ISLQ – SEPTEMBER 2004

FIRST AMENDMENT – RELIGION

Issues involving the Religion Clause have seemed to come to the forefront over the last eight weeks. In some instances the courts have reaffirmed long standing legal opinions regarding the separation of church and state. In other cases, however, the court involved has taken a more unique stance. Here are just a few:

A school district in New Hampshire followed sound legal precedent warning against making decisions based on the content of speech when it approved a senior project, which involved the teaching of a Bible study class after school. In the opinion of the principal the project centers around teaching and learning, a topic well within the senior project curriculum. To forbid the project simply because what is being taught by the senior student is religious in nature would be censoring based on the religious content of the speech, not because the action itself falls outside of board policy. Although the administration is having the decision reviewed by the school attorney before granting final approval, administrators have fairly certain that the voluntary, after-school-hour project does not run afoul of the Establishment Clause. The major objection is being made by those individuals who feel that such a decision could open the door to such projects being run by less favorable religions such as Wicca.

The decision of the 8th Circuit in *Wigg v Sioux Falls School District 49-5*, No. 2956/3107 (8th Cir. September 3, 2004) seems to contradict common knowledge regarding adult teacher participation in student religious groups. Under the United State Supreme Court decision in *Mergens v Westside Community School District*, XXXXX U.S. XXXXX, the Court, while affirming under the terms of the federal Equal Access Act the right of a student led Bible study to be recognized as a student group, also set up some restrictions of adult participation in such groups. One such restriction dealt with the participation of faculty sponsors. Such sponsors could only be passive chaperones, not active participants in the group.
In *Wigg*, the lower court held that Barbara Wigg could participate in student religious clubs at other elementary schools but not at Anderson Elementary School where she was a teacher. The concern was that having Ms Wigg participating in a evangelical Bible study group at the school where she taught would raise Establishment Clause problems because a private citizen may not understand that she was acting as a private citizen and instead, given that she was a teacher at the school, believe that the school was endorsing religion by having Ms Wigg teach a Bible study class. The lower court felt that such problems would be less likely to exist in another school because, although both schools were in the same district, knowledge that Ms Wigg was a district teacher would be less likely, thus confusion over possible endorsement of religion would be less likely.

In overturning the lower court, the circuit court held that in addition to participation in another school, Ms Wigg could also participate at her own the school. In making that decision, the court did not believe that a reasonable observe would believe that Ms Wigg's participation constituted a state endorsement of religion because the group would be limited to students who had parental permission to attend and it would be held after the school day.

Editor's Note: This decision seems to be splitting hairs. If the concern is over the beliefs of a "reasonable observer" only those observers who were parents at the school would know that the children were there only with parental permission – most likely because they were members of the evangelical fellowship sponsoring the Bible study or because a flyer advertising the activity had been sent home with the children (which raises a whole host of other possible problems.) How about another person from outside the school? Would he or she be able to understand that such activity was any different from the intramurals taking place in the gym which ***were*** *sponsored by the school? Unlikely. Moreover, and perhaps more important from a legal perspective, this decision seems to directly contradict the concerns voiced by the Supreme Court in Mergens which ultimately resulted in the restrictions on faculty participation. Finally, on a purely best educational practices concern, what does it say about Ms Wigg as an educator if she goes to court to fight for the right to participate in a group, at school, comprised of some of her students but excluding others, which is highly charged emotionally thus increasing the likelihood that Ms Wigg will be alienating one or more of her students who don't share her evangelical Christian beliefs? I know that I wouldn't want my children in her class now that she has shown by her actions a wanton disregard about the feelings of her students. It appears that Ms Wigg needs some serious diversity and tolerance training!*

Less than a month earlier, however, the time following earlier precedent the same 8th Circuit in the case of *Warnock v Archer*, No. 02-3322/03-1422 (8th Cir. August 24, 2004) held that the practice of the Devalls Bluff School District in Arkansas of opening in-service training sessions and faculty meetings with a prayer was a violation of the Establishment Clause. *Editor's Note: Even though the Wigg case was in South Dakota and Warnock was in Arkansas, once a case reaches the federal circuit level state boundaries disappear and decisions are binding on all cases within the given circuit.* This case rose out of a complaint by Steve Warnock about the opening of mandatory meetings with a prayer led by the superintendent of the district. The court relied on the 1971 landmark case of *Lemon v Kurtzman*, 403 U.S. 602 to rule that such a practice violated the Establishment Clause of the First Amendment as state endorsement of religion.

Moving to the 6th Circuit, that court ruled in the case of *Rusk v Crestview Local School District*, 2004 WL 1793283 (6th Cir. August 12, 2004) that a district policy requiring elementary teachers to distribute information from outside religious groups which promote specific community activities rather than the religion itself was not a violation of the Establishment Clause of the First Amendment. The district policy allowed distribution of flyers from other nonprofit community groups. The court concluded that since all flyers, both religious and non-religious, were aimed at the parents and the parents were the ones who ultimately decided whether the children would attend, that under the "reasonable observer" standard it was unlikely that the parents would believe that the school was endorsing religion.
Editor's Note: While this seems to follow the general theory that you can't discriminate on the grounds of content, schools need to be careful when they open up such a forum because along with the flyer about the Fall Fun Festival at the Catholic Church and the Easter Bazaar at the Baptist Church may be the Winter Solstice Feast at the Church of Wicca and the celebration of the Adolf Hitler's Birthday at the World Church of the White God. Schools can't just limit the open forum to those groups, which are favored by the community.

In *Seidman v Paradise Valley Unified School District No. 69*, 2004 WL 1727859 (D. Arz. August 2, 2004) the good intentions of a school district to avoid Establishment Clause violations ended up being a violation of the Free Speech Clause of the First Amendment in the opinion of the district court. In an effort to raise money the PTO of Pinnacle Elementary School came up with "Tiles for Smiles." In this fund-raiser the group sold tiles which would be permanent displayed on the hallway walls of the schools. Parents could purchase tiles and request that specific messages of love, encouragement, praise, and recognition be placed on their tile. Everything was going fine until the Seidman family purchased two tiles and on one put the message God Bless Quinn We Love You Mom and Dad and on the other God Bless Haley We Love You Mom and Dad. The school said no to those messages, afraid that permanent display of such a religious message on a permanent structure on school grounds would violate the separation of church and state. In response the Seidmans changed the message to "In God We Trust" which also was turned down. In ruling against the school, the district court stated that a school can not engage in viewpoint discrimination, that the refusal to allow the messages rested solely on the content of the speech, that such messages fell within the broad guidelines provided by the school and disallow the messages because of the religious tone of the message would be viewpoint discrimination. Moreover, the court found it unlikely that a rationale observer would believe that the school was endorsing religion.

Well it appears that the Wiccans have finally gotten into the fray in the South. In Great Falls, South Carolina the school board had always opened its meetings with a prayer to Jesus. After a practitioner of Wicca filed suit, the 4th Circuit ruled that such practice must end. Although the state of South Carolina is attempting to limit the effect of such ruling by stating that it applies only to the town of Great Falls, the South Carolina School Board Association is advising that the ruling applies not only to all of South Carolina but to all states in the 4th Circuit – Maryland, North Carolina, Virginia, and West Virginia.

SPECIAL EDUCATION

Before reviewing recent court action in the area of special education, it should be noted that reauthorization of the IDEA continues to be in doubt. Now that the Congress has returned from recess, it only has a limited window of opportunity to complete the reauthorization. Failing to do so, another window will open after the November elections but such would then be done by a "lame duck" Congress. If neither get the job done, the new Congress once seated will have to start the process of reauthorization all over again.

Autism, and specifically Asperger's Syndrome, has been at the center of recent conflicts regarding appropriate services. In Maine, a trail court upheld the decision of a local school district to ban a locally home-schooled child from the public school playground because of aggressive and defiant behavior. The child, Jan Rankowski had been a student at the elementary school but was unilaterally removed by his parent after a dispute over his IEP. The parents started to home-school the boy and agreed with the elementary school that he could continue to have access to the playground. After numerous complaints, however, the school district told Jan's parents that if they wanted the arrangement to continue, then they needed to have Jan undergo an extensive evaluation known as a functional behavioral assessment. Jan's parents denied that any behavior problems were occurring (i.e. the reported rock throwing and

threatening language) and claimed that the school district was discriminating against Jan because of his disability. In holding for the school district, the court found no discrimination but rather it found a school district doing its best to both serve a disabled student while protecting the general education students at the same time. The parents have vowed to appeal claiming that the ruling was tantamount to telling them to hide their son away in the attic.

Once again the disability is Asperger's Syndrome and once again the state is Maine. In this case, the O'Meara's wish for their daughter to be provided with special education services because of the socialization problem caused by her autism. The school district declined to staff her with an IEP because of her satisfactory academic achievement. The state court held of the school district, upholding its denial of special education services. This case is a perfect example of the tension between what should be provided in an "appropriate education." Does the term mean solely academics or is there a socialization component? What is meant by "adversely affected" in the IDEA? If the federal court in this case rules for the parents thereby agreeing that the inability to interact socially with others is a learning disability and must be provided for under the IDEA, already financially strapped school districts could be bankrupted by the enormous influx of currently non-identified children. Currently autism is one of the fastest growing disabilities being dealt with by the public schools.

An interesting decision by the 4th Circuit in *Weast v Schaffer* may lessen the hesitance of local school district to proceed to due process hearings. In *Weast* the court held that a school district does NOT bear the burden of proof under the IDEA in a Due Process hearing initiated by the parents. Actually this decision is fairly consistent with current law in other areas of discrimination. If an individual feels that he or she has been discriminated against because of race or gender, the burden of proof lays with that individual, not with the employer, to provide prima facia evidence of such discrimination. Under the IDEA the school district is required to provide an IEP for disabled students. Once that is done, if the parents disagree in essence they are stating that the school district is discriminating against their child because of his or her disability. Logically, given other discrimination law, the parent should have the burden to prove a prima facia case of that discrimination. All the 4th Circuit decision did was rule that nothing in the wording of the IDEA changes that common law assignment of the burden of proof.

DISCRIMINATION

A surprising suit has been filed by the ACLU on behalf of pregnant students in the Antelope Valley Union High School District in California. The suit is not surprising because of the legal issues being raised, but because it is almost inconceivable that any school district in this day and age would continue to have policies which shuttle pregnant students off to the side of any educational opportunity. In the Antelope Valley district, pregnant students and student with children are routinely moved from regular education classes to alternative classrooms, which offer no college-preparatory or language courses. The students are told that they must complete the majority of their coursework in these alternative classrooms to be eligible for free childcare and other related state services.

FIRST AMENDMENT – FREEDOM OF SPEECH

In the case of *Circle School v Pappert*, 2004 WL 1852953 (3rd Cir. August 19, 2004) the court ruled that Pennsylvania's Pledge of Allegiance violates the First Amendment. This "Patriotism Law" requires all public, private, and religious schools to recite the Pledge of Allegiance or sing the National Anthem each day. Students may opt out for religious reasons, however the school must notify the parents if the child chooses to opt out. It was this notification provision which the court identified as viewpoint discrimination in contravention of the United States Supreme Court ruling in *West Virginia State Board of Education v Barnette*, 319 U.S. 624 (1943). *Editor's Note: It must be the fact that there is no parental notification provision in the Illinois law which keeps it safe from a First Amendment challenge.*

SCHOOL FINANCE

Perhaps because of the lean state budgets, school funding continues to be a source of potential litigation in many states. Georgia's constitution obligates the state to insure that students receive an adequate education. Because in Georgia, as in many other states, school funding relies almost exclusively on property tax, a massive disparity has arisen between the funds available to wealthy suburban districts and poor rural districts. For this reason a group of rural school districts are contemplating litigation against the state to declare the current method of state funding unconstitutional because it does not ensure students an adequate education. *Editor's Note: If such litigation is filed it is very likely it will face the same fate as similar litigation in other states, including Illinois. Both in the landmark McInnis case and later in the Edgar case, the Illinois Supreme Court failed to find fault with the state funding policy both because it was decided that changing the funding was a legislative rather than judicial decision and because the court could find no benchmarks to measure what relationship, dollar for dollar, funding had with adequacy of education. I fear Georgia will face the same fate.*

As regarding the on-going litigation in California in the case of *Williams v California*, the state and the ACLU have reached a tentative settlement. Unlike his predecessor Gray Davis, Governor Schwartzenegger is committed to spend money trying to fix the schools rather than on perpetuating litigation by adding to the $18 million already spent on legal costs. Under the tentative settlement the state would spend up to $1 billion over a period of time to repair the deteriorating facilities of 2,400 low-performing schools. In addition, $139 million would be spent this year on textbooks and $50 million to assess the needs of these schools. Non-monetary terms include the establishment of a procedure for students, teachers, and parents to report complaints as well as continuous monitoring of these schools by the county education superintendents. Some complain that this settlement has too little cash and too much bureaucratic red-tape attached. Others, including the ACLU, say that it is a starting point.

In *Hoke County Board of Education v State of North Carolina*, No. 530PA02 (N.C. July 30, 2004) the North Carolina Supreme court affirmed a lower court ruling which held that the state has failed in its duty to provide students in the poorest districts with the "opportunity to attain a sound basic education." This requirements was defined in an earlier North Carolina Supreme Court case, *Leandro v State*, 488 S.E.2d 249 (1997). This ruling came just one week after the

North Carolina State Legislature failed to approve the appropriation of the $22 million needed to comply with the decision in *Leandro*.

LEGISLATION

The General Assembly has enacted the following amendments to the Illinois School code:

Public Act 093-0909 Effective August 2004

Now, instead of just making criminal background checks on prospective employees, school districts are required to conduct fingerprint-based criminal history records checks.

Public Act 093-0946 Effective July 1, 2005

This act amends that portion of the School Code regulating school physicals. Now in addition to the mandated school physicals and vaccinations, all students entering kindergarten, second grade, and sixth grade must show proof of a dental exam within a specified time prior to the start of school. For those students who have not had such an exam, the school district may withhold report cards until such time as the child has had an exam or shows that an exam has been scheduled within a reasonable time.

Public Act 093-0974 Effective January 1, 2005

The distinction between closed and open meetings of public meetings has been abolished as to written minutes. Starting in 2005 ALL open meetings, whether open or closed, must keep written minutes.

Public Act 093-0997 Effective August 23, 2004

In order to comply with NCLB, districts must now spend as least 40% of their Title II funding on the recruitment and retention of highly qualified teachers in areas where those teachers were identified as lacking.

Public Act 093-0857 Effective August 3, 2004

Under this law, no student will be able to obtain a diploma without taking the Prairie State Achievement Exam unless he or she falls under an exempt category.

Public Act 093-0858 Effective January 1, 2005

The compulsory education age has been raised from 16 to 17. In addition, the regional superintendent is required to take on the duties of truant officer for any school district that doesn't employ one. A provision to provide graduation incentives to current drop-outs was also added to the school code.