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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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SPECIAL EDUCATION

C.O. v Portland Pub. Sch., Nos. 10-35340/10-35402 (9th Cir. May 14, 2012): A three judge panel has determined that the IDEA does not provide a cause of action for nominal damages. C.O. was students with learning disabilities. He was denied entrance into a magnet school because he was performing at the third-grade level rather than the eighth grade level required for admittance into the magnet school. His mother filed an administrative complaint alleging deficiencies in C.O.'s IEP. The ALJ found that the district had violated the IDEA and ordered the school district to provide compensatory education. Before the education could be started, however, C.O. graduated from high school. Oman then filed suit in federal district court on behalf of herself and C.O. alleging procedural and substantive violations of the IDEA and seeking relief under the IDEA and 42 U.S.C. §1983. On the topic of compensatory damages, the 9th Circuit concluded that the congressional intent revealed in the IDEA's language does not provide nominal damages remedy, therefore federal courts cannot on their own invent such a cause of action. As to Oman's claim that the denial of the school district to admit C.O. to the magnet school was in violation of Section 504/ADA, the court pointed out that Section 504 "merely requires them not to exclude a person who is 'otherwise qualified' based upon his or her disability." The court found that the requirement of an eighth grade proficiency for anyone applying to the magnet school was not unreasonable, and therefore no Section 504 violation existed.

Petit v United States Dep't of Educ., No. 11-5033 (D.C. Cir. Apr. 13, 2012): The 2004 amendments to the IDEA provided that related services and assistive technology services do not include a medical device that is surgically implanted, or the replacement of such device. School districts are not responsible for selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing surgically-implanted medical devices. Although the 2004 amendments did not specifically address whether district must generally provide optimization and maintenance services for cochlear implants, the 2006 regulations state that school districts are not required to provide "mapping" services. The Plaintiffs in this case were the parents of children with cochlear implants who, until the final adoption of the 2006 regulations were being provided with mapping services by their school district. They sued for a declaratory ruling that the 2006 regulations went against the intent of the wording of the IDEA. In ruling for the ED, the court found that the ED's interpretation of the 1983 regulations was not plainly erroneous or inconsistent with the regulation; therefore mapping is not included as a related service.

D.P v Council Rock Sch. Dist., No. 11-2747 (3d Cir. Apr. 27, 2012): D.P. was autistic with a speech impairment. After a dispute about his IEP, D.P.'s parents withdrew him from public school and unilaterally placed him in a private school. A year later his mother requested a due process hearing to obtain reimbursement for the preceding school year. The hearing officer denied reimbursement. She then filed suit in federal district court alleging a violation of FAPE and requesting reimbursement of tuition. The district court granted summary judgment to the school district. On appeal, the Third Circuit affirmed the lower court's decision. The parent was not disputing the hearing officer's finding that the IEP offered to D.P. and the beginning of the 2008-09 school year was adequate, but was alleging that the failure to update the IEP for the 2009-10 school year was a violation of FAPE. The court stated that "if a student is enrolled at a private school because of a parent's unilateral decision, the school district does not maintain an obligation to provide an IEP."

FEDERAL AND STATE POLICY

Renee v Duncan, No. 08-16661 (9th Cir. May 10, 2012): Since the passage of congressional amendment “Section 163,” the Department of Education’s decision to allow teachers without full state certification, but participating in an alternative route to certification to be considered “highly qualified teachers” was not a violation of NCLB. The plaintiffs, a group of parents, students and community organizations, challenged the Departments of Education’s decision of what constituted “highly qualified teachers.” At the time of the complaint, NCLB only provided for teachers with full state certification. Plaintiffs claimed the Department of Education’s regulations allowing teachers, not yet fully certified, to be considered highly qualified teachers, harmed students by allowing unqualified teachers into the classroom. While the issue was being considered by the court, the federal government passed Section 163 which expressly expanded the definition of “highly qualified teacher” to incorporate the part of the existing regulation which was the subject of the suit—specifically that individuals working toward alternative certification, but who were not yet fully state certified, were highly qualified teachers. Consequently, the court found that so long as Section 163 was in effect the disputed regulation was valid. Prior to the passage of Section 163, the court agreed that the regulation would have been invalid “because it was inconsistent with the unambiguously expressed intent of Congress” that only fully certified teachers were to be considered “highly qualified teachers.”

Easton Area Sch. Dist. v The Express Times, No. 2042 C.D. 2011 (Pa. Commw. Ct. Apr. 30, 2012): The Express Times sent a records request to the Easton School District for copies of all e-mails sent and received between October 1, 2010 and October 31, 2010, for the e-mail addresses of nine school board members, the school board’s general e-mail, and the district superintendent. The district denied the request stating that the items being requested were not public records. The Express Times appealed the denial to the Office of Open Records (OOR). The OOR found that, except for a few e-mails which were confidential under FERPA, that the majority of the e-mails must be disclosed. The trial court affirmed the OOR’s decision. On appeal, the court affirmed the trial court’s decision. The court pointed to an earlier case, in which the same e-mails were requested by another newspaper and the request was found to be sufficiently specific and that the e-mails were public records.

Paschal v State of Arkansas, No. CR 11-673 (Ark. Mar. 29, 2012): The Arkansas Supreme Court ruled 4-3 that a state law making it a crime for a K–12 teacher to engage in consensual sex with a student who is an adult violates the constitution of the state of Arkansas. The state constitution recognizes a “fundamental right to privacy . . . that protects all private consensual, noncommercial acts of sexual intimacy between adults. Since the law criminalized sex between teacher and student, even if the student was an adult and the sexual conduct was consensual, it infringed on that constitutional fundamental right. Therefore, strict scrutiny was applied and the law could only be upheld if it advanced a compelling state interest and was the least restrictive method available to advance that state interest. Even given the compelling state interest of discouraging inappropriate contact between teachers and students, the court found that it was not the least restrictive method for accomplishing that interest. If what the state was really attempting to do was to criminalize a teacher using his or her position of trust or authority over the student to engage in sexual contact, such purpose was not mentioned in the statute.

DESEGREGATION

***Everett v Pitt Cnty. Bd. of Educ.*, No. 11-2000 (4th Cir. May 7, 2012):** Until a district which has been under a desegregation order has obtained unitary status, the district has the burden or proof to show that student assignment plans are consistent with the controlling desegregation order. The Pitt County Board of Education has been under a federal desegregation order since the 1960s. Since 1972, the issue was considered administratively closed; although there was never a determination that unitary status had been obtained. The topic remained dormant until 2006, when a complaint was filed that race was being used in the student assignment plan of the district. The matter was settled in early 2008, where Pitt County filed a motion requesting court approval of a prior student assignment plan. One of the plaintiffs who had filed the complaint opposed Pitt County's motion and request for unitary status. Court ordered mediation ensued. In late 2009 the district court issued an Consent Order which obligated the parties to "work toward attaining unitary status so that the district court may relinquish jurisdiction over this case and restore to the School Board full responsibility for the operation of its schools." In 2010 Pitt County began developing a new student assignment plan. After adopting a plan, the plaintiffs urged Pitt County to reconsider, stating that the plan chosen move the district further away from unitary status. Plaintiffs also suggest that Pitt County get guidance from the district court. Neither was done, so plaintiffs filed a motion in district court for injunctive relief. Since it was a request for injunctive relief, the court placed the burden of proof of the likelihood of irreparable harm on the plaintiffs and denied the motion. Plaintiffs appealed. The 4th Circuit Court reversed and remanded, stating that until unitary status is conferred, that Pitt County had the "burden as established by case law of demonstrating that the 2011–2012 Assignment Plan moves the school district toward unitary status, particularly where this plan allegedly causes immediate and substantial adverse effects on students."

STUDENTS' RIGHTS

***J.F.K. v Troup Cnty. Sch. Dist.*, No. 11-13297 (11th Cir. May 3, 2012):** O.K.K. was a male student who was sexually abused by his seventh grade female homeroom teacher. Parents complained and requested that their son be moved to another set of teachers. That was done. The inappropriate communication continued. O.K.K.'s father complained again and the district said that it would investigate. From the investigation, it was discovered that the teacher had been overly involved with many students. Still the inappropriate contact continued so the parents filed suit in federal district court alleging that O.K.K. was a victim of teacher-on-student sexual harassment in violation of Title IX. The school district filed a motion for summary judgment which was granted. The parents appealed. While the Eleventh Circuit did affirm the lower court's grant of summary judgment, it found that the district court had applied the incorrect standard in determining whether a valid teacher-on-student sexual harassment claim under Title IX existed. The court laid out the three-prong test that should be used for a plaintiff to defeat a motion for summary judgment for a claim of harassment under Title IX: (1) the plaintiff must identify a person with authority to take corrective measures in response to actual notice of sexual harassment; (2) the plaintiff must demonstrate that the notice was sufficient to alert the school official of the possibility of the Title IX harassment; and (3) the plaintiff must show that the authority figure acted with deliberate indifference to the notice of harassment. Whether the harassment was unwell-

comed was immaterial to the decision. The court concluded that “Whatley [principal] knew Gaddy’s [teacher] conduct was inappropriate, devoid of professionalism, and reeked of immaturity; however, despite this, her known conduct was not of the same type of conduct of a sexual nature” as was the subject of the case law relied upon by the student. Therefore, the district had not received “actual notice” of sexual harassment.

Lack v Kersey, No. 12-930 (N.D. Ga. Mar. 30, 2012): Lack was removed as student body president because, according to the school, “lack of follow-through, lack of respect for his advisors, rigidity, and insistence upon taking unilateral action when he was not authorized to do so.” Lack, upon filing suit for a temporary restraining order, stated that he was removed “because he supported the Prom King and Queen change, made a speech to incoming freshmen which referenced the debate team, and engaged in an off-campus Facebook message conversation with another student,” all part of his First Amendment freedom of speech. Although finding that the speech alleged by Lack was constitutionally protected, the court found that there also existed substantial reasons, such as those enumerated by the district, which would have allowed the district to remove him from his office in spite of any protected speech issues.

Pungitore v Barbera, No. 11-CV-6249 (S.D.N.Y. Mar. 30, 2012): Pungitore was enrolled in an 8th grade honors algebra class. She found the class not challenging enough and asked to transfer into a double accelerated honors math class. Her request, after review, was denied by the school district. She enrolled in the class the next year, but her parents filed suit alleging a violation of Title IX, as during the previous year all the students in the advanced class were male. The school district moved for dismissal. The district court granted the dismissal stating that in order to have standing to sue, Pungitore would need to show that she suffered “an injury in fact”, a causal connection between the injury and the defendant’s conduct, and that the federal court could address that injury. The court could find no injury in fact, past, present, or future.

State v Alaniz, No. 20110259 (N.D. Apr. 10, 2012): Vanyo, a police officer with the Grand Forks Police Department, was assigned as the SRO at a high school in Grand Forks. Working on information gathered about off-campus drug use by students, Vanyo and a school security officer staked out the location. Alaniz was identified as one of the students engaged in illegal drug use. Vanyo shadowed Alaniz by patrol car. When he lost him, he radioed the security officer who went to the location on foot. At the location he smelled something “funny.” When Alaniz returned to school, Vanyo reported him to the principal as an individual suspected of being involved in drug activity. The principal and Vanyo took him in to a conference where Alaniz voluntarily surrendered drug paraphernalia. At trial Alaniz moved for the evidence to be suppressed as it was obtained without probable cause. Alaniz’s motion failed at all levels, as the courts found that Vanyo was acting as a school official, therefore the less stringent TLO reasonableness standards were controlling. The state supreme court identified three standards applicable to school searches based on the amount of police involvement: (1) when school officials initiate the search or police involvement is minimal; (2) when the search involves school resource officers acting on their own initiative or at the direction of other school officials to further educationally-related goals; and (3) when “outside” police officers initiate the search, the warrant and probable cause requirements apply. In the instant case, the court found that Vanyo was acting as a SRO, therefore the second standard applied and reasonable suspicion was all that was needed.

EMPLOYEE RIGHTS

Weiss v Department of Educ. of the City of New York, No. 09-1689 (S.D.N.Y. Mar. 29, 2012): Weiss was employed by the NYCDE as an interim assistant principal in a five-year probationary position. During his tenure Weiss, who is Jewish, was subjected to anti-Semitic comments and behavior by the principal. The harassment increased as Weiss became more religiously observant. Previous satisfactory annual reviews became unsatisfactory. Weiss was terminated prior to the end of his probationary period. After unsuccessful internal appeals, Weiss filed suit in federal district court alleging violations of his rights under Title VII because he had been subjected to a hostile work environment, discrimination, and retaliation based on his religion. The NYCDE filed a motion for summary judgment which was granted on the issues of retaliation and due process, but denied on the issues of hostile work environment and religious discrimination. The court stated that Weiss' allegations "represent four years of repeated, offensive conduct on the part of Mulqueen [principal] disparaging Plaintiff, Plaintiff's Jewish identity and the Jewish identity of Plaintiff's co-workers, and at least one threat against Plaintiff in connection with his religious practice." The allegations presented genuine questions of material fact as to "whether a reasonable employee would have found the conditions of his employment to be hostile or abusive, and as to whether Plaintiff perceived his workplace as hostile or abusive." The court also found that Weiss had made a prima facie case as to religious discrimination relating to his negative annual evaluation and recommendation for termination.

Filarsky v Delia, No. 10-1018 (U.S. Apr. 17, 2012): The Supreme Court decided unanimously that private individuals temporarily retained to carry out government work are entitled to qualified immunity from suit under §1983. Filarsky was a private attorney hired by a municipal fire department to investigate one of its employees who was thought to be abusing his sick leave. During the investigation, evidence was requested. When the employee was eventually cleared he sued the city, the fire department, and Filarsky. On appeal, the Ninth Circuit said that Filarsky was not entitled to qualified immunity because he was not a city employee. In reversing the lower court, the Supreme Court stated four primary reasons for affording immunity to private individuals: (1) helping to avoid unwarranted timidity in the performance of public duties; (2) ensuring that talented candidates are not deterred from public service; (3) preventing the harmful distractions from carrying out the work of government that can often accompany damages suits; and (4) avoiding the difficulty private-public line-drawing problems.

Chicago Teachers Union v Board of Educ. of the City of Chicago, No. 10-3396 (7th Cir. Apr. 19, 2012): The Chicago Teachers Union filed suit against the Chicago Board of Education seeking a court order to require the CBOE to consider tenured teachers laid off in 2010 for vacant positions first, giving them preference over new hires. The CTU argued that state law gave them "permanent" appointments with recall rights. The district court agreed with the CTU and granted the injunction. The CBOE requested a rehearing. Before addressing the issues on rehearing, the court requested an opinion from the Illinois Supreme Court as to whether the Illinois School Code gave laid-off teacher a federal property right protected by the Fourteenth Amendment. The Illinois Supreme Court found that no such right existed. Therefore, the injunction was vacated. Illinois law does not give laid-off teachers recall right protected by the Fourteenth Amendment.

LEGISLATION: BILLS MAKING THEIR WAY THROUGH THE ILLINOIS GENERAL ASSEMBLY:

HB 5290: Anti-Bullying Bill. This bill was defeated. It would have required specific elements in district anti-bullying policies, such as a designated person for reporting bullying, procedures for investigation, basis for disciplinary action, and methods to inform parents of the resolution.

HB 1473: Similar to the Challenge Day organization supported by Oprah Winfrey, this bill allows the CPS to develop a program that “seeks to establish common bonds between youth of various backgrounds and ethnicities.”

HB 3810: General Assembly Scholarship Program. This bill was aimed at abolishing General Assembly scholarships. An amendment attached by the Senate also creates a task force to look into all fee and tuition waiver programs in all public higher education institutions.

HB 3819: Bilingual Education. This bill directs the Advisory Council on Bilingual Education to recommend future modifications to bilingual programs.

HB 4029: Transportation Contracts. School districts can no longer be sued for not awarding transportation contracts over \$25,000 to the lowest bidder.

HB 4993: Administrative Certification. Under this bill, candidates who were enrolled in ISBE-approved administrator education programs prior to August 2011 will be allowed to apply for administrative endorsements under provisions in effect when they began their studies. If they complete their programs prior to January 1, 2013, the new requirement that they have two full years of teaching experience will not apply to them.

HB 4278: Back Fees. This bill would have “back fees” paid for the reinstatement of an expired certificate into the ROEs institute fund to provide professional development for teachers.

HB 3826: Service Animals. This bill defines service animals to include both dogs and miniature horses.

SB 638: Alternative Teacher Certification: This bill extends deadlines for candidates. They now must enroll by September 1, 2013 and complete their program by January 1, 2015.

SB 639: Priority School Construction List: Renovation projects would be added to the Priority School Construction List.

SB 2850: School Day. Repeals the ability of school districts to count less than five-hour school days on the first and last day of school as a whole day of school.

SB 3244: Math Instruction. Requires ISBE to develop curriculum models addressing math achievement and make those models available to school districts.

SB 2706: ROEs. Cuts the number of regional superintendents from 44 to 35 by July 1, 2015. It sets a minimum population of a future ROE at 61,000 (currently 43,000).

Public Act 97-682: Allows immediate reinstatement of a lapsed teacher certificate when the individual holding the certificate pays back fees and either a \$500 penalty or completion of nine semester hours of coursework.