Federal/State/Local Control of Education

NCLB

Currently 25 educational, civil rights, and other groups are forming a coalition to press for a rewrite of the law. While support the general goals of academic achievement for all children, elimination of achievement gaps, and an accountability system, the coalition will push for a change in how academic progress is monitored, a reduction in the amount of standardized testing required, and a change in the method of sanctions for under-performing schools. This coalition is being formed, in part, to counteract the establishment of the Achievement Alliance, composed of educators, civil rights advocates, and business, in support of the current NCLB.

Charter Schools

Based on a recent ruling by the Appellate Court of the Fourth District, under the Illinois Charter School legislation, a local school district may refuse to grant a charter based solely on school district finances. In the case of *Comprehensive Community Solutions, Inc. v Rockford School District No. 205*, No. 4-03-0921 (4th Cir. IL, 2004), Comprehensive Community Solutions (CCS) submitted a proposal to the Rockford Schools for the establishment of a charter school to work with at-risk students. The advisory committee established by the Rockford school board to review such proposals recommended approval of the contract contingent upon agreement on a financial plan for the school. The Board of Education ignored that recommendation and voted 3 to 3 to reject the proposal. The issue was submitted to and ISBE appeal panel which found in favor of CCS and recommended that the denial of the charter be reversed. The State Superintendent of Education also recommended granting the charter. In a 4 to 4 vote, however, the ISBE voted down the motion to reverse the school district's denial of the proposal stating that the charter school was not economically sound for the district.

The question that ended up before the court was whether ISBE's denial of the charter school application based only on "school district economics" was in violation of the state charter school law. The charter school group, CCS, argued that under the charter school law if other relevant factors outweigh the financial impact, then the charter must be granted. The court responded in its opinion that financial impact was a valid factor to consider and that, in fact, in order to determine whether any given proposal was economically sound for both the charter school and the school district, such information must be considered. It then logically followed that if such information must be considered before granting a charter, then it was also a valid reason to deny the charter.

Religion and Education

A suit has been filed in New York State regarding the refusal of the Liverpool Central School District, Liverpool, New York to allow a fourth grade student to distribute and personal proselytizing statement, "Hi! My name is Michaela and I would like to tell you about my life and how Jesus Christ gave me a new one." to her classmates. The statement then goes on to list five ways in which Jesus has come into her life. The gist of the lawsuit is that since the school district allows the distribution of fliers from other students promoting basketball and the YMCA, a theater production at the Syracuse Children's Theater, and Camp Fire USA Summer Camp, to disallow the proselytizing statement would be a violation of the First Amendment freedom of speech.

Editor's Note: When a school district is faced with the problem, it is indeed a fact that the decision to allow or disallow cannot be made on the basis of the content of the message, That does not mean, however, that schools have no ability to decide what may be allowed to be distributed in the schools. Under the Supreme Court decision in Cantwell v Connecticut, 310 U.S. 296 (1940), it was established that public schools do have the ability to control the time, place, and manner of distribution of materials. Almost any regulations may be promulgated so long as they are enforced uniformly and do not make decision based on the content of the speech. A suggestion of the Liverpool School District is that it make a regulation that the fliers must be sponsored by a group or organization and advertising an event rather than simply a personal statement of an individual. In that way a decision has been made by general category, not by the content of the message. Now this would mean that if a local born-again Christian church wanted to have a student pass out fliers on a youth group meetings, the school would be hard pressed not to allow such disbursement if the Syracuse Children's Theater was still allowed to distribute. It would, however, end the practice of individual children using the school as a personal soap-box to air personal beliefs and feelings.

The posting of the Ten Commandments is once again going to be before the Supreme Court with the acceptance of the Court in October to review *McCreary County v American Civil Liberties Union of Kentucky*, Docket No. 1693. The last time that the Court entertained this issue was in the 1980 case of *Stone v* Graham, 499 U.S. 39 (1980). In a per curiam opinion, the United States Supreme court declared that a Kentucky Statue requiring the posting of the Ten Commandments, which would be purchased by private funds rather than state tax money, on the wall of each public school classroom was unconstitutional as violating the Establishment Clause of the First Amendment to the Federal Constitution. In other words, the Court was so convinced of the error of the Kentucky Statute that it made a decision without ever having input (oral arguments and legal briefs) from the parties involved.

In reversing the Kentucky Supreme court, which had held no violation of the Establishment Clause, the United States Supreme Court relied on the Lemon Test. This Court has announced a three-part test for determining whether a challenged state statute is permissible under the Establishment Clause of the United States Constitution. The first prong requires that the statute in question have a secular legislative. Next, once enacted the statute must not have, as its primary effect, the advancement or inhibition of religion. Finally, if those two prongs can be passed, the statue must not create an excessive entanglement with religion. When the Court applied the Lemon Test to the Kentucky statute it failed the very first hurdle. In the opinion of the Court posting of the Ten Commandments had no secular (non-religious) purpose because no matter what the state tried to provide in the way of disclaimers, the Ten Commandments are inherently religious. They are religious documents of the Jewish and Christian religions.

It appears that in the 25 years since the decision in *Graham*, Kentucky has attempted to overcome the objections of the Court while still pursing their need to intersperse Judeo-Christian religious documents into the day-to-day activities of the state. Perhaps the biggest difference now is that one of the dissenters in the *Graham* opinion, is now Chief Justice of the Supreme Court and is joined by three other like-minded justices. This time, instead of deciding how to apply the Lemon Test, the real question before the

Court will be whether the Lemon Test should be overruled as unworkable and be replaced by a specific test to address government display or recognition of historical expressions of religion. Unlike the posting of the Ten Commandments in *Graham*, in *McCreary County*, the documents was included with other historical documents including the Magna Carta and the Mayflower Compact. The display, although appearing to comply with the dicta of *Graham* was still ruled unconstitutional by the Sixth Circuit because there was no attempt to connect the Ten Commandments with the other secular documents thus its positing was seen as a violation of the first prong of the Lemon Test – no secular purpose for the action. In fact, at first the school had only posted the Ten Commandments, then only other historic and legislative references to God and the Ten Commandments before finally acquiescing and including other secular historical documents.

Refusing to include payments to private religious schools along with payments to private secular schools in a state voucher program is not necessarily a violation of the Equal Protection Clause of the 14th Amendment. In *Eulitt v State of Maine*, No. 04-1496 (1st Cir. October 22, 2004), the Court of Appeals for the First Circuit upheld Maine's law allowing local school districts to fulfill their obligation to provide a free public education by paying tuition for students to attend nonsectarian, but not sectarian, private schools. Parents of children in Catholic schools had challenged the law as a violation of the Equal Protection Clause of the 14th Amendment. Because the law does not impose criminal or civil sanctions on religious practice, does not inhibit political participation, or require state residents to surrender their religious convictions in order to obtain secular education, there is no inhibition of or animus towards religion. The rights of parents to obtain a religious education are not impermissibly interfered with solely because the state refuses to fund that choice as it does the choice to obtain a secular education. *Editor's Note: Bit by bit it appears that states are finding a way around Zelman v Harris. The general public has never been in favor of vouchers for private religious schools, having never passed a referendum allowing such a program.*

Using the Supreme Court's reasoning in *Hazelwood v Kuhlmeier*, 484 U.S. 260 (1988), the U.S. Court of Appeals for the 11th Circuit ruled in the case of *Bannon v School District of Palm Beach County*, No. 03-13011 (11th Cir. October 12, 2004) that a high school principal did not violate the 1st Amendment rights of a student when he made her remove a religious message she had painted on a mural as part of a school-wide beautification project. The school beautification project was not a public forum and the mural was school-sponsored speech thus able to be regulated by the school, which sponsored it. The student had painted a cross and the word Jesus on her mural along with an inspirational statement and a sun. In the opinion of the court, when the principal made her remove the cross and the word Jesus from the mural he did so for sound pedagogical reasons as allowed by *Kuhlmeier*.

In contrast, in the case of *Child Evangelism Fellowship of New Jersey, Inc. v Stafford Township School District*, the 3rd Circuit Court of Appeals ruled that censoring material to be distributed at a "back-to-school-night" solely by its content did not fall under the *Kuhlmeier* exception. The school district refused to distribute promotional material for religious clubs although it did allow the distribution of materials for secular

clubs. The court stated that this constituted impermissible viewpoint discrimination in violation of the First Amendment.

<u>Students' Rights</u>

Drug Testing

An August 2004 ruling by the 8th Circuit declaring an a school policy of the Little Rock School District, Little Rock, Arkansas unconstitutional could have impact for us here next door in the 7th Circuit. In the case of *Doe v Little Rock School District*, 380 F.3d 349 (2004) the U.S. Court of Appeals ruled that random, suspicionless searches of students and their belongings (i.e book bags, backpacks, and purses) was a violation of their Fourth Amendment rights to be free from unreasonable searches and seizures. Under a school district policy printed in the Little Rock School District's current Secondary Student Rights and Responsibilities Handbook which is distributed to students at the beginning of the year which states: "book bags, backpacks, purses and similar containers are permitted on school property as a convenience for students and . . . if brought onto school property, such containers and their contents are at all times subject to random and periodic inspections by school officials." Jane Doe was found to be in possession of marijuana and was charged with and convicted of misdemeanor drug possession. The court ruled that the school district lacked the requisite "special needs" to search students in the absence of individual suspicion/reasonable suspicion.

To come to this decision, the court balanced the need for a governmental search against the privacy rights of the individual using a three-part framework. First the court looked at the level of the expectation of privacy of the individual. Next, it reviewed the nature of the intrusion into that expectation of privacy caused by the search. Finally, the court considered the nature and immediacy of the governmental concern and whether the search as conducted was the least intrusive possible to meet those concerns. When talking of expectation of privacy, the court outlined the stance taken by the United States Supreme Court in the cases of *Vernonia v Acton*, 515 U.S. 646 (1995) involving student athletes, and *Pottawatomie County v Earls*, 536 U.S. 822 (2002) involving students in extra curricular activities. While the court firmly believed that *Earls* limited the privacy rights of students because of the need of the state to guard the discipline, health and safety of the school environment, it was equally firm in stating that those rights were not totally negated. The easiest way to summarize the courts discussion on the expectation of privacy of students is to place them along a continuum of expectations where private citizens have the greatest expectation of privacy in their belongs, and students who voluntarily choose to participate in an extra-curricular activity have some of the lowest expectations of privacy. The average public school student stands somewhere in-between, even in the face of the states claim of a need for safe educational environment.

Proceeding to the next question regarding the intrusiveness of the search, the court felt that the type of search done (school personnel physically searching through the purses, book bags, ets. of the students without the students present) was too intrusive. The court did seem to distinguish drug-sniffing dogs as being less intrusive by stating,

> "Whatever privacy interests the LRSD students have in the personal belongings that they bring to school are wholly obliterated by the search practice at issue here, because all such belongings are subject to being searched at any time without notice, individualized suspicion, or any apparent limit to the

> extensiveness of the search. Full-scale searches that involve people rummaging through personal belongings concealed within a container are manifestly more intrusive than searches effected by using metal detectors or dogs. Indeed, dogs and magnetometers are often employed in conducting constitutionally reasonable large-scale "administrative" searches precisely because they are minimally intrusive, and provide an effective means for adducing the requisite degree of individualized suspicion to conduct further, more intrusive searches. The type of search that the LRSD as decided to employ, in contrast, is highly intrusive, and we are not aware of any cases indicating that such searches in schools pass constitutional muster absent individualized suspicion, consent, or waiver of privacy interests by those searched, or extenuating circumstances that pose a grave security threat" [380 F.3d at 355-356]

It also bothered the court that, unlike the Supreme Court cases in *Vernonia* and *Earls*, the purpose of the searches in Little Rock appeared to be the imposition of criminal penalties as opposed to being used to end a perceived drug problem in the schools by removing and rehabilitating the offender. The court stated, "Because the LRSD's searches can lead directly to the imposition of punitive criminal sanctions, the character of the intrusions is qualitatively more severe that than in *Vernonia* and *Earls*. Rather than acting *in loco parentis*, with the goal of promoting the students' welfare, the government officials conducting the searches are in large part playing a law enforcement role with the goal of ferreting out crime and collecting evidence to be used in prosecuting students." [380 F.3d at 356]

Finally, the court looked to the immediacy of the governmental concerns and held that the state had failed to prove a need sufficient to justify the gross intrusion into the privacy of the students. Once again the court used a continuum to view immediacy of need. The lowest need, which would require the greatest justification would be a societal concern that public schools today are more dangerous and more drug infested. The need would intensify if the district had gone past just societal concern and had actually done research and found out that their specific school district had a growing drug problem, such as was done by the district in the *Vernonia* case. Finally, the greatest need would be if there was an imminent danger such as credible information that a drug deal was going to be occurring that day between rival gangs who were all going to be well armed with guns with the intent to injure each other.

Editor's Note: Perhaps the greatest concern to me, which should also be a concern to administrators, is the court's statement in dicta that "But we do not think that this handbook passage has effected a waiver by LRSD students of any expectations of privacy that they would otherwise have. The students are required by state law to attend school, and have not entered into a contract that incorporates the handbook or voluntarily assented to be bound by its terms. The lack of mutual consent to the student handbook makes it fundamentally different from an employee handbook, which may create an enforceable contract between an employer and employee under traditional contract principles. The LRSD may not deprive its student of privacy expectations protected by the fourth amendment simply by announcing that the expectations will no longer be honored" [380 F.3d at 355]

School attorneys commonly give the advice that if a school district wants to hold students to a type of behavior, or limit one of their constitutional rights, the district must

give notice of that fact and the easiest place is the student handbook. It has never been my belief that there must be a "meeting of the minds" before students, captive audience or not, could be required to abide by the rules of the school. If that is the case then where is the concept of "in loco parentis?" I don't believe standard contractual concepts of waiver apply to student handbooks. However, agreeing arguendo that they do, once the student is put on notice by the warning, why are they not waiving their own right to privacy by going ahead and bringing a portable container with them to school?

Student/Education Records

The business of determining what is considered an educational record under FERPA (Family Educational Rights and Privacy Act) has become just a little clearer, if possible after the Supreme Court ruling in *Owasso*. In the Kentucky Court of Appeals decision in *Medley v Board of Education of Shelby County*, 2004 WL 2367229 (Ky. Ct. App. October 22, 2004), it was decided that video tapes of a classroom are "education records" under FERPA and the complimenting Kentucky state student records law. Medley, a teacher at Shelby County High School, made an open records request to view videotapes made in her classroom for the purpose of professional improvement in the areas of teaching and classroom management. The superintendent denied the request on the grounds that the tape was an educational record under FERPA and that Medley did not have an educational reason for requesting the tapes. Ultimately the appellate court disagreed stating there was insufficient evidence to determine that Medley's request was not for legitimate educational reasons and sent the case back to the trial court to make that determination. While this opinion is not final on the subject of educational purpose, it is important to administrators on the topic of what constitutes and educational record.

The most recent United States Supreme Court opinion, *Owasso v Falvo*, 534 U.S. 246, (2002) left what exactly is an educational record rather gray. Justice Thomas in his opinion set outside parameters that once in the permanent record, the filed definitely was an educational record under FERPA. On the other end, papers in the process of being graded by other students were NOT educational records. Unfortunately, the Court refused to give any more direction than that, specifically refusing to decide whether a teacher's grade-book was an educational record under FERPA. At least this case gives some more direction, if only binding on the state of Kentucky.

Pledge of Allegiance

Ever since the United States Supreme Court decision in *West Virginia State Board of Education v Barnette*, 319 U.S. 624 (1943) it has been understood that students could not be required to recite the pledge of allegiance in violation of their religious beliefs. Now the 3rd Circuit has added another qualification to who may not be required to recite the pledge in its August 2004 decision in *Circle School v Pappert*, 2004 WL 1852953 (3rd Cir. 2004). Pennsylvania passed a law requiring all public and private schools to display the American flag in every classroom, recite the Pledge of Allegiance or national anthem each day, and notify parents of students who did not participate. While students could opt out for religious reasons, the thrust of the new law was to require written parental permission for refusal to recite. In holding that the law violated the students' rights to free speech, the court found that the parental notification provision could have a "chilling effect" on the students' right of free speech. As for the private schools, the court found

that the law was unconstitutional because, by mandating the time and manner through which the school could express their ideals and goals, it limited the private school's right of expressive association. *Editor's Note: What does this mean to schools in Illinois? Certainly religious objectors must be exempted. Schools, however, may wish to temper mandated participation depending upon the expectation of individual communities. At the very least all students, even religious objectors, can be required to abstain from reciting the pledge in a passive, respectful, and non-disruptive manner.*

Teachers' Rights

In *Flaskamp v Dearborn Public Schools*, No. 02-2435 (6th Cir. October 5, 2004), the U.S. Court of Appeals for the Sixth Circuit upheld the denial of tenure for a physical education teacher who had developed a lesbian relationship with her student assistant. Although the majority of the relationship occurred after the student had turned eighteen and graduated from high school, because it had begun while she was still a student the district chose to deny her tenure. She brought suit alleging violation of her Fourteenth Amendment rights to intimate relationships, privacy, and freedom from arbitrary state action. Deciding on these allegations, the court used a rational relation standard and stated that the board's action could be seen as an attempt to deter future teachers from developing relationships with students, even non-sexual relationships, with a goal of establishing a sexual relationship upon the student's graduation. As to the claim of violation of privacy, the court held that the board's action did not limit her ability to make choices regarding her personal relationships and since the information was kept confidential and only narrowly disseminated it did not violate her informational privacy. Once the court reached these decisions, it was concluded that the state action was not arbitrary.

Special Education

As of November 18, the House-Senate committee on the reauthorization of the IDEA has given almost unanimous approval to major changes in the law. These changes include providing new ways to quickly identify students in need of services, reducing legal challenges by parents, and allowing the removal of students for disruptive behavior not caused by their handicap. Unlike earlier house versions, manifestation hearings will still be required prior to discipline however, if the behavior is found to not be a manifestation of the student's handicap, the student may be expelled.

Administrative remedies under the IDEA do not need to be exhausted prior to litigation if the injury being claimed is physical in nature and not addressable under the procedures and remedies provided in the IDEA. In the case of *McCormick v Waukegan School District #60*, 374 F.3d 564 (7th Cir. 2004), a student with muscular dystrophy was forced by the physical education teacher, in contravention of his adaptive physical education IEP calling for non-strenuous activities, to run laps and perform push-up. As a result he suffered permanent kidney and muscle damage, over which his parents brought suit rather than seeking remedies under the IDEA.

Tort

In *Hill v Galesburg Cmty. Unit Sch. Dist. 205*, 805 N.E.2d 299 (Ill. App. Ct. 2004) a student injured his eye during chemistry lab because he failed to wear protective eye covers. The father sued the school district on his behalf. The school district claimed immunity under the Local Governmental and Governmental Employees tort Immunity Act. The appellate court held that,

School Finance

Legislation

State

The State General Assembly returned to Springfield on Monday, November 8 for the fall Veto session. At this time more attention is being paid to the speed of semi-trucks passing through Illinois, then on education in the state. About the only pending piece of legislation is the School Construction Grant Program. Because of the continuing financial ills of the state, construction spending was not decided in the spring along with the general state budget. Now is the time in which these issues should be raised.

Waiver hearings on waiver requests that were forwarded to the General Assembly in October are currently underway.