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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

***N.W. v Boone Cnty. Bd. of Educ.,* No. 13-6514 (6th Cir. Aug. 18, 2014).** In 2007, at the age of three, N.W. was enrolled in the Boone County Schools. He received special education services at St. Rita's School for the Deaf in Ohio, paid for by Boone County Schools. When he was six, his parents unilateral moved him to a different school and requested reimbursement from Boone County. A new staffing was held, a new IEP was developed, but the two sides could not agree on placement. A settlement involving reimbursement for tuition, transportation, and attorney's fees was reached, however, an agreement on placement remained elusive. During the ensuing hearings, N.W.'s parents insisted that the school where they had unilaterally placed N.W. be the stay put placement. At the conclusion of the hearings and appeals, the Exceptional Children's Appeal Board (ECAB) held that the new school was not the "stay put" placement for purposes of reimbursement because "no ARC decision or legal decision decided that placement at ABS was proper." The district court reversed this holding. On appeal to the Sixth Circuit, the panel vacated the district court's order granting tuition reimbursement to the parents for the new school, stating that the lower court had erred on two issues. First, the IDEA does not permit courts to order reimbursement in the absence of a finding of a failure to provide FAPE, and that finding had never been made. Second, the IDEA and its accompanying regulations did not support the parents' interpretation of the "stay put" provision, which require that the school district to approve of the placement at some point. Because Boone County never agreed to place N.W. in ABS in an IEP, it did not meet the criteria necessary to be the "stay put" location.

***M.M. v Lafayette Sch. Dist.*, Nos. 12-15769/15770 (9th Cir. Oct. 1, 2014).** Through RtI, C.M. was identified as a student in need of reading intervention and the school began providing him additional instruction in kindergarten. In first grade, C.M.'s parents requested that he be evaluated for a learning disability. It was determined that C.M. was eligible for special education services because he had a phonological processing disorder. In second grade C.M.'s parents had him evaluated by a Doctor of Audiology who diagnosed a central auditory processing disorder related to his disability and made recommendation in terms of environmental modifications, direct interventions, and compensatory strategies. The recommendations were not incorporated into his new IEP for third grade. C.M.'s parents had him assessed several more times, returning with the additional diagnosis of dyslexia. After over a year of discussions and inability to come to agreement as to the IEP, the parents filed a compliance complaint with the California Department of Education alleging that the school district failed to comply with the IDEA. The school district responded by filing a due process complaint. The ALJ issued a decision holding that the school district unnecessarily delayed its original assessment and that the parents had waited too long to request the IEE. Therefore, the district was only liable of a portion of the costs of the additional assessments. For the next two years, the parents filed numerous due process complaints and lawsuits alleging a variety of violations by the school district. In the end, the district court issued a final order in favor of the school district on all but one claim and the parents appealed to the Ninth Circuit. On appeal, the Ninth Circuit reversed the lower court and found that the school district had denied C.M. FAPE. Specifically, the school district failed to provide the parents with the RtI data in violation of the IDEA because it made the parents unable to give informed consent for both the initial evaluation and special education services. Because this procedural error "prevented the parents from meaningfully participating in the IEP process" the school district had denied C.M. a FAPE.

Discrimination

***Ollier v Sweetwater Union High Sch. Dist.,* No. 12-56348 (9th Cir. Sept. 19, 2014).** A class action lawsuit filed against Sweetwater Union High School District (SUHSD) alleging that female athletes were discriminated against in violation of Title IX with respect to "practice and competitive facilities; locker rooms; training facilities; equipment and supplies; travel and transportation, coaches and coaching facilities; scheduling of games and practice times; publicity; and funding." The suit also alleged that SUHSD retaliated against the softball coach, Chris Martinez, by firing him after he complained about the disparities. The district court granted summary judgment to the plaintiffs. On appeal, the Ninth Circuit affirmed the lower court on the issues of unequal participation and retaliation. The court stated that there existed a three-part test for determining if an institution was in compliance with Title IX: (1) Are participation opportunities for male and female students provided in numbers substantially proportionate to their respective enrollments; or (2) where the members of one sex have been and are underrepresented among athletes, can the institution show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or (3) where the members of one sex are underrepresented among athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, can it be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program? If an institution can satisfy any one of those prongs, then it is in compliance with Title IX. SUHSD failed all three prongs. On the topic of retaliation, the court concluded that "on the record before it, the district court correctly could find that Coach Martinez was fired in retaliation for Plaintiff's Title IX complaints, not for any of the pre-textual non-retaliatory reasons that Sweetwater has offered."

Dear Colleague Letter: Guidance to Ensure All Students Have Equal Access to Educational Resources. OCR has issued a "Dear Colleague Letter" detailing the standards set in Title VI of the Civil Rights Act of 1964. The purpose of the letter is to provide guidance to school officials regarding the requirements on educational resources, how OCR investigates resource disparities, and what can be done to meet obligations to all students.

***Blunt v Lower Merion Sch. Dist.,* Nos. 11-4200/11-4201/22-4315 (3d Cir. Sept. 12, 2014).** A group of African-American students brought a class action alleging discrimination by the Lower Merion School District (LMSD) under Title VI and §1983 violation of the Equal Protection Clause. The basis of their argument was that they were incorrectly placed in special education programs based on their race rather than a disability. Originally the students had claimed that they were disabled in a suit they had filed under the IDEA. The students argued that they were denied equal education opportunity because of their erroneous inclusion in special education programs, thereby denying them the opportunity to enroll in more challenging college preparatory courses. To support their contentions, they used primarily general statistical data regarding such type of discrimination. Summary judgment was granted the LMSD for failure to present a prima facie case of discrimination. The court stated that they students "must raise at least some reasonable inference that they were placed into classes and offered services by the School District due to intentional discrimination based on their race and not simply due to errors in evaluation." On appeal the decision of the lower court was affirmed; the plaintiffs had failed to establish a prima facie case of race discrimination under Title VI or §1983. "LMSD was entitled to summary

judgment because there is no evidence to suggest either that LMSD itself acted with a discriminatory intent, or that it knew of—but failed to correct—a third party's intentional discrimination."

Students' Rights

***Dariano v Morgan Hill Unified Sch. Dist.,* No. 11-17858 (9th Cir. Sept. 17, 2014).** During a Cinco de Mayo celebration at Live Oak High School, three white students wore t-shirts depicting the American flag. The high school has a long history of violence among students, including racial violence; fights between gangs and between white and Hispanic students had occurred over thirty times in the last six years, including on Cinco de Mayo the year before. Fearing renewed violence and concerned for the safety of the students, the three students were told to either remove that shirts or turn them inside-out. The students refused, stating that they would prefer to risk the possible violence that may result. They were sent home on excused absences. They were not disciplined. The parents filed suit on behalf of their children alleging violation of the First Amendment right to free speech. The district court granted the administrator's motion for summary judgment, and dismissed the claims against the school district based on sovereign immunity under the Eleventh Amendment. On appeal, the panel recognized the "heckler's veto" doctrine stating that government cannot silence a speaker just because of how an audience might react to the speech. In the school context, however, the crucial issue is the "substantial disruption" that occurs in the school setting. In other words, actions which would fall under the doctrine outside of the school setting, could be limited in the school setting because of the "school's need to protect its learning environment and its students." The decision of the lower court was upheld.

***Gallimore v Henrico Cnty. Sch. Bd.,* No. 14-009 (E.D. Va. Aug. 5, 2014).** Hermitage High School (HHS) Assistant Principal Turpin and Associate Principal Saunders were informed that a long-haired student had been smoking marijuana on the school bus. W.S.G., a student who matched that description, was taken by Turpin to Saunders office where he was thoroughly searched and no marijuana was found so he was sent back to class. W.S.G. filed suit against the school district, Turpin, and Saunders alleging a violation of his Fourth Amendment rights to be free of unreasonable searches. Turpin and Saunders claimed qualified immunity. The district court held that the searches, with the exception of W.S.G.'s cell phone, were valid under the Fourth Amendment. Under the T.L.O. standard, the search was justified at its inception because credible information had been received giving the administrators reasonable suspicion that a law or school rule had been violated, and it was reasonable in scope because the areas searched were reasonable potential hiding places for drugs—except for the cell phone. Regarding the question of qualified immunity, the court found that it did not extend to the search of the cell phone because "no reasonable school administrator could believe that searching a student's cell phone would result in finding marijuana—the purpose for which the administrator initiated the search."

***Antonio T.v State of New Mexico,* No. 33,997 (N.M. Oct. 23, 2014).** Antonio T. was drunk at school. The SRO, a deputy sheriff with the San Juan County Sheriff's Office, administered a breath test. He tested positive. Antonio admitted to bringing alcohol to school and consuming it on school grounds. At his legal proceeding on the charge of possession of alcoholic beverages by a minor, Antonia filed a motion to suppress his statement as not being obtained knowingly, intelligently and voluntarily. The trial court denied the motion. On appeal the court affirmed the

lower court's ruling, finding that Antonio had been subjected to an investigatory detention, not a custodial interrogation therefore constitutional rights had not attached. On appeal the New Mexico Supreme Court, the court held that Antonio's statements to the school resource officer should be suppressed because he had a constitutional right to remain silent. The court listed four factors that must be considered before admitting a child's statement or confession into evidence: (1) age of the child; (2) whether the child's statement was elicited; (3) whether the child was advised of his or her constitutional rights before the statement was elicited; and (4) whether the child made a knowing, intelligent, and voluntary waiver of those constitutional rights. The burden of proof is on the state. The court found that the statements were elicited. It acknowledged that there is a difference between questioning a child for school disciplinary reasons and questioning a child for evidence to be used in criminal court. Therefore, the statement could be used for school discipline, but was not admissible in court because the state had not met its burden of proof that the child's statement was made knowingly, intelligently, and voluntarily. The court stressed that its holding "should not be construed to require school administrators to advise a child of his or her right to remain silent in order to use incriminating statements elicited from the child against the child in school disciplinary proceedings."

Employee Rights

***Garney v Massachusetts Teachers' Retirement Sys.,* No. 11493 (Mass. Aug. 18, 2014).** Garney, a ninth grade teacher, was arrested for the purchase and possession of child pornography. He resigned in order to avoid being fired. Prior to entering a plea, he filed for retirement. Once his retirement became effective he pleaded guilty to eleven counts of purchasing and possessing child pornography. Two years later, the retirement board issued a decision concluding that he had forfeited his benefits because of his conviction. Garney filed a petition with the state district court challenging the board's decision. The district court affirmed the retirement board's decision, stating that teachers hold a position of special trust and that Garney's criminal acts had violated his duty to protect the welfare of children. On appeal, the superior court reversed the decision of the district court finding there was not the direct link between his convictions and his position as a teacher needed to cause him to forfeit his pension. The Massachusetts Supreme Court affirmed the superior court, concluding that the fact that a teacher's position is one of special public trust and the crimes committed violated that trust was insufficient in and of itself to warrant forfeiture. In order for the pension to be forfeited, the conduct must either directly involve the position or be contrary to the central function of the position.

***Jordan v Indian River Sch. Dist.,* No. S14C-02-036 RFS (Del. Super. Ct. July 31, 2014).** Jordan was a student at IRSD when she was injured in an experiment where her right arm and hand were exposed to cold water for a lengthy period of time. She file suit against the teacher, McVey, and the district, IRSD, for damages alleging that McVey's actions constituted gross or wanton negligence. The defendants, McVey and IRSD, filed a motion to dismiss arguing that their actions were discretionary and performed in good faith, therefore not negligent. The Superior Court denied the motion to dismiss. On the question of gross negligence, the court concluded that the defendants had not met their burden of demonstrating that Jordon had failed to establish that the defendants were aware of the unjustifiable risk inherent in the exercise. "A teacher owes a heightened duty when involving students in a hazardous activity." On the question of whether

immunity applied, the court found that it did not. Because of the "blatant and obvious risk" of having student stick their arm in freezing water for a long period of time, the defendants could not avoid "the apparent issues of negligence and gross negligence by simply claiming their actions were discretionary."

***Daubert v Lindsay Unified Sch. Dist.,* No. 12-166252 (9th Cir. July 25, 2014).** Daubert was a wheelchair bound resident of Lindsay Unified School District (LUSD). He liked to attend home football games. Unfortunately, the stadium's bleacher seating was not accessible to wheelchair users. Wheelchair users were provided three different locations where they could have an unobstructed view of the field, however, they were not in the bleachers and therefore Daubert felt they were inferior. He sued. The lower court found for the school district stating that, because the stadium was built in 1971, it was considered an existing facility under the ADA and, so long as wheelchair access to watch the game was provided, the bleachers were not required to be made accessible. On appeal, the Ninth Circuit affirmed the lower court. It reiterated the ADA's focus on "program accessibility" rather than "facilities accessibility." The court rejected Daubert's claim that the "social experience" of sitting in the bleachers was an important part of accessibility to the program.

***Fong v School Bd. of Palm Beach Cnty.,* No. 13-10393 (11th Cir. Nov. 4, 2014).** Fong was a math teacher who had been employed on a series of one-year contracts. When the high school where she taught received a poor rating, a new principal was hired with the mandate to improve the performance of the school. The new principal and two assistant principal's informally observed Fong's class. Speaking to her afterwards he noted her strong accent that made her unintelligible to the students. After subsequent evaluations, the principal found that Fong's teaching style and class management style, along with her resistance to feedback and change, were not a good fit for the school. Her contract was not renewed and she filed suit alleging discrimination based on national origin under Title VII. The district court granted summary judgment to the school district. On appeal, the Eleventh Circuit affirmed the lower court's decision. The court confirmed that "an employee's heavy accent or difficulty with spoken English can be a legitimate basis for adverse employment action where effective communication skills are reasonably related to job performance, as they are in a teaching position." When viewed in context of the other remarks made by the principal, the court concluded the, given the fact that the principal was instructed to improve student performance, he had a legitimate and non-discriminatory interest in the ability of any teacher to communicate with the students. Having decided that Fong could not prove intentional discrimination, the court reviewed the facts to determine whether there was disparate impact based on national origin. The court found that the reasons given for termination—that her style of teaching was not the best method to engage the students and increase student achievement, and that she was resistant to feedback and change—were legitimate and non-discriminatory. "The evidence relied upon by Fong is insufficient to show pre-text. The inquiry into pretext centers on the employer's beliefs, not the employee's beliefs and, to be blunt about it, not on reality as it exists outside of the decision maker's head…. The question is whether Fong's employers were dissatisfied with her for these or other non-discriminatory reasons, even if mistakenly or unfairly so, or instead merely used those complaints about her as cover for discriminating against her because of her Chinese origin."

Legislative Issues

Bullying

Public Act 98-0669, effective June 26, 2014 sets forth a comprehensive set of requirements to be added to a school's "policy on bullying." The criteria in the new law includes:

- providing contact numbers and email addresses for prompt and anonymous reporting on bullying;
- procedures to inform parents of incidents and availability of services including restorative measures;
- procedures for prompt investigation of bullying, involving appropriate school support personnel, notifying the principal or administrators and providing parents information about the investigation;
- interventions that can be taken to address bullying;
- a statement prohibiting retaliation for reporting acts of bullying;
- appropriate remedial actions for persons falsely accused;
- engaging school stakeholders such as students and parents or guardians;
- posting the policy via the district website and student handbook; and
- a policy evaluation process to assess outcomes and effectiveness of policy, which must also be made available.

Public Act 98-0801 creates a definition of "cyber-bullying" and requires district policies to include a process for investigating such offenses. The law now covers bullying from a computer that is accessed off school property or that is not owned by the school district if the resulting bullying substantially interferes with or limits the victim's ability to participate in opportunities offed by the school. 105 ILCS 5/27-23/7; effective Jan. 1, 2015.

Charter Schools/Privatization

Public Act 98-0640 deals with charter school funding. The new law provides that if a charter school dismisses a pupil from the charter school it must return to the school district an amount equal to 100% of the school district's per capita student tuition, on a pro rata basis, for the time the student is not enrolled at the charter school. 105 ILCS 5/27A-11; Effective June 9, 2014.

HB 4522, still awaiting the Governor's signature, allows two or more contiguous school districts with some portion of their territory located within the geographic boundaries of the same municipality to jointly operate, through an institution of higher education located in that same municipality, a science and mathematics partnership school for serving some or all of grades kindergarten through 8th grade.

Public Act 98-0639 requires a charter school to comply with all federal and state laws and rules applicable to public schools that pertain to special education and the instruction of English language learners. 105 ILCS 5/27A-5; Effective June 9, 2014.

Legislative Update

Public Act 98-0661, signed June 23, encourages districts to make emergency and crisis response plans available electronically to first responders, administrators and teachers when those plans are updated.

Public Act 98-1066 which became effective immediately on August 26, 2014 allows schools boards to use remaining funds on hand in the Fire Prevention and Safety Fund for required safety inspections.

HR 883 urges all schools in Illinois to educate youth about the dangers associated with the use of heroin and the escalating numbers of accidental deaths due to heroin overdoses. Heroin is becoming an increasing problem in high schools in Illinois and across the Midwest. In response a bill passed both Houses establishing the Young Adults Heroin Use Task Force to conduct a study on the heroin use problem in grades 6 through 12. This resolution declares a Heroin State of Emergency and directs the House Task Force on Heroin Crisis to develop legislation to combat the problem.

HB 5431 passed both Houses. It requires the IHSA to develop an on-line certification and training on concussion awareness that will be required for high school coaching personnel and athletic directors.

HB 5892 provides for the administration of undesignated epinephrine auto-injectors by a pupil, school nurse, and trained personnel. It was sent to the Governor in June.

SB 3004 would limit the authority a local school district has regarding the disciplining of students, including the use of expulsions or suspensions. It would require behavioral support services and alternative educational services be provided to students and, unless otherwise required by statute for a specific criminal offense, prohibit a student from being arrested or otherwise cited for a criminal offense committed during school hours while on school grounds.

Public Act 98-0705, effective July 14, 2014 requires the Illinois State Board of Education (ISBE) to adopt a definition of dyslexia and establish an advisory group to develop training for educators on dyslexia.

Public Act 98-0632, effective July 1, 2014 requires training on how to properly administer Cardiopulmonary Resuscitation and how to use an Automated External Defibrillator to be included in high school health education classes.

Public Act 98-0688 effective June 30, 2014 makes changes to the Alternative Route to Teacher Certification programs, including that no one may be admitted to the program after Sep. 1, 2014.

Public Act 98-0636, effective June 6, 2104 requires the Illinois Purchased Care Review Board to approve the usual and customary rate or rates of certain out-of-state, non-public providers of special education programs.