

ISLQ – JULY 2004

DEVELOPMENTS IN THE COURTS

RELIGION

The importance for school districts to understand their ability to regulate the “time, place, and manner” of distribution of non-instructional materials was emphasized by the recent decision in *Child Evangelism Fellowship of Maryland v Montgomery County Public Schools*, No. 03-1534 (4th Cir. June 30, 2004). The case dealt with the refusal of the Montgomery County Public Schools to allow a student to distribute materials promoting a religiously based after-school care program. The plaintiffs had contended that since MCPS allowed materials from other groups such as Four-H and Boy Scouts to be distributed by students and teachers, that it was a violation of the First Amendment to deny them the same access. In reversing the lower court, the court of appeals stated that MCPS had made its decision not to allow distribution of the materials solely on their content, something which is impermissible under the First Amendment. *Editor’s Note: In essence, once non-curricular, not school-sponsored materials are allowed to be distributed, all such material regardless of content must be distributed in the same time and manner. If school districts want to keep particular outside materials out their school buildings, then they must keep all outside materials out of their buildings. Public schools cannot pick and choose by content. Rather their ability to regulate comes by being able to regulate the time, place and manner that such material is distributed (i.e. after school hours, off of school property, on one bulletin board in the school library, etc.)*

Much to the dismay of many legal scholars and public school educators, the question as to whether the current pledge of allegiance violates the First Amendment is still undecided. In an 8-0 decision in *Elk Grove Unified School District v Newdow*, No. 02-1624 (U.S. June 14, 2004) the U. S. Supreme Court ruled that Michael Newdow, the non-custodial father of the public school student, lacked standing to challenge the constitutionality of the pledge of allegiance policy. The Court never reached the merits. *Author’s Note: Those wishing to maintain the status quo were heartened by a statement in the dicta which describe the pledge as a “patriotic exercise designed to foster national unity and pride in the ideals that our flag symbolizes.” Such proponents of retaining “under God” in the pledge claim that this is an indication that the Court favors the status quo. To claim such, however, ignores the fact that the Court said something very similar in the *Barnette* case and then continued to reverse a prior holding in *Minersville v Gobotis* in order to uphold the right of Jehovah’s witnesses to abstain from saluting the flag, abhorring the rote and perhaps coercive recitation of words at the behest of the state and comparing such compulsion to the lavish displays of forced patriotism which were concurrently occurring in Nazi Germany.*

The Supreme Court has clearly stated on several occasions that state sanctioned prayer in public schools is unconstitutional – and yet it continues. In *Holloman v Harland*, 2004 WL 1178465 (11th Cir. May 28, 2004) the court held that a teacher’s daily practice of taking prayer request from students and then instructing the class to engage in a moment

of silent prayer was systematic enough to be considered a pattern for which the board could be held liable and in violation of the Constitution.

When you think you have heard everything, there comes another story out of the south. It was the practice of the Manatee School Board in Florida to open its meetings with a Christian invocation. When Jewish parents sued, the district reached a settlement when it would open meetings with nonsectarian invocations, which don't "preach, proselytize, or advance particular religious beliefs." If the board intentionally violates the settlement it has agreed to pay the plaintiff's attorney's fees. *Author's Note: I don't know which is more disturbing – that a school district would start a public school board meeting with a prayer or that parents would feel that a satisfactory settlement was to allow a "less in-your-face prayer" at the beginning of the meeting. The Supreme Court has been pretty clear that an invocation, even a nonsectarian (if there really is such a thing as a non-religious prayer) invocation is inherently religious and a violation of the Establishment Clause. What about separation of church and state? What about not favoring religion over non-religion? The desire of individuals to avoid conflict at all costs is frightening.*

VOUCHERS

State constitutions continue to be the main line of defense against the spread of vouchers for private and private religious schools. In *Owens v Colorado Congress of Parents*, No. 03-0364 (Colo. June 28, 2004), the Colorado Supreme Court held that Colorado's pilot voucher program violated the Colorado State Constitution. Article IX, Section 15 gives control of locally raised tax revenue to local school districts. When the state of Colorado enacted a pilot voucher program, which mandated that each local school district allocate a portion of their local revenue to participating non-public schools, a coalition of parents, teachers, and students filed suit. In a 4-3 split, the Colorado Supreme Court rejected the state's contention that the meaning of "local control" had changed over time given the increase in state funding, instead stating that to allow the pilot voucher legislation would, in essence, amend the state constitution by striking Article IX, Section 15.

SCHOOL REFORM

Illinois is not the only state where consolidation is a hot topic. Currently, a group of small school districts in Arkansas is challenging a new state law, which requires that all districts with enrollments of less than 350 students merge with another district. The state law grew out of a 2001 court case dealing with school funding and declaring the method by which the state funded Arkansas schools was inequitable and inadequate. The current law suit argues that forced consolidation has no relationship to the state's ability to comply with court ordered mandates to reform funding and that consolidation should be done solely for educational reasons.

NO CHILD LEFT BEHIND

In the opinion of the Wisconsin Attorney General, the state may be under no legal obligation to implement the NCLB if costs exceed the federal funding provided. Her

opinion is based on the NCLB provision that prohibits the federal government from requiring states to implement any curriculum or “mandate a state or any subdivision thereof to spend any funds or incur any costs not paid for under this act.” Naturally, the U.S. Department of Education disagrees that the NCLB should be characterized as a non-funded mandate. The Attorney General’s opinion cites three NCLB provisions which are not adequately funded: (1) cost of testing programs for all third through eighth graders; (2) costs of implementing sanctions against schools which fail to meet AYP; and (3) the cost of providing programs so that every student may reach proficiency levels on standardized tests.

TECHNOLOGY

As if Internet access for students is not confusing enough, a recent Supreme Court decision has further muddied the waters. Currently there are two federal laws dealing with Internet access. The Child Online Protection Act (COPA) applies to publishers of adult materials on-line. The Children’s Internet Protection Act (CIPA), which was recently upheld against a free speech challenge, is the law, which requires school districts receiving federal funding to adopt Internet safety measures to protect children from harmful materials. In *Ashcroft v ACLU*, No. 03-218 (U.S. June 29, 2004), the U.S. Supreme Court, in a 5-4 decision, declared COPA unconstitutional because it was too broad thus threatened to deny people of their freedom of speech. The Court felt that there were other, less restrictive methods, to protect minors from accessing unacceptable material on the Internet. *Author’s Note: Like parental supervision?*

Students are not the only one being affected by what is available on the Internet. In California a teacher was placed on leave because of allegations that he given the students in two of his classes the web address of where they could access the video of the American soldier being beheaded in Iraq and then allowed students to use his classroom computer to view the video. The teacher denies the allegations, stating that he discovered to students trying to access the video and discouraged them from doing so. This brings up many questions dealing with academic freedom, the classroom as a marketplace of ideas, and age appropriate information.

STUDENT DISCIPLINE

Dress codes, as with regulations of other speech, must be done a content neutral basis. In a recently filed suit in California, a district is being sued by a student who was suspended for wearing a T-shirt stating, “Homosexuality is Shameful” which he wore to express his religious beliefs that homosexuality is morally wrong. The student chose to wear the shirt on the “Day of Silence” in April, a day of significance for the homosexual community. Basically the school district felt that the student had violated district policy against hate speech which bans clothing which promotes or portrays “violence or hate behavior including derogatory connotations directed toward sexual identity.” Moreover, the policy states that student speech can be limited if it creates a clear and present danger or a material or substantial disruption.

The City of New York decided to settle rather than face a lawsuit from a lesbian student who was suspended after wearing a T-shirt inscribed with the words, "Barbie is a Lesbian." Since there was no dress code policy, the student claimed that she had been singled out for harassment based on her sexual orientation. In response to her threatened suit the New York City Department of Education agreed to pay her \$30,000 and then adopted a dress code policy which allows students to wear politically charged attire so long as nothing printed is libelous or obscene and causes no substantial disruption.

In Salt Lake City, a middle school student was suspended for 45 days for sharing his prescription cold medicine with his cousin. Such action was in violation of the school's zero tolerance policy which forbid students' self-medicating under any circumstances.

When the senior class president deviated from his approved commencement speech and referred to the school as a "prison," school officials at Grand Rapids Union High School, Grand Rapids, Michigan cut the power to his microphone. That is one way to handle a controversial student speech! So far no suit has been filed by the student or his parents.

DISTRICT LIABILITY VS SOVEREIGN IMMUNITY

In Ohio, the fact that a district failed to report child abuse when required to do so by law negated a defense of sovereign immunity. In *Yates v Mansfield Board of Education*, 2004 WL 1124474 (Ohio June 2, 2004), a principal failed to take action when a ninth grader reported that she had been inappropriately touched by a teacher. After investigation the principal had decided that the student was lying so did nothing, including failing to report the incident to the police or child services. About three years later the same teacher became involved with another ninth grade student. This time the principal alerted both the police and the student's parents. The teacher was subsequently arrested, tried, and convicted of felony sexual battery. The parents of the second student sued the school board on the grounds that their daughter's attack was the direct result of the district's failure to report the first allegation of sexual abuse. Upon reaching the Ohio Supreme Court, it was held that the statutory duty to report sexual abuse is not limited to a specific victim but is a general statutory duty, which constitutes a valid statutory exception to sovereign immunity.

ATHLETICS AND TITLE IX

When Title IX requires that school district provide equal opportunities to both male and female students, that requirement must be taken seriously. When two New York school districts offered girls' soccer only in the spring thereby depriving the girls from competing in the state tournaments which were held only in the fall, rather than in the fall as was done for boys' soccer they were found in violation of Title IX. In ruling against the district, the U.S. Court of Appeals for the Second Circuit relied on the U.S. Department of Education's Office of Civil Rights (OCR) interpretation of Title IX's implementing regulations, 34 C.F.R. 106.41(c) and decided that the two districts "failed to provide girls' soccer with the equivalence of opportunities to engage in available pre-season and post-season competition" as was provided for the boys. While there is

flexibility in complying with the requirements of Title IX, any disparity must be justified by nondiscriminatory factors.

FINANCE

The Indiana State constitution guarantees a free public education to all students in the state of Indiana. When the Evansville-Vanderburgh School Corporation imposed an activity fee to raise revenues without raising taxes, a group of parents filed a class action lawsuit challenging the constitutionality of the policy under Article 8, Section 1 of the Indiana Constitution. A subset of the class, composed of those parents whose children qualify for free and reduced price lunch, also claimed a violation of their due process rights under the Fourteenth Amendment. The Indiana Court of Appeals, while not addressing the federal constitutional question, did hold that the \$20 activity fee did constitute the charging of tuition in violation of the state constitution. The court noted that while the fee was not tuition per se, if it was increased sufficiently it could price some children out of the ability to participate in public education thus violating the intent of the constitutional provision. The ruling is being appealed to the state supreme court. Should the Indiana Supreme Court agree that activity fees are a violation of the mandate for the state to provide an education without tuition equally open to all, this could strike a budget blow to the vast majority of Indiana schools which charge some kind of school fees.

In Minnesota the fight over state school funds is in the arena of an online school, Minnesota Virtual Academy. Minnesota Virtual Academy delivers curriculum developed by licensed teachers to home computers where the student, under the guidance of his or her parent, work through the content. The argument of the state teachers union is that the state law requires that any school receiving state funding must provide instruction from certified teachers. In the case of the online school, instruction is being provided by parents. The court, however, in dismissing the case decided that key factor is that the curriculum delivered by the computer is developed by certified teachers, and that is what is required by the state statute. The union is appealing the dismissal.

LEGISLATION TO WATCH

Criminal Background Checks

HB 3977 Pending action by the Governor

In this bill sponsored by Gordon, school districts would be required to include a fingerprint check when doing mandated background checks of prospective employees. The fingerprinted based criminal history records check would be provided by the Illinois State Police and FBI.

Automated External Defibrillator

HB 4232 Pending action by the Governor

If this bill is signed into law, school districts would be required to not only have a policy on medical emergencies but would also be mandated to have an automated external defibrillator (AED) in each indoor physical fitness facility. A trained AED user would also be required to be employed in each physical fitness facility during school-sponsored physical fitness activities.

Closed Sessions

HB 4247 Pending action by the Governor

The bill follows up on that summer's new law requiring a record be kept of the proceedings of closed meetings of public boards. This proposed law requires boards to keep written minutes of both closed and open meetings, but removes verbatim recordings of closed meetings from the requirement that the public body regularly review them to determine whether the need for non-disclosure continues.

Professional Development

HB 6906 Pending action by the Governor

If a school district has an overall shortage of highly qualified teachers, or a shortage of highly qualified teachers in math, science, reading, or special education, then the district must spend at least 40% of its Title 2 grant money on professional development for teachers in the areas where a shortage has been documented.

School Breakfast Program

SB 1400 Pending in the Senate

If this bill passes, school district with at least 40% students eligible for free or reduced price lunches will be required to offer a school breakfast program of eligible students. Under the bill associated costs (i.e. transportation, labor, supervision) will be reimbursable. A waiver would be available if the district could show that providing such a program would be cost prohibitive.

Teacher and Administrative Certification

SB 1553 Passed. Public Act 93-0679. Effective date June 30, 2004

For teachers, this bill eliminates that need to obtain 50% of CPDUs from x-type activities and 50% y-type activities. Instead teachers may obtain all CPDUs or any percentage thereof for either type of both types. Also, the need for a Local Professional Development Committee is eliminated, holders of Standard or Masters Teaching certificates no longer would need to develop a certificate renewal plan and submit it to an Local Professional Development Committee, and removes the expiration date of the substitute teacher provision that allows substitute teachers to teach up to 120 days in a school year.

For administrators the bill eliminates the requirement to develop an administrative certificate renewal plan. It also changes the number of administrator academy hours required from 36 to 30, deletes the requirement of submission of the administrators plan to a review panel, changes to a self-reporting system for continuing education

professional development and administrator academy courses, and requires all certificate holders who evaluate staff to complete a 2-day teacher evaluation course. Also in the bill is a guarantee that local school districts will continue to be able to choose their own architects for local construction projects.

Compulsory Education

SB 2918 Pending action by the Governor

This bill changes the compulsory education age from 16 to 17 and allows eligible students to enroll in graduation incentive programs.

State Board of Education

SB 3000 Pending in the Senate

This is the bill, which contains the language allowing the Governor to replace seven of the nine sitting board members on July 1, 2004. The bill also contains language allowing local school districts to participate in a state drug purchasing program, allowing the ISBE line item appropriations in its budget, requiring all ISBE rules and policies to go through the legislature, requiring the ISBE to develop a 5-year strategic plan, requiring ROEs to assist schools with grants, calendars, and certification as well as provide shared services to local districts.