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IN THIS ISSUE

Is Title IX an Effective Remedy Against Higher Education Institutions for Sexual Harrassment Plaintiffs? *page 23*

Jamie M. Thomas

Developments in the Courts

Religion *page 35*

Student Rights *page 36*

Teachers' Rights *page 37*

Parental Rights *page 39*

Federal Government and Education *page 39*

Legislation to Watch *page 41*

Bills That Did Not Pass *page 42*

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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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Is Title IX an Effective Remedy Against Higher Education Institutions for Sexual Harassment Plaintiffs?

Jamie M. Thomas

Although sexual harassment in an educational context is not a recent phenomenon, recent cases have brought renewed attention to this issue for college administrators. The highly publicized University of Colorado football scandal in particular has focused attention on the issue of the liability of higher education institutions for the sexual harassment of its employees and students. Plaintiffs in sexual harassment cases have used Title IX of the Education Amendments of 1972 (specifically 20 U.S.C. §§ 1681-1688, discussed *infra*) as the basis for claims of university liability. In order to assess a university's risk of being held liable for its employees or students' acts of sexual harassment, this paper is a review of *Simpson v. University of Colorado* (2005 U.S. Dist. LEXIS 5633) and other recent sexual harassment cases utilizing Title IX to determine whether Title IX is an effective avenue of relief for plaintiffs of sexual harassment claims. These cases suggest that it is improbable that a college or university will be held liable for its employees or students' acts of sexual harassment under Title IX, for reasons discussed herein.

The five cases for this review were chosen primarily because they are recent, all having been decided between 2001 and 2005. A secondary concern was to gather cases from a variety of jurisdictions in order to assess the success of Title IX plaintiffs on a more general scale. All cases were decided by United States District Courts or Courts of Appeals. *Simpson v. University of Colorado* (2005 U.S. Dist. LEXIS 5633) is the primary focus of this review because of the depth with which it addresses the bases for university liability, in addition to its recentness and the publicity that it has garnered. The remaining four cases will be discussed in

reverse chronological order, from most recent to least recent. Implications and conclusions of the effectiveness of Title IX for sexual harassment claims against universities will then be discussed, based upon the facts and holdings of these cases.

The plaintiffs in *Simpson v. University of Colorado* (2005 U.S. Dist. LEXIS 5633), Lisa Simpson and Anne Gilmore, were University of Colorado (herein referred to as CU) students in 2001 when they attended a party at which CU football players and recruits were also present. *Simpson* at 5638. Ms. Simpson was the hostess of the party, which took place at her apartment on December 7, 2001. *Id.* After several hours of drinking alcohol with her guests, Ms. Simpson retired to her bedroom, where she alleged that two football recruits sexually assaulted her while CU football players gathered around her bed to watch. *Id.* at 5639-40. Ms. Gilmore alleged that she was assaulted by two CU football players and a recruit at the same time on another bed in Ms. Simpson's bedroom. *Id.* at 5640. The plaintiffs filed this claim against the University of Colorado on the basis of §1681(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681-1688. *Id.* at 5642. Section 1681(a) provides:

no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

The plaintiffs alleged that the sexual assaults that occurred on December 7, 2001 were part of consistent sexual harassment and assaults about which CU had actual knowledge and demonstrated deliberate indifference. *Id.* at 5640.

The court relied on *Davis as Next Friend LaShonda D. v. Monroe County Bd of Educ.* (526 U.S. 629 (1999)) and *Murrell v. School District No.1, Denver, Colorado* (186 F.3d 1238 (10th Cir. 1999)) to determine the elements that a plaintiff must prove in order to prevail in a Title IX sexual harassment claim. *Simpson* at 5642-45. Based upon these cases, the court held

that a plaintiff suing a university for sexual harassment under Title IX must prove by a preponderance of the evidence the following five elements:

1. that the University had actual knowledge of sexual harassment of female CU students by football players and recruits as part of the football recruiting program;
2. that the University was deliberately indifferent to this known sexual harassment of female CU students by football players and recruits as part of the football recruiting program;
3. that the plaintiffs were subjected to severe, pervasive and objectively offensive sexual harassment caused by the University's deliberate indifference to known sexual harassment;
4. that the harassment occurred in the context of an educational activity; and
5. that the harassment had the systemic effect of depriving plaintiff of access to educational benefits or opportunities.

Id. at 5646-47. In applying this standard to the plaintiffs' case, the court held that summary judgment was appropriate in favor of the defendant because "no rational trier of fact could conclude that the plaintiffs have established the first and second elements." *Id.* at 5647.

The plaintiffs claimed that CU had actual knowledge of and was indifferent to sexual harassment caused by the practices of CU's Athletic Department and football program. *Id.* at 5648. The court first addressed the issue of whether an institution must have actual knowledge of a risk of sexual harassment by a particular harasser, or whether knowledge of the risk of harassment by a group of harassers was adequate for liability to arise (as in the case of *Bryant v. Independent School Dist. No. 1-38 of Garvin County, OK*, 334 F.3d 928 (10th Cir.2003)). *Id.* at 5651. The court held that knowledge of a risk of harassment by a group of harassers was enough to impose liability. *Id.* at 5653. However, the court further noted that "the risk at issue must be well-defined and focused to support a claim of Title IX liability", and that in this case that meant that there must have been notice to the university of the risk of sexual assault to female students as a result of the university's football recruitment program. *Id.* at 5654. The court found that several events cited by the plaintiffs as putting the university on notice (including a 1997 assault, the alleged harassment of one female football player that came to light after the 2001 assaults, and an October 2001 sexual assault of a female athletic trainer) did not create actual knowledge

of the sexual harassment of female students prior to the December 7, 2001 events. *Id.* at 5666. Therefore, the court found that no rational trier of fact could find that the university had actual knowledge of a risk of sexual harassment of CU female students as a result of the CU football or recruitment program. *Id.* at 5670-71.

Next, the court analyzed the issue of whether the university demonstrated deliberate indifference to the risk of sexual harassment of female CU students through the practices of the CU football and recruitment program. The court noted that “deliberate indifference is a high standard” and that “a school’s response to a risk is not deliberately indifferent unless it is clearly unreasonable in light of the known circumstances.” *Id.* at 5671 (citing *Davis*, 526 U.S. at 648). Although CU’s football policies pertaining to alcohol and sexual harassment were criticized by its own internal investigatory committee, the court noted that “[I]t is important to note that wise and appropriate University policy is not the standard by which a Title IX claim is judged.” *Id.* at 5678. The court found that CU’s actions were not deliberately indifferent to the risk of sexual harassment of CU female students by the football players and recruits, mainly because CU was found not to have had actual knowledge of the risk. *Id.* at 5679-80. Therefore, the court held that summary judgment was appropriate for CU because the elements of Title IX liability could not be proven to a rational trier of fact. The plaintiffs’ complaints were dismissed with prejudice. *Id.* at 5682.

Plaintiff Melissa Jennings claimed her soccer coach sexually harassed her and her teammates, resulting in her claim against the University of North Carolina at Chapel Hill on the basis of sexual harassment actionable under Title IX. ***Jennings v. University of North Carolina at Chapel Hill et al.***, 340 F.Supp.2d 666; 2004 U.S. Dist. LEXIS 21827 (M.D.N.C., 2004). Ms. Jennings claimed that her soccer coach sexually harassed her during the period of August 1996

through May 1998 by making sexual comments to and about the soccer teammates on several occasions, by asking the plaintiff and other women about their sexual activities, and by asking the plaintiff specifically with whom she was sexually active during a one-on-one meeting to assess her performance as a soccer team member. *Jennings*, 669-670. Plaintiff alleged that she told the Assistant to the Chancellor about the coach's inappropriate sexual comments in 1996, although they were not brought to the attention of University administration again until May of 1998, after plaintiff was dismissed from the soccer team. *Id.* at 670-671. The coach was ordered to apologize to plaintiff in June of 1998 and ordered to refrain from talk of a sexual nature with players. *Id.* at 671.

The court began its analysis by citing the *Davis* standard that in order to be actionable under Title IX, sexual harassment must be "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Id.* at 674. The court further noted that the severity should be assessed using a reasonable person standard, giving "careful consideration of the social context" of the harassment. *Id.* The court relied on *Davis* also for its standard that in order to create liability, the funding recipient must have had actual knowledge of the harassment and acted with deliberate indifference, which effectively must cause the harassment. *Id.* at 674.

Next, the court turned to analyzing the harassment, noting the following factors: that the harassing comments occurred less than weekly; that the comments were not severe considering the social context, since the players sometimes joked and made comments of a sexual nature among each other; that the sexual nature of the discussions were not initiated by the soccer coach; and that the comments were not physically threatening. *Id.* at 675. Based upon this analysis, the court determined that while the comments were "inappropriate in some respects"

and “quite possibly offensive to her”, the conduct was not severe, pervasive and objectively offensive such that it deprived plaintiff of educational opportunities. *Id.* The court reasoned that since the one direct sexual comment asking plaintiff about her sexual activities was rebuffed by plaintiff, after which the coach did not ask further questions of a sexual nature, the question was a “mere utterance” that was not physically threatening nor severe enough to give rise to university liability for sexual harassment. *Id.* The defendants were therefore granted summary judgment on the Title IX claim. *Id.* at 678.

In an interesting twist on the traditional Title IX sexual harassment claims, plaintiff Danielle Howell brought suit against North Central College because she claimed to have been sexually harassed by her basketball coach and teammates due to her heterosexuality. ***Howell v. North Central College et al.***, 320 F.Supp.2d 717 (N.D. Ill., 2004), 2004 U.S. Dist. LEXIS 10453. Plaintiff claimed that after she voiced her opposition to homosexuality at a team luncheon in November of 2000, she was subjected to harassment about lesbian activity in order to “indoctrinate her”. *Id.* at 719. Plaintiff claimed that she overheard an assistant coach and player discussing plaintiff’s sexual orientation, and that the assistant coach spoke to plaintiff about lesbian activity several times in order to indoctrinate her, which plaintiff resisted. *Id.* Plaintiff claimed that her dismissal from the team resulted in her refusal to be indoctrinated and also in her continued wearing of ribbons in her hair, which plaintiff claims her coach said was “too feminine”. *Id.* Plaintiff and her parents wrote the athletic director a letter outlining the situation in December of 2000, after which the college asked for the basketball coach’s resignation, terminating her when she refused. *Id.* The assistant basketball coach accused by plaintiff of harassing her was then promoted to coach. *Id.*

The court began by citing the Supreme Court's holding in *Oncale v. Sundowner Offshore Services* (523 U.S. 75, 118 S.Ct. 998 (1998)) that same-sex harassment is not excluded from coverage of Title VII, but that same-sex sexual harassment must meet the statutory requirement that it constitute discrimination because of sex. *Id.* at 721. The court further noted that the Seventh Circuit has consistently held that harassment based on one's sexual preference or orientation is not actionable, but that same-sex harassment is actionable when it constitutes discrimination "against women because they are women and against men because they are men". *Id.* at 722, citing *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000). The court determined that the Seventh Circuit has consistently differentiated between harassment motivated by gender stereotyping—which is actionable—and harassment motivated by sexual orientation—which is not actionable. *Id.* at 722.

Using this line of reasoning, the court determined that plaintiff was not harassed based on a gender stereotyping theory, because she fit into gender stereotypes and was allegedly told that she was "too feminine". *Id.* at 723. In fact, she alleged that the harassment was motivated by her anti-homosexual views. *Id.* The court thus reasoned that plaintiff's claim was essentially a freedom of speech claim and that plaintiff had "tried to wedge a protected speech claim where it will not fit: into Title IX's prohibition against discrimination on the basis of sex." *Id.* The court determined that even in the best of lights, the claims were about harassment based on sexual preference, which is not actionable under Title IX, but that most likely the claims were about freedom of speech, which is outside of the scope of Title IX altogether. *Id.* The court thus dismissed the Title IX claim *sua sponte*. *Id.* at 724.

The "deliberate indifference" aspect of Title IX liability was the focus in *Oden v. Northern Marianas College et al.*, 284 F.3d 1058 (9th Cir. 2002); 2002 U.S.App. LEXIS 4595.

Plaintiff Meredith Oden was a student of a music teacher at Northern Marianas College (herein referred to as “NMC”) beginning in January 1996. Over the course of the next two months, the music instructor’s behavior included the following: making comments about plaintiff’s physical appearance; touching plaintiff in a manner that made her uncomfortable; forcibly kissing plaintiff on the mouth; and grabbing and touching her body. *Oden* at 1059. Plaintiff contacted a counselor at NMC in late February of 1996, at which time the counselor assisted plaintiff in preparing a complaint for sexual harassment. *Id.* Plaintiff filed the complaint on March 8, 1996, and subsequently dropped the instructor’s course. *Id.* NMC’s human resources met with the accused instructor and instructed him not to attempt any contact with the complainant. *Id.* NMC formed a Committee on Sexual Harrassment and ultimately issued a decision in February of 1997 that the accused instructor was guilty of sexual harassment. *Id.* The Committee did not dismiss the instructor from the university, but did impose several disciplinary sanctions upon him. *Id.* Plaintiff brought the claim for sexual harassment under Title IX due to NMC’s failure to control or discipline the accused instructor.

Plaintiff sued the instructor individually and NMC under Title IX at the trial court level, at which her Title IX claim was dismissed. Plaintiff appealed this ruling. *Id.* at 1060. Plaintiff claims that NMC was deliberately indifferent to her plight because it failed to hold the Committee hearing against the instructor until over one year had passed since the complaint was filed, in violation of NMC’s own policies. *Id.* at 1061. Plaintiff additionally alleged that the university failed to sufficiently punish defendant, because he continued to be employed by NMC. *Id.*

The court affirmed the dismissal of plaintiff’s Title IX claim. *Id.* The court noted the actions taken by NMC when it received actual knowledge of the claim: NMC provided

counselors to assist plaintiff with preparing and presenting her case before the committee; NMC provided personal counseling sessions to plaintiff; NMC instructed the music professor not to contact plaintiff; NMC conducted a hearing, ultimately finding that the professor did harass plaintiff; and NMC imposed several disciplinary proceedings on the professor. *Id.* at 1061. As to the lengthy delay between the time NMC received the complaint and ultimately held the hearing, the court reasoned that the delay was reasonable in light of the fact that NMC had to create a committee to hear the case, and also in light of plaintiff's contributions to the delay by having difficulty obtaining counsel and relocating to New Mexico. *Id.* The court held that NMC was guilty of, at most, "bureaucratic sluggishness", which the court declined to equate to deliberate indifference, especially "where the school authorities began turning their bureaucratic wheels immediately after being notified of the alleged misconduct." *Id.*

These cases demonstrate that many districts and many courts are utilizing the *Davis* standards of liability for universities in Title IX sexual harassment cases. As Chief Judge Tacha noted in the *Bryant* case,

Davis painstakingly limits the range of facts that, if proved, will support a finding of liability and an award of damages under this theory. The compass of facts supporting liability under the deliberate indifference theory is narrow and heavily qualified. *Bryant v. Independent School Dist. No.1-38 of Garvin County, OK*, 334 F.3d 928, 938 (10th Cir. 2003).

As noted in the review of these recent cases, none of the plaintiffs prevailed on their Title IX claims. Courts have struck these claims on the following grounds (in addition to others): that facts do not demonstrate that the university did not have actual knowledge of the risk of sexual harassment of its students; that sexual harassment was not pervasive or severe; and that the university did not act with deliberate indifference. Each of these elements provides protection for the university against liability because of the difficulty with which such high standards are proven.

An especially difficult aspect of proving these standards is that the university must have had actual notice of the risk of such harassment. Given an unpredictable event such as a sexual assault, the university would have had to receive actual notice of this risk in order to be liable for it. How would this notice likely occur? Unless someone were threatening to assault university students in the presence of a university administrator, actual knowledge is very difficult for a plaintiff to prove. Of course there may be certain situations in which the culture or repeated actions of a student or group put the university on notice, but these instances would likely be very rare. The purpose of this actual notice provision protects the university by ensuring that universities are not liable for sexual harassment unless the administration knew and could have taken action to stop it. This is a great protection to a college administration, which is thus not expected to constantly monitor university communities for threats of sexual harassment in order to protect itself from liability. It simply must take reasonable action to end the sexual harassment upon its receipt of actual notice.

It is very interesting that “severe, pervasive and *objectively* offensive” (emphasis added) is another element of proving Title IX liability. In order to determine the objectiveness of the comments in *Jennings*, the court applied a reasonable person standard, as set forth in *Oncale*. *Jennings*, at 674. While it is somewhat questionable that a traditionally-aged female college student would react as a reasonable person with more life experience, this standard nonetheless does protect universities by not interpreting the comments through the student’s experience. It is also somewhat alarming that the *Jennings* court supported its finding that the sexual comments were not severe by noting that the comments were not physically threatening. *Jennings*, at 675. Threatening physical harm should not be an aspect of proving sexual harassment, but as the *Jennings* court demonstrates, this could be an element of what some courts consider severe and

pervasive. It is unclear what even a reasonable person standard dictates in the context of sexual harassment, but this ambiguity works in favor of universities because it is the plaintiff's burden to prove by a preponderance of the evidence that the harassment was so severe and pervasive (and would be to a reasonable person) as to have the effect of depriving the plaintiff of educational opportunities.

Finally, the university's deliberate indifference was difficult for all of the plaintiffs to prove. Though these cases indicated that the lack of deliberate indifference can be directly tied to the lack of actual notice before the occurrence of the sexual harassment, (see especially *Simpson* and *Jennings*), the *Oden* case illustrates that deliberate indifference is difficult to prove even when actual notice is received. As you recall, in that case the court held that Northern Marianas College was not deliberately indifferent even when taking one year to form a committee, hold a hearing, and sanction the accused professor. *Oden* at 1061. This ruling suggests that even colleges that take an excessive amount of time to address issues of sexual harassment will not be found guilty of deliberate indifference, as long as they are taking some steps toward resolving the problem. Considering the statutes of limitations in most states, an unintended consequence of this ruling may be to encourage colleges and universities to take their time in resolving sexual harassment.

Essentially, these cases show that it is very difficult for a plaintiff to prevail against a university in a Title IX sexual harassment claim. The high standards required provide protection to colleges and universities that are not aware of risks of sexual harassment. It protects colleges that take steps toward addressing and resolving sexual harassment once they have received notice of its occurrence. In order to further protect itself, a college or university should develop policies and procedures about addressing and resolving sexual harassment and it should take care

to follow those procedures so as not to seem deliberately indifferent. A college should take seriously claims of sexual harassment and take steps to resolve it. A college administration should pay attention to blatant risks of sexual harassment, but it need not scour the campus to locate sexual harassment risks. Title IX standards are written such that universities are only liable for sexual harassment that they had actual knowledge of, and that their blatant indifference effectively caused. This is a very difficult burden for the plaintiff to meet and results in a low level of success against colleges and universities.

REFERENCES

Simpson v. University of Colorado et al., 2005 U.S. Dist. LEXIS 5633 (D. Colo., 2005).

Jennings v. University of North Carolina at Chapel Hill et al., 340 F.Supp.2d 666 (M.D.N.C. 2004); 2004 U.S. Dist. LEXIS 21827.

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DEVELOPMENTS IN THE COURTS

Religion

Graduation in Local Churches: The idea of separation of church and state continued to be eroded through a federal district court ruling in Orlando, Florida, which denied a request for a temporary restraining order filed by the Americans United for Separation of Church and State. The Brevard County Public Schools were allowed by the court to proceed with their plans to hold graduation of the four district high schools at a local Christian church, resplendent with traditional religious imagery decorating the walls. Because the ceremony itself was secular, the school district didn't understand why choosing a church as a location should raise a constitutional question. To add insult to injury, the court refused to even require the removal or covering of the religious symbols stating that it lacked the authority to issue such an order.

Editor's Note: Perhaps it may someday become commonplace, at least in Florida, to hold the religious baccalaureate ceremony in a church followed immediately by the "secular" graduation ceremony. Certainly that would not cause any constitutional problems!

Access by Outside Groups: In the case of *Child Evangelism Fellowship v Montgomery County Public Schools*, a Maryland federal district court upheld the school district policy limiting classroom distribution of materials from outside groups based on the type of group. The court stated that this was not impermissible content discrimination in violation of the First Amendment. The basis of the suit was that the Child Evangelism Fellowship which runs after-school evangelical programs wanted to distribute materials promoting the after-school clubs in classrooms on the same basis as any other community organization such as Boys Scouts and 4-H. When such was not allowed, the religious group filed suit. In response to the suit, the school district revised its policy to allow only school district sponsored groups; county, state, or federal groups; parent-teacher organizations; licensed day care providers operating on-campus; and non-profit organized youth sports leagues to disseminate materials in the classroom. The court found that the policy as revised constitutes a non-public forum, not a limit open forum, thus must only pass a test of reasonableness. The policy passes that test because it is content neutral and is a reasonable attempt to limit the ever increasing number of organizations which wish to have access to the children thereby threatening to disrupt the orderly administration of the school.

"Day of Silence" vs "Day of Truth": In response to the national Day of Silence, coordinated by the Gay, Lesbian, Straight Education Network (GLSEN), to call attention to bias against homosexuals, the Alliance Defense Fund (ADF), a Christian legal defense group, has organized a national Day of Truth on the day following the Day of Silence. The purpose of the Day of Truth is to give a forum to youth, primarily Christian youth, in which they can voice their opinion that homosexuality is morally wrong and destructive – an opinion for which many students have been disciplined when voicing such on campus. In its first year, the Day of Truth has drawn participation from 1,150 students at 350 schools. While this is small compared to the number of schools which observe a Day of Silence, the ADF hopes that it will grow as more individuals become aware of its existence. A spokesman from GLSEN called a Day of Truth a publicity stunt which is unlikely to gain a national following. *Editor's Note: Who knows where this will go. It is, however, a good representation of the polarization of society which is also being felt in*

the public schools and will have to be dealt with both legally and educationally by future teachers, administrators, and school attorneys.

In God We Trust: Pennsylvania is following the lead of 18 states including Virginia and Mississippi, as the Pennsylvania legislature considers a bill that would require all public schools in the state to display the motto “In God we Trust” in every classroom, cafeteria, and auditorium. The American Family Association (AFA), whose mission is to “equip citizens to change the culture to reflect Biblical truth and traditional family values,” is leading the “In God we Trust” campaign. Needless to say, the American Civil Liberties Union opposes such a law as insensitive and a violation of the basic human right to be free from being coerced into supporting or showing support to one religion over another, or to religion over non-religion.

Prayer in School: The folks in Selbyville, Delaware are still praying at school board meetings, athletic events, banquets, and graduation ceremonies. Two families have filed suit in federal court to attempt an end to the practice claiming that it promotes Christianity, thereby violating the Establishment Clause of the First Amendment. The response from the vice president of the school board has been that, although they understand that it may appear discriminatory to Jewish families, it is the school board’s belief that the majority has the right to express its faith anywhere it wants, even in the public schools. The Rutherford Institute is providing free legal assistance to the vice president. The remainder of the school board is being represented by the board’s insurance character and has not commented on the suit. *Editor’s Note: Makes one wonder whether the “majority” which the vice president of the school board claims to represent is truly a “majority” or is just a very vocal, stubborn, and insensitive minority.*

Student Rights

Proms and School Dances: Suspension and expulsions for student actions connected to proms and school dances continue to make headlines across the country. One such incident related to a male student who chose to wear a dress to his high school’s prom at Lake Geneva Badger High School in Wisconsin. While it was originally reported in the Milwaukee Journal Sentinel that the student was suspended and given a ticket for disorderly conduct because of his attire, the reporter was missing some crucial facts. While the administration was not pleased with the cross-dressing that was not what got the student escorted out of the prom. He was suspended for his behavior, which included knocking over another male student in the middle of the dance floor, lying on top of him, and then simulating a sex act with him. It was for this behavior that the student was suspended by the school and was ticketed by the school’s police liaison officer. *Editor’s Note: It should always be remembered that local school districts have fairly great discretion in disciplining for behavior. It is the traditional difference between the state’s ability to controlling belief and controlling action. To discipline solely on attire may indeed run afoul of a student’s First Amendment Right to freedom of expression/speech. The state cannot control the beliefs of a student regardless of how repugnant they may be. However, to discipline for the actions of the student are definitely within the purview of the school district both as an arm of the state and under the concept of “in loco parentis” which allows schools greater leeway in maintaining order within the school.*

Freedom of Speech: The Rutherford Institute is back defending the voice of “conservative” students in today’s “politically correct liberal schools.” The suit was filed by the members of the Hudson High School Conservative Club claiming viewpoint/speech discrimination because they were required by administrators to remove posters promoting the club. The reason for the removal was that a web site listed on the poster was for the national Conservative Club which maintains a website that contains excessively violent and anti-gay material. The school was particularly alarmed about a link to the High School Conservative Clubs of America’s website through which students could gain access to footage of the beheading of Americans in Iraq. Removal of the posters, therefore, was based more on the school’s duty to protect younger children from graphic violence under the “in loco parentis” concept and to promote the mission and goals of the school. The suit will really center around whether such regulation is allowed in the absence of actual “material and substantial disruption” caused by the posters (a la *Tinker v Des Moines*) or whether schools have a compelling interest insuring that materials accessible through the schools are age appropriate. *Editor’s Note: Given the decision of the Supreme Court regarding drug testing wherein the school was viewed as appropriately guarding the safety and children from the perceived evils of society, my money is on the court upholding the school’s attempt to safeguard the children from graphic violence.*

Douglass v Londonderry School Board: It is not a violation of a student freedom of expression to be denied the right to have his senior yearbook picture include his shotgun. Blake Douglass submitted a senior photo for publication, which showed him in his trap shooting attire and holding his shotgun. The school left the decision up to the student editors as to whether to include the photograph in the yearbook. The student editors voted overwhelmingly to not allow the photograph. Because the school district left the decision totally up to the students, expressing no preference, the court found that there was no state action thus no violation of the student’s first amendment rights.

Palmer High School Gay/Straight Alliance v Colorado Springs School District No. 11: The two-tiered system of recognizing student groups depending on their relationship to the curriculum withstood a challenge in the Colorado federal district court. The Colorado Springs district has a two-tiered system of student groups divided between curricular groups and non-curricular groups. Under the policy, official recognition is limited to curricular groups only, thereby maintaining a closed forum on campus. Since the Gay/Straight Alliance Club was not a curricular group, no limited open forum had been created, thus the Equal Access Act was not controlling. Consequently, since all non-curricular groups are disallowed, there was no content discrimination when the Gay/Straight Alliance Club was also disallowed recognition as an official student group.

Teachers’ Rights

Teacher Sues a Board Member: A board member in California has been named in a lawsuit filed by a female principal claiming defamation of character. The board member allegedly spread a rumor while in the teacher’s lounge in the principal’s building that the female principal was sleeping with the male superintendent in return for favorable treatment under the budget. Originally the principal wanted the comments to be investigated as sexual harassment. When the

school district's attorney stated that the statements did not constitute sexual harassment, this suit was filed. *Editor's Note: Remember, in order for sexual harassment to occur, there must exist some on-going relationship between the two parties. Moreover, when claiming hostile work environment such as the case here, the statements must have been made because of the alleged victim's gender (i.e. this loose cannon board member would not have defamed the principal if she was a man – unlikely since the poor relationship between the two probably had little to do with gender), and they must be ongoing.*

Williams v Vidmar: In this case several important legal points were reasserted regarding a teacher's right to free speech in the classroom. Williams claimed that he had been denied equal protection under the Constitution because he was required to obtain pre-approval of any supplemental materials he wished to use in his elementary classroom. He alleged that the reason for this requirement was because the principal disliked his Christian beliefs. In reality, the principal had started requiring Williams to obtain pre-approval after receiving numerous complaints from parents that Williams was proselytizing in the classroom. While the district did affirm the validity of Williams' equal protection claim, it went on to emphasize that elementary teachers do not have a free speech right to determine curriculum, that the classroom was a non-public forum, and therefore what went on in the classroom was subject to restrictions based on legitimate pedagogical concerns. One of those concerns was that Williams was attempting to teach religion rather than teach about religion. Teachers do not have the right to express their religious beliefs in the classroom.

Jackson v Birmingham Board of Education: This is the case, which will go down in legal history as the "Title IX Whistle Blower Case." In *Jackson*, the United States Supreme Court ruled in a 5-4 decision that Title IX protects individuals who, although not victims of discrimination themselves, are victims of retaliation because they reported gender discrimination of others. Jackson, a girl's basketball coach in the Birmingham public schools, believed that his athletes were being denied access to equally funding and facilities/equipment so he complained of such to his supervisors. After bringing such complaints he started to receive negative performance evaluations, which ultimately resulted in his removal as coach. Jackson consequently sued the school district under Title IX. In reversing a lower court, the U. S. Supreme Court concluded that when a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional discrimination on the basis of sex. Unlike the lower courts, the Court chose to construe the term "discrimination" broadly so as to better serve the intent of the law. It does not matter that such coverage is not specifically state within the "four corners of the document." *Editor's Note: It is not surprising that the Court split on political ideology lines with O'Connor, Stevens, Souter, Ginsburg, and Breyer in the majority and Thomas, Rhenquist, Scalia, and Kennedy dissenting. Luckily if indeed Rhenquist soon retires, the politically conservative justice appointed by Bush will not change the balance of the Court dramatically. Major shifts could be seen, however, if a second justice retires allowing Bush to appoint a second far right/religious right conservative.*

Teacher on Student Sexual Harassment: In the case of *Williams v Paint Valley Local School District*, Williams attempted to claim that a less stringent "reasonableness" standard is all that is needed to find "deliberate indifference" in cases of teacher on student sexual harassment rather than the more stringent "clearly unreasonable" standard required in cases of student on student

sexual harassment. Casey Williams was allegedly molested in 1999 by his fourth grade teacher Harry Arnold. At least five other students had complained of abuse by Mr. Arnold between 1976 and 1990. Williams claimed that the district showed deliberate indifference to his safety by continuing to employ Mr. Arnold. Relying on United State Supreme Court cases *Davis v Monroe County Board of Education*, 526 U.S. 629 (1999) and *Gebser v Lago Vista Independent School District*, 524 U.S. 274 (1998), the U. S. Court of Appeals for the Sixth Circuit held that there is only one standard of proof for harassment cases in the public schools. A school district can only be held liable for known harassment if its response is “clearly unreasonable in light of known circumstances.”

Parental Rights

Rights of Non-custodial Parents: *Crowley v McKinney* - The U.S. Court of Appeals for the Seventh Circuit (of which Illinois is part) has ruled that a non-custodial parent does not have a 14th Amendment Due Process right to participate in the education of his or her child. The suit dealt with Daniel Crowley, a very vocal non-custodial father of two children in suburban Chicago public schools. Crowley openly criticized the administration regarding its leadership of the district and with the school’s failure to provide him with notices, records, correspondence and other documents, which are provided to custodial parents. Crowley also alleged that he was barred from watching his son on the school playground, from participating in school activities, and denied information about his son’s attendance. In rejecting Crowley’s claim the court stated that the practical difficulty of schools’ accommodating the demands of divorced parents and the federal courts’ lack of expertise in drawing the line so parental rights would not interfere with public schools’ educational mission, non-custodial parents do not have a federal constitutional right to participate in their children’s education at the level of detail desired by Crowley.

Editor’s Note: This puts an interesting twist on Illinois law which would seem to say the opposite and give non-custodial parents ALL the rights of custodial parents when it comes to the schooling of their children!

Federal Government and Education

Involvement in Curriculum: Perhaps gaining courage from NCLB, the federal government has decided to intrude further into the constitutionally protected rights of the state to control public education within the states. Senator Robert Byrd of West Virginia successfully introduced legislation, which requires all public schools to set aside September 17 to teach student about the U.S. Constitution and citizenship. Byrd was able to get it passed virtually unnoticed by inserting it deep within an un-related funding bill. Now it is up to the U.S. Department of Education to implement the bill. *Editor’s Note: Does this mean the DE will attempt to dictate curriculum to all state? Does this mean that the DE will tell local school districts how September school calendars must be constructed – because what happens if a school isn’t in session on September 17th? This steps WAY OVER any power the federal government has to influence education. The scariest part is that the general public has not risen up against this intrusion.*

No Child Left Behind: It has almost reached a point of mutiny among the states against the intrusive requirements of no child left behind. Following are some of the main points of the ongoing struggles between states and the federal government regarding the control of public education:

California: Coachella Valley Unified School District is threatening a lawsuit against the state of California alleging improprieties in the state's method of implementation of the federal law as regarding special needs and high-risk students. Coachella Valley, with more than 80% of its students classified as English Language Learners, is one of 14 districts in California, which have been identified as failing under NCLB. California, in turn, is requesting a waiver of the federal rules defining federal schools. In the meantime, California exempts from being labeled as failing any school district in which students from low-income households attain acceptable scores on a different test. The response to California from the U.S. Department of Education is that they must eliminate that exemption even though doing so would increase the number of failing schools from 14 to 310.

Michigan: The Michigan Department of Education is preparing to request the U.S. Department of Education grant them an exception as to how some special education students are counted toward a district's compliance with adequate yearly progress. Michigan, like many states, currently uses an alternative test for approximately 4% of their students, primarily special education students. The state claims that since they educate special education students to age 26 instead of 21 as required by federal law, they have an inordinately higher number of special education students when compared to other states, thus should have different expectations.

Texas: The state of Texas is permitting local school districts to exempt more special education students from the requirements of NCLB than is actually permitted by the federal legislation. This move by Texas may cause the state to lose federal funding, but as of late March the federal government had not yet responded.

Utah: Utah's legislature has passed overwhelmingly a bill that gives state accountability standards precedent over federal standards contained in NCLB. In the meantime, 20 Republican state senators have sent a letter to Bush criticizing his administration for overstepping its boundaries in its attempt to seize control of public education from the states. Bottom line is that Utah is looking for the federal government to put in writing an affirmation that state standards pre-empt and will always pre-empt any federally imposed standard. While the DE has threatened to withhold \$76 million in federal funding, state officials doubt that will happen. Meetings have been arranged with the educational powers that be in Utah to work out a compromise.

Center on Education Policy: The CEP has released a report with several findings, none of which are terribly surprising.

- Vast majority of states claim moderate to serious challenges meeting NCLB
- 80% of schools responding state that NCLB's requirements as regarding disabled or non-English speaking students is unrealistic and unfair
- There is not enough state or federal funding to properly implement NCLB with some states claiming that funding cuts have hurt those children most in need

The response of the U.S. Department of Education is that the report shows a positive effect caused by NCLB. The DE dismisses claims of inadequate funding as whining unsupported by the facts.

US Department of Education: Secretary of Education Spellings has announced significant changes in enforcement of the accountability provisions of NCLB. As long as states

are able to show improvement and a strong commitment to the goals of NCLB, they will be given greater flexibility in meeting accountability requirements. That having been said, however, Spellings said that the major components of NCLB such as annual testing, reporting by sub-groups, and requirements for highly qualified teachers are not up for negotiations. *Editor's Note: In other words, if you are good "soldiers", applaud the current administration so that they look and feel good, then the federal government will award you "favors/spoils" such as flexibility and lessened accountability. Keep questioning the wisdom of the administration's educational policy and you face economic censure. Gee, that seems like a violation of the first amendment to me! But then, this is the same administration that gave us the Patriot Act which unabashedly rips away some of our most basic of human freedoms and inalienable rights – guess they have been alienated!*

Connecticut: Connecticut has announced its intention to sue the federal government under the argument that NCLB is an impermissible unfounded mandate. The Connecticut Attorney General is in the process of contacting other states to see if they will join in the proposed lawsuit.

National Education Association: The NEA along with local school districts in Michigan, Texas and Vermont and 10 NEA state affiliate organizations, have sued the federal government alleging that the accountability provisions included in NCLB are illegally forcing states to satisfy unfunded mandates which is expressly prohibited in the wording of the NCLB itself. More specifically, the plaintiffs are requesting the court to prohibit the federal government from withholding federal funds to states, which have refused to comply with accountability standards when such compliance would require the state to spend its own money to meet the standard. This is the first suit actually filed to challenge the NCLB by the terms of its own legislation; the unfunded mandate provision. Up to this point when school districts complain about the lack of money, the federal government has said that if they don't want to pay for compliance they don't need to accept Title I funds.

LEGISLATION TO WATCH

HB 881 (Kosel) creates new guidelines to which school districts must comply if they offer a Gifted Education Program. **The bill was approved** by both chambers and will go to the Governor for action.

HB 3480 (Kosel) provides that the annual budget of a school district shall separately identify revenue from taxes and revenue from all other sources, including without limitation vending machines, and disclose all school board-sanctioned contractual agreements and the estimated revenue to be received as a result of these contracts. It requires the approval of the school board for all contracts and agreements that pertain to goods and services and that are intended to generate additional revenue and other remunerations for the school district in excess of \$1,000 (now, no limit) and provides that the annual budget shall contain a statement of the cash on hand, an estimate of the cash expected to be received, an estimate of the expenditures from revenues, and a statement of the estimated cash from all other itemized sources (rather than all other sources). **The bill was approved** by both chambers and will go to the Governor for action.

SB 575 (del Valle) increases the high school graduation requirements. It would require at least two years of science (instead of one); require three years of mathematics – including algebra and

geometry – (instead of two); require at least two "writing-intensive courses", one being an English course; and require English every year of high school (instead of three years). Passage of these courses would be a prerequisite to receiving a high school diploma. **The bill was approved** by both chambers and will go to the Governor for action.

BILLS THAT DID NOT PASS:

SB 176 (Shadid) is a school reorganization bill that would allow for easier facilitation for dual districts to form a new unit district. It is designed to allow for a high school district to join with some – but not all – of its feeder elementary districts to form a new unit school district.

SB 208 (Sandoval) adds greater penalties for school board members and school district employees that fail to report incidences of child sexual abuse under the Abused and Neglected Child Reporting Act.

SB 277 (Haine) would decrease the number of years of the probationary period needed before a teacher acquires tenure.

SB 409 (Raoul) would lower the compulsory school age from 7 years to 5 years and require all school districts to provide kindergarten beginning with the 2006-2007 school year.

Editor's Note: This legislative information was obtained from the Illinois Association of School Boards.