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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

***Smith v Henderson*, No. 13-420 (D.D.C. 18 July 2014).** This case dealt with a civil rights claim. Specifically, after several schools in the Washington, D.C. school district were closed, a group of parents from those schools filed suit against the district alleging that the closings had a disparate impact on poor and minority children; that the schools chosen for closure was motivated by discriminatory animus. In its lawsuit, the parents alleged breach of contract, fraudulent representation, and violation of the Equal Protection Clause, Title VI, the IDEA, the ADA, the Rehabilitation Act, the D.C. Human Rights Act, and the D.C. Sunshine Act. The district's new superintendent justified the closing on the basis of low enrollment. All of the schools that were closed had been operating at half-capacity or less. First the parents requested a preliminary injunction to keep the school from closing. The court denied the injunction. The parents filed an amended complaint, but summary judgment was granted to the school district. After the summary judgment, the only claims remaining were those under the Equal Protection Clause, Title VI, and the D.C. Human Rights Act. In granting the district's motion for summary judgment on the equal protection and Title VI claims, the court stated that the "core problem" which the parents were trying to litigate was a policy issue better remedied through the legislative, not judicial, process; the issues were political rather than legal. "Whether charter schools, performance pay, and school turnarounds are worthwhile policy tools is a question for school superintendents and state legislature. There is no governable legal standard for assessing the promise of those reforms." The court stated that both the Equal Protection Clause and Title VI require a showing of discriminatory intent. Because the decision to close schools was neutral on its face the parents need to show that the plan had been applied differently based on the students' race or had an impermissible discriminatory intent. Comparing current policies with policies from the 1970s in order to show that intent was ineffective because the individuals in control were not the same in the two time frames. Moreover, the criteria used—closing under-utilized schools was supported by the evidence presented. "What policymakers are grappling with here is the current state of de facto segregation in the city," something different from de jure intentionally segregation.

***Phillips v City of New York*, Nos. 12-cv-98/12-cv-237/13-cv-791 (E.D.N.Y. 6 June 2014).** Two of three families who had received religious exemptions from inoculations for their school aged children challenged the degrees of exclusion of their children from school on the grounds that it violated their First Amendment right to free exercise of religion and their Fourteenth Amendment right to substantive due process and equal protection. The third family alleged that its child's religious exemption had been denied. The defendants, City of New York and the New York City Department of Education, moved for summary judgment, or in the alternative dismissal of the claims. The district court granted the motion to dismiss all claims relying on the United States Supreme Court's decision in *Jacobson v Commonwealth of Mass.*, 197 U.S. 11 (1905), the Second Circuit's holding in *Caviezel v. Great Neck Public Schools*, 500 F. App'x 16 (2d Cir. 2012), cert. denied, 133 S. Ct. 1997 (U.S. 2013), and *Sherr v Northport-East Northport Union Free School District*, 672 F. Supp. 81 (E.D.N.Y. 1987), concluding that no constitutional right to a religious exemption from compulsory inoculation laws exist.

***Yara v Perryton Indep. Sch. Dist.*, No. 13-10684 (5th Cir. 31 March 2014).** Yara was a student at Perryton High School. He participated in a role-playing exercise created by his world history teacher to teach about persecution. In this exercise, individuals who were wearing red-ribbons

were discriminated against by other students and staff. Yara was injured when a non-ribbon wearing student ordered Yara to carry him on his back. Another student jumped on, everyone fell, and Yara hurt his back. Yara filed suit under §1983 against the school district alleging his Fourth Amendment right to be free from unreasonable seizures and excessive force and his Fourteenth Amendment substantive due process rights to bodily integrity had been violated. The district court granted the school district's motion for summary judgment stating that Yara had failed to prove that an adopted custom or policy was the moving force behind the alleged constitutional violations. As regarding the §1983 liability based on the failure to train, there was no evidence that the school district policymakers were deliberately indifferent. The Fifth Circuit affirmed the lower court's decision. It stated that in order to hold a school district liable under §1983, a plaintiff cannot rely on holding an employer liable for the actions of an employee or agent; the plaintiff must prove that "the unconstitutional conduct was directly attributable to the [school district] through some sort of official action or imprimatur." Yara's claim failed because there was no evidence that the policy making authority of the school district, the school board, was aware of the activity, and there could be no deliberate choice to disregard the responsibility to appropriately train or supervise because no violation had occurred during the first two years of the program.

***Doe v Acton-Boxborough Reg. High. Sch. Dist.*, No. SJC-11317 (Mass 9 May 2014).** Atheist and Humanist students and parents sued the school district seeking declaratory and injunctive relief and claiming that the daily recitation of the Pledge of Allegiance violated the state constitution's equal protection clause. Massachusetts has a state statute that requires "each teacher at the commencement of the first class of each day in all grades in all public schools shall lead the class in a group recitation of the 'Pledge of Allegiance to the Flag.'" The plaintiffs are aware that they are not required to participate, but they want to participate; they don't want to say "under God." The trial court found that the words "under God" did not turn the political exercise of the Pledge of Allegiance to a religious exercise. The Massachusetts Supreme court affirmed the lower court's decision. "Although this court has not been called on previously to so state, we take this opportunity to confirm what has been obvious and understood to be the case for the decades since the *Barnette* case was decided: no Massachusetts school student is required by law to recite the pledge or to participate in the ceremony of which the pledge is a part. Recitation of the pledge is entirely optional. Students are free, for any reason or for no reason at all, to recite it in its entirety, not recite it at all, or recite or decline to recite any part of it they choose, without fear of punishment."

EMPLOYEES' RIGHTS

***Price v Board of Educ. of the City of Chicago*, No. 13-2007 (7th Cir. 2 July 2014).** Plaintiff, Price, was part of an enormous economic layoff in 2010 of teachers in the Chicago Public Schools (CPS). Price filed suit in federal court against CPS saying that CPS had violated her Fourteenth Amendment right to Due Process because she was tenured and therefore had a property interest in her continued employment. The district court dismissed the case stating failure to identify a protected property interest. Price appealed. The Seventh Circuit affirmed the lower court. In making that decision, the court stated that Price failed to identify a source, independent of the Due Process Clause, for the protectable property interest she claimed. The general prop-

erty interest was the right to continued employment. However, Price attempted to claim a greater interest. She claimed that by virtue of being a tenure teacher she had “a permanent property interest in filling any existing open or vacant position in CPS for which she was qualified at the time of her layoff even if it was not the position [she] had previously filled.” To support that claim, Price referred to 105 ILCS 5/34-84, the Illinois Tenured Teacher Statute. The court found that a 2012 Illinois Supreme Court case, *Chicago Teachers Union, Local No. 1 v Bd. of Educ.*, 963 N.E.2d 918, had ruled: “The General Assembly’s removal of layoff and recall procedures from section 34–84 eliminated any substantive rights arising from section 34–84 for tenured teachers to be rehired after an economic layoff.” The court went on to say that the case cited applied equally to pre-layoff and post-layoff rights.

Hubbard v Clayton Cnty. Sch. Dist., No. 13-12130 (11th Cir. 27 June 2014). Hubbard was employed by Clayton County Schools as an assistant principal. While holding that position, he was elected president of the Georgia Association of Educators (GAE), a private, non-profit professional association representing public educators in Georgia. It was the standard practice, since the president would be working full time for the union during his or her tenure, that the school district employing the individual would enter in to an “on-loan” arrangement where the president would continue to be an employee of the school district therefore accruing employment benefits, but the president’s salary and benefits would be reimbursed by GAE. During his presidency Hubbard, when interviewed by the media, made remarks that could be construed as derogatory about the Clayton County school board. Following those remarks, the school board voted to discontinue any employee leave not specifically provided for in Board Policy, including the “on-loan” agreement with GAE. Hubbard resigned from his position with the school district. Upon learning, however, that the teachers’ union president had been allowed to take leave until his term expired, Hubbard attempted to rescind his resignation. While the district said it was amenable to him rescinding his resignation, the fact that he had already cashed out his leave and not reported to his assigned school made that impossible. Hubbard completed his term as GAE president, and a second term, and then filed suit in federal district court against the Clayton County Schools alleging retaliation against him for exercising his freedom of speech. The district court granted summary judgment for the school district relying on the Supreme Court decision in *Garcetti*; Hubbard’s speech was pursuant to his official duties for the school district and therefore was not protected by the First Amendment. On appeal, the Eleventh Circuit vacated the district court’s decision and remanded the case for further proceedings on the question as to whether Hubbard’s speech was protected. The court went back to the United States Supreme Court case in *Pickering v Bd. of Educ.*, 391 U.S. 563 (1968), finding that *Garcetti* was a refinement of the standard set in *Pickering*. The threshold question was whether the employee spoke in his capacity as an employee or a private person. The court found that Hubbard was talking in his capacity of the president of GAE, not as an employee of the Clayton County Schools, therefore *Garcetti* did not apply.

Barbee v Union City Bd. of Educ., No. 13-5188 (6th Cir. 17 March 2014). Barbee was employed by the Union City Schools as a teacher and assistant basketball coach. Although Barbee had some discipline issues, he was “elected” for tenure at the April board meeting. Following that board meeting many more issues surfaced and he was eventually terminated. He was placed on leave prior to the end of school and then informed during the summer months that, as a non-tenured teacher” he would not be re-hired for the upcoming school year. The Tennessee Education Association (TEA) took the position that Barbee had been re-hired and given tenure at the

April board meeting. The school district stated that tenure does not become effective until the teacher is re-employed for the following school year. Barbee filed suit. The district court granted summary judgment for the defendants, agreeing that Barbee's tenure did not take effect until he was re-hired for the following school year. On appeal, the circuit court affirmed the decision of the district court. It based its decision on the wording of the state law which provided that a tenured teacher "may be dismissed, suspended, or have his contract non-renewed only with cause and after having been given notice, a hearing, and an opportunity for judicial review" but provided no such safeguards to non-tenured teachers. Under state law, for a teacher to obtain tenure, three things had to happen: (1) he or she must be eligible for tenure; (2) the school board must "elected" for tenure; and (3) must satisfy four tenure-eligibility requirements in state law, one being re-employed by the board for service after the probationary period. The court found that being "elected" provided only a type of provisional tenure; actual tenure did not commence until the individual was rehired.

Pekowsky v Yonkers Bd. of Educ., No. 12-4090 (S.D.N.Y. 29 May 2014). Pekowsky was a music teacher and representative of the local union at Yonkers Middle School. He often "buted heads" with Principal Wermuth, especially on the topic of compensation to teachers for supervising extracurricular activities. Wermuth made no secret of her dislike of working with Pekowsky and tried to work around him whenever possible. One particularly contentious day, Wermuth finally issued a letter of reprimand to Pekowsky which led to his involuntary transfer from Yonkers Middle School. Pekowsky filed suit alleging retaliation. Defendants filed motions for summary judgment which were denied by the district court. The court found that Pekowsky's advocacy on behalf of the teachers in his capacity as representative of the union was protected speech. "Pekowsky's advocacy on behalf of fellow teachers was not aimed at redressing his own grievances, but was undertaken as a representative of the teachers' union." The court also found that Pekowsky's transfer and the letter of reprimand could be considered an adverse employment action by a reasonable jury. It also stated that "a reasonable jury could find the Pekowsky's protected union activity was a motivating factor in the decision to transfer Pekowsky and to place the Wermuth letter in his file." Finally, using the test from ***Mt. Healthy City School District Board of Education v Doyle***, 429 U.S. 274 (1977), the court concluded that "a reasonable jury could find that Pekowsky would not have been transferred, and the Wermuth letter would not have been written, had Wermuth not borne animus against Pekowsky because of his union activities."

Lane v Franks., U.S. No. 13-483 (WL 2765285 June 2014) Lane was employed by Central Alabama Community College as the director of a youth program. He discovered that an Alabama state legislator, Schmitz, was on the youth program's payroll even though she had done no work from the program. He reported his findings to the College's President Franks and attorney and was warned that firing Schmitz would have negative repercussions on both his program and on him. Eventually Schmitz was indicted as part of a larger public corruption scandal. Lane was subpoenaed as a witness. Not long after his testimony that was unfavorable to both Schmitz and the college his employment was terminated. Lane sued Franks alleging retaliation for exercising his First Amendment right to free speech. The federal district court ruled in favor of Franks. The Eleventh Circuit Court affirmed the ruling of the district court, holding that Lane's testimony was not protected because he was acting pursuant to his official duties as a college employee. On appeal to the United States Supreme Court, the Court held that a public community college

employee's truthful subpoenaed testimony in a public corruption trial is protected speech under the First Amendment. Although the employee's testimony addressed information he learned during the course of his employment, testifying in court proceedings was not within the scope of his ordinary job duties, and therefore his testimony was protected even though it concerned those duties.

Vergara v State of California, BC484642 (Super. Ct. Cal. 10 June 2014). The group, Students Matter, filed suit on behalf of nine California public school students alleging that five state laws relating to teacher employment denied low income and minority children their right to an equal opportunity for an education. The Superior Court held that all of the challenged statutes were unconstitutional. The court found that the two-year tenure statute was insufficient for making the determination as to whether the teacher should be granted tenure. Regarding the teacher dismissal law, the court found that the onerous dismissal procedures outlined in the law discouraged school districts from attempting to dismiss unsatisfactory teachers. The court concluded that the state had not met its strict scrutiny burden in regard to the dismissal statutes. Regarding making seniority the sole criteria for lay-offs violated the equal protection clause. Finally, the court found that the challenged statutes disproportionately affected poor and minority students and allowed grossly ineffective teachers to remain in the classrooms.

Santer v Board of Educ. of East Meadow Union Free Sch. Dist., Nos. 51/52 (N.Y. 6 May 2014). Teachers and member of the teachers' union staged a picket to protest the lack of a new collective bargaining agreement. On one day heavy rain was forecasted, so instead of picketing on the sidewalk, they picketed from the cars by parking on both sides of the street in front of the school and putting their picket signs in their windshields. By doing this, they occupied all of the spaces used by parents to drop off and pick up their children. This forced parents to double-park and let their children out in the middle of the road, creating a dangerous situation. As the situation became worse the principal called the police to come and handle the "traffic situation." The school instituted disciplinary procedures against the teachers involved because they had "intentionally created an unnecessary health and safety risk." The arbitrator found in favor of the school district, that the teachers intended to disrupt the student drop off and caused a dangerous situation, and levied fines against them. The teachers petitioned the state court to vacate the arbitrator's judgment. The court denied the petition. On appeal, the appellate court reversed the arbitrator's decision. The school district appealed. The Court of Appeals reversed the appellate division's decision, and affirmed the imposition of the fines. While recognizing that teachers retain the right to free speech, the court noted that those rights are "somewhat diminished" because of the teachers' status as public employees. Turning to the United States Supreme Court case of *Pickering v Board of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563 (1968), the court used the two-prong test contained therein to analyze the instant case. The first prong was whether the speech related to a matter of public concern. The teachers' speech did relate to a public concern; the labor dispute affected issues important to the public. The second prong weighs the employee's interest in free speech against the employer's interest in providing efficient public services. In this instance, the employer's interest predominated because the actions of the teachers had affected student safety and the orderly operation of the school. Moreover, the court held that the teachers were not disciplined because of the content of their speech but on the place of their speech; it caused a dangerous situation for students.

ADMINISTRATION

Mpoy v Rhee, No. 12-7129 (D.C. Cir. 15 July 2014). Mpoy was employed by the Washington D.C. Public Schools (DCPS) as a probationary special education teacher. He complained to his building principal that his room was unsanitary, lacked needed resources, and that his aides were performing poorly. No corrections were made. Later, Mpoy claimed that the same principal instructed him to falsify documents to make it appear that his special education students were performing better than they actually were. Mpoy refused to do so. Subsequently, the principal issued two warning letters to Mpoy and a five-day suspension. Mpoy sent an e-mail to the superintendent cataloging his grievances. At the end of the year, Mpoy was non-renewed. Mpoy filed suit in federal district court alleging his non-renewal was retaliation for “reporting the misconduct and inappropriate conditions” at the school to which he was assigned. While Mpoy had named several defendants, the court allowed Mpoy’s retaliation claim to proceed only against Superintendent Rhee and Principal Presswood in their personal capacities. The remaining defendants filed a motion for judgment on the pleadings which was granted by the district court stating that Mpoy’s speech was not protected by the First Amendment because it was pursuant to his official duties rather than as a private citizen on a matter of public concern. In the alternative, the court stated that even if the speech was protected, Rhee and Presswood were entitled to qualified immunity. Mpoy appealed the ruling. The D.C. Circuit panel affirmed the lower court ruling on the grounds of qualified immunity. On the question of whether Mpoy’s speech was protected, the court looked to circuit law and found that Mpoy’s e-mail was not protected by the First Amendment because it “reported conduct that interfered with his job responsibilities.” While the court noted that the United States Supreme Court’s decision in *Garcetti v Ceballos*, 547 U.S. 410 (2006) may have modified the earlier circuit court ruling, the court decided that it did not have to explore that possibility because the case could be decided on the question of qualified immunity.

Metropolitan Sch. Dist. Of Martinsville v Jackson, No. 55A01-1304-CT-182 (Ind. App. Ct. 19 May 2014). Michael Phelps was a middle-school student at Martinsville West Middle School who had accumulated an unbelievable number of discipline referrals. A significant number involved harassing, threatening, and physically assaulting other students. About a week before he was going to be expelled, his mother removed him from school. While some teachers knew about Phelps’ threats to assault another student, no one reported it to the administration. Phelps did indeed carry out his threat one morning, about a week after his mother had removed him from school, and shot another student twice in the stomach. Phelps was charged and found guilty of attempted murder. He was sentenced to 35 years. Following his conviction, the student who had been shot, Jackson, and his mother filed suit against the school district alleging negligence, specifically for allowing Phelps entrance to the building, and to fail to warn monitors that Phelps posed a threat and to watch out for him, alerting 911 should he appear. The school district filed a motion for summary judgment arguing statutory immunity and contributory negligence on behalf of Jackson. The trial court denied the motion and the school district appealed. The Indiana Court of Appeals affirmed the trial court’s decision. The court stated that because the challenged actions were not “policy decision that resulted from a conscious balancing of risks and benefits and/or weighing of priorities” such actions were not immune from legal challenge under Indiana law. Indiana tort law uses something called the “planning/operational test” which was defined in an Indiana Supreme Court decision, *Peavler v Bd. of Comm’rs of Monroe City*, 528 N.E.2d 40 (Ind. 1988). This test defines planning activities as those that “include acts or omissions in the

exercise of a legislative, judicial, executive or planning function which involves formulation of basic policy decisions characterized by official judgment or discretion in weighing alternative and choosing public policy.” The allegations made by Jackson dealt with negligent implementation of the school safety plan, not the formation of the plan itself. “Under our reading of Indiana case law, Indiana statutes, and the evidence before us, Principal Lipp’s safety plan does not entitle the School District to discretionary function immunity under the Indiana Tort Claims Act. As regarding whether the administration exercised reasonable care for the protection of the students and whether there was contributory negligence on behalf of Jackson, the court determined that genuine issues of material facts on the issue existed therefore summary judgment would have been inappropriate.

People v Marquan M., No. 139 (N.Y. 1 July 2014). Albany County officials enacted a county statute criminalizing cyberbullying, which was defined as: “Any act of communicating or causing a communication to be sent by mechanical or electronic means, including posting statements on the internet or through a computer or email network, disseminating embarrassing or sexually explicit photographs; disseminating private, persona, false or sexual information, or sending hate mail, with no legitimate private, persona, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person.” Marquan M., a high school student, ran afoul of the law almost immediately when he created a sexually charged Facebook page using pictures of high-school classmates. He was charged under the new cyberbullying law and then moved to dismiss the charge alleging the statute violated his right to free speech. His motion was denied. He appealed. The Court of Appeals reversed Marquan’s convictions and struck down the cyberbullying statute on the ground it violated the First Amendment Free Speech Clause. “Prohibitions of pure speech must be limited to communications that qualify as fighting words, true threats, incitement, obscenity, child pornography, fraud, defamation or statements integral to criminal conduct.” The court stated that laws prohibiting the cyberbullying directed at children may be permitted, the current law as written applied to far more than just children. “On its face, the law covers communications aimed at adults, and fictitious or corporate entities, even though the county legislature justified passage of the provision based on the detrimental effects that cyberbullying has on school-aged children.”

School Bd. of City of Norfolk v Opportunity Educational Institution, Nos. CL13-6955/CL14-1002 (Cir. Ct. Va. 10 June 2014). Norfolk Public Schools (NPS) and the Virginia School Boards Association (VSBA) filed suit against the Opportunity Education Institution and its governing board, both established by state law to take over chronically low performing schools, was unconstitutional under the Virginia Constitution. The plaintiffs argued that they violated Article VIII, §7 of the Constitution of Virginia stating “the supervision of schools in each school division shall be vested in a school board,” and Article VIII §5 which provides that the State Board of Education shall create school divisions; the General Assembly created OEI. The Circuit court held that OEI violated both §5 and §7 of the constitution: “The OEI legislation removes schools from the supervision of the division’s school board. Because this action is not in harmony with Article VIII, §7 of the Constitution, the General Assembly lacks the authority to direct this result. The Virginia Supreme court has not equivocated on this constitutional principal: “No statutory enactment can permissibly take away from a local school board its fundamental power to supervise its school system.”

HIGHER EDUCATION

***Fisher v University of Texas at Austin*, No. 09-50822 (5th Cir. 15 July 2014).** This is the aftermath of the Supreme Court decision regarding the use of race in deciding admission to the University of Texas at Austin. Fisher, a white applicant, was denied admission to the University of Texas under its “holistic review program” which takes the applicant’s race into consideration in order to increase minority enrollment. After the program was upheld by the Fifth Circuit, the case was appealed to the United States Supreme Court which, in a 7-1 decision vacated the Fifth Circuit’s decision stating that the lower court erred in not using strict scrutiny in determining the case. The case was remanded for further proceedings consistent with the Supreme Court’s opinion. On remand, the Fifth Circuit affirmed the original decision of the district court after applying strict scrutiny to the facts. The court stated that “UT Austin implemented every race-neutral effort that its detractors now insist must be exhausted prior to adopting a race-conscious admissions program—in addition to an automatic admissions plan not required under *Grutter* that admits over 80% of the student body with no facial use of race at all.” The court found the holistic review program to be a compliment to the automatic, top-ten-percent admissions policy. In short, the court said that since 80% of the student body was chosen by a race neutral, automatic policy, that using race as a factor in the admittance of the final 20% was appropriate, even though the institution’s goal of a diverse student body had already been met by the race neutral policy. The dissent stated that the holistic review was not narrowly tailored to achieve the goal of diversity. Quoting Justice Kennedy’s concurrence in *Parents Involved in Cmty. Schs. v Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), the dissenting judge stated that the use of racial classifications is permissible only as a “last resort to achieve a compelling state interest.” The dissented further noted that, “Absent a meaningful explanation of its desired ends the University cannot prove narrow tailoring under its strict scrutiny burden.... The exacting scrutiny required by the Supreme Court’s ‘broader equal protection jurisprudence’ is entirely absent from today’s opinion, which holds that the University has proven narrow tailoring even though it has failed to meaningfully articulate its diversity goals.... Because the role played by race in the admissions decision is essentially unknowable, I cannot find that these racial classifications are necessary or narrowly tailored to achieving the University’s interest in diversity.”