

**ILLINOIS SCHOOL LAW QUARTERLY ON-LINE**  
**May 2004**

**No Child Left Behind**

In response to growing unrest and dissatisfaction with NCLB, even among Republicans and in an extremely important election year, the Department of Education is announcing more modifications to the law. One modification is to deal with rural schools, which are having trouble meeting the “highly qualified teacher” mandates, as well as applying those mandates to areas where there are teacher shortages such as science. These changes include giving teachers more time to prove that they are highly qualified (i.e. if highly qualified in one subject give the teacher three more years to prove that they are highly qualified in additional subjects), allowing new teachers three years to prove that they are highly qualified, and allowing states to establish their own standards to determine whether a teacher is highly qualified in more than one field.

Additional changes were announced by Secretary of Education Ron Paige at the Annual Meeting of the National School Boards Association. Paige stated that the modifications were aimed helping schools that were narrowly missing the 95% participation rate. Under the amendments to the NCLB the requirement of showing 95% participation rate of all subgroups every year will now shift to an averaging of participation rates over a two or three year period and to allow an absent to be excluded from the calculation if the student is absent because of a “serious medical emergency.” These changes mark the fourth change since December, but Paige announced that they will be the last.

In response to under-funding, the Maine Senate has passed a bill prohibiting the use of state funds to comply with the NCLB. The Maine Department of Education will determine the state’s cost of compliance and then limit state action to only those measures covered by federal funds. After all, when speaking in Cleveland in March 2004, Secretary of Education Paige stated that if it is not funded, it is not required. Maine took the Secretary up on his word!

**STUDENTS’ RIGHTS AFTER WEST SIDE V MERGENS:** A topic that many thought was decided, that is the criteria under which student groups must be allowed, seems to be the center of controversy again except homosexuality rather than religion is the pivotal issues. In *Caudillo v Lubbock Independent School District*, No. 03-165 (N.D.Tex. March 3, 2004), a student group, the Lubbock Gay Straight Alliance, was denied the status of a student group. The reason given by the school district, and supported by the court was that the official did not violate freedom of speech because the decision to not allow the group was not based on the content of its speech, but rather was based on the fact that the group’s web site had links to other sites which provided detailed information on sexual matters. The district policy forbade discussion of sexual matters whether heterosexual or homosexual. Using the decision in *Bethel School District No. 403 v Fraser*, 478 U.S. 675 (1986), the court found that the school district had the right to exclude sexually explicit, indecent, or lewd speech, especially given the fact that children as young as 12 attended the school.

In addition, citing a second case *Hazelwood v Kuhlmeier*, the court found that the district also had the ability to limit speech, which was inconsistent with its basic missions and goals. Because the district had an “abstinence only”, the web site’s links to sites discussing safe sex were inconsistent with that policy. Turning then to the Equal Access Act which requires schools who have created a “limited open forum” to provide equal access to all student groups regardless of content, the court decided that the instant case fell under the “maintain order and discipline” and “well being of the students” exceptions to the Equal Access Act. While at this point this case seems to be an anomaly, it is worth watching because it has provided a blue print for other courts to follow in narrowing the Supreme Court’s ruling in *Westside v Mergens*. *Caudillo* is already being cited by opponents of gay student groups in other school districts (e.g. in Louisiana and Kentucky).

**VOUCHERS:** Some issues never seem to die. In the last month a federal district court rejected a constitutional challenge to Maine’s law restricting the use of public money for the payment of tuition in religious schools. Even in light of recent Supreme Court rulings on the topic, the court felt bound by the precedent set in a early case in the First Circuit which had essentially the same facts and legal arguments.

Going to the other coast and the state of California, a state agency has been found guilty of violating a provision of the state constitution. The California Statewide Communities Development Authority (CSCDA) has the authorization to issue tax-exempt bonds to assist the development of communities by financing industrial development, housing, health care facilities, and educational facilities. When CSCDA chose to issue tax-exempt bonds to help finance new educational facilities for one religious K-12 school and two religious universities, the California appellate court found the agency guilty of helping to support an institution controlled by a religious authority, an action which is forbidden by the state constitution. The court was not persuaded by the fact that the CSCDA had included a contractual clause limiting the use of the facilities to nonsectarian uses. The court stated that the institutions were pervasively sectarian; that it was impossible to separate the schools’ religious and secular missions. *[Editor’s Note: Hopefully voucher opponents will read this case, CSCDA v All Persons Interested in the Matter of the Validity of a Purchase Agreement, 2004 WL 424166 (Cal.App. March 9, 2004) because the same argument could be used in many states with similar constitutional prohibitions, which are currently allowing tax money to go to the support of private religious schools.]*

**HOMESCHOOLING AND ATHLETICS:** Because of the lack of state oversight of home-schooled children in Illinois, the recent decision out of Michigan, *Reid v Kenowa Hills Public Schools*, No. 239473 (Mich Ct. App. March 2, 2004) may be of interest. In that case, the court ruled that home-schooled children were not entitled to participate in extracurricular athletics at their local public schools. Its decision was based on the fact that participation in extra-curricular activities is a privilege not a right and therefore confers no property or liberty interest in the individual. As a result, the Michigan High School Athletics Association’s rules of enrollment in a public school for eligibility for participation could not be overridden by a constitutional interest.

**LIABILITY FOR TEACHER-ON-STUDENT SEXUAL HARASSMENT:** In a case out of Michigan, *Doe v Warren Consolidated Schools*, 2003 WL 23315570 (E.D.Mich. February 13, 2003), the federal district court held that the school could be liable for teacher-on-student sexual harassment under both Section 1983 and Title IX of the Civil Rights Act of 1964 because school district officials were aware of the teacher's behavior and failed to take any action to prevent him from having contact with students. The teacher, James Kearly, had been employed as a physical education teacher for 32 years. About 18 years into his employment numerous allegations of improper sexual and non-sexual conduct started appearing in his file. He was even charged with criminal assault and battery, but because the school district would not hand over evidence it possessed the prosecutor was unable to obtain a conviction. In response to a grievance, and in spite of continued warnings from school district personnel about Mr. Kearly's behavior, his personnel file was expunged and he was transferred to an elementary school where he molested three female students.

Mr. Kearly pled no contest to criminal sexual conduct, and the parents of the girls filed a civil suit alleging liability under Section 1983 for violation of due process and under Title IX for sexual harassment. The court found that under Section 1983, a reasonable jury could come to the conclusion that because the district had ample evidence to know that Mr. Kearly was a pedophile yet did nothing, that such behavior was a "custom of inaction" thus a violation of the students' due process. Moreover, because of the actual knowledge possessed by the district of Mr. Kearly's behavior, they were also culpable under Title IX. In federal actions such as these, state tort immunity laws will be of little effect in shielding school districts that have actual knowledge of misconduct but fail to act.

Still on the topic of sexual harassment, here is a case to make even the most seasoned administrator nervous. As of this writing, two Arizona public school administrators are facing misdemeanor charges, an investigation by the State Department of Education, and possibly the loss of their licenses because they pursued an incident of improper conduct between a male student and a female student as sexual harassment rather than reporting it as sexual abuse. There is an Arizona state law requiring school personnel to immediately report each incident of sexual abuse of a child to police or Child Protective Services. Because of the situation surrounding the incident (where a male football player shoved the face of a female student into his crotch during class) the athletic director and assistant principal proceeded under their sexual harassment policy, did not see it as sexual abuse, and thus did not report the incident to police. Law enforcement became aware of the incident through the female victim's mother. Moral of the story is that it is better to over report than under report. Should your state have a reporting law similar to Arizona, even if the misconduct appears to more closely fit the definition of sexual harassment, report it and let law enforcement sort it out.

**DRUG TESTING FOR TEACHERS:** The wave of the future is upon us, or at least upon the employees of one school district in Kentucky. In January 2004, the Knott County Schools enacted a policy, which requires all district employees who work in "safety-sensitive" positions to consent to random drug testing as a condition of employment. The policy states that violations will be reported to appropriate legal officials. In response, an elementary school teacher has filed suit in federal court alleging

that the policy violates her Fourth Amendment right to be free from unreasonable searches and seizures, as well as violating the confidentiality of employee medical files contained in the American with Disabilities Act.

The federal district court denied the teacher's request for a preliminary injunction, finding that the district policy violated neither the Fourth Amendment nor the ADA. In making this decision, the court relied on an earlier case, *Knox County Education Association v Knox County Board of Education*, 158 F.3d 361 (6<sup>th</sup> Cir. 1998), which upheld suspicionless drug testing of teachers even absent any finding of pronounced drug abuse among the group being tested. For a complete copy of the opinion see *Crager v Board of Education of Knott County*, 2004 WL 813491 (E.D.Ky. April 8, 2004).

*[Editor's Note: Back when the United States Supreme Court upheld the 7<sup>th</sup> Circuit's approval of drug testing of all students in extra curricular activities, I warned that the next step would be random drug testing of teachers and other employees of public school districts. It was my belief, that the reasoning used by the Supreme Court to uphold suspicionless testing for students was easily applicable to teachers and others in close proximity to those students – much easier say that trying to get around the property right contained in a public education, a legal jump which would be needed to extend drug testing to the whole student body. It appears I was right. What is additionally alarming here is that the policy calls for testing of individuals in “safety-sensitive” positions, yet the plaintiff is an elementary teacher. If her position is considered “safety-sensitive” then what position in a public school would not fall under the policy?]*

**EDUCATING HOMELESS CHILDREN:** The latest reauthorization of the McKinney-Vento Homeless Assistance Act has landed 13 school districts in Suffolk County, NY in hot water. The plaintiffs are alleging that when state social welfare programs move homeless families, schools districts in the area where the families are relocated refuse to accept the children citing lack of residency. Defendants in the suit include Suffolk county Department of Social Services and the state of New York along with the school districts.

With the reauthorization of McKinney-Vento, the definition of homeless was expanded beyond just those students living in shelters. Now every district, not just those receiving McKinney-Vento funds must designate a homeless liaison. In addition, the Act requires districts to provide transportation to enable homeless students to continue to attend their school of origin, even after they move out of the school's attendance area or the school district entirely. Under these new provisions, every school district will now be required to deal with McKinney-Vento in some form.

**STUDENT FREEDOM OF SPEECH:** The topic of student's right to free speech is again in the news in various school districts across the United States. In Washington, the Secret Service questioned a student about anti-war sketches, which he had done and had been forwarded by school officials. One sketch showed George W. Bush's head on a stake. Another depicted George W. as the devil firing off rockets with the caption “End the War – on errorism.” The student was also disciplined by the school district simply for expressing his political views, a decision questioned by the American Civil Liberties Union of Washington.

In North Carolina the infringement was on a student's speech during school elections. Jarred Gamwell, an openly gay student, had placed campaign posters in the school halls with slogans such as "Queer Eye for Hunt High" and "Gay guys Know Everything". The principal had the posters removed using the reason that the language was disruptive and had no relevance to the campaign. The Wilson County Superior Court upheld the school's actions by refusing to grant a temporary restraining order to block the removal of the posters.

Also in North Carolina, three students were given one-day suspensions for wearing t-shirts printing with the phrases "Homosexuality is a sin," and "God made Adam and Eve, not Adam and Steve." The shirts were worn to protest the "Day of Silence," a day in which students voluntarily go all day without speaking to show their support for gays. The students were disciplined under a school policy which prohibited the wearing of anything that is "offensive to any race, religion, or gender." *[Editor's Note: Sexual orientation is not a race, a religion, or a gender so is it really covered by this policy? If your school district has similar policies, is sexual orientation covered as a protected group?]*

**CHARTER SCHOOLS:** Many individuals still question whether charter schools are a viable method or school choice or merely a way to scam the taxpayer. Evidence to support the scam theory comes from Pensacola, Florida where Escambia Charter School has been charged with fraud for allegedly hiring out students to work for the Florida Transportation Department, thereby providing themselves with a \$40,000 profit. The school receives \$140,000 from the state of Florida to provide 25 hours a week of education to students with academic and behavioral problems. At the same time the school is earning \$250,000 for work done by the students because in reality the students are spending only five hours a week in school and working 20 hours a week for the FTD. The FTD paid the school \$16.25 per hour for each student, the school paid the student \$10.00 per hour and kept the remaining \$6.25, whence the \$40,000 profit. The school disagreed, saying it only needed to repay \$19,000.

**DUE PROCESS:** In the case of *In Re Andre M*, No. 03-0228 (Ariz. April 23, 2004), the Arizona Supreme Court ruled that a confession obtained by law enforcement officers while questioning the student on school grounds was inadmissible in the criminal trial because the student's mother was not allowed to be present. Andre M. was involved in a fight at school and was sent to the principal's office. The police arrived and questioned Andre. After the questioning was done, Andre's mother arrived and waited for the police to question Andre further while she was present. While she was waiting the police found a gun in another student's car. The gun had ties to Andre. Ultimately Andre's mother left without talking to the police, thus unaware that a gun had been found. Before she left, however, administrators assured her that one or more of them would make sure they were present if the police wished to talk to Andre again.

Unfortunately, the administrator never conveyed this request to the police and when Andre's mother returned she found her son being interrogated, alone and behind closed doors. The police prevented her from entering the room. Looking at these facts, the court reminded the state that confessions resulting from custodial interrogations are inherently involuntary and the burden was on the police to prove that the exclusion of the

parent was justified or required. Since the police failed to show any justifiable reason for the exclusion of Andre's mother, the interrogation was ruled to be a violation of the student's due process and inadmissible in criminal court – fruit of a poisonous tree.

*[Editor's Note: Remember that different rules apply depending on who is conducting the investigation/questioning and the possible disciplinary consequences. Law enforcement officials are going to be held to a hire standard of behavior that school administrators who are operating under the protection of "in loco parentis." In addition, the greater the possible deprivation of the right to an education, the greater must be the due process afforded. Minimal deprivation (10 days or fewer) means minimal due process needed (notice, rebuttal, impartial hearing). Maximum deprivation such as incarceration requires maximum due process (written notice, reasonable time frame, right to counsel, right against self-incrimination, right to confront and cross-examine witnesses).]*

**BIG BROTHER IS WATCHING:** A sealed warrant was served on Deer Valley School District in Arizona and the FBI question approximately 20 employees at the district's Administration Services Center. The FBI action was part of "Operation Fastlink" spearheaded by the Department of Justice under Attorney General John Ashcroft. Operation Fastlink involved raids on 120 sites in 27 states and 10 foreign countries. Ashcroft refused to comment on whether certain school districts were targeted and if so why they were chosen. He stated simply, "Our educational institutions have access to very high speed and good computer capacity, and the ability to move things digitally. So, it's not surprising to me that there may be individuals who would seek to use those kinds of access points into the system."

**CASE NOTE: *LOCKE V DAVEY*, 124 S. Ct. 1307; 158 L. Ed. 2d 1; 2004 U.S. LEXIS 1626; 72 U.S.L.W. 4206; 17 Fla. L. Weekly Fed. S 163 (2004)**

In an attempt to help students who had worked hard and achieved academic success in high school but who were financially unable to obtain a college education, the state of Washington established the Promise Scholarship Program. This program established a scholarship, renewable for one year, to eligible students to continue their studies at a postsecondary institution of their choice. To be eligible the student had to graduate in the top 15% of his or her graduating class or score 1200+ on the SAT or 27+ on the ACT. In addition, the student's family income had to be less than 135% of the state's median income. Finally, the student was required to enroll at least half time in an eligible post-secondary institution in the state of Washington, but could not pursue a degree in theology at that institution while receiving scholarship money. The money, which was \$1,125 for academic year 1999-2000 and \$1,542 for 2000-2001, could be used for any education related expense including room and board. The scholarships were funded through the state's general fund.

Joshua Davey met the criteria and was awarded a Promise Scholarship. He chose to study at Northwest College, a private Christian college affiliated with the Assemblies of God. Under the scholarship it was an eligible post-secondary institution. When Davey enrolled he declared a double major in pastoral ministries and business management/administration. While the business major was acceptable under the scholarship program, the pastoral ministries degree was clearly excluded since it was a devotional degree. Refusing to drop the pastoral ministries major, Davey did not receive any scholarship funds. Instead, Davey brought suit in the District Court to obtain an injunction against the state claiming that the refusal to provide him with the scholarship money violated the Free Exercise Clause, the Establishment Clause, and the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The District Court refused Davey's request for an injunction and ultimately granted summary judgment for the state. The United States Court of Appeals for the Ninth Circuit reversed the District Court's decision and the issue was appealed to the United States Supreme Court.

In the opinion written by Chief Justice William Rhenquist, a phrase was coined that will in the future likely be repeated. When looking at the relationship between the Establishment Clause and the Free Exercise Clause of the First Amendment, Rhenquist stated that the *Davey* case involved the "play in the joints" between the two halves of the Religion Clause. There was no doubt in his mind that under standing precedent the state could "consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology." [2004 U.S.LEXIS at 1634]. However, that was not the question before the Court. Rather the question before the Court was "whether Washington, pursuant to its own constitution, which has been authoritatively interpreted

as prohibiting even indirectly funding religious instruction that will prepare students for the ministry, can deny them such funding without violating the Free Exercise Clause.” [2004 U.S.LEXIS at 1634, 1635].

The crux of the discussion and ultimate decision by the Court revolved around whether the prohibition of using scholarship funds for devotional degrees was so hostile to religion that it caused a presumption of unconstitutionality. This theory was first advanced by an earlier Supreme Court case *Church of Lukumi Babalu Aye, Inc. v Hialeah*, 508 U.S. 520 (1993) which ruled that a program is presumptively unconstitutional when it is not facially neutral with respect to religion. The majority rejected this presumption, holding instead that nothing was contained in the history or text of the Washington Constitution, nor in the operation of the Promise Scholarship, which could be viewed as “animus toward religion.” [2004 U.S.LEXIS at 1638]. To the contrary, the Court found quite the opposite. “Far from evincing the hostility toward religion which was manifest in *Lukumi*, we believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits. The program permits students to attend pervasively religious schools, so long as they are accredited.” [2004 U.S.LEXIS at 1639]

Consequently, the Court found no presumption of unconstitutionality. “Without a presumption of unconstitutionality, Davey’s claim must fail. The State’s interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here. We need not venture further into this difficult area in order to uphold the Promise Scholarship Program as currently operated by the state of Washington.” [2004 U.S.LEXIS at 1639].

## **STATE LEGISLATION**

The bill, which would have prohibited soft drink vending machines on school grounds (H.B. 4058) was defeated in the Illinois House.

At a time of financial crisis in Illinois public education, 56% of both bond proposals and tax increase proposals were defeated by voters. However, an advisory question put forth by Lt. Governor Quinn which asked whether income tax on those earning over \$250,000 should be doubled to help pay for improved public education was endorsed in 38 of the 39 jurisdictions where it was put on the ballot. The next step to put this proposal into action would be to get three-fifth majority vote in both house and senate, plus 60 percent of the voters in November. To that end, Sen. Maggie Crotty of Oak Forest is sponsoring Senate Joint Resolution and Constitutional Amendment 20 to place the issue on the November ballot. Now the question remains as to whether there is simply enough time to bring the issue to a vote in both chambers this year.

## **ILLINOIS APPELLATE COURT**

*Andra Mina v The Board of Education for Homewood-Flossmoor, Community High School District 233*, No. 03 CH 01612 (First District, Sixth Division, April 23, 2004)

This case dealt with residency issues. Andra Mina was a student at Homewood-Flossmoor High School. At the start of the 2001-02 school year Andra and her mother, Mihaela, and step-father, Marian, lived in an apartment in Flossmoor. In November of 2001, the assistant principal noticed that mailings to the Flossmoor address were being returned with a forwarding address of University Park, a area outside of the school's attendance area. There was also an eye-witness that had seen Andra being driven to school from outside of the district.

In August 2002, Andra once again listed the Flossmoor address on her registration forms. This time the school district did some investigating and decided that Andra no longer lived inside the district and would need to pay tuition should she wish to continue attending Homewood-Flossmoor High School. Andra's parents requested a hearing. During that hearing they explained that their living outside of the district was only temporary and was caused by the uninhabitable nature of the house which they had purchased in the district and were in the process of rehabbing. Because of delays in the purchase and sale of the homes, Andra's family claims that they were forced to leave the apartment before their new house was ready and so, as a temporary measure, they were staying in their vacation home in Chicago Heights. Throughout the proceedings the family insisted that it was their intent to permanently reside in the Homewood-Flossmoor District.

To make a decision, the court looked to Illinois law and past precedent. Under the laws of the state of Illinois, only those students residing in the district may attend district schools without paying tuition. A student's residence is presumed to be the same as the residence of the person who has legal custody of the student, whether that person is a parent or another responsible adult. Past precedent has held that there are two elements that must be examined when determining residency: physical presence and intent. A student may only have one residence and that residence may not be established solely to enjoy the benefits of free schools. When claiming intent, physical evidence is more important than mere declarations of intent. While intent is an important element in determining residency, physical presence is also required. When looking at the facts in the instant case, the court concluded that Andra and her family resided in University Park and had purchased the property in Chicago Heights solely for the purpose of attending school tuition free. Consequently, the court found for the school district.

*Joshua T. Hill v Galesburg community Unit School District 205*, No. 3-02-1040 (Third District, 2004).

In this case, Joshua Hill was a student at Galesburg Senior High School. He was performing an experiment in chemistry class when a glass beaker exploded. Because Joshua was not wearing protective eyewear, he incurred injury to his right eye. There were several questions in front of the court dealing with both the Illinois Eye Protection in School Act [105 ILCS 115/1 (West 2002)] and the Illinois Local Governmental and Governmental Employees Tort Immunity Act [745 ILCS 10/1-101 *et seq.* (West 2002)].

First, does a school district have a duty to provide protective eyewear to students and employees? Because the law states that the school district "may" provide protective eyewear, such is not mandatory. Thus, under the Eye Protection Act, school districts have no duty to provide eye protection to students and teachers.

Second, even if the district has no duty to provide the eyewear, does the district have a duty to ensure that protective eyewear is worn? The school argued that the responsibility to wear the protective eyewear falls to the student. The court disagreed, stating that to assign the responsibility to the student rather than the teacher conducting the class made little sense. Rather, it is up to the teacher who is conducting the class to make sure that all students are wearing their protective eyewear. Moreover, no dangerous activity should be started until the student either puts on the eyewear or leaves the area.

Third, even though a duty exists to ensure that students wear the protective eyewear, is the school district immune from suit under the state tort immunity act? Under the tort immunity act, teachers are not liable for an injury resulting from an act or omission involving the determination of policy or the exercise of discretion. However, a teacher is liable if the act is ministerial in nature. Since the teacher has a duty under state law to make sure that all students are wearing protective eyewear, that act of carrying out that duty becomes ministerial rather than discretionary, thus there is no immunity from suit.

Fourth, even if the teacher lacks immunity, is the school district as a whole still immune? Under state law, districts are immune when an employee is acting in a supervisory role at the time of the injury. In Joshua's case, the chemistry teacher was acting in a supervisory role, supervising the class, thus the district is immune from suit.

Finally, was the teacher's act willful and wanton thus abrogating the district's immunity? Under the tort immunity act, willful and wanton behavior is defined as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." [745 ILCS 10/1-209 (West 2002)]. Given that the teacher had actual knowledge that Joshua was performing a potentially dangerous experiment while not wearing protective eyewear and did nothing to stop him from doing so, could be regarded by a jury as a "reckless disregard" for Joshua's safety.