

ILLINOIS STATE
UNIVERSITY



Volume 32, No. 4
July 2012

ILLINOIS STATE
EDUCATION LAW AND POLICY
JOURNAL

IN THIS ISSUE

STUDENTS' RIGHTS	<i>page 44</i>
EMPLOYEE RIGHTS	<i>page 44</i>
ADMINISTRATIVE ISSUES	<i>page 46</i>
LEGISLATIVE UPDATE	<i>page 48</i>
RECENT BILLS SIGNED INTO LAW	<i>page 48</i>
SPECIAL EDUCATION	<i>page 49</i>

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.

Illinois State University is an Equal Opportunity/Affirmative Action institution in accordance with Civil Rights legislation and does not discriminate on the basis of race, religion, national origin, sex, age, handicap, or other factors prohibited by law in any of its educational programs, activities, admissions or employment policies. University policy prohibits discrimination based on sexual orientation. Concerns regarding this policy should be referred to Affirmative Action Office, Illinois State University, Campus Box 1280, Normal, IL 61790-1280, phone 309/438-3383. The Title IX Coordinator and the 504 Coordinator may be reached at the same address.

Illinois State Education Law and Policy Journal is published as a service of the Center for the Study of Educational Policy, Department of Educational Administration and Foundations, College of Education, Illinois State University, Campus Box 5900, Normal, IL 61790-5900.

If you quote or paraphrase, please credit author and *Illinois State Education Law and Policy Journal* in an appropriate manner. This publication is not produced for the purpose of rendering legal advice or services. Expressed points of view of the Editor and contributors represent personal opinion and not that of the University, College, or Department. All inquiries should be directed to Editor, *Illinois State Education Law and Policy Journal*, Illinois State University, Campus Box 5900, Normal, IL 61790-5900., phone 309/438-8989.

STUDENTS' RIGHTS

Estate of Asher Brown v Cypress Fairbanks Indep. Sch. Dist., No. 11-cv-1491 (S.D. Tex. May 23, 2012): Brown was a middle school student who was subjected to constant bullying by his peers. The behavior was reported to the school numerous times by Brown's mother and by Brown himself. Ultimately Brown committed suicide and his mother, Truong, filed suit against the school district alleging violations under the Rehabilitation Act, Title IX, and the First and Fourteenth Amendments. The school district moved to dismiss and was successful on all but the § 1983 due process claim and the Title IX claim. During the pendency of the case, the 5th Circuit issued a decisions which stated that, as a matter of law, school districts had no constitutional duty to protect the plaintiff-student from non-state actors. In light of this ruling, the school moved for reconsideration of the denial of its motion to dismiss the § 1983 due process claim on the ground that there was no state action; the bullying was by individual students. The district court granted the motion for reconsideration and dismissed the § 1983 due process claim. The court agreed that the existence of explicit school policies mandating action on the part of the school district in the face of student-on-student bullying did not give rise to a duty to protect Brown from bodily harm and threats to his bodily integrity. "Regardless of whether the issue is existence of a policy or enforcement of a policy ... policies promising school action to prevent student-on-student bullying cannot serve as a basis for Asher's constitutional due process rights."

EMPLOYEE RIGHTS

Macy v Holder, Appeal No. 0120120821 (EEOC Apr. 20, 2012): Title VII does protect transgender employees. The complainant was a police detective in Phoenix, Arizona. She was genetically male, and presenting as a male, when she applied for a position at the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). During the background check she informed the prospective employer that she was in the process of transitioning from a male to a female. Shortly thereafter she was informed that, because of federal budget reductions, the position was no longer available. She checked with an agency EEO counselor and was told that the position wasn't cut but that someone else had been hired, because he was farthest along in the background investigation. Complainant filed her formal internal EEO complaint alleging "sex," "female," "gender identity," and "sex stereotyping" as the bases for her complaint. The ATF accepted her complaint, but stated that "claims of discrimination on the basis of gender identity stereotyping cannot be adjudicated" by the EEOC and would be process according to the Department of Justice (DOJ) policy. The DOJ had two separate systems for adjudicating sex-based complaints: (1) claims for sexual discrimination were processed under Title VII; and (2) claims for sexual orientation and gender identity discrimination under a separate process which "allows for fewer remedies and does not include the right to request a hearing before an EEOC Administrative Judge or the right to appeal the final Agency decision." Complainant appealed this dual system, alleging that it was a de facto dismissal of her Title VII claim. On appeal, the EEOC determined that the AFT had "mistakenly separated the Complainant's complaint into separate claims: one described as discrimination based on "sex," and others that were alternatively described ... as "sex stereotyping," "gender transition/change of sex," and "gender identity." The EEOC stated that Title VII protections extended beyond just biological sex, encompassing as well "the cultural and social aspects associated with masculinity and femininity." In short, when an employer

discriminates against someone because he or she is transgendered, the employer has engaged in disparate treatment related to the sex of the victim; that the employer has illegally taken gender into account when making an employment decision. Discrimination against a transgendered individual does not create a new “class” of people covered under Title VII, but rather is simply another form of sex discrimination.

Knox v Service Employees Int'l Union, Local 1000, No. 10-1121 (U.S. Jun. 21, 2012): The United States Supreme Court reversed the 9th Circuit when it held that the action of a California public sector union of imposing a special assessment on nonmembers solely to fund political activities, without provide the option to opt-out, was an unconstitutional violation of the First Amendment. The offending union was the Service Employees International Union, Local 1000 (SEIU). The 9th Circuit had upheld the union’s action stating that the law mandated a balancing test under which the proper inquiry is whether the union’s procedures, in its mandated notice and period to opt out, reasonably accommodated the interests of the union, the employer, and the nonmember employees. The fact that SEIU had followed those procedures and given 45 days to opt out, did reasonably accommodate those interest despite the fact that the additional assessment was levied after the 45 day opt out period had expired and no new notice and chance to opt in was provided. SEIU attempt to make the issue moot by sending out a notice to all members of the class action offering a full refund of the special assessment after the Supreme Court granted certiorari. The Supreme Court was not impressed. “Such post-certiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye.” Moreover, SEIU continued to defend the legality of the political fund, so it was clear that an actual case and controversy still existed. Alito, writing for a seven justice majority found that “during the collection of regular dues on an annual basis, there is no way to justify the additional burden of imposing yet another opt-out requirement to collect special fees whenever the union desires. . . We see no justification for any further impingement of nonmembers’ First Amendment rights. The general rule—individuals should not be compelled to subsidize private groups or private speech—should prevail . . . When a public-sector union imposes a special assessment or dues increase, the union must provide a fresh notice and may not exact any funds from nonmembers without their affirmative consent.” In her concurrence, Sotomayor felt that the Court had exceed the scope of the case regarding whether an opt-in provision was required. In his dissent, Breyer stated that the Court departed from the basic assumption underlying Hudson. He did not believe that the First Amendment required “giving a second objection opportunity to those nonmembers who did not object the first time.”

Ekstrand v School Dist. of Somerset, No. 11-1949 (7th Cir. June 26, 2012): Ekstrand was a teacher who suffered from Seasonal Affective Disorder. She was assigned a classroom with no natural light which exacerbated her conditions forcing her to take medical leave. Even after repeated requests to be given a room with natural light from Ekstrand, and statements from her physicians that lack of natural light caused her disability to worsen, the district continued to refuse to assign Ekstrand to a room with natural sunlight. Ultimately Ekstrand filed a suit against the district alleging violation of the ADA. The district court granted the school’s motion for summary judgment. Ekstrand appealed to the 7th Circuit which reversed the lower court decision in part, finding that there was a triable issue of fact as to whether Ekstrand was a qualified individual with a disability under the ADA and whether the district was aware of her disability. At trial, a jury found in favor of Ekstrand. The school district moved for a judgment as a matter

of law, which was denied by the trial court. On appeal to the 7th Circuit the court unanimously affirmed the district court's denial of the school district motion. The court found that there was sufficient evidence for a jury to determine that Ekstrand was a qualified person under the ADA and that the school knew of the disability.

Donegan v Livingston, No. 11-812 (M.D. Pa. July 3, 2012): Donegan, an instructional aid who was unhappy about a transfer, reported to work in what appeared to be an intoxicated state. After a bit of dithering by school personnel, multiple phone calls in an attempt to figure out what to do, Donegan was ultimately sent with the policy to be tested for alcohol. Ultimately she tested negative for alcohol. Donegan filed suit alleging that the claim of intoxication had been a pretense on behalf of Livingston in an attempt to embarrass her and force her to quit her job. All of the defendants filed a motion for summary judgment. In granting the motion for summary judgment, the court declined to categorize what had occurred as a "search" covered by the Fourth Amendment, but as a "special needs" exception to the warrant requirement. According to the court "searches which further a specified governmental need but are 'not supported by the typical quantum of individualized suspicion, can nonetheless still be found constitutionally reasonable.'" Ultimately, the court found that a breathalyzer test of a school employee fell within the "special needs" exception. "As teachers inhabit a highly regulated environment which is particularly sensitive to alcohol and drug abuse ... teachers have a reduced expectation of privacy in the use of such substances at work." Since there was reasonable suspicion that Donegan was intoxicated, the court found that in this particular set of circumstances the use of a breathalyzer was acceptable. The court emphasized, however, that it was not determining the constitutionality of have a written or unwritten policy of subjecting employers to breathalyzer tests, as that was not the controversy in front of the court.

ADMINISTRATIVE ISSUES

Teague v Arkansas Bd. of Educ., No. 10-6098 (W.D. Ark. June 8, 2012): The state of Arkansas passed a law, the Public School Choice Act of 1989, with the stated goal of permitting students to choose from among different schools with differing assets that meet their individual needs. However, because of past segregation laws in the state of Arkansas, the PSCA also included a prohibition against minority to majority transfers for fear that allowing white students to transfer out of a primarily minority school and in to a primarily white school would cause a re-segregation of public schools in Arkansas. When Parents for School Choice were not allowed to transfer their children from the Malvern School District where they resided, to the Cove School District because of this "minority to majority" provision, they appealed to the Arkansas State Board of Education, which upheld the local school district. The parents then filed suit in district court alleging a violation of the Equal Protection Clause of the 14th Amendment. In finding for the parents, the district court relied on the United States Supreme Court decision of *Parents Involved in Community Schools v Seattle School District No. 1*, 551 U.S. 701 (2007). The court found that the "minority to majority" transfer prohibition directly contradicted the stated goal of freedom of choice. Therefore, the purpose of the prohibition was actually aimed solely at creating racial balance. In order to satisfy the requirement that such race-based policies be narrowly tailored the school would need a process where there was "an individual review of each student to determine if his or her transfer would contribute to the overall goal of the district ... A decision to deny transfer cannot be based solely on a student's race and must have consideration of

their individual circumstances, otherwise the plan is unconstitutional.” Because the court found that the offending clause was not severable from the act as a whole, the court found the entire act unconstitutional.

Hill v Fairfax County School Board, No. 111805 (Va. June 7, 2012): In this case the Virginia Supreme Court considered the question of whether “a series of electronic communications of whatever type constitutes a meeting of a public body for purposes of applying the FOIA.” At a public meeting, the Fairfax County School Board (FCSB) voted to close a school. Hill submitted a FOIA request for board records, primarily e-mails, leading up to the decision. Hill filed suit alleging that the FCSB had violated the FOIA by conducting illegal closed sessions prior to the meeting through the exchange of e-mails in which the members discussed the closure of the school. The Virginia Supreme Court found that the communications were not a meeting because they did not occur in an asynchronous setting such as a chat room or instant messaging. The court likened the e-mails more to letters sent through ordinary mail; that the feature of “simultaneity” needed to constitute a meeting was not established.

Moss v Spartanburg Cnty. Sch. Dist. Seven, No. 11-1448 (4th Cir. Jun. 28, 2012): In 2006 the state of South Carolina enacted the Release Time Credit Act (RTCA) which allowed students to leave school to attend religious instruction off-campus during the school day. Moreover, if the instruction met secular criteria listed in the RTCA, students could receive elective credit for such off-campus religious instruction. In light of the RTCA, the Spartanburg School District adopted a release time policy which stated “The district will accept no more than two elective Carnegie unit credits for religious instruction taken during the school day in accordance with this policy. The district will evaluate the classes on the basis of purely secular criteria prior to accepting credit. The district will accept off campus transfer of credit for release time classes with prior approval.” Subsequently the school district was approached by the Spartanburg County Bible Education in School Time, a private, unaccredited religious education organization, requesting the students from the school district be allowed to participate for academic credit in a released time religious course focusing on a Christian worldview. The school district said that it would prefer that the credits be obtained as transfer credits from an accredited private school, so the non-accredited organization partnered with an accredited private school to meet the requirements of the Spartanburg schools. The Spartanburg school district never promoted the school, but did allow counselors to provide information to parents who expressed an interest. Moss and others filed suit against the Spartanburg schools alleging violation of the Establishment Clause of the First Amendment. The district court found that the school’s released time policy did not violate the three-prong *Lemon* test: (1) the purpose of the policy had a secular purpose as stated in the RTCA; (2) the adoption and implementation of the policy did not have the principal effect of advancing religion and “did no more than merely accommodate students’ desire to partake in religious instruction;” and (3) the passive acceptance of academic credit for religious instruction did not constitute excessive entanglement. The parents/students appealed. Before reaching the decision of the district court, the 4th Circuit spoke on the issue of standing to sue. While the court found no injury for the other families who had merely received the literature, or for the Freedom of Religion Foundation (which had joined in the suit probably to provide legal and monetary assistance), the court did find an element of coercion on the Moss family. Being Jewish, the Mosses “came to the view that it was part of a broader pattern of Christian favoritism. It made them feel like “outsiders” in their own community. The court stated that such “feelings of

marginalization and exclusion are cognizable forms of injury, particularly in the Establishment Clause context.” Since the United States Supreme Court has already found that release time for religious instruction is constitutional, the issue before the court was whether the addition of award credit for such instruction changed the basic nature of the practice to something which ultimately advanced religion. The court failed to find such a transformation stating that the policy “relies exclusively on the provision of off-campus religious instruction by nongovernmental educators and passively accommodates the ‘genuine and independent choices’ of parents and student to pursue such instruction. The district court’s decision was upheld.

Bronx Household of Faith v Board of Educ. of City of New York, No. 01-8598 (S.D.N.Y. June 29, 2012): This is the culmination of litigation which has been on-going in the 2nd Circuit since 2002. The conflict revolves around a facilities use regulation (Reg. D-180) which forbids the use of the school facilities for religious services. The law is already settled that allowing religious worship services in public schools during non-school hours is not seen as an endorsement of religion in violation of the Establishment Clause. In its request for a permanent injunction, Bronx Household of Faith asserted that Reg. D-180 violated its free exercise rights and fostered excessive government entanglement with religion in violation of the Establishment Clause. The NYCBOE argued that Reg. D-180 was necessary to avoid violation of the Establishment Clause. In granting the permanent injunction the court found that Reg. D-180 was not comprehensive and neutral; rather, it treated certain religions differently from others and such is not allowed under the First Amendment. It also found that the wording of the regulation requiring the stated to inquire into religious doctrine constituted an impermissible entanglement with religion. Hopefully this litigation is now at an end.

LEGISLATIVE UPDATE

Regional Offices of Education: It appears that decision has finally been made as to what to do with the ROEs. SB 2706 contains the first significant ROE consolidation in almost 20 years. There are no changes to the authority and duties of Regional Superintendents, it merely reduces how many of them there will be after 2014. ROEs may voluntarily consolidate through 2013 either by a joint resolution of County Boards seeking to merge the counties into a new ROE or by a more complicated method involving citizen and regional boards of school trustees. After January 1, 2014 if more than 35 ROEs remain, or if any ROE has a population under 61,000 persons, the ISBE will have “the authority to impose further consolidation.”

[The following information was obtained from the Illinois Association of School Board’s website at <http://www.iasb.com/govrel/alrmenu.cfm>:]

RECENT BILLS SIGNED INTO LAW

HB 4993 provides that a candidate for an administrative certificate who has enrolled and begun coursework prior to August 1, 2011, in an approved Illinois State Board of Education (ISBE) program, and who successfully completes that program prior to January 1, 2013, may apply for the general administrative endorsement until January 1, 2013, without his or her two years of full-time teaching or school service personnel experience. The bill is now **Public Act 97-0701**, effective June 25, 2012.

SB 638 makes changes to Alternative Routes to Teacher Certification procedures. It extends the timeline for which persons may be admitted to an Alternative Teacher Certification program or Alternative Route to Teacher Certification program from September 1, 2012, to September 1, 2013. Likewise it extends the dates for completion of the program from September 1, 2013 to January 1, 2015. Under this section, it adds charter schools as a recognized institution. The bill is now **Public Act 97-0702**, effective June 25, 2012.

SB 3244 requires ISBE to work with stakeholders to develop a model mathematics curriculum that must be available to school districts, though districts would not be required to implement the curriculum. The bill originally required that high school students must complete a fourth year of math before graduating from high school, but that provision was removed from the bill due to Alliance opposition. The bill is now **Public Act 97-0704**, effective January 1, 2013.

SB 2413 makes appropriations to the Illinois State Board of Education (ISBE). It funds K-12 education \$208 million below the FY '12 funding level, including \$162 million less in the General State Aid (GSA) formula. With this reduction, the proration rate for GSA in FY '13 is estimated to be 89% (the proration rate for FY '12 was 95%). Funding for mandated categorical grants is generally held flat. No General Revenue Fund money was allocated for Regional Office of Education salaries as the necessary provisions were amended in the law to allow lawmakers to again fund these offices out of Corporate Personal Property Replacement Tax funds. The bill is now **Public Act 97-0728**, effective July 1, 2012.

HB 5114 authorizes school districts, under the Safety Education provisions of the School Code, to provide instruction for students enrolled in grades 6-8 on Cardio-pulmonary resuscitation (CPR) and how to use an automated external defibrillator (AED). The instruction may be provided by video. The bill is now **Public Act 97-0714**, effective June 28, 2012.

HB 5195 includes in the definition of “energy conservation project” an Energy Efficiency Project in connection with any school district or community college district project. It removes the requirement that the Illinois Finance Authority implement a project aiding school districts. The bill is now **Public Act 97-0760**, effective July 6, 2012.

HB 2850 removes provisions allowing days of attendance to be less than five clock hours on the opening and closing of the school term. It would become effective for the 2013-14 school year. The bill is now **Public Act 97-0742**, effective June 30, 2013.

SB 3802 creates the Fiscal Year 2013 Budget Implementation Act to make necessary changes in statute to implement the new budget. It allows for the transfer of funds into and out of the Education Assistance Fund and the School Infrastructure Fund, as well as provides the authority for the payment of salaries for regional superintendents of schools out of the Corporate Personal Property Replacement Tax fund. The bill is now **Public Act 97-0732**, effective June 30, 2012.

SPECIAL EDUCATION

E.S. & M.S. ex rel. B.S. v Katonah-Lewisboro Sch. Dist., Nos. 10-4446-cv(L), 10-5007-cv(XAP), 11-2225-cv(L), 11-2228-cv(XAP) (2d Cir. July 6, 2012): B.S., the child of the plaintiffs, was a special education student who was unilaterally removed from the public school district and placed in a private facility because the parents felt that the IEP provided by the public school was inadequate. Despite B.S. no longer being a student at the school, the dis-

trict still developed an IEP for the following year in case B.S. return. The second IEP, however, did not take into account any progress made by B.S. at the private facility because the public school felt that no progress had been made. When the parents filed suit for reimbursement of tuition for the private school, the court found that the first IEP was sufficient as B.S. was making progress in the public school and denied their motion. As to the second IEP, however, because it did not take into account progress made in the private facility, had B.S. returned it would have been inappropriate, therefore the court did find a denial of FAPE as to the second IEP and awarded judgment in favor of the parents. Now the question became payment of attorney's fees. The judge awarded full attorney's fees despite the fact that the parents only prevailed on half of their action. Moreover, the judge also reduced the hourly rate being charged by the parents attorney because the judge felt that it was too high compared to the amount charged by other attorneys in other IDEA cases. In short, no one was happy and both parties appealed. Unfortunately, both parties left the 2nd Circuit equally unhappy as the 2nd Circuit found that the district court did not abuse its discretion and therefore did not reverse either the award of full attorney's fees or the lowering of the attorney's hourly rate.

Woods v Northport Pub. Sch., Nos. 11-1493, 11-1567 (6th Cir. July 5, 2012): T.W. was a special education student. His parents started administrative proceedings alleging that he was denied FAPE. During the pendency of the proceedings they unilaterally placed T.W. in a private school. A denial of FAPE was found and relief was ordered including compensatory education and a prospective placement should T.W. return to the public school. Upon reaching the 6th Circuit, the decision of the district court was affirmed except for the requirement that T.W. re-enroll in Northport Public Schools to obtain an amended IEP. The court found that the IDEA requires that public schools "make FAPE available to all children with disabilities residing in the State between the ages of 3 and 21 and refusing to do an IEP pre-enrollment constitutes a violation of the IDEA." The court did not, however, require that Northport fund T.W.'s private education stating that there was no indication that Northport could not provide FAPE upon T.W.'s return to public school.

L.G. & E.G. ex rel. E.G. v Fair Lawn Bd. of Educ., No. 11-3014 (3d Cir. June 28, 2012): When L.L. began pre-school he was put into a program exclusively for preschoolers with autism spectrum disorder, without any interaction with non-disabled children. L.L.'s mother agreed to the placement. Eventually L.L.'s parents requested that L.L.'s placement be modified to provide opportunities to interact with general education peers. The school, Fair Lawn, believed that L.L. lacked the requisite skills to benefit from placement in a less restrictive environment, so declined to change the placement until such skills had been obtained. Eventually the parents unilaterally placed L.L. in another placement and initiated due process proceedings against Fair Lawn for reimbursement of educational expenses. The administrative law judge found that Fair Lawn had provided FAPE and had met the IDEA's LRE requirement. L.L.'s parents filed suit in federal court. The district court granted summary judgment to Fair Lawn and L.L.'s parents appealed. The 3rd Circuit affirmed the district court. Although the parents refused to sign the IEP, contrary to the allegations of the parents they were not excluded from the process; they had an opportunity to participate in the IEP's formulation in a meaningful way. As regarding the decision on the LRE, the court noted that such a decision must be reasonable at the time it is made. It used a two part test developed by the court in *Oberti ex rel. Oberti v Bd. of Educ. of Clementon School Dist.*, 995 F.2d 1204 (3d Cir. 1993): (1) whether education in the regular classroom, with

the use of supplementary aids and services, can be achieved satisfactorily, and (2) if not, whether the school has mainstreamed the child to the maximum extent appropriate. Using this test, the court concluded that the administrative law judge's findings of fact were sufficient to conclude that the placement was the LRE from which L.L. could benefit.