual with a disability" within the meaning of the ADA. A qualified individual is defined in the law as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." In the case of Johnson, that fact that she did not possess appropriate certification to teach prevented her from being a "qualified individual." That being said, the question of whether reasonable accommodations were provided is not reached. "Unless a disabled individual independently satisfies the job prerequisites, she is not 'otherwise qualified' and the employer is not obligated to furnish any reasonable accommodation that would enable her to perform the essential job functions."

Special Education

***M.B. v Hamilton Southeastern Sch.,* 10-3096 (7th Cir. Dec. 22, 2011):** M.B. suffered traumatic brain injury when at the age of four, upon which M.B.'s parents contacted the school district about special education services. The evaluation and placement was delayed for various reasons, and in the end the parents disagreed with the placement which did not include full-day kinder-

garten, and requested a due process hearing. The hearing office found that the district had made some procedural errors, but did not find those errors to result in substantive harm denying M.B. a free appropriate public education. On appeal the parents were again denied relief, stating that FAPE had been provided. The Seventh Circuit affirmed the lower court's decision, finding that any procedural errors that occurred were not substantial enough to deny M.B. FAPE. As regarding the substantive defects alleged, the burden was on the parents to prove that the hearing officer, the State Board, and the district court "clearly erred in determining that M.B. was making progress under this IEP."

Legislation Effective January 2012

HB1277 This piece of legislation adds a new reason why a school board can go into closed session. Now auditor reports can be given in closed session when the topic of the audit is internal control weakness which may indicate or have allowed fraud.

SB 1578 Under this law, 2 of the 4 required teacher institute days may be used as a teacher and educational support personnel workshop day, however, educational support personnel can be exempted from the workshop if it does not apply to their job duties.

HB 78 Under this law, a student who has been suspended or expelled, or an employee who has been dismissed for disrupting the school that knowingly remains in a safe school zone without any lawful business will be guilty of criminal trespass.

HB 1240 Now, if a school district asks for the criminal background check from another district, the other district must provide anything that has been done within the last 5 years.

HB 3281 Cyber-bullying has become a major problem in the schools. Although this law does not address all types of cyber-bullying, it does allow a school to suspend or expel a student who has made true threats against a school employee, student, or other personnel. It no longer makes any difference from where the threat is made so long as it is accessible through technology in the school or by third parties associated with the school.

HB 192 The Stalking No Contact Order Act has been amended to allow the judge to order that the respondent accept a change in educational placement or program determined by the school district.

HB 2086 So long as there are no safety issues, a student cannot be denied participation in an alternative education program just because they have been suspended or expelled from his or her home school.

HB 3010 Adds mental, psychological, or developmental disabilities, including autism spectrum disorder to definitions of "disability" under the Human Rights Act.

A piece of legislation which became effect last summer (Summer 2011) was SB 7 which made comprehensive and significant changes to the laws regarding teacher hiring, firing, discipline, and collective bargaining. Here is a summary of some of the major provisions:

Senate Bill 7 – Major Changes Made to Receive Race to the Top Funds

(1) Hiring, Layoffs, Recall, and Teaching Assignments

   (a) Makes performance a primary criterion in layoffs, recall, and teaching assignments. Ends layoff policies based on the "last in-first out." Instead, teachers will be laid off based on

performance and job qualifications first, with seniority playing a "tie breaker" role

(b) In hiring, administration has the total discretion to hire teachers who best fit the needs of the schools, and when they consider in-district transfers, performance and qualification with be the primary consideration. It is not grievable.

(c) RIF is now referred to as honorable dismissal

(d) Upon honorable dismissal each teacher must be categorized into one or more positions for which the teacher qualified. Within those categories, there will be 4 groupings:

Grouping One: No performance evaluation

Grouping Two: Needs Improvement or Unsatisfactory on either of the last two performance evaluations

Grouping Three: Satisfactory or Proficient on both of the last two performance evaluation

Grouping Four: Excellent on last two performance evaluations or two excellent and one satisfactory or proficient on the last three evaluations

(2) Tenure and Certification

(a) Requires two proficient or excellent performance evaluation ratings during the last three years of the four-year probationary period for attainment of tenure.

(b) Accelerated Tenure: New teachers who earn three excellent performance reviews in their first three years will earn tenure at the three-year mark

(c) Tenure Portability: Tenured teachers with a track record of proficient and excellent ratings may earn tenure in two years if they move to a new district and earn two excellent performance ratings in each of their first two years.

(3) Dismissal and Revocation of Certification

(a) Teachers now may be dismissed on the basis of performance, without the requirement of failure to complete a 1 year remediation plan

(b) Teachers may be dismissed for incompetency, if they have received an unsatisfactory rating on a performance review for 2 or more terms of service within 7 school terms of service.

(c) If the school board dismisses a teacher in the last year of the probationary period the written notice of dismissal must contain specific reasons for dismissal

(d) The procedures for an administrative hearing on the dismissal have been reworked to be more proscribed.

(e) Revocation of Certification: Certificates of teachers with two unsatisfactory ratings in a seven-year period may be reviewed by the State Superintendent for revocation or professional development opportunities to help the teacher improve may be chosen instead. The teacher would bear the cost of the mandated professional development.