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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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SUPREME COURT NEWS

New Chief Justice of the United States Supreme Court: The United States Supreme Court has a new Chief Justice. John Roberts was sworn in on September 29, 2005 as the 18th Chief Justice of the United States Supreme Court, replacing Chief Justice William Rhenquist who earlier in September lost his battle with thyroid cancer. During his career, Chief Justice Roberts has had the chance to advocate on a variety of educational issues. For that fact, he is probably the first Justice since Justice Powell, Jr. to bring such first-hand knowledge regarding education to the Court. Prior to his appointment to the federal bench, Chief Justice Roberts had been a participant in several school law events sponsored by the National School Board Association. As Deputy Solicitor General during the elder Bush's administration, Chief Justice Roberts co-authored briefs on behalf of the administration for cases such as *Lee v Weisman*, *Franklin v Gwinnett County School District*, *Freeman v Pitts*, and *Board of Education of Oklahoma City v Dowell*. Despite what might be classified as a conservative agenda in those briefs, those opinions may or may not be reflective of his own personal opinions. In any event, Chief Justice Roberts will have a chance very soon to weigh in on the topic of religion and education as two controversial suits – one dealing with the Pledge of Allegiance, and the other with the teach of creationism/intelligent design – will be before the Court.

DEVELOPMENTS IN THE COURTS

No Child Left Behind

Expectations and requirements under the administrations major piece of educational policy continue to change as an increasing number of states mount a variety of attacks on various aspects of the law. Here are just a few updates:

Florida: Officials in Broward County report that students allowed to transfer out of low performing schools into higher performing schools under the law have shown no significant increase in academic achievement. In the statistics gather by the district, the 842 students who chose to transfer did no better on state tests than those students who chose to remain in the failing schools. The US Department of Education responded by praising the school district for studying the actual effect but then went on to say that it is too early in the program to determine whether the results are valid.

Virginia: The USDE has granted a special waiver to Virginia allowing four school districts to offer tutoring services to students which fail to make AYP for two consecutive years before allowing them to transfer in the third year. The federal government is hoping that this trial waiver will convince more parents to take advantage of the private tutoring provisions of the NCLB.

US Department of Education (USDE): The USDE has approved, at least in part, the requests of 16 states to relax their accountability standards. It is considering requests from 31 additional states. The biggest area of contention is with the requirements surrounding the testing of special education students. *Editor's Note: If you take count, that now totals 47 out of 50 states that have received approval or are in line for the possibility. When 94% of the country is telling the federal government that their educational policy isn't work as currently conceived, wouldn't you think a responsive administration would listen?*

Illinois: The lawsuit filed by the Ottawa School against the USDE and the Illinois State Board of Education to obtain a declaratory ruling as to how a local school district is to comply with the competing and often contradictory requirements of the NCLB and the IDEA has been dismissed for lack of standing!

The Governor of Illinois has also signed into law a provision that states that special education students will be tested, for purposes of the NCLB, at the grade level where they are taught under their IEP, rather than at the grade in which they fit by chronological age. The new law also narrows the requirement of improvement for schools which fail to make AYP in a particular subgroup. Now, a school will only be placed on the early warning or watch lists if it fails AYP in the same subgroup and same subject. Now approval is needed from the USDE.

NEA: The NEA strikes back as it files a 42-page brief in federal court opposing the USDE's motion to dismiss for lack of standing the NEA's lawsuit alleging the under-funding of the NCLB.

Connecticut: The State of Connecticut has finally filed its long-threatened lawsuit against the USDE alleging the failure of the federal government to fully fund accountability provisions under the NCLB negates the requirement for compliance by the states because it would cause them to spend state money on compliance – something Connecticut alleges is specifically disallowed by the federal legislation.

Special Education/IDEA

Since the recent reauthorization, concerns have started to be raised about the disciplinary provisions contained in the revised IDEA which went into effect July 1, 2005. One of the most troubling for many advocates is the provision which shifts the burden of proof to the parent when that parent challenges the suspension or expulsion of their special education student. Another provision placing a greater financial burden on parents is the requirement that parents will be responsible for “reasonable attorneys’ fees” in frivolous lawsuits. The idea which fueled many of these changes is that an increasing number of parents are making unreasonable, perhaps even impossible demands, on school districts as far as providing services to their handicapped children. Should the school district, on the advice of their educational experts, deny those requests as not appropriate, the parents file a due process suit which is both stressful and extremely costly. The hope of those drafting the changes for the reauthorization wanted to make such “frivolous or bullying” lawsuits diminish and get back to the real work required by the IDEA which is providing a free, public education in the most appropriate environment to children who fall under the jurisdiction of the IDEA.

Linda T. v Rice Lake Area School District, No. 04-3731 (7th Cir. Aug 2, 2005): Under a recent 7th Circuit ruling (which includes Illinois specifically) parents of a special education student involved in a due process hearing can not receive attorney’s fees under the IDEA if only *de minimis* changes are made by the hearing. In the instant case, the school district held a mandatory staffing as the autistic child moved from elementary to middle school. In that staffing the district determined that the most appropriate placement for the child was not in the middle school, but rather to split his days between the middle school and a special education facility. In the ensuing due process hearing, the ALJ essentially found for the school district but did mandate a minor change in the IEP so as to better document the exact number of hours of autism training required for the staff. This change was not considered significant enough to entitle the parents to an award of attorney’s fees.

Fitzpatrick v Town of Falmouth, No. 05-97 (Me. Aug. 10, 2005): Under a ruling by the Maine Supreme Court, a school district did not violate the rights of a child suffering from Aspergers autism when it refused to allow him access to the school playground until he had undergone a behavioral assessment. The child was barred from the playground after numerous reports from teachers and students that he used threatening and/or offensive language and was physically violent toward the other children.

Students' Rights

Uniforms: *Jacobs v Clark County School District*, 2005 WL 1420889 (D. Nev. June 13, 2005). The federal district court in Nevada has upheld a local district's uniform policy, holding that it did not violate the student's First Amendment rights to freedom of speech and freedom of religion. In considering the free speech claim, the court based its ruling on the application of the three prong test first articulated in *U.S. v O'Brien*, 391 U.S. 3673 (1968). In considering the first prong, the court found that the school district did have a substantial governmental interest in improving the educational process and the uniform policy furthered that policy. The second prong of the test required that the policy was unrelated to suppressing student expression and since the purpose was to improve the educational process not stifle student expression, this prong was also passed. Finally, the court noted that the policy was sufficiently narrow so as to not impose incidental restrictions greater than necessary. Turning to the issue of the free exercise of religion, the court noted that the policy was passed to further a reasonable governmental interest and was neutral as to religion, thus did not violate the First Amendment Religion Clause.

Military Recruiting: The school board in Wichita, Kansas has come up with a way to deal with the issue of allowing military recruiters on school grounds. Under NCLB, schools are required to provide directory information to military recruiters. Normally school districts have a blanket document for parents to sign if they do not want directory information to be released and while this would solve the problem, it would also keep this student information from college recruiters as well. The Wichita school board now has prepared a separate form just for military recruiters, which is being included in enrollment packets sent to parents. While the superintendent opposed the separate form citing administrative problems which will likely be caused by the tracking the separate form and the increase number of parents "opting-out", the school board felt that the parents had the right to be fully informed and actually know just what they were signing.

Student Achievement: The Arizona Center for Law and Public Interest as filed suit to enjoin the state from requiring that English-learning students pass Arizona's state assessment test in order to graduate from high school until the state improves funding for English-learner instruction. The state's response has been that to graduate individuals who can not speak English fluently, sending them out into society with the appearance that they have met the requirements to graduate from an Arizona high school is not the answer. *Editor's Note: Looks like the Arizona legislature may have found a back door to the mandate that all students, citizens and illegal immigrants alike, must be educated. By inadequately funding necessary programs year after year for non-native English speaking students, they will fall farther and farther behind and eventually, hopefully in the eyes of Arizona lawmakers, drop out of school and no longer be a financial burden on the public schools. But how about the public in general?*

Home Schooling:

Jones v West Virginia State Board of Education, No. 31785 (W.V. July 6, 2005): West Virginia has joined those states in saying that home-school children may be barred by the West Virginia Secondary Schools Activities Commission's rules, from participating in interscholastic athletics. The WVSSAC, like many other state athletic associations, require that individuals who wish to participate in interscholastic athletics must be enrolled full time in a member school. The West Virginia Supreme Court affirmed the general belief that participation in interscholastic

activities in neither a fundamental nor constitutional right, but rather is a privilege upon which reasonable rules and regulations may be placed.

Alternative Schools:

D.C. v School District of Philadelphia, No. 444 (Pa. Cmmw. July 20, 2005): The Pennsylvania courts have ruled that automatically assigning students to an alternative school when they return from a delinquency placement or criminal conviction is not an administrative decision, but rather is a form of discipline which requires due process including a pre-placement hearing. The school tried to argue that the juvenile or criminal hearing already satisfied any due process necessary. Stating that such hearings have no power to decide issues regarding the student's return to public school, the court denied such an argument.

Sexual Harassment:

Bostic v Smyrna School District, 04-1463 (3d Cir. Aug 10, 2005): In upholding the decision of the lower court, the U.S. Court of Appeals for the 3rd Circuit, reaffirmed the United States Supreme Court's ruling in *Gebser v Lago Vista Independent School District, 524 U.S. 274* (1998) that in order for the school district to be liable under Title IX for sexual harassment of a student by a teacher, the school district must have actual notice of said harassment. The possibility, gleaned through rumors or hearsay, is not "actual notice" as required by the Supreme Court.

Off-School Conduct: There is an increase in schools, who in an attempt to increase discipline of the student body, who are contemplating or have passed policies and procedures which control the student's off-campus behavior. In one such case, the U.S. Court of Appeals for the 4th Circuit held that a Virginia's school district's code of conduct was not unconstitutionally vague. In the instant case, several students set off bottle bombs off campus. Upon learning of the activity, one student was expelled under the district's "off campus activity" policy. The district claimed that such behavior had negatively impacted the educational environment because of the inordinate amount of time that school administrators had be required to devote to the incident. The court sided whole-heartedly with the school, finding that neither the student's substantive or procedural due process had been violated.

Graduation Requirements: In August SB 575 was signed into law changing graduation requirements for public schools in Illinois. The requirements, which became effective with in August 2005, will be phased in over several years. The law makes the following changes in minimum requirements: (1) two years of science (instead of one); (2) three years of mathematics – including algebra and geometry – (instead of two); (3) two "writing-intensive courses", one being an English course; and (4) four years of English (instead of three years).

Legal Liability

Meeker v Edmundson, No. 04-2301 (4th Cir. July 13, 2005): Under a decision by the 4th Circuit Court of Appeals, a wrestling coach who is alleged to have allowed a team member to be beaten by other members of the team, may be sued under Sec. 1983. In *Meeker*, the plaintiff was a

member of Edmundson's high school wrestling team. He alleges that over a three-month period he was repeatedly beaten by other team mates at the direction of Coach Edmundson as a form of discipline and as an attempt to get him to quit the team. In ruling against the school district's claim of immunity, the court stated that both criteria need to defeat a defense of qualified immunity (that the official's alleged conduct violated a constitutional right; and the constitutional right was a clearly established law at the time the conduct occurred) had been proven.

Coleman v School Board of Richland Parish, No. 04-20445 (5th Cir. July 25, 2005): School boards should stand warned that if they chose to break the law even after they know that their behavior is illegal (i.e. prayer at graduation, racial discrimination), then their insurance companies may very well not step in to defend them in the resulting law suit. The U.S. Court of Appeals for the 5th Circuit ruled in favor of the insurance company when it chose to enforce an exclusion clause in its contract for "acts committed with the knowledge of their wrongful nature or with intent to cause damage" and refused to defend a school board for legal claims arising from alleged intentional racial discrimination. *Editor's Note: While school boards can act with virtual impunity if no member of the tax paying community files suit over such things as school sanctioned prayer at school events (a common occurrence in central Illinois) that doesn't mean that if someone does sue that those boards can not automatically assume that they won't finally have to atone for their sins!*

Federal Regulations

Bioterrorism Preparedness and Response Act of 2002: The new law requires that "food facilities" register with the FDA. Luckily for public schools, it looks as if they will fall under an exemption for nonprofit food establishments and registration will be unnecessary.

Copyright of "Orphaned Works:" A work is considered "orphaned" when the owner of the copyright can't be located. If someone wants to use the work, he or she often becomes frustrated trying to obtain permission from the holder of the copyright. In response, the Copyright Office is not contemplating passing legislation and rules to deal with such "orphaned works."

Religion

Meyers v Loudoun County Public Schools, No. 03-1364 (4th Cir. Aug. 10, 2005). The Fourth Circuit has come down on the side of allowing "in God we trust" to remain in the daily Pledge of Allegiance in Virginia schools. Under the court's rationale, mere inclusion of that phrase does not covert a declaration of patriotism into an unconstitutional religious exercise. In making its decision, the court relied on past precedent allowing prayer at the opening of legislatures.

Dobrich v Walls, 2005 WL 1812933 (D. Del. Aug. 2, 2005): While not binding outside of the state of Delaware, there is now a ruling by a federal district court that the opening of public school events (board meetings, athletic events, banquets, and graduation ceremonies) with a prayer is

NOT a violation of the Establishment Clause of the First Amendment. In addition, the court found that individual board members have absolute immunity from lawsuits brought by parents alleging that the board had adopted policies and practices allowing religious worship and prayer in the district's schools. *Editor's Note: While the court did leave many loopholes and made its decisions on very narrow grounds, the simple fact that any court in light of the Supreme Court's past decisions on prayer in school and at school functions, would not find such behavior blatantly unconstitutional is extremely disturbing to anyone who believes that inherent advantages flow to both the state and religion from keep such strictly separate.*

Lee v York County School Board: The Rutherford Institute has entered into the fray between a Spanish teacher, William Lee, and a Virginia high school. The case centers around the fact that, when Mr. Lee was on leave, district officials removed religious posters from his classroom, including one which advertises that National Day of Prayer. The district maintains that the posters were appropriately removed because of their "overt religious message" which had caused complaints by students and parents. It appears that the main question before the court is whether Mr. Lee's claim that such religious posters is appropriate in the context of Spanish-language instruction. *Editor's Note: If that was truly his intent in displaying the posters could he not have found some posters about Spanish/Mexican religious holidays, written in Spanish? What does a United States National Day of Prayer have to do with Spanish instruction? Hopefully the court will not be cowed by the fear that they appear "heathen" or "unpatriotic" and rule appropriately that such an argument is specious.*

Ten Commandments:

Van Orden v Perry, 2005 LEXIS 5251; McCreary County, Kentucky v American Civil Liberties Union of Kentucky, 2005 LEXIS 5211:

After the United States decision in *Stone v Graham*, 449 U.S. 39 (1980), it seemed pretty well decided that display of the Ten Commandments on public property (in the *Graham* case a public school) was inherently religious thus could not pass the first prong of the Lemon Test and therefore was a violation of the Establishment Clause of the First Amendment. On June 27, 2005, however, the Supreme Court decided on two new cases on the public display of religious material, making what appear to be two conflicting decisions, and throwing what many thought was black letter law firmly back into the twilight zone.

In the *Van Orden* case the dispute was around a six-foot granite monument of the Ten Commandments located among 17 historical monuments scattered around the 22-acre grounds of the Texas Capitol. This specific monument had been a gift in 1961 from the Fraternal Order of the Eagles and was intended to be a deterrent to future juvenile delinquents by providing them with a proposed "code of conduct" by which to live their lives. In *McCreary* the issue was the posting of the Ten Commandments in two county courthouses. Originally, the Ten Commandments hung alone or with other Biblical verses but after a challenge was filed by the ACLU, the state added other historical documents such as copies of the Constitution, the Bill of Rights, and lyrics to the Star Spangled Banner.

In making a decision, the United States Supreme Court upheld the granite monument as not in violation of the Establishment Clause, but disallowed the hanging of Ten Commandments as an impermissible advancement of religion. In *Van Orden* the court seemed to be swayed by the location of the monument, the reason for its erection, and the fact that it was just one of 17 monument located in and around the Texas Capitol on public grounds. The Court found a valid

secular purpose for the monument and held that the religious content of the monument was insufficient to imply state endorsement of religion. In *McCrary*, however, the Court stated that the posting of the Ten Commandments, was inherently religious and was the state attempting to make a religious statement based on Judeo-Christian morality. As it had found in *Graham*, such a statement is clearly a violation of the Establishment Clause of the First Amendment. So, as the law now stands, it appears that the Court will make its decision based on how successful the state is in displaying the religious material within a “historical” display. If the religious material was there first and the historical material was added later, it appears more likely to be ruled unconstitutional. *Editor’s Note: This is the most schizophrenic decision handed down by the Court in a long time. Basically they seem to be saying that if the display is not “too in your face” and you make sure to put it in a historical context from the beginning then somehow the religious material is not “too” religious and will survive scrutiny. In other words, “When are the words of God, not the words of God, but just a historical text for the education of future generations?” Sounds like a riddle for the Pope after he decides how many angels can dance on the head of a pin!*