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Mission Statement

The primary purpose of the Illinois School Law Quarterly On-Line is to provide a forum for the interchange of ideas, theories, and issues on various aspects of school law among practitioners, professors, and attorneys. The emphasis is on analyzing issues in school law for the purposes of developing new theories to explain current and past developments in the law and to provide the theoretical framework which can be used to anticipate and predict future developments in school law.

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DEVELOPMENTS IN THE COURTS

Curriculum

This may be taking local control to an extreme but if successful could mark the end of summer reading lists for public school children. In Wisconsin, a father has filed suit over homework assigned over summer vacation. The crux of his argument is that the school district has overstepped its authority assigning work after the successful completion of the state mandated 180 days of school. While some may agree that students are pushed unnecessarily hard, causing them to grow up too early and not experience the joys and benefits of childhood, other dismiss this type of litigation as frivolous. Mr. Philip K. Howard, chair of Common Good which is an organization devoted to the end of America's overly litigious society, especially as it pertains to public education, was quoted as saying that, if he were the just "I would not only dismiss the lawsuit, I'd levy a fine against the father for misusing the courts." [Milwaukee Journal Sentinel, Jamaal Abdul-Aim writer]. *Editor's Note: In some ways this suit is very similar to other legal controversies over local control such as the appropriateness of state legislative control over school calendars. What one must always remember in these situations, however, is that the public schools are just a creation of the state legislature and can be amended or even disbanded if that was the will of the people. There is no federal constitutional right to a public education.*

In the federal courts in Georgia, evolution is once again the topic of litigation. In the Cobb County School District, science textbooks, which contain information about Evolution have been marked with a sticker reading: "This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered." since the fall of 2002. Parents filed suit alleging that the stickers violated the Establishment Clause of the United States Constitution. The federal district court, after applying the Lemon Test, a constitutional violation. While a plausible secular purpose for the stickers was found, that being an attempt to pacify a section of the population while promoting critical thinking, the school district policy could not pass the rest of the test. Turning to the "effect" prongs of the test the court found that a reasonable observer reading the sticker would interpret it as sending a message of favoritism toward those in the community who oppose evolution, namely fundamentalist Christians. Those in the community who favored the teaching of evolution, namely everyone else Christian and non-Christian alike, were essentially being told that they were in an unfavorable political position.

No Child Left Behind

<u>Bigger Better NCLB?</u>
According to the introduction of his nominee to replace Rod Paige as Secretary of Education, Margaret Spellings, President Bush said "Margaret Spellings and I are determined to extend the high standards and accountability measure of the No Child Left Behind Act to all of America's public high schools. We must ensure that a high school diploma is a sign of real achievement, so that our young people have the tools to go to college and to fill the jobs of the 21st century." [Los Angeles Times by Nick Anderson]. This time, however, he might face more of a fight even from those who originally backed the legislation. Many liberals who previously supported the policy,

such as Ted Kennedy, have gone on the record of opposing any expansion of the NCLB unless the shortage in current funding is erased. Major conservatives, such as Tom DeLay, opposed the legislation from the beginning. Consequently it is unlikely that President Bush's words will come to fruition.

Requests for Exemptions

The states are at it again, this time taking a different tactic. Connecticut and Virginia are the latest to request an exemption from the expanded testing requirements of NCLB. Connecticut argues that such requirements are a needless financial burden and would add no benefit. Currently Connecticut tests students in grades four, six, and eight. To test again in grades three, five, and seven as required under NCLB would add no significant statistical data about the success or failure of those students.

Virginia is taking a different route to the same destination by introducing state legislations, endorsed by the Virginia Association of School Boards, which would direct the Virginia Board of Education to seek an exemption from NCLB. The argument presented by this state is that 84% of the public schools are already accredited under the state's accountability law and that it would be counterproductive to stop this state accreditation process as would be required to comply with NCLB. Virginia argues that state money would be better spent finishing what was already started under state law.

In both cases, requirements regarding the testing of students with limited English proficiency are also being challenged. Connecticut is requesting a three-year exemption for non-English speaking students. Virginia is also seeking additional testing time for non-English proficient students.

NCLB vs IDEA

School districts in Illinois are in the planning stages of a potential lawsuit against the federal government to gain directions as to how to reconcile the conflicts between the requirements of NCLB and the IDEA. Under the IDEA, children identified as needing services are provided with an individualized education plan (IEP) which includes specific and reachable goals given the child's particular disability or disabilities. This plan is reviewed and adjusted on an annual basis. The whole basis of the IDEA is that certain children, while able to gain a benefit from education, can not realistically be expected to succeed at the grade level, which matches their chronological age. The NCLB legislation, on the other hand, expects ALL students regardless of disability to learn at or above the grade level, which matches their chronological age and requires standardized test without modifications for disabilities to measure this performance. These two philosophies are diametrically opposed. Moreover, to show adequate yearly progress (AYP) 95% of the students enrolled in a school (general and special education combined) and 40% of that number must pass the standardized tests. Schools which fail to make AYP face loss of federal Title I funds and, ultimately, state takeover of the school.

In the state of Illinois there are over 200 school districts that, because of high special education and special needs (i.e. non-english proficient) populations, will be unlikely to meet AYP thus face the loss of federal funds specifically earmarked for remedial education. It is a Catch-22. Kids who are in need of remedial education fail the exam and the punishment for the school

district to reduce the amount of funds provided for remedial education. The IDEA requires IEPs but this almost guarantees failure to meet AYP. Consequently, Illinois school districts such as Ottawa and Princeton feel they have no choice but to turn to the courts to direct them as to which laws to follow since attempts to follow both will end up with the potential destruction of their districts.

Tutoring Services

Under the provision in the NCLB forbidding schools which have failed to meet AYP for two years in a row from providing their own tutoring programs, the city of Chicago Public Schools has been ordered by the U.S. Department of Education to discontinue using its NCLB funding for its after-school tutoring program. This program currently serves 80,000 students. The Chicago schools have rejected the directive saying that it is willing to take the issue to court if necessary. The main reason is money. By providing the services in-house Chicago pays roughly $300 - $400 per year per student as opposed to $800 - $1,500 for an outside service. To switch mid-year will cause tens of thousands of students to lose tutoring services. The response from U.S. Undersecretary of Education Eugene Hickok was that Chicago should be looking to the state of Illinois to make up the funding difference.

District Liability for Administrator Termination

The 7th Circuit has come out with a decision, which should be taken very seriously by school districts in Illinois. In its ruling in the case of *Baird v Board of Education for Warren Community Unit School District 205*, No. 03-3630 (Nov. 12, 2004) the U.S. Court of Appeals for the 7th Circuit found that (1) superintendents are entitled to appropriate procedural due process which facing termination; and (2) school board members who fail to provide such due process are not entitled to qualified immunity. The court also found that the due process included in a state claim for breach of contract after the termination was not sufficient to excuse the lack of due process prior to termination.

Baird was employed as a superintendent and principal in the Warren Community Unit School District 205. After completing just one year of a three-year contract, the board informed him that he was going to be terminated for cause. When he attempted to gather documents and information to mount a defense prior to his termination, he was informed that board policy only provided him with notice and an opportunity to be heard – minimal due process. He appeared at the termination hearing for the sole purpose of objecting to the inadequate due process afforded him.

The federal district court granted a summary judgment for the school district but upon appeal to the circuit court the summary judgment was reversed. The appellate court agreed with Baird that when there is a multi-year contract there is a constitutionally protect expectation for continued employment. Should the district wish to break that contract, it must provide maximum due process not just the minimal due process allowed by the District 205 (notice and a chance to be heard.)

As to immunity for the board members, the court quickly noted that since the board was acting in an administrative rather than legislative capacity, there was no absolute immunity for its actions. As to qualified immunity, the court looked at the wording of the law, which allows this type of immunity when a public body makes a reasonable mistake. It was decided that in light of Baird's informing them of this right to due process that they acted a manner, which could not be interpreted as a reasonable mistake, therefore no immunity attached to their actions.
Editor's Note: What does this mean for Illinois school districts? Anytime a district wishes to terminate an administrator in the middle of his or her contract, even if there is reasonable cause to do so, maximum due process must be afforded. This means more than just notice and a chance to be heard. When the state is going to deprive an individual with property, and the 7th Circuit was pretty clear that being in the middle of a multi-year contract does created a constitutionally protect property right, that is considered a maximum deprivation of rights and maximum due process must be followed. Written notice outlining the specific charges must be provided to the administrator. That notice must be delivered in a timely fashion so that the administrator as a reasonable chance to prepare a defense. The administrator must be informed that he or she has a right to be represented by counsel, to not incriminate himself or herself, and to cross-examine witnesses. Assuming that the district truly does have cause for termination, making the extra effort pre-termination will avoid costly litigation post-termination.

Employment
In *Barrett v Steubenville City Schools*, No. 03-4373 (6th Cir. November 15, 2004) the 6th Circuit has ruled that an employee can file a discrimination suit on the grounds that he was denied a permanent position because his son was enrolled in a catholic school rather than public schools. To make such a requirement is a violation of the teacher's constitutional right to direct his child's education.

Religion

Release Time for Religious Education
Religion is still in the forefront of potential education related litigation. In Stauton, Virginia parents have requested that the school board end the district practice of allowing release time for religious education. The main points made by the parents is that the practice (1) stigmatizes those children who do not attend; and (2) takes away from valuable instructional time which is needed to meet Virginia's Standards of Learning and NCLB. In response, 1,000 residents of Stauton (not necessarily all parents but community members) filed a petition to keep the current practice citing the United States Supreme Court decision in *Zorach v Clauson* [343 U.S. 306, 1952]. The school board is expected to make a decision in February. *Editor's Note: In this case as in many of these types of disputes the parents objecting are primarily individuals who have moved out of urban areas where such practices were long ago abolished. They are clashing with long-time rural residents who don't wish things to change, including acknowledging the increasing diversity of society within America.*

Pledge of Allegiance
Although Dr. Newdow, the non-custodial parent who challenged the word "under God" in the Pledge of Allegiance, lost the first battle in front of the Supreme Court he is not defeated. He is launching his next assault against the Pledge of Allegiance. This time, however, he has seems to have overcome the procedural error which got his case dismissed last time. He has gathered eight custodial parents who agree with the position that "under God" should not be in the Pledge and they are the new plaintiffs in *Newdow v Congress*. Working as the attorney, Dr. Newdow is alleging that the 1954 federal law that added the words "under God" to the pledge, the California law requiring school districts to recited the Pledge, and the policies of five school districts requiring the Pledge, are all unconstitutional as an impermissible establishment of religion. *Editor's Note: If you are interested in more, up to the minute information, Dr. Newdow has his own website.*

Time- Place- Manner Restrictions
It appears that national religious right legal groups are more than willing to jump to the aid of any student who makes a colorable claim of a violation of his or her free exercise of religion. Such was the case in West Bend, Wisconsin. Members of a student Bible group approached the administration to request the distribution of Thanksgiving cards with a religious message at the school entrances, they were denied permission for failure to follow appropriate time, place, and manner restrictions for non-school sponsored material. The administration was prepared when it came to Christmas and when asked, informed the group that it could post a Christmas card on the bulletin board and provide a container of "help yourself" candy canes. This was the time, place, and manner for which school policy provided the distribution and/or dissemination of all non-school sponsored communications. Essentially the members of the student Bible group were upset that they couldn't stand in the doorway and hand out Christian messages thereby making it virtually impossible for anyone to enter the building without submitting to their proselytizing first. Consequently, the disgruntled students contacted Liberty Counsel and attempt to make an issue out of a non-issue. Because Liberty Counsel threatened a lawsuit over the fact that not as many students could be reached (harassed?) if the card was posted as opposed to being handed out, the school finally agreed to let the kids stand next to the community bulletin board on December 9th and physically hand out the Christmas cards from 6:45 a.m. until classes started at 7:30 a.m. *Editor's Note: The right of a public school to strictly regulate the time place and manner of communications inside the school so long as decisions are not made based on the content of the communication is well settled. In the instant case, by buckling to the unreasonable demands of the "Christian" folks, they have actually started a precedent of bending the rules, which they may ultimately regret.*

Another religious right legal group, Liberty Legal Institute (founded by its chief counsel Kelly Shackelford in 1997 to protect the religious freedoms and the First Amendment rights for individuals, groups, and churches) got into the fray in Plano, Texas when it filed for a temporary restraining order on behalf of a third grade boy who was not allowed to hand out pencils with religious messages attached during a winter break party. The order was granted despite the fact that the school district, even before the suit was filed, had decided that the parties were actually non-instructional time and students could hand out whatever they wanted at the parties. Still the suit was filed and the order was made. Moreover, the U.S. Department of Justice notified the Liberty Legal Institute that it was also investigating the incident. *Editor's Note: The fact that*

public schools, and ultimately taxpayers, are being plagued by unnecessary litigation by far right religious legal organizations is bad enough. What is extremely scary and should be closely watched is that the U.S. Department of Justice is getting involved. Is it because it is Texas or is this a forewarning of "big brother" type behavior to come from the Justice Department?

<u>Independent Literary Integrity Not Enough?</u>
Just as, in an attempt to avoid litigation from the religious right, schools will attempt to modify curriculum so as to not offend fundamentalist beliefs, it appears that such attempts go in the other direction as well. Lake Washington High School in Kirkland, Washington decided to cancel the performance of Charles Dickens' *A Christmas Carol* for fear that they would be entangling church and state. A private theater group was going to do a free performance for the school but it was cancelled for fear that it promoted one religion over another. *Editor's Note: Others in the area seem not to have lost their head and criticize the decision. The legal rule is that a piece of art, whether visual, musical or dramatic, is permissible in the public schools if it has inherent worth apart from its religious content. Undoubtedly, A Christmas Carol, has inherent worth apart from the fact that it is set during Christmas time. The emphasis of the story is on man's salvation and connection with community rather than a celebration of any given religious principal.*

This question was also alive during the holiday season on the other side of the United States as the Thomas More Law Center filed suit against the South Orange/Maplewood School District in New Jersey on behalf of two students. The complaint arose from the district's decision to omit any religious instrumental music from school winter concerts. The band was instructed to restrict its selections to secular seasonal tunes such as "Winter Wonderland" and "Frosty the Snowman." The suit alleges that the school district policy violates the Establishment Clause because it favors non-religion over religion. *Editor's Note: While the United States Supreme Court has said that one religion may not be favored over another a religion or religion over non-religion, this pleading is certainly a new twist on that statement. Essentially what the suit is alleging is that the school district has established a religion by not doing anything religious. Hopefully the court will see the speciousness of that argument and dismiss the suit. One the other hand, given the extremely Christian nature of the winter program at University High School, a public school associated with the public Illinois State University, taking religion out of performances is not a great concern here in the heart of Illinois!*

<u>Diversity of Religion</u>
Given that Islam is the fastest growing religion in the United States, it was only a matter of time before complaints were going to arise over school calendars, which follow primarily Christian religious holidays. A 22-member committee of the state education department in Maryland has unanimously proposed that all Maryland public school students allow up to two "floating holidays" for religious observances. While the Baltimore County Muslim Council notes that this proposal is a step in the right direction, it does not believe that the fight will be over until Muslims receive equal treatment for their holidays. It is the Council's position that either the schools close for Eid al-Fitr, Eid al-Adha, Rosh Hashanah and Yom Kippur, or close for no religious holidays. The state wants to leave the final decision on if and when to close up to local districts but emphasizes that whatever the decision it must take religious diversity into account. *Editor's Note: The traditional school schedule may be changing. Public schools in areas with*

diverse populations are going to have to make some hard choices. Closing school for the religious holidays of even the three to five major religions (Christianity, Judaism, Islam, Hinduism, and Buddhism) would account for a large number of days. But which do you leave out? Or should the schools close for none and each student gets to decide for which religious holidays he or she wishes to use his or her two personal days? In the future there may be school on Christmas just as many schools currently have school on Good Friday.

Special Education

Reauthorization

President Bush has finally signed into the IDEA reauthorization bill passed by Congress. One of the major changes this year is a focus on eliminating the over-representation of minority students in special education programs. Under the reauthorization, states will be required to keep statistics on how many minority group members are in special education classes and provide comprehensive early intervention programs for children in those groups which appear to be over-represented. Local school districts are allowed to spend up to 15% of their federal special education funds on these early-intervention programs

Burden of Proof

The 4th Circuit has been fairly consistent in assigning the burden of proof to parents in due process hearings. Relying on the decision in the earlier case of *Weast v Schaffer*, the 4th Circuit in *JH v Henrico County School Board*, No. 04-1454 (4th Cir. Jan. 20, 2005) ruled that a hearing officer in an IDEA due process hearing incorrectly placed the burden of proof on the school district, rather than the parents, in a situation where the parents were seeking reimbursement for educational services provided over the summer. Basically, the 4th Circuit has taken the stance that due process hearings in which parents question the services being provided by the school should follow the same allocation of burden as any other discrimination suit. If an individual feels that he or she has been discriminated against by an educational institution because of his or her race, the burden rests upon the individual to make a prima facia case of discrimination. It should be no different in an IDEA due process hearing because, in effect, the parents are saying that their child is being discriminated against by an educational institution because of his or her handicap. Logically, then, the burden should rest upon the parents to show that the school district's program was insufficient or inappropriate (i.e. discriminatory) rather than to force the school district to prove the appropriateness of the program.

Student Rights

Dress Code vs Freedom of Speech

It has been fairly settled, both in Illinois and across the country, that public schools have the ability to regulate student dress to the extent that it is disruptive to the educational environment or promotes ideas or behaviors which are illegal or against the mission of the school (i.e. drug or alcohol use, violence, intolerance). At some point, however, dress codes may run afoul of a student's freedom of speech. In Vermont this is exactly what happened when a middle school student named Zachary wore a t-shirt criticizing President Bush's foreign policy as well as

references through both words and drawings to Bush's past drug and alcohol abuse. One of the words printed on the shirt was "cocaine." Zachary had worn the shirt several times without incident. It wasn't until he wore it on a field trip that a parent chaperone complained and, ultimately Zach was disciplined. When the case ended up in federal district court, the court supported the ability of the school to ban the images of drugs and alcohol as inappropriate in the middle school setting. When it came to the word "cocaine," however, the court held that such was essential to the political message that Zach was conveying regarding the fitness of George Bush to be President, thus could not be censored. The court ordered the district to remove any reference of the discipline from Zach's file. *Editor's Note: Two different Supreme Court cases were discussed in this case. Tinker v Des Moines allows a district to limit a student's freedom of speech if it substantially disrupts the educational atmosphere. Clearly that did not seem to be the case in the instant case. The other Supreme Court case discussed was Bethal v Fraser in which the Supreme Court held that a school district should limit student speech, even if political, if the speech is lewd, offensive, or inappropriate in a school setting. Keep these two cases in mind when dealing with student speech in school because they set out two very different reasons for limiting student speech. A t-shirt advocating the legalization of marijuana including a picture of a marijuana leaf is unlikely to cause a material and substantial disruption in the educational environment, but could be considered inappropriate for a school setting thus able to be prohibited.*

In the case of *Harper v Poway Unified School District*, 2004 WL 2651281 (S.D.Cal. November 4, 2004) a California district court has ruled that a student can sue a school district for violation of his freedom of speech, free exercise of religion, and freedom from establishment of religion. During a "Day of Silence" observance, Chase Harper wore a t-shirt with the words "Homosexuality if Shameful" and was suspended for violation of the school's hate speech policy. Chase sued. Regarding his free speech claim, the district court found that the shirt fell neither under the exception found in *Bethal v Fraser* (plainly offensive), nor in *Tinker v Des Moines* (substantial and materially disruptive.) As for his freedom of religion, a material question of fact as to whether the message on the t-shirt was an exercise of religion and whether an attempt to force him to change his beliefs through school policy or face suspension did occur. Therefore, the suit will proceed. *Editor's Note: This is a weakness of all hate speech policies when dealing with homosexuality. Such policies could conflict with free exercise of religion because there do exist religions where tolerance of certain behavior is not allowed; it is sinful period, no argument.*
On the flip side is the gay student in Missouri who was disciplined for wearing t-shirts with gay pride messages. One shirt had a pink triangle and the words "Make a Difference." Another said "I'm gay and I'm proud." The ACLU is supporting the student in his law suit. *Editor's Note: In a statement made by the ACLU, the school district allegedly allows students to wear t-shirts with anti-gay statements so the student in this instance wants the same treatment.*

Student Discipline
The U.S. Court of Appeals for the 4th Circuit has declined to require school officials to notify parents before students are detained for an unspecified period of time for questioning either by school officials or by police officers. The case arose from a situation at a Virginia elementary school where it was brought to the attention of school administrators that a student had a gun in her possession. The student was detained for questioning. Her book bag and desk were searched

but nothing was found so she was released to go home. Upon later investigation another student said that the gun had been disposed of in the woods behind the school. The accused student was again detained and questioned by both school officials and police officers. During this time she asked that her mother be called but no one did so. It was only after the gun was not found that the girl's mother was contacted. In the opinion of the court, so long as the student is under the care and control of the school district there is no requirement for parental notification.

Zero tolerance policies, despite their inherent infirmities, continue to be on the books. In Arizona students were suspended for inhaling helium during decorating for a school dance. The district policy has a zero tolerance policy regarding non-medicinal inhalants. The students were originally suspended for five days but it was reduced to one day by the principal. Thankfully the principal had some common sense!

New Federal Legislation

It may be news to many local school districts, but under the reauthorization of the federal Child Nutrition Act, by the 2006-07 school year all school district must have a "wellness" program in place. While the act gives some guidance as to what should be included in such a program, the U.S. Department of Agriculture should be providing more detailed guidelines in the near future. The Act requires schools to appoint wellness councils composed of students, teachers, community members, and district food program personnel. The wellness council will be responsible for developing plans to address the types of food sold in schools, physical education, and nutrition. Schools must also appoint monitoring officers to insure compliance with the district developed wellness regulations. *Editor's Note: Maybe next the federal government will adopt the lead of legislation pending in Texas to put the weight of every child on his or her report card. Two legal questions are immediately raised in my mind. First, where is the federal government getting the ability to make mandates such as this unless this is a new type of categorical aid, in which case if districts don't take the money than they don't need to adopt wellness plans. Secondly, in the case of Texas, this legislation is aimed at fighting obesity in children but last time I looked obesity is a medical condition, which should be kept confidential under a whole different set of federal regulations. Do school personnel who might have access to the permanent records of these students have the legal right to be privy to their medical records too?*