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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

### School Finance

**Kansas:** The Kansas Supreme Court has ruled that the state's newly passed bill which allocates an additional \$148.4 million to public education is good enough for now. The court had informed the state in an earlier ruling that it needed to provide \$285 million for public education. This last minute action by the Kansas legislature has succeeded in keeping the public schools in Kansas from failing to open this fall; however, it is only a temporary fix. The court has retained jurisdiction over the case so that it can continue to monitor state funding to public education.

**North Carolina:** The North Carolina Supreme Court has ruled that all punitive fines, penalties, and forfeitures collect by state agencies must be remitted to the state general fund so that those amounts shall go exclusively to the funding of the public schools.

**Maryland:** The Maryland Supreme Court in *Maryland v Bradford*, No. 04-85n (Md. June 9, 2005) has upheld a new state law which forbids school districts to end the year with a deficit budget. Should a district find itself in the red, the Education Fiscal Accountability and Oversight Act requires that district to develop corrective action to close the deficit and risk losing up to 10% of its state funding should it fail to do so. The main target of the legislation was the Baltimore County Public Schools which ended 2004 with a \$58 million deficit.

### NCLB

**Individual Growth Measures:** Perhaps the newest shift in focus of the US Department of Education is its sudden willingness to consider a variety of options suggested by several states for measuring the progress of schools and school districts, all of which focus on how much progress individual students make over a period of time. While it is too later to include any of these "growth measures" in the accountability calculations for the up-coming school year, at least the Department of Education has not dismissed the possibility without first investigating further.

**Florida:** Broward County Public Schools has released a report which shows that children who were transferred out of failing schools and into non-failing schools as defined under the NCLB have shown no significant academic progress as shown by their scores on state standardized tests. The only difference found was in the fact that transfer students were more likely to be sent to the principal's office as a means of punishment than other students.

**U.S. Department of Education:** The U.S. Department of Education has given approval to 16 states to relax the accountability standards for their states under NCLB. It is still considering 31 other requests which have already received oral decisions. Secretary Spellings claims these reviews are a follow-through on the Department's promise to take a more "common sense approach" to implementation of the NCLB. Still few are happy. Because of the time it takes to review the requests, along with the fact that the requests are not made public, causes many states to make claims of favoritism. One of the main areas of reconsideration is in the measuring of

special education students. The Education Department as issued an interim standard which allows school districts who meet certain criteria to opt for the inclusion in the AYP calculations the scores of special education students who take alternative assessments so long as these scores do not exceed 2% of the total tested student population. *Editor's Note: Could this be at least partially in response to the litigation recently filed by districts here in Illinois?*

**“Persistently Dangerous”:** This is another area creating controversy among the states. In the NCLB states are required to define “persistently dangerous” schools. If a school is labeled as persistently dangerous under the state definition, students who wish to transfer to a safer school must be allowed to do so. In addition, the school which has been labeled as persistently dangerous must, within 30 days, file a plan to increase safety at the school. The problem is that, since the definition created by individual states, these definitions vary widely among the states. As a result, the US Department Education is currently reviewing the definitions of six states to see if they are following the intent of the law.

**Connecticut:** Proposed legislation is picking up support in the state, approval of such having passed the state legislature in a special session. The governor is voicing an intention to sign the bill supporting such litigation. The Connecticut State Board of Education, however, refuses to climb on board stating that such concerns about NCLB are better addressed through legislation that litigation. Maine has also expressed great interest in the possibility of a lawsuit regarding the fact that NCLB is an unfunded mandate. The federal General Accounting Office disagrees saying that compliance with the terms of the NCLB are merely conditions for a state receiving federal Title I funding and nothing more. It is a contract like any other. If the state doesn't want to comply then it is giving up the federal funds attached to that compliance.

**Supplemental Educational Services (Tutoring):** The U.S. Department of Education, through non-binding guidelines, is encouraging states and school districts to ensure that private tutors offering their services are not guilty of any unfair labor practices such as false advertising or kickbacks. The state of Illinois already plans to increase its monitoring of private tutors. The proposed policies would prevent tutors from trying to obtain extra funds for the state or use of bribes of toys or money in an attempt to lure students to sign up for services. *Editor's Note: This provision under the NCLB has proven to be a cash cow to those private tutoring services that were wise enough to prepare ahead.*

## **Special Education**

Some parent advocates are upset with a new provision included in the reauthorization of the IDEA. As of July 1, 2005, the burden of proof now rests on the parents who are challenging the school district's suspension or expulsion of a student identified as deserving services under the IDEA. Under the IDEA if a student is expelled for a reason not related to his disability he remains expelled during the pendency of an appeal. With the shift of burden of proof, some parents fear that they will have a more difficult time getting their children readmitted to school. Schools, however, believe that the change will help them maintain a safe school environment. Other changes under the reauthorization which also have caused concern among parents is the requirement that parents pay attorney's fees for “frivolous litigation” and that school districts no

longer are required to provide an interpreter for non-English speaking parents in formal meetings. *Editor's Note: Such changes are not all the surprising. From the late 1980s when state funding for public education started to become scarce, general education students have been pitted against special education students. In addition to scarcity of funding during the past 15 plus years, more and more students with greater and greater disabilities are being served by public schools, with an increasing number being included in the regular classroom. As a result, since about the time of the first reauthorization in 1997, parents of general education students have become more and more vocal regarding the safety and rights of their children to receive an education without the disruption of special education students. In the minds of an increasing number of parents, the rights of the two groups of students are becoming more and more mutually exclusive. Whence changes in the IDEA.*

***Pennsylvania:*** As a settlement of a lawsuit brought by 12 parents wherein the accused the Pennsylvania Department of Education of denying their children FAPE by refusing to place them in regular classrooms, the Commonwealth of Pennsylvania has agreed to a statewide monitoring system to insure inclusion of the states' 250,000 special education students whenever possible. Under the settlement agreement, the PDE will oversee all 501 school districts in the state and, using a score based on time in classroom of special education students, will rank those districts. Those districts at the bottom will be placed on a warning list and provided in-service for teaching students with disabilities in the regular classroom. Continued failure to comply may result in a loss of state funding.

***Forest Grove School District v T.A., 04-331 (D. Ore. May 11, 2005):*** Parents who unilaterally place their children in private school are not entitled to tuition reimbursement under the IDEA if they do so without requesting special education services from the local district or without notify the local district that they intend to seek reimbursement. In this case the district had concluded that the student was not eligible for special education services. The parents and the district arranged for him to complete his high school graduation at a local community college. Instead, however, the parents enrolled him in a residential private school and sought tuition reimbursement.

## **Student Rights**

***Jacobs v Clark County School District, 2005 WL 1420889 (D. Nev. June 13, 2005):*** The decision of the court upheld the constitutionality of a school uniform policy. The wearing of a school uniform does not infringe upon a student's First Amendment rights of freedom of speech or freedom of religion. The state does have an interest in improving the educational atmosphere in the public schools and a dress code furthers that interest. As such, a dress code policy is unrelated to student expression or religion. Its purpose is to increase student achievement, promote safety, and create a positive school environment. *Editor's Note: This decision out of Nevada closely follows the rationale stated in several prior decisions here in Illinois. Nothing much new as far as guidance to district administrators.*

**Student Health:** Federal law, the Child Medication Safety Act (CMSA) now prohibits school districts from requiring that students medicate their children prior to allowing them into the schools. This shifts the power to the parents to make that decision to use drugs such as Ritalin on their children. Much of the impetus for this legislation came from recent reports regarding the possible incorrect diagnosis or over-diagnosing of such conditions as ADD/ADHD and the unknown dangers and/or long term effects of prescribing such powerful drugs to children.

## **Religion**

***McCreary County v American Civil Liberties Union of Kentucky*, No. 03-1693 (U.S. June 27, 2005); *Van Orden v Perry*, No. 03-1500 (U.S. June 27, 2005):** In one of the last decisions in which Justice O'Connor participated, the United States Supreme Court's ruling seems to many to be inconsistent at best. Before the Court were two cases dealing with the public display of the Ten Commandments on state land. The *McCreary* case concerned the display of the Ten Commandments in the courthouses in two counties in Kentucky. *Van Orden* concerned a monument on the grounds of the Texas Statehouse which displayed the Ten Commandments.

In *McCreary* the Court split with Souter, Stevens, O'Connor, Ginsburg, and Breyer in the majority; Rhenquist, Scalia, and Thomas dissenting. The majority held that the display was unconstitutional as a violation of the Establishment Clause of the First Amendment. The Court found that the state action in *McCreary* bore a striking similarity to the posting of the Ten Commandments in the classroom in *Stone v Graham*, 449 U.S. 39 (1980). In both cases the Court found that the posting violated the first prong of the test from *Lemon v Kurtzman*, 403 U.S. 602 (1971) which requires a secular purpose for the action. The Court could find no such non-religious practice for posting of the Ten Commandments.

Surprisingly, however, in *Van Orden*, Justice Rhenquist joined by Scalia, Kennedy, and Thomas filed a plurality opinion stating that the display of the Ten Commandments on state ground did not violate the Establishment Clause of the First Amendment. Justice Breyer filed a concurring opinion, while Souter, Ginsburg, Stevens, and O'Connor dissented. The plurality conceded that the Ten Commandments deliver a solely religious message, but given context in which they were displayed they also conveyed a secular moral message about proper standards of conduct and the historical significance of the document in relation to the current legal system. Rhenquist stated that the Lemon Test was not effective in determining whether such a passive display was in violation of the First Amendment, distinguishing *Graham* as a case dealing specifically with public elementary and secondary schools. Scalia could find nothing unconstitutional with the state favoring religion over non-religion, and in-fact claimed that was the necessary outcome if the government was to stay "neutral." Thomas called for the elimination of all Establishment Clause tests except the Coercion Test from the graduation prayer case of *Lee v Weisman*.

*Editor's Note: Given that this is the Court's last statement on Establishment Clause jurisprudence, combined with the current conservatism of Supreme Court nominee Roberts as shown by his filling a brief for the previous Bush administration in support of prayer at graduation, the area of religion and the public schools could be an area of increased activity over the next several years.*

## **Curriculum**

**Intelligent Design:** Where before there was Creationism, the Creation Science, now there exists Intelligent Design as the new attack on the teaching of evolution.

**Pennsylvania:** A bill is in committee which would allow local school districts to require the teaching of intelligent design theory as part of their science curricula. *Editor's Note: As history shows us, the folks out there in Pennsylvania have always had difficulty understanding the concept of the separation of the church and state to avoid a violation of the Establishment Clause of the First Amendment. In this instance, one has to wonder whether law schools in the state teach constitutional law, and if they do whether included in that instruction is a discussion of the case Edwards v Aguilar where the requirement of the teaching of creation science failed to pass even the first prong of the Lemon Test.*

**Michigan:** A local school board has voted to allow the concept of "intelligent design" to be discussed in elective social studies classes. Such discussion will be at the discretion of the teacher and it must fit in to the curriculum of the class. Intelligent design will not be taught in science class. *Editor's Note: Much better, and more legal, resolution!*

**Utah:** A state senator plans to introduce a bill to the state legislature, which would require schools to teach "divine design" alongside evolution. The senator in question is being supported by the Eagle Forum out of Alton, Illinois. The states of Kansas, New York, Missouri, Georgia, and Alabama are considering similar legislation. *Editor's Note: See comments above regarding legislation in Pennsylvania.*

## **Teachers**

**Incentives:** Houston has decided to put its money where its mouth is. The school board unanimously voted to give all teachers at three high schools rated "academically unacceptable" a \$1,500 bonus if students reach goals on state standardized tests. In addition, individual teachers can receive an additional \$1,500 if their individual students score high enough on the exam. The purpose of this \$800,000 outlay is to attempt and attract teachers to these failing schools. Not surprisingly, the Houston Federation of Teachers has been critical of the plan. *Editor's Note: When looking at the union's criticism, a great deal of it stems from the bonus plan's lack of reliance on seniority which is the traditional selling point for union membership, especially for mediocre or lazy teachers.*