

Vol. 18, No. 3
Spring 1998

ILLINOIS STATE
UNIVERSITY



SCHOOL
LAW
QUARTERLY™

IN THIS ISSUE

- Page 82* **School Administrator Performance-Based Employment Contracts: Don't Worry, Be Careful**
- Page 91* **Torts Potpourri: Negligence Review, Reference and Update**
- Page 99* **School Funding and Reform Bill of 1997 PA 90-0548 (HB 452) Implications for School Administrators**
- Page 112* **Superintendent Power, Immunity, and Workplace Harmony**
- Page 114* **Discrimination, Harassment, and Intercourse: Putting the X in Sex**
- Page 117* **Smoke Gets in Your Eyes: Reasonable Suspicion?**

Department of Educational Administration and Foundations
College of Education, 331 DeGarmo, Campus Box 5900, Normal, IL 61790-5900, Phone: 309/438-2049

EDITOR

Elizabeth Timmerman Lugg, J.D., Ph.D.

ASSOCIATE EDITOR

Paul C. Burton, J.D., M.S.Ed.

PUBLICATIONS EDITOR

Lilly J. Meiner

BUSINESS MANAGER

Jane L. Smith

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 School Law Quarterly is published every Fall, Winter, Spring and Summer by the Department of Educational

Administration and Foundations and the College of Education, Illinois State University, Campus Box 5900, Normal, IL 61790-5900.

Annual subscription price is \$24.95 per year for single copies. Copyright pending. If you quote or paraphrase, please credit author and *Illinois State School Law Quarterly* 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, Associate Editor, and contributors represent personal opinion and not that of the University, College, or Department. All inquiries should be directed to Editor, *Illinois State School Law Quarterly*, Illinois State University, Campus Box 5900, Normal, IL 61790-5900.

EDITORIAL BOARD MEMBERS

Dianne Ashby
Illinois State University
Normal, Illinois

Larry Barlett
University of Iowa
Iowa City, Iowa

John Dively
Carbondale Community High School
Carbondale, Illinois

Marcilene Dutton
Illinois Association of School Administrators
Springfield, Illinois

Dixie Huefner
University of Utah
Salt Lake City, Utah

Robert Hendrickson
The Pennsylvania State University
University Park, Pennsylvania

Nelda Cambron McCabe
Miami University of Ohio
Oxford, Ohio

SCHOOL ADMINISTRATOR PERFORMANCE-BASED EMPLOYMENT CONTRACTS: DON'T WORRY, BE CAREFUL

Marcilene Dutton, J.D.

Author's Note: This discussion will deal with the area with which I am most familiar, that of superintendent contracts. I hope that, in a general sense, these comments will help other administrators grappling with the issue of performance-based contracts. For an excellent discussion of this topic as it relates to principals, please see Vol. 5, No. 6 of the Illinois Principals Association's Building Leadership: A Practitioner's Bulletin (February 1998), authored by Megan Paisley. In addition, the school law firms in this state have all promptly responded to P.A. 90-548 and many have authored excellent discussions of the law's requirements, including performance-based contracts for administrators.

Like it or not, performance-based contracts for superintendents and other school administrators are here to stay. P.A. 90-548, the so-called "school reform law of 1997," now requires that school administrators employed under multiple year contracts of up to five years must have "performance-based" agreements

"...linked to student performance and academic improvement within the schools of the districts."

¹ At first blush, a reading of the law would lead one to believe the Illinois General Assembly wished to put pressure on all school administrators to force betterment of student academic performance.

Perceptions can be deceiving, however. The effect (and, incidentally, the intent) of the new law will be to eradicate the roll-over or "evergreen" clauses contained in many superintendent employment contracts. "Evergreen" clauses operated to automatically extend the contract by one year annually in the Spring without any action on the board's part. In the past the goal was that, even though superintendents could not in many cases achieve meaningful tenure, one would always be in the first year of a three-year contract so there would be some job protection afforded.

However, the new law went a little further than simply eliminating automatic roll-over clauses with its statement that "no contract may be extended or rolled over prior to its scheduled expiration unless all the performance and improvement goals contained in the contract have been met." Note that nothing disallows the parties from terminating their existing employment contract and entering into a new contract. Nor does the law disallow the parties from recontracting once the existing agreement

has expired. Likewise, the law does not call for termination during the term of the contract for failure to attain the performance and improvement goals.

There has been much discussion about the state of existing employment agreements and whether or not someone who had a silent evergreen clause in their employment agreement before January 1, 1998, can still take advantage of the roll-over clause and not be bothered with creating and attaching the performance based goals. In my opinion, within the next employment year or two, this discussion will be moot. In order to protect your employment agreement from attack based on whether or not it contains all the elements now required by law, and, perhaps more importantly, to protect yourself from attack from the community or press, it will prove prudent to move toward a performance-based contract. Additionally, by taking the lead in this discussion, you will be in the driver's seat as opposed to being in a position of responding to your board's proposed performance-based agreement.

The next question is what in the world is meant by "...goals and indicators of student performance and academic improvement [of the schools within the district]"? As with many elements of P.A. 90-548, no one is exactly sure what this vague statement means. What we do know is that multiple year contracts must

contain the amorphous performance-based standards that must be used by the local school board to "...measure the performance and effectiveness of the superintendent [or principal or other administrator]...". We also know the law provides for "...such other information as the local school board may determine." A careful reading of the law leads me to the following conclusions: 1) school administrator multiple-year employment agreements must contain at least two goals (one related to "student performance" and the other related to the "academic improvement of the schools within the district"); 2) there must be indicators or measurements outlined in the agreement on how attainment or non-attainment of the goals will be determined; and 3) the parties are allowed to include other information that can either be used to determine the effectiveness of the school administrator, or that can be used to define the parameters of the performance-based agreement.

At this early stage, I have observed a few things from the performance-based agreements that have been crafted. First, most contracts contain three performance-based indicators. Second, and while personally I advise caution in using test scores, many contracts contain reference to test scores as either goals or indicators of performance.² Third, many have taken the prudent approach of including

“caveats” in the agreements³. And, fourth, the performance-based goals or indicators can be contained in the body of the contract⁴, attached as an addendum to the contract (the method I prefer)⁵, or referenced to/included in the annual evaluation instrument.⁶

Even though it has been a challenge to craft some of these performance-based goals and indicators, it is the superintendents new to their position (accepting employment in the district for the first time after January 1, 1998) who are facing the most undefined challenge of all – “what can I promise to achieve before I even know this district?” An approach taken by at least one district has been for the parties to contractually acknowledge that multiple year contracts must be performance-based with the parties agreeing to negotiate the performance goals and indicators before a stated date.⁷ Another approach used has been for the contract to include simple goals and indicators along with an acknowledgement that the parties will meet during the term of the agreement to amend the goals and indicators as needed. Thus far, the school district employers and law firms drafting the employment contracts for those employers have been very fair and have, apparently, recognized that an employee new to the district could not possibly bind to specifics without a little more information than that contained in the job brochure or school district report card.

In conclusion, it all boils down to a few practical admonishments: 1) don’t sign anything without reading it very carefully; 2) think about the measurements that will be used and project into the future to try to pinpoint what information may or may not be available at the time the board will be doing its evaluation of attainment (for example, do we need to specify that the previous year’s test scores will be the ones considered); 3) remember the law does not require that an administrator be terminated for non-attainment of the goals and indicators so don’t sign a contract that calls for the same; 4) think carefully about any caveats that may be necessary to include in the contract; and 5) don’t put yourself in the position of hoping for a roll-over or contract extension in the last three months of the employment term. Finally, and most importantly of all, remember that no two school districts are exactly alike so do not blindly adopt another district’s goals and indicators without consideration of your district’s strategic plan and individual challenges.

Go forth . . . you know there are some land mines out there but rest assured that a performance-based contract does not have to necessarily be one of them.

Endnotes

¹ 105 ILCS 5/10-23.8 Superintendent – Contracts. After the effective date of this

amendatory Act of 1997 [January 1, 1998] and the expiration of contracts in effect on the effective date of the amendatory Act, school districts may only employ a superintendent under either a contract for a period not exceeding one year or a performance-based contract for a period not exceeding five years.

Performance-based contracts shall be linked to student performance and academic improvement within the schools of the districts. No performance-based contract shall be extended or rolled over prior to its scheduled expiration unless all the performance and improvement goals contained in the contract have been met. Each performance-based contract shall include the goals and indicators of student performance and academic improvement determined and used by the local school board to measure the performance and effectiveness of the superintendent and such other information as the local school board may determine.

By accepting the terms of a multi-year contract, the superintendent waives all rights granted him or her under Sections 24-11 through 24-16 of this Act for the duration of his or her employment as superintendent in the district.

105 ILCS 5/10-23.8a Principal and other administrator contracts. After the effective date of this amendatory Act of 1997 [January 1, 1998] and the expiration of con-

tracts in effect on the effective date of the amendatory Act, school districts may only employ principals and other school administrators under either a contract for a period not exceeding one year or a performance-based contract for a period not exceeding five years.

Performance-based contracts shall be linked to student performance and academic improvement attributable to the responsibilities and duties of the principal or administrator. No performance-based contract shall be extended or rolled over prior to its scheduled expiration unless all the performance and improvement goals contained in the contract have been met. Each performance-based contract shall include the goals and indicators of student performance and academic improvement determined and used by the local school board to measure the performance and effectiveness of the principal or other administrator and such other information as the local school board may determine.

By accepting the terms of a multi-year contract, the principal or other administrator waives all rights granted him or her under Sections 24-11 through 24-16 of this Act for the duration of his or her employment as a principal or an administrator in the district.

² An example of a bad performance goal using test scores as the indicator read: “The cumulative ACT test scores of at least ___% of the Districts’ students taking said test shall be

at least ____ for each school year covered by this agreement, as shown by the ACT test score transcripts of said students.” This goal was negotiated out of the contract.

For an excellent discussion about formulating goals and indicators, see the “Administrator Performance-Based Contract Worksheet” included at the conclusion of this article. It bears repeating: if you are going to use test scores as a measure, define the population to be used carefully taking into account the mobility rate of students in the district.

³ An example of a reasonable caveat is as follows: The Superintendent shall manage and otherwise oversee the successful transition of the district from a one campus school district to a two campus school district provided the project suffers no work stoppage for any reason including litigation. (Note: the district has passed its referendum).

In one contract where the goal is to “improve student performance in the fundamental learning areas of reading, writing, and math,” the following caveats have been agreed to by the parties: 1) change in IGAP testing that results in a change in the base scores of the test thereby making comparison to the previous years’ test scores invalid; and 2) availability of resources needed to implement program as recommended by the superintendent to improve instruction in reading, writing, and math.

⁴ Academic Improvement and Student Performance Goals – This Agreement is a performance-based contract. The Superintendent shall meet the following student performance and academic improvement goals during the term of this Agreement, which the parties agree are goals which are linked to student performance and academic improvement within the schools of the District:

Goal A: To provide the resources to ensure that the use of technological equipment and knowledge to utilize recent software is available to all students.

The Superintendent shall have a state approved technology plan on file. Subject to the Board providing commitment is necessary financial resources, the district will have at least two computer labs and three to six networked computers in all classrooms.

Goal B: To provide services in cooperation with parents, community, staff and faculty that ensure increased contact between all homes and staff resulting in support of children’s social and emotional needs so that these problems do not impede student learning.

The Superintendent shall see that building principals, parent liaisons, guidance counselors, school social workers, and school nurses, as well as classroom teachers have contact with parents/guardians on a regular basis.

⁵ In the text of the contract, the para-

graph addressing the performance-based element reads:

Goals and indicators related to student performance and academic improvement of the schools within the district must be included in all multiple-year superintendent contracts. The parties have mutually agreed upon goals and indicators as well as the measurement of the same which are attached to this contract as addendum A.

⁶ Reprinting the entire evaluation instrument here is not possible. However, the instrument itself was not remarkable. The contract language that referenced using the evaluation instrument as the measurement tool recognized that the mean score on the entire evaluation would, on a scale of one to five, be at least a three or above which would indicate satisfactory evaluation on the board's behalf that progress was being made toward student performance and academic improvement of the schools within the district.

Using the annual evaluation itself as a forum for discussing contract extension is a good approach. When the evaluation instrument itself is the measure that will be employed, the parties can easily provide that satisfactory rating on the evaluation instrument will result in an extension of the contract for one year or for

the maximum period provided by law. Not all members of the school law community agree, however, that this approach does not violate the law's prohibition against automatic roll overs.

⁷ Performance Provisions: During the initial year of this Contract, July 1, 1998 through June 30, 1999, the Superintendent shall develop specific goals designed to enhance district-wide student performance and academic achievement as well as the indicators to measure same. The goals and indicators will be submitted to the Board not later than April 1, 1999 for discussion and approval.

Once the Board approves the goals and indicators, the goals and their respective indicators will be implemented and measured, pursuant to a schedule mutually agreed upon by the Board and the Superintendent, over the remaining three (3) years of the contract. The goals, indicators, and schedule of implementation and measurement shall be reduced to writing and become an amendment to this Contract on or before July 1, 1999.

Marcilene Dutton, J.D., is the Associate Executive Director of the Illinois Association of School Administrators.

Appendix A

Administrator Performance-Based Contract Worksheet

All multiple-year contracts for administrators must now be performance-based. Performance-based contracts shall be linked to “student performance and academic improvement within the schools of the district.” Each performance-based contract shall include goals and indicators of student performance and academic improvement, and “such other information as the local board of education may determine.”

You must have at least two goals, one dealing with student performance and one dealing with academic improvement. The third goal category is other. You may have more than one goal in each category.

Superintendents have for years been working under performance goals, but with varying degrees of sophistication, relative to the manner in which the achievement of the goals have been linked to the superintendent’s employment contract. This new contractual requirement, good or otherwise, is here and most likely here to stay. The issue now is for school administrators to shape realistic and attainable goals within the legal parameters of the performance-based contract. To do this, time, energy, and expertise and careful consideration of what the board wants or school district needs will be needed.

It may be desirable to incorporate caveats to the contract that will identify obstacles to the achievement of the goals in order to provide protection to the superintendent. Such caveats could be in the way of natural disasters but more likely along the line of financial or labor problems. In addition, the indicators used should be observable so that progress toward and attainment of the goals can be determined. Lastly, consideration should be given to including clearly defined empowerments to the superintendent in the employment contract necessary to achieve the goals. Such empowerments might take the form of more control over the appointment, assignment and salaries of district administrators.

Student Performance Goals

Goal: State the goal.

- Indicators: 1. Define the student population base from which observations will be made and measurements will be taken. (check all that apply)
- A. District _____
 - B. Building _____
 - C. Grade level _____
 - D. Special population _____
 - E. Point in time _____
- or
- Longitudinal _____
2. Determine the measurement tool _____
3. Determine the base year of the measurement tool _____

(Appendix continues)

Appendix A (continued)

4. Determine the timelines for the measurement tool _____
5. Coordinate the measurement timelines of the employment contract relative to evaluation and renewal _____
6. List any administrative empowerment(s) _____
7. List any caveat(s) _____

Definitions

Student Performance: A condition of student behavior or status that is not directly related to academic performance but is generally accepted as a behavior or status, that if present, is believed to contribute to an improved learning climate.

Student Performance Goal: A statement jointly developed by the superintendent and board of education indicating the student performance toward which joint effort from the board and superintendent will be directed which is specified in the superintendent’s employment contract.

Academic Improvement: A condition of enhanced student performance as determined by tests or other measurements.

Academic Improvement Goal: A statement jointly developed by the superintendent and board of education indicating the academic improvement toward which joint effort from the board and superintendent will be directed which is specified in the superintendent’s employment contract.

Other Board Determinant: An observable and measurable factor within the school district.

Other Board Determinant Goal: A statement jointly developed by the superintendent and board of education indicating the desire to add, delete, or modify an observable and measurable factor within the school district which is specified in the superintendent’s employment contract.

Administrator Empowerment: A contractually expressed authority granted to the superintendent by the board expressly for the attainment of a student performance, academic improvement or other board determinant goal.

Caveat: A condition, identified in the employment contract, which if present or which develops during the term of a superintendent’s multiple year employment contract shall release the superintendent from achievement of the expressed goal.

Point in time and longitudinal: An example of a point in time measurement would be as in the annual testing of a high school junior for the ACT test. An example of a longitudinal measurement would be as in the following of a given grade school class through its annual Iowa Test of Basic Skills.

Examples of Student Performance Goals

1. Student truancy shall be reduced.
2. Student attendance rates shall be increased.
3. Student suspensions shall be reduced.

(Appendix continues)

Appendix A (continued)

4. Student graduation rates shall be increased.
5. Student participation in co-curricular activities shall be increased.

Examples of Academic Improvement Goals

1. Student academic performance shall be improved.
2. Student math performance shall be improved.
3. Student reading scores shall improve.
4. Student standardized testing scores shall improve.
5. Student Grade Point Averages (GPA's) will be increased.

Examples of Other Board Determinant Goals

1. A school district Foundation shall be established.
2. A long range school facility plan shall be developed.
3. A minority staff recruitment plan shall be developed.
4. A citizens advisory committee for each attendance center in the school district shall be formed.
5. A long range financial plan for the school district shall be developed.

Examples of Administrator Empowerments

1. The board agrees to the assignment, retention, and promotion of otherwise properly certificated district administrators as per the timely recommendation of the superintendent.
2. The board agrees to the assignment, retention, and promotion of otherwise properly certificated employees as per timely recommendations of the superintendent.

Examples of Caveats to the Employment Contract

1. A failure to increase the school district's income of combined state aid, categoricals, and local property tax revenue, by more than 3% from the previous school year.
2. A work stoppage by any of the non-administrative school district employees during any year of the employment contract.
3. Staff turnover that might have a negative impact on the performance of students (as in the retirement of the high school science teacher).

Note: Questions regarding this worksheet should be addressed to: Walt Warfield, Executive Director, at 217/787-9306 or wwarfiel@juno.com

TORTS POTPOURRI: NEGLIGENCE REVIEW, REFERENCE AND UPDATE

Paul C. Burton, J.D., M.S.Ed.

Introduction

There is no definitive empirical data of which I am aware that establishes a “least favorite” topic among the many that school administrators face in their careers. If my random and unscientific 25 years of experience in Illinois education is any indication, a short list of probable topics for the distinction would include tenured teacher dismissal, maintenance of flat school building roofs, and state goal visits. All of these areas are stress producing, and several are often lose/lose situations. The topic that appears to cause the greatest stress, however, is “torts,” that legal term which describes the great morass of common law “wrongs” encompassed in negligence, intentional no-no’s, and strict liability. This article is an attempt to help remove this seemingly endless source of administrative headaches from a “least favorite” topic which invokes expletives upon mention, and replace it with something more along the line of, “It’s really not that difficult.”

Origin of the “Torts” Term

School administrators, like the nation

at large, have trouble understanding “torts” because the legal community has no easy way of making torts understandable. If I was adventurous enough to guess, I’d say “torts” is probably a word whose origin lies within some ancient and forgotten language, its meaning having had something to do with medical procedures without anesthetics. It often occurred to me in law school that the t-o-r-t were the first four letters of “torture.” According to popular law school wisdom, “tort” derives from the french word for “wrong.” This, apparently, is wrong, in spite of “torts” being listed in several french to english dictionaries as “wrong.” My friend, a native speaker of the romantic language, informs me that “tort” is some kind of weird cake. “Weird” is certainly an appropriate starting point for this subject, and “cake” of course brings to mind Marie Antoinette’s infamous “let them eat cake” remark. If memory serves, I believe she lost her last court case. Thus, we see how the entire legal area of torts is nicely tied together. In any case, a tort is a wrong, and torte is a French for cake. So, in school law torts has something to do with “wrong,” and figuring out how to categorize the wrong, characterize who did what to whom, and arriving at a working understanding of “torts” is really not that difficult. Let us proceed, cake in hand.

Categories of Torts

For our purposes here, there are three categories of torts; negligence, intentional, and strict liability. Negligence encompasses the unintentional but none-the-less harmful results caused by someone's conduct or action. Intentional torts are those where conduct is purposeful and the resulting effect is some harm to person or property. Strict liability is statutory assignment of responsibility for harm regardless of intent. Negligence and intentional torts evolved from common law, but are now almost universally statutory.

Characteristics: Torts

The characteristic of greatest import shared among the three tort categories is that they are civil matters, i.e. not criminal. OJ Simpson is not guilty of criminal battery resulting in death,¹ but is guilty of civil battery.² The standard in all criminal cases is "beyond a reasonable doubt."³ The standard in civil matters varies but is always less rigorous than that in criminal cases.⁴ This is logical as the consequences of a conviction for civil matters is less stringent than that for criminal conviction.⁵

Characteristics: Intent

The characteristic of greatest import in distinguishing among the three torts is "in-

tent." In negligence, there is no intent. "Intentional" torts are either against a person or against property. The most common intentional torts against a person are assault, battery, and false imprisonment. Intentional torts against property are trespass to land, trespass to chattels, and conversion. Other forms of intentional torts exist, including wrongs described as "intentional infliction of emotional distress" and "outrage." Exact definitions and their attendant elements vary among jurisdictions. The last category, strict liability, is a legal classification designed to preassign liability. It applies to specific marketed products and some dangerous items and activities.

Characteristics: Elements (Prima Facie Case)

The first place most folks of otherwise good sense and educated brains get tripped up by torts is in understanding the elements of the particular "wrong" in question. Because negligence is the primary concern of schools and school administrators, our focus here will be on negligence.

Negligence is comprised of four elements: duty, breach, causation and damages. The establishments of all four elements is a necessary precondition to any plaintiff's hope of winning a negligence suit. Establishing that all four elements have been met is like getting

to first base. To score, there are more bases to run, but you first have to get on base to have any hope of scoring. Although each element has its own particular nuances and can become the subject of complicated debate in any given case, all elements are fundamentally straightforward.

Duty: Duty is the place where negligence suits should begin, although in fact the incurred damages element (injury when to persons) seems to draw the most attention because that is the observable effect of a negligent act. Unfortunately, the emotional nature of damages usually distracts us from properly remembering and considering the duty element requirement, and is therefore often a cause of misunderstanding negligence cases.

Duty is the product of common law and statutory development. For example, a doctor has no inherent duty under the color of law to treat an accident victim. Many school law exams test this element by describing a horrible traffic accident in which many children are hurt and dying and the brilliant and successful doctor, medical bag in his car, sits calmly in front of the accident scene reading the Wall Street Journal. Bad guy? Sure. Callous disregard? Of course. Violation of the Hippocratic oath? Probably. Duty to aid the victims? Not according to the law. If there was a requirement, it would be classified as

an affirmative duty, and affirmative duties generally do not exist at common law.

Breach: A breach of an established duty must occur to establish a prima facie case of negligence. Custom and usage, statutory violation, and the doctrine of *res ipsa loquitur*⁶ are the primary means of establishing a breach of duty. In reality, breach is rarely an issue. If duty is established and damages have occurred, breach is generally assumed.

Causation: As we shall observe, causation is where a great amount of the legal attention in a negligence case is focused. Causation at first blush seems simple. X acted negligently and Y was hurt as a result. This is “cause in fact,” or “actual cause.” The reason causation is the most contentious element of a negligence case is because not all actual causes are sufficient to establish legal liability, or “proximate cause.” Proximate cause, or “legal cause,” is a doctrine which operates to limit a defendant’s liability on the basis of damages being “foreseeable.” Generally, a defendant is liable for “foreseeable” damages, and not liable for “unforeseeable” damages. What’s foreseeable and what’s unforeseeable? You have now arrived at the perplexing question which provides endless hours of courtroom drama, legal debate, and six digit attorney’s fees.⁷ There is no magic test to determine liability. Defendants are liable for damages that

are deemed to be normal consequential results of their conduct as long as those consequences occurred within the zone of risk created by that conduct. Foreseeability, the area encompassed within the zone of risk, and the effect of intervening factors, often become the focal points of negligence court actions. While the lay public focuses primarily on the damages, the legal community is focused on the grey area of proximate cause. Now we lay public school administrators know better.

Damages: Damages encompasses two meanings in negligence. As an element of a cause of action, there must be damage to property or injury to a person actually and proximately caused by a defendant's breach of duty to have a negligence case. As compensation, when a person is injured or property harmed, "fair and adequate" relief for resulting past, present and perspective damages are generally compensable. In people injury cases, damages may include medical expenses, lost earnings, and lost earning capacity. In some cases, pain and suffering are compensable. In property cases, damages are the reasonable cost of repairs. If property has been destroyed, the fair market value principle applies. One damage issue which arises frequently and causes confusion is the plaintiff's duty to take reasonable action to mitigate damages.

Another is the general bar to reduction of damages based on plaintiff's own insurance or other financial resources. This restriction is called the collateral source rule.

Defenses

There are two primary defenses to negligence; comparative fault and assumption of the risk.

Comparative Fault: The common law once completely barred a plaintiff's recovery for damages if s/he was in any way at fault. This was the doctrine of contributory negligence. Illinois follows the statutory doctrine of comparable fault which recognizes a degree of fault and bars plaintiff's recovery only in cases where the degree of his/her fault exceeds 50%. If plaintiff's fault is 50% or less, then s/he can recover damages from defendant to the degree defendant is liable. It is noteworthy here that defendants share liability collectively among themselves regardless of individual degree of liability. Successful plaintiff's therefore may recover the entire judgment from any single defendant.

Winning the case only gets plaintiff to third base. Recovery of full damage awards following district court adjudication is rare.

Assumption of the Risk: Assumption of the risk may be expressed or implied. If a defendant engages in an activity knowing

the risks, implied assumption of risk may bar his recovery of damages.

Immunity

At common law, government entities and the public officials employed by them were immune from negligence causes of action related to performance of discretionary functions. In 1970 Illinois adopted a new State Constitution which eliminated this common law immunity “except as may be provided by our general assembly through statutory law.” *Epstein v. The Education*, No. 80965, Illinois Supreme Court, Oct. 17, 1997, referring to Ill. Const. 1970, art. XIII, sec. 4.. Pursuant to statutory authority, the state legislature enacted immunity legislation in several forms which effectively reestablished common law immunity for government entities and their employees. 745 ILCS 10/1-101 et seq. (West, 1996), provides general governmental immunity; 105 ILCS 5/24-24 (West, 1996) provides school employee immunity by granting in loco parentis authority; 105 ILCS 5/34-84 (West, 1996) confers immunity for administrative acts. This legislative grant of immunity was done without “the old common law governmental/proprietary function distinction.” Epstein. “There is nothing in section 3-108(a)’s language which even remotely suggests that it does not apply to ministerial tasks.” Epstein.

Willful and Wanton: The school specific statutes grant immunity for negligence but not for the more irresponsible conduct commonly called “willful and wanton.” This is a source of confusion for two reasons; first, willful and wanton action does not conform to the distinctions we previously made under “intent.” Such action is often described as being either “intentional or unintentional.” This is not only not helpful, but confusing. The idea encompassed in the designation is that defendant does not intend the results, thus the injury is not intentional, but the conduct s/he engaged in was reckless beyond the reasonable regard for the safety of others. Remember “zone of risk?” If a defendant acted recklessly and failed to exercise the degree of ordinary care which would prevent injury to someone who was actually known to be or could reasonably expect to be within the “zone of risk” then that defendant acted with the “intentional or reckless” disregard known as “willful and wanton.” (See Black’s Law Dictionary, Sixth Ed., 1990, 1600). Don’t confuse intent to act recklessly with intent to commit harm. Big difference. Big confusion. Now we are all informed and know better.

Unfortunately, that does not resolve one huge school law issue. If school statutes confer only immunity from negligence suits, and the Government Tort Immunity Act confers

general immunity which includes immunity from willful and wanton conduct, are schools and school personnel also immune from suit for their more reckless acts? The Second Circuit says yes, because the list of government entities specified in the general immunity statute specifically names schools. See *Henrich v. Liberty High School*, No. 2-96-0561 (2d. Dist. 1997). The Illinois Supreme Court seems inclined to support this interpretation as consistent with their ruling in *Epstein v. The Education*, No. 80965, (1997), where the Court specifically stated that statutes are to be interpreted independently and effect given accordingly. Look for the issue of school immunity from willful and wanton acts to be addressed in the future by the Illinois Supreme Court to resolve inconsistent holdings among Illinois judicial circuit. Barring legislative action to revise statutes, the Second Circuit holding granting school immunity from willful and wanton acts should prevail.

Reference Sources.

So where do you go to research school torts issues and happenings? Following the sacred principle of legal research, "find someone who has already done it," the place to start Illinois school torts research is right here with the Illinois State University School Law Quarterly. A Synopsis of Tort Liability

Cases Involving Student Injuries in Illinois and Related Guidelines for School Personnel⁸ is a good article with specific suggestions for school administrators. Reference to cases and statutes is included in the information provided in the Illinois School Law Survey,⁹ as are brief definitive summaries following a question and answer format. Much more comprehensive, but updated less frequently and far more costly, is the Illinois Institute of Continuing Legal Education, Illinois School Law (Illinois School Law Ed. 1980). This is commonly referred to as "Ice-Cycle" and is available in most legal libraries and some university library law sections. Several publications of Illinois Compiled Statutes in annotated form provide the exact wording of statutes, complete legislative history, and case summaries which interpret the statute. The Illinois School Code is a compilation of Illinois Statutes which address school matters, but lacks annotation of cases.

Conclusion.

"Torts" is difficult for school professionals to understand only in limited ways. First, because the language is "legalese," not "educationese," complete understanding comes only from becoming familiar with the legal language. This is neither inherent nor easy. Second, because we as human beings tend to focus on the emotional, not the professionally

(legal in this case) contentious, we lose sight of the ball and strike out. Watch the ball and hitting is easy. Third, because the legal community does a poor job of helping non-lawyers understand anything, we school professionals have to help ourselves. The limited ways that “torts” are difficult to understand can be overcome by systematically dissecting the subject and understanding how and where the elements of confusion occur. Hopefully we have accomplished that here for “torts.”

The subject of “torts” is only one of the hundreds of legal subjects that illustrates the need the school community has for its own legal resources. The existing legal community is not going to explain anything to us. Whether this is because our understanding might cost them money and professional advantage is properly the subject for another time. What is important here is that the idea that the education of our children in legal matters is a necessary precondition to the intelligent and responsible exercise of democratic citizenship seems to be severely under-addressed by either the legal or the education world. Democracy is advanced citizenship which requires cognizance to be effectively practiced. The education of this country’s children in legal cognizance begins with their teachers and administrators. The failure of the legal community to help effectively educate school professionals

cannot be an excuse for the continuing failure. Illinois education needs its own legal resource for exploration, explanation and evolution of legal matters. An Illinois School Law Center available to all Illinois educators is a long needed entity whose time has come.

Endnotes

¹ Murder by any other name ...

² Murder by any other name ...

³ In evidence means fully satisfied, entirely convinced, satisfied to a moral certainty; and phrase is the equivalent of the words clear, precise and indubitable. Blacks Law Dictionary, 6th Edition (West, 1990).

⁴ The two most common civil standards of proof are “clear and convincing:” that proof which results in reasonable certainty of the truth of the ultimate fact in controversy, and “preponderance of the evidence:” evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. Black’s Law Dictionary, Sixth Edition, (West, 1990).

⁵ Possible incarceration for criminal convictions.

⁶ “The thing speaks for itself.” Rebuttable presumption or inference that defendant

was negligent, which arises upon proof that instrumentality causing injury was in defendant's exclusive control, and that the accident was one which ordinarily does not happen in absence of negligence. Blacks Law Dictionary, Sixth Edition (West, 1990).

⁷ Actually, most negligence suits are taken for plaintiff's on a contingency basis, meaning the attorney(s) must win to get paid. 33 percent is standard, 40 percent or more is acceptable depending on the strength of the case, and competition among personal injury and torts attorney's can provide access to representation for as little as 25%.

So, the bills are usually those belonging to defendant's. Since large corporations are often the target of suits, they often maintain their own stable of attorneys, and thus avoid much outside billing expense.

⁸ Illinois School Law Quarterly, Vol. 17, No.2, January, 1997.

⁹ Brian A. Braun, Fourth Edition, Illinois Association of School Boards, March, 1996.

Paul C. Burton, J.D., M.S. Ed. is an attorney, a former school superintendent, associate editor of the Illinois State School Law Quarterly, and a candidate for the Doctor of Philosophy Degree at Illinois State University, Normal, Illinois.

**SCHOOL FUNDING AND REFORM
BILL OF 1997 PA 90-0548 (HB 452)
IMPLICATIONS FOR SCHOOL AD-
MINISTRATORS**

Elizabeth T. Lugg, J.D., Ph.D.

Riding the wave of school funding reform, the Illinois State Legislature enacted the School Funding and Reform Bill late in 1997. This bill not only provides for various changes in public school funding, it also enacts fairly substantial changes and controls on the administration of local school districts. Tucked among the increases in the Cigarette Tax, poverty grants, and new foundation levels, are fairly substantial limitations on the rights of school districts to freely contract with their administrators, new rules for teacher certification, and power to grant Charter Schools installed in the State Board of Education. What do these reforms really mean to local principals and superintendents?

This article will examine several of the new and revised sections of the school code, which were the result of the School Funding and Reform Bill. Some of the changes have minimal impact on the administrator in the field. Others, however, will completely change the way districts are administered and the property rights enjoyed by employees in their jobs.

**105 ILCS 5/2-3.124; New Section Deal-
ing With Mandatory Liability Insurance
for Employees**

Content:

Under the terms of this new section the State Board is required to provide a minimum level of professional liability insurance (also known as Errors and Omission's Insurance or E&O insurance) to all certificated employees of the state's public schools. This insurance covers the employees should he or she be sued in civil court, and will pay for bail bond and an attorney should the employee be charged with a crime.

Implications:

In practice, little difference is going to be seen by school districts or employees. Currently, most school districts carry some level of personal liability coverage on all the employees of the district. That is to say that if an employee, acting reasonably and within the bounds of his or her employment, is sued by someone (i.e. a parent), the school district's insurance company will provide attorneys to defend the lawsuit. If damages are won against the employee, or if the lawsuit is settled, the school district's insurance will pay those amounts. Under new section 105 ILCS 5.2-3.124, the State Board of Education is also

required to provide liability insurance to any employee who requests it. At the most, therefore, the school district may recognize some savings by have the risk split between the State Board of Education and the district's private insurance company.

105 ILCS 5/10-20.9a; Final Grade; Promotion

Content:

While this section is not new, amendments were made which lessen the discretion of the local school district in deciding which students to promote to the next grade. Previously, under the wording of the statute, school districts were "discouraged" from promoting students for reasons other than academic performance. Under the new wording, school districts "shall not promote" for reasons other than academic performance. More specifically, "(d)ecisions to promote or retain students . . . shall be based on successful completion of the curriculum, attendance, performance based on Illinois Goals and Assessment Program tests, the Iowa Tests of Basic Skills, or other testing or any other criteria established by the school board." The new wording of the section goes on to state that, if a student is not promoted to the next grade, remedial assistance shall be provided. In short,

these amendments attempt to sound the death knell for "social promotion."

Implications:

The major implication of this section is that administrators will need to draft required policies outlining the district's academic requirements for promotion to the next grade. That duty is very clearly stated. What is not so clear is who is going to provide and pay for the remediation mandated by the new wording. The law very clearly states that students who are determined, under the policies of the local district, to be ineligible for promotion to the next grade "shall" be provided remedial assistance which may include 90 hours of summer school, tutors, increased or concentrated instructional time or modifications to the instructional materials. What is not stated is exactly who is going to pay for this remediation. Is this to be provided by the schools with no cost to the parents? Are parents suppose to underwrite this program and, if so, is that keeping with the spirit of free public education as required by the Illinois State Constitution?

One possible solution is for the local school board to write such broad criteria that it continues to be able to exercise a wide degree of discretion (or delegate that discretion to the administrators) in determining exactly

who should be promoted. So long as that discretion is not exercised in an arbitrary, capricious, or discriminatory manner, this may actually be the best short-term solution for many districts. It appears from the face of the statute that, if the board policy includes some curriculum, attendance and testing criteria, it should withstand any type of review from a state agency or a court, yet could continue to allow the flexibility needed to truly serve all students.

105 ILCS 5/10-20.30; No Pass-No Play Policy

105 ILCS 5/34-18.17; No Pass-No Play Policy

Content:

These two new sections of the school code could also be known as “let’s get tough on athletes” policy. With the enactment of these sections, the Illinois State Legislature is attempting to be a “super-school board” and require all students in grade 9-12 to maintain some acceptable grade point average if they wish to participate in extra-curricular activities (which usually means sports). There is an attempt to soften this rather heavy handed mandate by including a reporting requirement so it appears that the state is actually interested in seeing if such a rigid policy has any real effect on student behavior.

Implications:

For the majority of school districts which do require a minimum grade-point average to compete in extra-curricular activities, the only change will be the requirement to record the existing district policy with the State Board and the report any discipline arising under the policy. For those districts which do not currently have any such policy, a policy will need to be drafted, implemented, recorded with the State Board of Education, and violations thereunder reported to the state. Unfortunately, the implication for the students, especially those students who are at-risk and are only being kept in school because of their interest in an extra-curricular activity, may be lost by this unnecessarily paternalistic move by the state.

105 ILCS 5/10-22.6; Suspension and Expulsion of Pupils

Content:

The change in this section was the addition of sub-section (f) which extends the concept of suspension and expulsion from school to include suspension and expulsion from all school activities and prohibition from even being on school grounds.

Implications:

The addition of the sub-section (f) will finally give many administrators the power needed to keep potentially disruptive students away from athletic events and other “quasi-public” activities. Unlike private businesses where dismissed employees, and citizens at large, can be legally kept off of the premises, public school buildings and the events held in those buildings have a “quasi-public” nature. After all, the structures and grounds are supported by tax money just like parks and other public lands. Yet the burden on the district and its administrators to maintain a safe environment is enormous. This expansion of the effect of suspensions and expulsions now gives districts the legal ability to prohibit suspended and expelled individuals from coming anywhere near the school building, even on the pretense of attending a “quasi-public” function such as a basketball game.

105 ILCS 5/10-22.23; Certified Nurses

Content:

Because of changes to this section of the school code, school districts may not employ non-certified registered nurses to perform professional nursing services in schools. Prior to this, all nurses employed to perform nursing services in schools were required to hold

a school service personnel certificate. This amendment was in response to a First District Appellate court decision where the court ruled that only certified school nurses could perform professional nursing services in schools.

Implications:

The major implication of these changes is to increase the flexibility which districts will have in staffing health-care positions. Under the new law, only positions requiring teaching, the exercise of instructional judgment, or the educational evaluation of students will be required to be performed by a certified school nurse. This creates a gray area regarding IEP meetings since that is a situation which might be construed to include the exercise of instructional judgment. Unofficially, the State Board of Education interprets the wording to allow non-certified nurses to participate in these proceedings. This new wording also will make it easier for local districts to contract with outside agencies to provide much of its health care services.

105 ILCS 5/10-22.34c; Out-Sourcing Non-Instructional Services

Content:

This new addition to the school code specifically allows school districts to hire out-

side contractors to provide non-instructional services, even if these services are currently being provided by an employee or bargaining unit member. Such employees may be laid off with 30 days notice.

Implications:

Local school districts may or may not recognize a savings by contracting with outside individuals to provide services such as grounds-keeping, janitorial, clerical/bookkeeping, etc. If such “out-sourcing” is done, however, local unions will become highly uncomfortable and accuse the district of engaging in a prohibited practice or attempting to break the union. Therefore, public relations considerations need to be taken into account along with financial considerations before any final decision is made regarding exercising the rights provided by this new section.

105 ILCS 5/10-23.8; Performanced Based Multi-Year Contracts for Superintendents
105 ILCS 5/10-23.8a; Performance Based Contracts for Principals

Content:

These legislative changes are some of the most controversial of all because they deal with the popular “evergreen” contracts. They also appear to restrict the ability of the school

board and school district to freely contract with its administrators. Under the new legislation, administrators now have a choice between single year employment contracts with no statutorily stipulated language, or multi-year contracts of two to five years which are performance based and linked to student performance and academic improvement.

In order for this section to be applicable to any given individual, two conditions must be met. First, the effective date of HB 452 must have passed. That condition was met as of January 1, 1998. The second condition is that the employment contract in effect on January 1, 1998 must expire. Once that has happened, the above criteria will apply. The content of the one-year contract can remain the same. Any multi-year contract, however, must include performance and improvement goals determined by the local board but based on student performance and academic improvement. The significance of requiring these performance and improvement goals is that no multi-year contract may be extended or rolled-over until those goals are met. Finally, the HB 452 also eliminates the requirement that school boards give superintendents and principals notice of dismissal by April 1.

Implications:

The implications of this legislation are

driven as much by what is actually omitted from the legislation as what is included. The wording of the legislation immediately raises two very serious questions. First, when does a contract expire? Many superintendents' contracts currently have what is often termed an "evergreen" clause. What that clause says is that, unless the board takes some affirmative action to keep the contract from extending, as of a certain date each year the contract will automatically extend for another year. Through this method, a superintendent can always safely remain in the first year of a three-year contract. Many have stated that HB 452 intended to do away with "evergreen" clauses, but did it? For example, Superintendent Jones was hired in 1980. Everyone was happy with his performance so in 1985 he was awarded an "evergreen" contract and it has been automatically extending for 13 years. It can be easily argued that the date of his current contract is 1985 and will continue in full force and effect until such time as the board takes affirmative action to end the 1985 contract. In other words, at no time will the contract automatically "expire" which, as stated above, is the second criteria needed for the new law to take effect. While allowing such automatic continuation to continue in perpetuity may be a public relations nightmare, nothing specifically stated on the face of the legislation makes such

automatic extensions without the inclusion of performance based goals illegal. This would not be the same for contracts which contained only language allowing continuation of employment upon the expiration of the contract. In such a case, clearly the contract in effect on January 1, 1998 will expire with the potential for a new one to be entered into by the district and the administrator. Should the contract negotiated be multi-year, then it will need to include performance based goals.

Second, what happens if the performance based goals are not met? One thing is very clear from the face of the statute, and that is that a multi-year contract cannot be extended until the performance goals included therein are met. It does not say, however, that if the goals are not met that the administrator must be terminated. Quite the contrary. The local board has been given substantial discretion to not only determine what the goals shall be, but also whether they have been met and, even if they have not been met, whether the board wishes to negotiate new goals in the context of a new contract. The only mandates regarding multi-year contracts is a) that they be performance based; b) that they contain performance based goals; c) that those goals be based on student performance and academic improvement; and d) that the contract can not be extended until those goals are met.

What this means to the administrator in Illinois, is to make sure and take his or her employment contract seriously. Whether the administrator is negotiating a new contract or continuing under an existing contract at this point, that document should contain all the safeguards which used to be contained in the school code. This means making sure that there is a provision requiring notice of termination and perhaps some type of due process hearing. This also means taking the time to sit down with the local board of education and develop goals which are both attainable, concrete enough to be easily enforced, realistic enough to be achieved, and something on which both sides can agree. While it is true that the state is now meddling perhaps too much in quasi-private contractual matters (remember all public school employees technically remain state employees), it is also true that the lion's share of the power was reserved to the local school board. For additional information on the implications of the legislation on administrators' contract, please refer to the article authored by Marcilene Dutton, J.D., Associate Executive Director of the Illinois Association of School Administrators contained in this publication on pages 82 through 90.

105 ILCS 5/17-1.5 ; Limitation of Administrative Costs

Content:

This new section has the stated purpose of establishing limitations on the growth of administrative expenditures in order to maximize the proportion of school district resources available for the instructional program, building maintenance, and safety services for students. As defined by this section, "administrative expenditures" include the annual expenditures of school districts for board of education services, executive administration services, special area administrative services, business support services, other support services, internal services, and all other expenditures for the direction of the maintenance of the physical plant, transportation, and food services.¹ Starting with the 1998-99 school year increases in administrative expenditures, as described above, are limited to the lesser of 5% or the percentage increase in instructional expenditures for the school year over the prior school year. On or before October 15, 1998 and October 15 of each subsequent year, school districts are required to file a one page report with the State Board which lists the actual administrative and instructional expenditures for the prior year and the projected administrative and instructional expenditures for

the current year. Should a school district fail to file this report, the State Superintendent is required to notify the school district in writing that it has failed to report and to do so in 60 days. If the school district still does not respond, the next payment of general state aid due, and all subsequent payments, may (but is not required to be) withheld until such a report is filed.

In addition, if the State Superintendent determines that a school district has exceeded the statutory administrative expenditure limitation, the district will be directed to take corrective action. If within 60 days such corrective action to bring the district's administrative expenditures into compliance with the law is not done, and the district fails to provide adequate assurance that such corrective action will be taken, the State Superintendent may (but is not required to) withhold all subsequent payments of general state aid. The State Superintendent is required to publish a list each year of the school districts that violate the limitation imposed by this new law. The State Board of Education may recommend to the General Assembly and the Governor any additional sanctions or remedial actions that the State Board determines necessary to deter non-compliance with the limitation. The General Assembly and Governor may, but once again are not required to, impose such additional sanctions.

Implications:

This new section is one which does, potentially, hold one of the greatest threats for school districts because there is the possibility of losing state aid money should a district not comply. It is also a glaring example that certain segments of the population, most likely taxpayer rights groups, desire the ability of individuals only marginally connected to any given school district, to dictate local district fiscal policy. Many would argue that under the concept of local control it is up to the individuals of the specific district to determine what percentage of their district's revenue should go for administrative expenses, physical plant maintenance, and instructional program; that it is not a function of the state to make such an allocation. The actual impact of this legislation has yet to be seen but very likely will be extremely detrimental for rapidly growing districts.

105 ILCS 5/21c; Alternative Teacher Certification

105 ILCS 5/21d; Alternative Administrator Certification

Content:

Under this new legislation, the State Board of Education in conjunction with the State Teacher Certification Board are required to establish an alternative route to teacher and administrator certification for certain eligible individuals. For teachers, the three parts of the alternative certification include a course of study in education theory, methods, and teaching; a full-time teaching assignment for one year; and a comprehensive assessment of the persons teaching performance. To be eligible for this alternative certification program an individual must possess a bachelor's degree and have been employed for at least five years in an area related to his or her education. Once all of the criteria for this alternate certification have been met, and the individual has taught for one-year under a nonrenewable provisional alternative certificate, for the purposes of employment that individual is to be treated no differently than someone who obtained his or her certificate through more traditional methods.

The alternate route for administrative certification includes an intensive course of

study in education management, governance, organization, and planning; assignment for one year as an administrator on a full-time basis; and a comprehensive assessment of the person's performance by school officials and a recommendation to the State Board that the person be issued a standard administrative certificate. To be eligible for the alternative certification program, an individual must have a master's degree in a management field and five years experience in a management level position. As with the alternatively certificated teacher, once the alternatively certified administrator has held a one-year administrative position under a nonrenewable provisional alternative administrative certificate, he or she shall be issued a standard administrative certificate.

Implications:

If the research to date proves to be true, the greatest implication for K-12 education will be an influx of individuals who either simply do not turn out to be very good teachers or who, because they entered teaching and public school administration for the wrong reasons, do not continue on with education as a career. Again, the primary effect of this new legislation will be on institutions of higher education which prepare teachers and administrators. Most likely it will be those institutions

which provide the educational theory and methods for the teaching candidates and the management, governance, organization and planning courses for the administrative candidates. As for day to day administration of a K-12 school, the impact will be minimal because once all of the alternative certification procedures are met, that individual is to be treated no differently than any other teacher or administrator.

105 ILCS 5/21-0.01; Certification of Teachers

Content:

This new section gives the Illinois State Board of Education broad discretionary powers to set standards for certificated employees. More specifically, in conjunction with the State Teacher Certification Board, the State Board of Education shall have the power to:

- Set standards for teaching, supervising, or holding other certificated employment in the public schools;
- Administer the certification process;
- Approve and evaluate teacher and administrator preparation programs;
- Enter into agreements with other states relative to reciprocal approval of teacher and administrative preparation programs;

- Establish standards for the issuance of new types of certificates; and
- Take such other action relating to the improvement of instruction in the public schools through teacher education and professional development as that attracts qualified candidates into teacher training programs as is appropriate and consistent with applicable laws.

In addition, the State Board in conjunction with the Certification Board, is required to implement a new system of certification for teachers beginning on January 1, 1998. This system will include the implementation of a system of examinations based on national professional teaching standards. The State Board shall report recommendations and improvements to the teacher certification system to the General Assembly and the Governor by January 1, 1999 and annually thereafter for the next two years.

This new section creates a three-tiered system for certificates. The first-tier is an Initial Training Certificate which is issued to people who have 1) completed an approved teacher preparation program; 2) are recommended by an approved teacher preparation program; 3) have successfully completed the Initial Training Certificate examinations; and 4) have met all other criteria established by the

State Board. The Initial Training Certificate is valid for 4 years but is not renewable.

The second-tier certificate is a Standard Teaching Certificate. This certificate will be issued to individuals who have 1) taught for four years with an Initial Training Certificate; and 2) have met all other criteria established by the State Board. The Standard Certificate is valid for 5 years and may be renewed every five years upon showing proof of continuing education or professional development. Teachers who were issued teaching certificates prior to January 1, 1999, and are renewing those certificates after January 1, 1999, shall be issued a Standard Certificate.

The third-tier certificate is a Master's Certificate which will be issued to individuals who have successfully achieved National Board certification through the National Board for Professional Teaching Standards. A Master's Certificate is valid for seven years and renewable every seven years through compliance with the requirements set forth by the State Board. Unlike the Initial Training Certificate and the Standard Certificate which will be issued with a distinction between elementary and secondary education and well as being issued for specific educational categories within those broader classifications, the Master's Certificate is a singular certificate based upon achieving National Board certification.

Implications:

The new wording of this section will have far more impact on institutions of higher education than on K-12 education. While the new certification classifications will have an impact on contract wording and perhaps even on the composition of salary schedules, the new classifications will have a profound impact on teacher preparation institutions both in preparing teachers to obtain Initial Training Certificates and providing continuing education and professional development for teachers holding Standard Certificates.

105 ILCS 5/24-11; Teacher Probationary Period

Content:

The change to this section requires that all teachers who are first employed by a school district (including teachers employed in a special education program of a joint agreement) after January 1, 1998, and who have not previously been employed by the district (or all the programs in the joint agreement), shall serve four years of probation instead of the earlier statutory period of two years. This new wording does not apply to teachers who were hired before January 1, 1998 and who are completing their probationary period, or to part-time teachers hired prior to January 1,

1998 whom later become full-time. Also, the deadline was shortened from 60 days to 45 days for providing written notice of dismissal to a probationary teacher. Notice for tenured teachers for reduction-in-force remains at 60 days.

Another change in this section is the removal of the ability for the district to extend a teacher's probation for one additional year. Previously, the board at its discretion could extend the probationary period for one additional year by giving the teacher written notice by certified mail at least 60 days before the end of the teacher's two-year probationary period. This option was entirely deleted in the new legislation.

The Act also changes the notice requirements for reduction-in-force of educational support personnel. Instead of requiring notice 60 days prior to the end of the school year, under the new law notice is required 30 days prior to when the employee is dismissed for reduction-in-force. Educational support personnel may continue to be removed at the discretion of the board if removal is for cause.

Implications:

Because of the changes in notice deadlines and the extension of the probationary period, both board policy and the implementing administrative regulations will need to

be amended to reflect the change. For those districts which incorporated two year tenure acquisition language and dismissal procedures into their master contract, it is most likely that for teachers employed on or after January 1, 1998 the mandatory language of this section would take precedent over such wording. As far as the behavior of administrators, little will change. The same procedures will need to be followed to dismiss or RIF any probationary or non-probationary teacher. Consequently, the impact on day-to-day administration of the building and the district should be minimal.

Problems could arise, however, with the changes in deadline for dismissal of educational support staff if the bargained contract restates the 60-day notice provision of the old law. Because the phrase "at least" is included in the legislation it means that the 30-day deadline does not necessarily take precedent over contract language, or that contract language allowing 60 days is not in compliance with the new law. Most likely, unions will push to hold firm to any language already stated in a master contract which allows more than 30 days notice.

Endnotes

¹ To define the administrative expenditures, the law specifically refers to “codes” from the Illinois State Board of Education’s Program Accounting Manual and regulations as follows:

- 2310 Board of Education Services
- 2320 Executive Administration Services
- 2330 Special Area Administrative Services
- 2490 Other Support Services – School Administration
- 2510 Direction of Business Support Services
- 2520 Fiscal Services
- 2541 Service Area Direction (Operation and Maintenance of Plant Services)
- 2551 Service Area Direction (Pupil Transportation Services)
- 2561 Service Area Direction (Food Services)
- 2570 Internal Services
- 2600 Support Services – Central

For those districts which contract with outside private agencies to provide transportation, maintenance, and/or food services, to be in compliance with this section the management fee under the contract would need to be broken out and counted as “administrative expenditures.”

Elizabeth Timmerman Lugg is an assistant professor in the Department of Educational Administration and Foundations at Illinois State University, Normal, Illinois.

SUPERINTENDENT POWER, IMMUNITY, AND WORKPLACE HARMONY

Paul C. Burton, J.D., M.S.Ed.

**Khuans v. Sch. Dist. 110, Nelson, et.al.,
No. 96-3664 (7th Cir. Sept. 2, 1997).**

Facts of the Case

Collette Ann Khuans was a school psychologist employed part-time at Charles J. Sahs School District 110 through a twelve district special education cooperative (A.E.R.O.). Her employment was established by annual contract. Employed by A.E.R.O. since 1986, Khuans and other special education employees “encountered problems” with Khuans’s immediate supervisor, Lynda Zielke in the fall of 1993. Those “problems” were described as not being able to find Zielke on school property, communication deficiencies, and deviation “from what Khuans and other A.E.R.O. employees believed were proper legal procedures governing special education services.” In December, Khuans “related her thoughts” to the school principal, who met with A.E.R.O. employees, sans Zielke, and then “reported the conflict” to the Administrative Assistant of A.E.R.O., Tom Beaver. Beaver “declined to address the matter until the staff first met with Zielke.” A meeting took place

on December 15, followed by a private meeting in which Zielke “browbeat” Khuans. In February, Khuans took her complaints about Zielke to the district superintendent (Nelson), additionally discussing “the propriety of some changes in services, which Zieke planned and Nelson approved, as well as a memo written by Nelson (and not intended for Khuans’ eyes) indicating his belief that Khuans’ services were no longer needed.” Khuans’ was informed February 22 that her contract would not be renewed. She sued the district, Nelson and A.E.R.O. alleging a violation of First Amendment free speech under 42 U.S.C. 1983. Nelson moved for dismissal on grounds of qualified immunity. The district court denied the motion, and Nelson appealed.

Rationale and Decision of the Court

The appeals court explained that, procedurally, qualified immunity is immunity from suit, not just a defense, and the effect of the immunity is lost if suit is allowed to go to trial. Therefore the denial of immunity is a final appealable order. Under the circumstances of this case the question of immunity is a purely legal one, therefore the appeals court reviews de novo.

The court reviewed the line of cases on constitutional free speech in the workplace, concluding that Khuans had failed to state a

claim, and that at the time this case arose the standards for determining protected free speech of independent contractors like Khuans was unclear. The court then reversed the circuit court's denial of Nelson's motion for dismissal under a qualified immunity theory, stating that the lack of clarity would not be resolved with the development of additional facts. Included in the majority opinion was the observation that Khuans had "plead herself out of court" by specifying unprotected personal speech as opposed to mostly speech of public concern.

Implications for School Administrators

Superintendents' have statutory authority and court-backed power to see that the goals and objectives of their districts are met. Exercising this power and authority as chief executive officers of their respective school districts is consistent with that held by their private sector counterparts. The difference between constitutionally protected free speech and unprotected private expression is one crucial distinction superintendents must be able to make on an on-going basis. Nelson's immunity plea was "a winner" in the eyes of the court. The important lesson of this case, however, is that Nelson's exercise of power and authority was within his discretion. Exercise of power and discretionary authority in

the public sector will usually be entertained approvingly by the courts. Unanswered administrative questions include whether Khuans' removal preserves organizational harmony in light of remaining staff members critical of Zielke, or whether using alternative dispute resolution strategies would have produced more effective all around results than termination.

**DISCRIMINATION, HARASSMENT,
AND INTERCOURSE: PUTTING THE
X IN SEX**

Paul C. Burton, J.D., M.S.Ed.

**Smith v. Metropolitan Sch. Dist. Perry
Township et. al. No. 95-3818
(7th Cir. Southern Dist, Indiana, Oct. 22,
1997).**

Facts of the Case

Steve Rager was a teacher and boys swim coach at Southport High School in Indianapolis. Heather Smith was a student at Southport, and a member of the girl's swim team. Smith became acquainted with Rager as both were at school swim meets during her freshman year, 1987-88. Over the following three summers Rager coached Smith at a summer community swim program. During the summer between her junior and senior year, Smith came to regard Rager as a friend. At the opening of Smith's senior year she became Rager's student assistant. Rager made sexual advances toward Smith in September, 1990. Smith and Rager engaged in sexual intercourse in late September, and continued doing so throughout the school year.

Although Smith at first enjoyed the sexual relationship, she eventually "began to

feel confused and disturbed," afraid to say "no" to Rager, or to tell her parents. Smith first queried Rager about discontinuing the sex in January, 1991, but continued to have sex with him even after graduating. On July 12, Smith told Rager she wanted to stop. He asked for "one last time," which she granted. Smith and Rager had sex for a final time on July 18, 1991. On July 28, Smith confided in a male friend, later her husband, that the relationship had taken place. He encouraged her to tell her parents. She did. Smith and her parents then reported the relationship to school officials and the sheriff's office.

"Two days later school officials suspended Rager and advised him that if he did not resign he would be fired and lose his teaching license. Rager resigned the following day. The school district then sent a letter to the State Board of Education recommending that Rager's teaching license be revoked" (Smith, 1997 No. 95-3818, at 3).

In May of 1993, almost two years later, Smith and her parents filed suit against the school district, school officials and Rager claiming sex discrimination under Title IX, constitutional violations under 42 U.S.C. 1863, state law negligence, and two counts of state law based on intentional infliction of emotional distress and seduction.

All defendant parties except Rager moved for summary judgment, which the district court granted on the 1983 claims, but denied on the Title IX and negligence claims. The moving parties then requested certification by the district court for interlocutory appeal under 28 U.S.C. 1292(b) on the Title IX summary judgment denial. The district court granted the certification and it was accepted by the appeals court.

Rationale and Decision of the Court

Title IX language specifies that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. 1681 (a). A private right of action for sex discrimination can be brought under Title IX. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979). Smith’s private right of action alleges sexual harassment by Rager. Only education institutions, as the recipients of the Federal financial assistance specified in the Code, are proper defendants to the private right of action. Individuals are not proper parties to a Title IX action. The court then found the sexual harassment charge to have merit under the law, and concluded as follows: Title IX prohibits discrimination on the basis

of sex by a “program or activity.” Thus, the appropriate defendant is the “program or activity” itself – in other words, the grant recipient. Because Title IX only prohibits discrimination by the “program or activity,” it must be the “program or activity” and the institution that operates it that discriminate, not merely one of its employees. Agency principles, either pure or the agency-like principles of Title VII, cannot impute discriminatory conduct of an employee to the “program or activity” because Title IX contains no language indicating that Congress intended agency principles to apply. Rather, “a school district can be liable for teacher-student sexual harassment under Title IX only if a school official who had actual knowledge of the abuse was invested by the school board with the duty to supervise the employee and the power to take action that would end such abuse and failed to do so.” *Rosa H.*, 106 F.3d at 660. Here there is no evidence that anyone had actual knowledge of the alleged relationship between Smith and Rager. On the contrary, it appears that Rager and Smith successfully hid their conduct. Therefore, the School Board and School District were entitled to summary judgment. Moreover, the principal and assistant principal do not constitute the educational “program or activity,” either individually or officially, so they too are entitled to summary judgment.

Accordingly, we reverse the district court's denial of summary judgment and remand to the district court with instructions to enter summary judgment in favor of defendants on Smith's Title IX claim. We express no opinion on the merits of plaintiffs' other claims.

Reversed and Remanded.

Implications for School Administrators

This conclusion precipitated interesting dissent opinion and an instructive exchange on issues involving language of Title VII, Title IX, and the Office of Civil Rights administrative interpretations. School administrators with any involvement in Federal Title VII or IX programs or activities would invest time wisely by reading the 50 plus pages of this opinion and its dissent. School administrators would likewise invest time wisely by formulating district policy which prohibits, among other things, student assistants and a supervising teacher from closing office doors when alone together.

SMOKE GETS IN YOUR EYES: REASONABLE SUSPICION?

Paul C. Burton, J.D., M.S.Ed.

Bridgman v. New Trier High Sch. Dist. No. 203, No. 97-1412 (7th Cir. N.D., Nov. 4, 1997).

Facts of the Case

Having been caught several times smoking cigarettes, New Trier High School freshman Andrew Bridgman was required to attend an after-school “cessation” program. His arrival at the required place and time was marked by “giggling and acting in an unruly fashion” according to Mary Dailey, the Student Assistance Program Coordinator supervising the program. Dailey stated that while others involved “quickly calmed down,” Bridgman did not, instead “remaining distracted” and otherwise acting inappropriately during the program. Dailey, a certified drug addiction counselor, observed that Bridgman had bloodshot eyes, dilated pupils, erratic handwriting, and gave “flippant” answers on a program worksheet. Dailey accused Bridgman of being under the influence of drugs, which he denied. After Bridgman was allowed to call his mother, Dailey insisted Bridgman undergo a “medical assessment” administered

by the School Health Services Coordinator, Joanne Swanson, a nurse. Tests revealed Bridgman had blood pressure and heart rate readings “considerably higher than those listed on the record of [his] freshman physical exam.” Dailey then told Bridgman to remove his shirt and hat and empty his pockets so she could conduct a search. “Bridgman sarcastically inquired whether she wished him to remove his shoes and socks as well, to which she replied in the affirmative” (Bridgman, 1997 No. 97-1412 at 2). The search apparently produced nothing which shed light any on Bridgman’s possible drug use. Following Mrs. Bridgman’s arrival, permission was sought to test Andrew’s reactivity to light. After being informed that this would not “definitely determine” whether Andrew had used drugs, Mrs. Bridgman opted to have a pediatrician test him the following day. The results were negative.

Mrs. Bridgman filed a 42 U.S.C. 1983 action alleging district actions and policy constituted Fourth Amendment search and seizure violations. She also filed a state action based on alleged tortious conduct resulting in false light invasion of privacy. The school district moved for summary judgment, and this was granted by the district court. Mrs. Bridgman appealed.

Rationale and Decision of the Court

Conducting a review de novo, the appeals court explained that at common law summary judgment was appropriate when no genuine issue as to any material fact was shown by available evidence, and that the moving party is entitled to a judgment as a matter of law. The evidence is construed in the light most favorable to the nonmoving party and all justifiable inferences are drawn from it. If the moving party produces evidence substantiating entitlement to summary judgment, the nonmoving party must then demonstrate affirmatively that a genuine issue of material fact does in fact remain for trial. Simply relying on the pleadings, the existence of some factual dispute, or “some metaphysical doubt as to the material facts” is insufficient to demonstrate a genuine issue of material fact. The standard required to demonstrate a genuine issue of material fact is one in which a “fair-minded jury could return a verdict for the [non moving] party on the evidence presented.” *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242.

In arguing against the district’s summary judgment motion, Bridgman offered expert testimony indicating that bloodshot eyes, dilated pupils, and high blood pressure and pulse are unreliable indicators of marijuana use. The district offered medical association literature which states such symptoms are indica-

tive of marijuana use. The lower court had ruled that the inquiry was not whether the medical community agreed, but whether Dailey’s ordering medical examination and then conducting a search were reasonable. Scrutinizing Dailey’s search of Andrew Bridgman for reasonableness gives rise to a review under *New Jersey v. T.L.O.*, 469 U.S. 325.

In *T.L.O.*, the Court established that the special circumstances of the school setting mitigates the normal Fourth Amendment requirement for probable cause. Searches of students are permissible if “justified at its inception” and “reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* at 341-342. The 7th Circuit has interpreted the “justified at its inception” *T.L.O.* language as meaning a “search is warranted only if the student’s conduct creates a reasonable suspicion that a particular regulation or law has been violated, with the search serving to produce evidence of the violation.” *Cornfield*, 991 F.2d 1320.

A second prong of *T.L.O.* requires that “the measures adopted [must be] reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” *T.L.O.*, 469 U.S. at 341-342.

Applying *T.L.O.* as interpreted by the

7th Circuit Court to Dailey's ordering medical assessment and then searching Andrew Bridgman's outer clothing, the court concluded that Dailey had reasonable suspicion. Her standing as a certified drug addiction counselor, the medical literature suggesting a large segment of the medical community subscribes to the physical symptoms displayed by Bridgman as accurate indices of possible marijuana use, and the use of the medical assessment as an investigative tool, were all "reasonably calculated to uncover further evidence of the suspected drug use." The court brushed aside the erratic handwriting element of Dailey's argument as she had no previous handwriting observations upon which to base a valid comparison.

Because Bridgman had not demonstrated a genuine issue of material fact and the search was reasonably related to the objectives, the court sustained the lower court's finding that the nature of the search was not constitutionally intrusive.

Affirmed.

Implications for School Administrators

Constitutional protections afforded citizens of the United States are the quintessential difference between "us," and the other 200 or so countries in the world. We enjoy extraordinary protection from intrusive and

objectionable government conduct. For that blessing of constitutional protection we should be extremely grateful. In the school setting, "extremely grateful" must take the form of diligence in ensuring careful and strict adherence to the common law guidelines to constitutional compliance. The guidelines for conducting searches which comport with the Fourth Amendment is relatively straightforward: a reasonable suspicion that this particular student has committed a specific rule violation, that the search is reasonably calculated to produce evidence related to the rule violation, and that the age and sex of the student in question, and the nature of the violation, serve to limit the intrusive nature of the search. Applying these guidelines serve far more than the particular search in question, for every search of a student provides a lesson to all students, and the community at large, regarding the seriousness with which we take the Constitution and its protections.