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IN THIS ISSUE

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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

Discrimination

Elgin, Illinois – Three Latino families have filed suit against the Elgin Area School District #46 claiming that their 14th Amendment rights to equal protection have been violated because Elgin, through the drawing of attendance boundaries, has segregated the schools. The Latino families claim that the new boundaries concentrate Latino children in inferior districts schools, which are poorly equipped and over-crowded compared to their white counterparts. The school district defends the new boundaries citing an interest in lower the time spent on the bus by Latino students and a hope that by having students attend school closer to their homes it will increase parental involvement in the children's education. This is the first desegregation suit to be filed in Illinois since 2000. In an interesting twist, the Mayor of Elgin has sided with the Latino families calling the new boundary plan "a tragic mistake" [Daily Herald by Tara Malone] and, along with sympathetic parents have hired an attorney to intervene in the suit on behalf of the city.

Student Discipline

Jennings v Wentzville R-IV School District, No. 04-1668 (Feb. 16, 2005)
Two members of the high school cheerleading squad, Rachel and Lauren, spent an afternoon prior to a football pep assembly drink alcohol at a friend's house. As they performed at the event later in the afternoon, two other members of the squad became suspicious and informed the coach that they felt Rachel and Lauren had been drinking. At about 11:00 p.m. that night the coach picked-up Rachel and Lauren for an impromptu meeting regarding the accusations after five members of the team threatened to quit over the incident. The meeting lasted into the wee hours of the morning but neither Rachel nor Lauren confessed to drinking.
The next day the coach talked to Rachel and Lauren's parents. It was after this conversation that the girls finally confessed. It was at this time that the coach went to the administration and told about everything that had transpired including the late night meetings, talking with the girls' parents, and the subsequent confession. The administration decided to start from scratch. All information gained by the coach was disregarded and the coach was dismissed from her position on the grounds that she had shown poor judgment in holding the late night meeting. Based on the results of the new investigation both Rachel and Lauren were suspended for 10 days and the parents were informed of their rights to seek review of the suspensions. The parents did not seek review, choosing to file a lawsuit instead.
Both the federal district court and the Eighth Circuit court dismissed the case, rejecting the parents' claims of failure to provide due process. Relying on the Supreme Court decision in *Goss v Lopez*, the court held that suspensions of 10 days or fewer do not require maximum due process including trial-type procedures. All that is required under *Goss* is notice of the charges and an opportunity for the student to present his or her side of the story. This was provided.
Editor's Note: Remember, that 10 day "deprivation of the right to an education" is still extremely important when trying to decide the breadth of due process rights which must be afforded students prior to suspension. If the suspension had only been from the cheerleading squad and not from the academic program, and assuming that the girls were not being considered for cheerleading scholarships to college, there is a question whether even Goss style

due process is required. Remember, it is the deprivation of an education which is the property right. Ability to participate in extra-curricular activities is still considered to be a privilege rather than a right.

School officials were entitled to qualified immunity in the suit of *Tun v Whitticker*, No. 04-2972 (7th Cir. Feb. 16, 2005). In that suit a student alleged that his substantive due process rights were violated when he was expelled for posing naked in the school locker room. Tun was a member of the high school wrestling team. Three team members posed together while showering. When the school learned of the incident, Tun was expelled for violating the district policy forbidding "participating in inappropriate sexual behavior including . . . public indecency on school property . . . [and] possession and/or distribution of pornographic material which would reasonably be considered offensive by community standards for students, which are without redeeming social value." After six weeks the expulsion was reversed on appeal and Tun was allowed to return to school and the record was expunged. The lawsuit followed. In finding that the school officials were entitled to qualified immunity even though the original decision for expulsion was overturned, the court held that the officials' actions did not constitute abuse of authority that "shocks the conscience" nor was the law so "clearly established" that the officials should have been aware that they were acting in an unreasonable manner.

Student dress code was at the center of the controversy in the case of *Blau v Fort Thomas Public School District*, No. 03-6337 (6th Cir. Feb. 8, 2005). After the middle school adopted a dress code policy to improve safety, discipline, and academic achievement in the school a parent, on behalf of his daughter filed suit alleging that the dress code infringed on his daughter's freedom of expression and due process rights, as well as his own due process rights to determine how to dress his child. In holding in favor of the school district, the Sixth Circuit determined that the dress code policy satisfied the U.S. Supreme Court's three-pronged test for upholding regulations restricting expressive conduct: (1) the policy was unrelated to the suppression of expression; (2) it furthers an important governmental interest; and (3) it does not substantially burden any more speech than absolutely necessary to meet the governmental interest. Since students do not possess a constitutional right to wear blue jeans or any other specific article of clothing, all that was needed was a rational relationship between the district policy and the goal to be achieved.

In the case of *In the Matter of J.F.M. and T.J.B.*, 2005 WL 90153 (N.C. App. 2005) the court found that a school resource officer did not violate the Fourth Amendment rights of two students when he attempted to detain them on school grounds. Following the reasoning in the Fourth Circuit case of *Wofford vEvans*, 390 F. 3d 318 (4th Cir. 2004) which extend the reasoning from the United States Supreme Court decision in *New Jersey v T.L.O.*, 469 U.S. 325 (1985), to include detention of students the court found that the actions of the resource officer in attempting to detain a student on school property were reasonable. The court found that, because he was working in conjunction with the school administration, he needed only to have reasonable suspicion rather than probable cause to conduct a search and detain the student.

No Child Left Behind – Status Report

The Coachella Valley Unified School District voted to file suit against the state of California over the state's implementation of the NCLB. The allegation is that the NCLB is too rigid in how it deals with schools with high special education, low-income, or immigrant students. With an enrollment of 80% non-English proficient students, Coachella Valley is one of 14 schools in California, which have been labeled as failing. Currently there are only 14 failing schools in California because the state exempts schools from a "failing" status if students from low-income households reach a certain score on a separate test. The U.S. Department of Education wants to abolish that exception which would cause the number of failing schools in California to increase from 14 to 310. The state of California is currently seeking a waiver from the requirements.

The Chicago Public Schools have won the first round with the U.S. Department of Education of the issue of tutoring. In December, the USDE informed Chicago that it had to cease using NCLB funds for after-school tutoring being provided by the school district. After negotiations, however, the USDE decided that it would not require Chicago to pay back money spent during the fall semester and that the in-house tutoring could continue for the remainder of the school year so long as non-NCLB funds are used. Chicago will being using $4 million from its summer school budget. The outlook for tutoring past this school year, however, remains unclear.

The U. S. Department of Education informed the Philadelphia schools that if it wants to continue to use it Intermediate Unit as the source for tutoring services, the IU must be converted to an independent legal entity. *Editor's Note: In the state of Pennsylvania an Intermediate Unit is akin to the Regional Superintendent's Office here in Illinois. Each IU covers specified school districts and provides a range of services (i.e. vision, special education, tutoring, GED, etc.) that individual districts are unable to provide on their own. Just as Illinois has different rules governing the City of Chicago's schools, Philadelphia also operates under it's own special state laws in Pennsylvania including having an IU which is part and parcel of the Philadelphia school district.*

Responding to a January 28 letter from the U.S. Department of Education, which included parameters for the hourly fee a tutoring provider could charge taking into account the company's instructor-student ratio, the number of sessions, and the quality of its staff, the Colorado education department sent out an RFP to its providers. In the RFP the providers, many which are private businesses, were told to provide proposals based on a pricing structure of $20 per hour, a pupil-teacher ratio of 6-to-1, and a minimum of 45 hours of instruction. When challenged, the U.S. Department of Education immediately started to back down claiming that Colorado had misinterpreted the letter and that the federal government had no intention on infringing on the "free market." *Editor's Note: Now isn't that interesting seeing that the federal government under the NCLB is having no trouble infringing on the constitutional rights of the states to control the education of students within the borders of their states!*

Tennessee has also jumped into the fray when it sent a delegation of school board members to Washington D.C. to attempt to convince Tennessee congressmen to work towards reform of the NCLB. The board members object to the transportation requirement of students from failing to non-failing schools. The board members are specifically upset over the fact that even if only one

subgroup failed, for example special education students, that ALL students in the school could be bused to another school. It makes no sense to those educators that the district would have to pay to bus students who were succeeding in their current school. The lawmakers listened sympathetically but cautioned that it was unlikely that there would be any major changes to the NCLB prior to its scheduled reauthorization in 2007.

Under an agreement between North Dakota's congressional delegation and the U.S. Department of Education all North Dakota teachers currently in the classroom have been declared qualified to teach under the NCLB. In retrospect, Senator Conrad from North Dakota would probably not have voted for the NCLB had he known that it was not going to be fully funded and the issues of teacher qualifications would be handled so poorly.

Utah has decided to take a different tactic in dealing with the NCLB. After trying for the better part of year to opt out of the NCLB, that method has been abandoned because of fear of losing $106 million in federal funding. Now the Utah state legislature is considering a new bill, which would force the NCLB to be subordinate to state laws when the two statutes are found to be in conflict. Under the proposed legislation, local school districts could ignore compliance with any portion of the NCLB, which was not fully funded. Utah is relying on wording in the NCLB itself which allows for waivers to help states with compliance and the clause which states that provisions of the NCLB do not need to be carried out should federal money not be appropriated to pay for the changes. Although the U.S. Department of Education has not commented specifically on the Utah bill, staff members claim that the USDE continues to work with states, including Utah, to achieve the common goal of making sure that all children learn.

Under the NCLB states are required to report all public schools labeled "persistently dangerous." Nowhere in the law, however, is "persistently dangerous" defined such as to be applicable to all states. Therefore only 26 schools out of 92,000 nationwide have been so defined, all of them in New Jersey, Pennsylvania, and South Dakota. For example, in North Carolina weapons possession is not calculated into the "persistently dangerous" formula, while it is in South Carolina. North Carolina counts suicide, while South Carolina does not. Three consecutive years of dangerous conditions qualifies as persistently dangerous in South Carolina, while it only takes two consecutive years in North Carolina. *Editor's Note: Yet another inconsistency in a long line of inconsistency, which threatens to undermine even the best intentions, which may be once existed in the NCLB.*

Special Education

The special education case of *Schaffer v Weast* (Docket No. 04-698) has been accepted for review by the United States Supreme Court. The Court's decision in this case may finally settle the issue as to whether the school or the parents should bear the burden of proof when the parents sue under the IDEA. Currently the federal courts are split in this issue. The First, Fifth, Sixth, and Tenth Circuits place the burden of proof on whichever party is seeking the change in the IEP. The Second, Third, Eighth, and Ninth Circuits always place the burden of proof on the school district. The facts of the *Schaffer* case are fairly common. Brian Schaffer is a seventh grader with ADHD. When Brian's parent sought to enroll him in the public schools, they did not

agree with the two IEP's offered by the district. The parents felt that first IEP had him at a school where class sizes were too large so the district offered another location and the parents rejected that IEP as well. Instead the parents chose to enroll Brian in a private school and requested a Due Process hearing under the IDEA to seek reimbursement of tuition. The question which will be before the Supreme Court is whether it is up to the parents to prove why the IEP's offered were unsatisfactory or up to the school district to explain why the IEP's offered were appropriate. The outcome of this case could have a major impact on parents and school districts alike.

The IDEA does not provide for tort-like damages for injuries suffered by students. In the case of *Ortega v Bibb County School District*, No. 04-10314 (11th Cir. Jan 26, 2005) a child died from asphyxiation when his tracheotomy tube became dislodged while he was at a special needs preschool. His mother sued for wrongful death. The Eleventh Circuit, in reversing the lower court, held that tort-like damages are inconsistent with the statutory scheme of the IDEA. This decision follows similar decisions in the First, Seventh, and Ninth circuits which have also ruled that the IDEA does not provide tort-like damages for compensation of personal injuries.

Now that the IDEA has been reauthorized, hearings are underway to determine the contents of implementing regulations.

Religion

On March 2, 2005 the United States Supreme Court heard the 10 Commandment Cases of *McCreary County, Ky. v. American Civil Liberties Union of Kentucky* and *Van Orden v Perry*. Both cases involved the display of the 10 Commandments on public property. In *McCreary* the Sixth Circuit held that such displays do violate the First Amendment. In *Van Orden*, the Fifth Circuit held constitutional a monument displaying the 10 Commandments which stands near the Texas state Capitol. Hopefully the forthcoming decision by the Court will end the confusion regarding what is appropriate is pertaining to religious texts in public places.

In *Doe v Tangipahoa Parish School Board*, No. 03-2870 (E.D. La. Feb. 24, 2005) the federal district court has ruled that it is unconstitutional to open school board meetings with a prayer. The school district's attempt to claim that such prayer is allowed under the "legislative prayer" exception contained in the case of *Marsh v Chambers*, 463 U.S. 783 (1983) was not accepted by the court as it stated that the decision in *Marsh* was too narrow to be allowed to include school districts. Moreover, the court recognized the various United State Supreme Court decisions, which rejected the application of *Marsh* to public schools. Applying the Lemon Test, the court held that the prayer failed all prongs from having no secular purpose, to advancing religion, to excessive entanglement between church and state.

Teacher to Student Sexual Harassment

In *Sauls v Pierce County School District*, No. 03-16267 (11th Cir. Feb. 9, 2005) a high school teacher became sexually involved with one of her students, Dustin Sauls. A year later in 2001,

the principal received information that the teacher, Ms Blythe, had been sexual active with students but Dustin was never named as one of those students. While investigating this report, the principal found the Blythe had been accused of sexually inappropriate conduct in 1998 but that nothing had come of it when both Blythe and the named student denied any such relationship. At that time, however, the principal had warned Blythe about even the appearance of inappropriate behavior. Blythe denied the 2001 allegations and was once again warned of engaging in inappropriate behavior. Several months later the principal received a report of sexual behavior between Blythe and Dustin. The principal contacted the Georgia Professional Standards Board and local law enforcement, asking the GPSB to conduct an investigation. Out of the investigation came a confession from the student involved in the 1998 incident and information that Dustin was blackmailing Blythe regarding the relationship. Blythe resigned and surrendered her teaching certificate. This lawsuit followed.

Relying on the United States Supreme Court case of *Gebser v Lago Vista Independent School District*, 524 U.S. 274 (1998) the court found that school officials had responded appropriately to both the 1998 and 2001 allegations. Both times a thorough investigation was done and Blythe was warned about any further conduct. The district had not shown deliberate indifference. Rather, it was the conscious concealment of the relationships by the students involved that kept the district from preventing further abuse, not negligence on the part of the district.

NEW LAWS WHICH TOOK EFFECT ON JANUARY 1, 2005 OR LATER:

January 1, 2005

Breakfast Requirement for School. This law has no number yet because as of March 11 it was still sitting on the Governor's desk waiting for his signature. This law requires schools that have at least 40% of student eligible for free or reduced-priced lunches to offer a school breakfast program. Most of the costs of the program would be reimbursable. If the cost of the program would significantly exceed the allowable reimbursement, the school district may petition the Regional Superintendent for an exemption from the requirement.

Public Act 93-0910 Defibrillator in Schools. The Act requires school districts to have a policy on medical emergencies, to have an automated external defibrillator in each indoor physical fitness facility, and to have a trained AED user in each physical fitness facility during school-sponsored physical fitness activities. An indoor physical fitness facility would include a swimming pool, stadium, athletic field, track and field facility, tennis court, basketball court, or volleyball court. Depending on the number of facilities being operated by a school district there may be a gradual phase in of this requirement with 100% compliance by 2009.

Public Act 93-0974 Open Meetings Verbatim Records. Requires public bodies to keep written minutes of closed, as well as open, meetings and 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. Also under this act a court is now permitted to examine verbatim records in a civil proceeding in camera.

Public Act 93-0851 Unauthorized Video Taping. The Act provides that the offense of unauthorized videotaping consists of knowingly making a video record or transmission of live video made in violation of the statute. The attempt here was to each camera phones being used in school locker rooms while still allowing new reporters access to locker rooms with the appropriate permission.

Public Act 93-0802 Grow Our Own Teacher Education Act. Creates the Grow Our Own Teacher Education Act which is intended to prepare highly skilled, committed teachers who will teach in hard-to-staff schools and hard-to-staff positions and who will remain in these schools for substantial periods of time. Let's see if money is actually ever appropriated for incentives under this Act.

Public Act 93-0692 Sports Official/Coach Assault Penalty. The Act provides that if someone assaults an individual a sports official or coach at an athletic facility where the coach or sports official was participating in an athletic activity, the person committing the assault is guilty of aggravated assault. This is a warning to parents to not best up coaches and referees!

Public Act 93-0886 Tobacco Displays – Minors. This is the law, which requires that all tobacco products must be moved behind the counter. Now access to both tobacco and Sudafed require the assistance of a store clerk. The Illinois Legislature didn't want minors shoplifting cigarettes or housewives to cook meth!

Public Act 93-0938 Street-gangs in Schools. This law creates the offense of criminal street gang recruitment on school grounds. It provides that a person commits the offense when on school grounds he or she threatens the use of physical force to coerce, solicit, recruit, or induce another person to join or remain a member of a criminal street-gang (as opposed to a non-criminal street-gang?)

Public Act 93-0859 Dropout Rate Reports. This law is an attempt to accurately track the transfer of students. Basically, if the original school can not verify to what school a student transferred within 150 days from the date the student leaves, the original school must count that child as a dropout and not a transfer student. We don't want our superintendents doing what Ron Paige did in Houston, TX before he was appointed as the federal Director of Education, even if the President did applaud him as significantly reducing dropouts!

Public Act 93-0858 Compulsory Attendance Age Increase. Students must now remain in school until age 17. In reality I don't think it will have much effect on dropout rates.

Public Act 93-0966 Health Exam – Obesity. Now school health exams must include the collection of data relating to obesity including at a minimum date of birth, gender, height, weight, blood pressure and date of exam. The Department of Public Health must collect and maintain this health data and connect it to obesity. Maybe I am missing something but the physical forms the schools my boys go to already include all those items. I am not really sure what this law was intended to do other than another murky, nonfunded requirement that makes the legislators who sponsored the bill able to go back to constituencies and pat themselves on the back for taking the problem of childhood obesity seriously.

January 15, 2005

Public Act 93-1070 Consolidation Incentive Funding. This is the Act which appropriated the $1.8 million to fund school district consolidation costs for the year. This money had been promised as an incentive for districts to consolidate but then was absent from the original appropriations bill in the Spring 2004.

January 21, 2005

Public Act 93-1079 Graduation Ceremonies for IEP Students. This law requires each high school to have a policy to allow children with disabilities who have completed four years of high school to participate in the graduation ceremony of the student's high school graduation class and to receive a certificate of completion of the student's IEP. This law seems directly contrary to federal law, which states that if a special education student has successfully completed his or her IEP than he or she is entitled to a high school diploma, not a certificate of completion. This also violates the spirit of the US Supreme Court decision in *Brown v Board of Education* which is the philosophy underlying the IDEA.

July 1, 2005

Public Act 93-1078 Sex Discrimination Prohibition. Discrimination against homosexuals is now unlawful under this act. The Act, however, makes it clear that employers are not required to give preferential treatment or special rights based on sexual orientation. For example, if employers only provide health insurance only for legally married spouses, they are not required to also provide health insurance for homosexual partners who are not legally married.

Public Act 93-0946 Dental Exams for Students. When this law becomes effective all kindergarten, second, and sixth grade students will need to show proof of a dental examination by May 15th of the school year. This will affect current pre-schoolers, first graders, and fifth graders. If such is not shown the school may hold the student's report card. This seems blatantly illegal. My guess is that they don't have to give the physical report card to the child but, if requested, must forward it to another institution. Otherwise a sixth grader, who is academically qualified to advance to seventh grade, could be held in elementary school indefinitely because he hadn't had his teeth cleaned in the last 12 months. I don't really see the compelling state interest in that. Not the same interest as the U.S. Supreme Court found in *Ingrahm v Wright* for the requirement of vaccinations against infectious diseases. You don't catch cavities, gingivitis, or bad breath by being in close proximity to someone with those conditions.

BILLS TO WATCH AS OF MARCH 11, 2005

SB 10 (del Valle) Would require that beginning in 2006-07 the ISBE would establish a parental participation pilot project to provide grants to the lowest performing school districts to help these districts improve parental participation through certain activities.

SB 41 (del Valle) Would require the annual testing of all pupils enrolled in 3rd, 4th, 6th, and 8th grades in writing

SB 211 (Hunter, D-Chicago) Allows a school board to excuse pupils in grades 9 through 12 from engaging in physical education courses if those pupils must utilize the time set aside for P.E. to receive special education support and services. Also significantly changes requirements with regard to a P.E. course of study and requires a P.E. course of study to provide students with an opportunity for an appropriate amount of daily physical activity. Maybe would should just try reducing P.E. to 2 times a week instead of every day?

SB 223 (del Valle) Creates new guidelines to which school district must comply if they offer a Gifted Education Program.

SB 277 (Haine, D-Alton) Makes changes to the probationary period time before a teacher receives tenure.

SB 1621 (Maloney) Changes the residency requirements for pupils of a school district.

SB 1627 (Ronen) Provides that an employee is entitled to up to 30 days of unpaid military leave during the time federal or State deployment orders are in effect, subject to certain conditions. The bill also provides that an employee shall not take leave as provided under the aCt5 unless he or she has exhausted all accrued vacation leave, personal leave, compensatory leave, and any other leave that they may be granted to the employee except sick leave and disability.

SB 1638 (Burzynski, R-Sycamore) Allows a school board to appoint a student to the board to serve in an advisory capacity.

HB 1336 (Coulson, R-Glenview) Requires teachers to teach students character education (respect, responsibility, fairness, caring, trustworthiness, and citizenship) I order to raise pupils' honesty, kindness, justice, discipline, respect for others, and moral courage for the purposes of lessening crime and raising the standard of good character. We already have a character education law but this expands the areas to be taught and the reason for the instruction.

HB 1337 (McKeon, D-Chicago) Requires that an employer give an employee PAID time to go vote.

HB 2369 (Molaro, D-Chicago) Adds school board members as mandated reports of child abuse.

HB 2693 (Smith, D-Canton) Would require school districts to complete an additional fire drill each year, bringing the total to three. One of these would need to involve participation by the local fire department. In addition there would need to be a yearly meeting among the school and all emergency response units in the area to review the school's emergency response plans. Why, is all I have to say.

HB (Schock, R-Peoria) Only scores on State assessments of students enrolled in a school on or before the last school day in September of the school year in which a state assessment is given

shall be used in determining whether a school is placed on academic early warning status or academic watch status. I would guess that the rationale is that a school should not be held accountable for the academic success or failure of a student who has only been in attendance for part of the school year – perhaps just a week.

HB 3554 (Jenisch R-Glendale Heights) Allows a school board to require drug testing for students participating in extra-curricular activities. Just codified common law. Already have been able to do this since the late 1990s.

HB 3555 (Mathias, R-Arlington Heights) Allows a school district, by resolution of its board, to operate on a 4-day school week plan approved by the ISBE.

HB 3615 (Yarbrough, D-Broadview) This is a very confusing bill. It would create the Ensuring Success in School Law, which would impose various new mandates on local school districts. For all students who are expectant parents, parents, or the victims of domestic or sexual violence the school would be required to separately track the transfer rates of students so identified, allow the students to transfer to another school upon request, substantially change the suspension/expulsion procedures for such students, require the school district to determine if the students was the "primary aggressor" in a case of domestic violence, require schools districts to provide indefinite home bound instruction to these students, and enroll or re-enroll these students even if the student is unable to produce records normally need for enrollment such as previous academic records, proof of immunization, proof of residency. Moreover, and perhaps more troubling, this bill would take policy making authority out of the hands of the local school district and force the school district to use the policies and procedures promulgated by a statewide "working group." I see so many potential illegalities with this bill that they are almost to numerous to go into at this time – student confidentiality, preferential treatment, violation of the concept of local control . . .

HB 3685 (Winters, R-Rockford) Requires a school board to adopt a policy that prohibits a school bus that is in operation for the purpose of transporting students to or from school or a school-related function or activity from running on idle for more than 10 minutes while the bus is parked. WHY?