

Vol. 25, No. 6
November 2005

ILLINOIS STATE
UNIVERSITY



***SCHOOL
LAW
QUARTERLY
ON-LINE***

IN THIS ISSUE

Supreme Court News *page 59*

Developments in the Courts

No Child Left Behind *page 59*

Special Education *page 61*

School Finance *page 61*

Students' Rights *page 62*

Religion *page 63*

Teachers' Rights *page 64*

Editor

Elizabeth Timmerman Lugg, J.D., Ph.D.

Publication Manager
Andrea J. Rediger

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.

Illinois State University is an Equal Opportunity/Affirmative Action institution in accordance with Civil Rights legislation and does not discriminate on the basis of race, religion, national origin, sex, age, handicap, or other factors prohibited by law in any of its educational programs, activities, admissions or employment policies. University policy prohibits discrimination based on sexual orientation. Concerns regarding this policy should be referred to Affirmative Action Office, Illinois State University, Campus Box 1280, Normal, IL 61790-1280, phone 309/438-3383. The Title IX Coordinator and the 504 Coordinator may be reached at the same address.

Illinois School Law Quarterly On-Line is published as a service of the Center for the Study of Educational Policy, Department of Educational Administration and Foundations, College of Education, Illinois State University, Campus Box 5900, Normal, IL 61790-5900.

If you quote or paraphrase, please credit author and *Illinois School Law Quarterly On-Line* in an appropriate manner. This publication is not produced for the purpose of rendering legal advice or services. Expressed points of view of the Editor and contributors represent personal opinion and not that of the University, College, or Department. All inquiries should be directed to Editor, *Illinois School Law Quarterly On-Line*, Illinois State University, Campus Box 5900, Normal, IL 61790-5900, phone 309/438-7668.

SUPREME COURT NEWS

First it was Harriet Miers, a marginally qualified to unqualified candidate for replacing Sandra Day O'Connor on the United States Supreme Court. After almost a month of embarrassment in the public press, Ms Miers made the intelligent decision to remove her name from nomination. In less than a month, President Bush has forwarded another name for nomination creating yet more controversy. Judge Samuel A. Alito Jr. of the United States Court of Appeals for the Third Circuit has been nominated to fill the upcoming vacancy on the Supreme Court. Some have given him the nickname "Scalito" because of the keen resemblance of his legal decisions to Justice Scalia; a Scalia "mini-me" as it were in the opinion of some in the legal community. Probably the most recognizable decision of Judge Alito for those interested in education law was his agreement with the majority in the case striking down the wording of the hate speech policy at the State College Area Community School District in State College, Pennsylvania (a.k.a. Happy Valley the home of Penn State University) as being overly broad so as to infringe on the free speech and free exercise of religion of students who wished to put forth the message that homosexuality was a sin under the beliefs of their religion.

DEVELOPMENTS IN THE COURT

No Child Left Behind

The United States Department of Education (USDE) has issued a statement that accountability standards will be relaxed for one year in the five states declared disaster areas to allow those schools damaged by hurricane Katrina to recover without being labeled, thus facing penalties, for failure to obtain AYP. The schools affected will not need to apply for a waiver in order to avoid the accountability standards for the coming school year. School in "non-disaster" states but which were forced to absorb misplaced students, will still need to apply for a waiver and prove that their inability to meet AYP is due to the aftermath of Katrina.

As for the \$7,500 voucher being offered by the USDE, Director Spellings explained that such voucher is available for any "school" hosting a displaced student, including private religious schools. The parent must make the decision where his or her child will attend and then the school must apply for the funding.

Related to NCLB, federal auditors have found that the Bush administration acted improperly and in violation of the law when it paid various members of the news media to provide favorable coverage of the administration's educational policies. In its statement, the Government Accountability Office called what was done a "dissemination of covert propaganda" which is in direct violation of federal law.

Furthermore, the U.S. Department of Education's Office of Inspector General is looking in to alleged mismanagement and/or conflict of interest in the Reading First Program, a keystone of Bush's NCLB. The claims being investigated include allegations of undue pressure by federal officials and contractors to use specific assessment tools and/or reading programs, and that there exist conflicts of interest with government-hired contractors who have financial ties to those publishers and assessment centers who stand to make a substantial sum of money from government contracts.

As of October 27, 2005 Secretary of Education Margaret Spelling has sent a letter to all the states that they have a one-year moratorium from NCLB's requirement of having 100% highly qualified teachers by the end of 2006 IF they can meet the following four requirements signifying adequate progress toward that goal:

- (1) The state has in place a definition of "highly qualified" that is consistent with the law;
- (2) Have in a place a thorough and comprehensive mechanism through which the state communicates to parents and the public on the topic of "highly qualified" teachers;
- (3) A complete and accurate data base on "highly qualified" teachers in the state; and
- (4) Have in place evidence that steps are being taken to insure that highly qualified teachers are as likely to be teaching in high risk/high needs schools and in affluent schools.

Some critics of Spelling say this letter was essentially unnecessary because the requirements under the NCLB for "highly qualified teachers" is mushy at best and really ensure nothing more than minimal qualified teachers.

Oral arguments have been heard on the Education Department's motion to dismiss the lawsuit brought by the NEA alleging that the Education Department has violated a provision of the NCLB which prohibits imposing unfunded mandates on the states in order to comply with the provisions of the federal law. Both sides seem confident that their position will prevail. The Education Department presented arguments in the alternative that the NEA lacks standing, but if standing is found that the federal government has provided adequate funding to the states. The NEA argued that it is not required to show the specificity of harm claimed by the Education Department. Furthermore, even if the NEA is found to lack standing the attorney for the NEA is confident that a similar suit recently filed by Connecticut's Attorney General will survive.

The question as to who can provide tutoring to students in schools "in need of assistance" under the NBLB appears to be playing out in Florida. The move is to disallow tutoring from any group affiliated with the "failing" school district (a' la Chicago) and would require outside providers, causing a windfall to third party providers who have been paying attention and are prepared to jump into the market. Groups from the district who would be barred from providing supplemental educational services would be teacher unions, child-care centers, after school programs, voc-ed or computer centers, and parents' groups. This requirement under the NCLB has created a new private third-party

tutoring business with possible revenues in the billions of dollars over the next several years. At this point, however, it appears that Chicago's waiver remains intact. The Boston Public Schools was also recently granted a similar waiver, as has the City of New York schools.

Special Education

Schaffer v Weast, No. 04-698 (U.S. Nov. 14, 2005): In the first school law case to be heard by the United States Supreme Court, new Chief Justice John Roberts was forced to recuse himself from hearing the case because his former law firm, Hogan and Hartson was representing Maryland's Montgomery County Public Schools. The case, *Schaffer v Weast*, deals with the question of who should bear the burden of proof in due process proceedings under the IDEA. At the time it was heard by the Court, the federal circuits were split as to whether it should be the parents claiming inadequacy in the IEP who should bear the burden of proving those inadequacies, or whether the burden should fall on the challenged school district to prove that the IEP is adequate. *Editor's Note: I would tend to agree with Justice Breyer when he stated that he "had never seen a case" that "didn't start out with the idea that the person challenging" carried the burden of proof.*

Now, the playing field has finally been leveled in due process hearings and the assignment of burden of proof has been allocated in a more traditional manner. In a 6 (O'Connor, Stevens, Scalia, Kennedy, Souter, Thomas) – 2 (Ginsberg, Breyer) decision, the United States Supreme Court held that, under the IDEA, the party challenging the IEP in an administrative hearing (i.e. due process hearing) carries the burden to prove that the IEP is inappropriate. This does away with the advantage that parents who challenge IEPs have held up to this time. Now, whether the school or parents challenge, that individual will have the burden to prove inappropriateness much like whomever claims discrimination under federal law has the burden to prove a prima facie case of discrimination.

The Court reasoned that the intent of the IDEA was cooperation between parents and schools with minimal administrative and litigation related costs. Moreover, the Court found ample safeguards within the procedures required under the IDEA to counteract any advantage, real or perceived, that the school district might enjoy in such a situation. In dissent, Justice Ginsberg showed a basic distrust of public schools, claiming that in the face of current budget shortages schools would always opt for the cheapest possible alternative to comply with the law. In a separate dissent, Justice Breyer stated that the decision on such matters should be left to the states and, indeed, that decision does not forestall individual states from allocating burden of proof in a different manner.

School Finance

In response to litigation *Lake View School District v Huckabee*, the Arkansas state legislature promised that it would make school funding its top priority. In a report just released by the Special Master appointed by the Arkansas Supreme Court, it was

concluded that the legislature went back on the promise. Adding insult to injury, not only did the legislature fail to increase per pupil spending, it did find the money to provide cost of living increases for both state agencies and themselves. In response to the Special Master's report, Governor Huckabee has proposed that all local school district superintendents be made state employees answerable to the state Department of Education and their total number be cut from 254 to 75, one for each county in the state to avoid duplication. It appears to some that the Governor has decided to make the superintendents, and their relatively high salaries, the scapegoat in this controversy.

Students' Rights

Maimonis v Urbanski, 2005 WL 1869208 (7th Cir. Aug. 4, 2005): A student who was suspected of being in possession of a controlled substance refused to submit to a search of her purse when asked to do so by school officials. As a result, the student was suspended for 7 days for possession of a controlled substance. She was informed that she had a right to an appeal hearing on the suspension, but she did not take advantage of that opportunity. Instead she sued the school district alleging a violation of her 4th Amendment right against unreasonable search and seizure. In dismissing the case, the 7th Circuit reaffirmed the law set forth by the United States Supreme Court in *T.L.O. v New Jersey*, 469 U.S. 325 (1985) by stating that the school official only needed "reasonable suspicion" to search her purse, and no reason at all to "request permission" to search her purse. Moreover, under *Goss v Lopez*, 419 U.S. 565 (1975) since the suspension was only for 7 days all that was needed was the minimal due process described in *Goss*. Since the district went above and beyond the minimum required the court found no violation of the student's 14th Amendment right to due process.

Fields v Palmade School District, No. 03-00457 (9th Cir. Nov. 2, 2005): Voluntary student surveys containing sexual material were at the heart of this case which had its dismissal by a lower court upheld by the 9th Circuit Court of Appeals. In *Fields* a group of parents had become upset when they learned of the sexual nature of some of the questions on a survey administered to first, third, and fifth graders in an attempt to determine children's exposure to early trauma. The main idea in question was whether a parent has a fundamental right to control the flow and content of sexual information to his or her child. Quoting earlier precedent, the court found that under the legal concept of *parens patriae* the school has the right to dictate the public school curriculum, including in the areas of sexuality and health. The parent has the right to determine whether to send the child to public or private school, but once public school is chosen it is the school district, not the parent, who has the ability to determine curriculum. In the words of the 9th Circuit, "Schools cannot be expected to accommodate the personal, moral or religious concerns of every parent. Such an obligation would not only contravene the educational mission of the public schools, but also would be impossible to satisfy." *Editor's Note: In this case, since the survey was voluntary, it would have been easier for the school to be up front about the sexual nature of some of the questions. Had the parents had more information it is likely, although fewer would have participated, those who chose to participate would not have ended up in court. This is a case where doing the bare legal minimum may not be the best choice in a public relations, cost/analysis context.*

Sexual Harassment: In a record breaking settlement in the state of Washington, Bellevue School District settled a sexual harassment lawsuit for \$192,500. While this case did make it way to the courts, administrators should still sit up and take note. In this case an elementary student was repeatedly harassed by a group of boys who threatened to molest her and drew pictures of her naked. When the girl complained to the school counselor she was ignored and reprimanded for tattling. The school refused to investigate the allegations. Basically the district didn't believe that elementary age children could be guilty of sexual harassment. Moral of this story, is NEVER, NEVER, NEVER, ignore a complaint of sexual harassment regardless of how unlikely it seems. Had the school district taken the girl seriously and investigated it would now be about \$200,000 richer!

Religion

In a case out of the 2nd Circuit, questions regarding how to deal with students who fulfill assignments with clearly religious products are brought to light. The case, *Peck v Baldwinville Central School District*, No. 04-4950 (2d Cir. Oct. 18, 2005), concerned a kindergartner who, when asked to make a poster reflecting information learned in class about environmentalism, twice returned with a poster containing a robed figure and other religious content. The first time, when Bible verses rather than information learned in class were contained on the poster, the teacher declined to accept the poster. She told the student that he would need to redo the work and this time follow the instructions to include information learned in class. The second poster, although still containing the robed figure, was accepted and displayed with the posters of the other class members. When the student made his presentation of the poster, interestingly enough he never mentioned religion in his explanation about the poster or environmentalism.

When the 2nd Circuit dealt with this case, it ruled both on the free speech claim and the Establishment Clause claim. As regarding freedom of speech, the court stated that a response to a class assignment does not constitute personal speech which should be regulated according to *Tinker v Des Moines Independent School District*, 393 U.S. 503 (1969). Instead, such speech is more correctly dealt with under *Hazelwood School District v Kuhlmeier*, 484 U.S. 260 (1988) as school sponsored speech which can be regulated if such restrictions are "reasonable related to legitimate pedagogical concerns." The school was justified in censoring the poster because the robed figure was not responsive to the assignment and in fact was not the work of the student but was the work of his mother.

As regarding a potential Establishment Clause violation, the court applied the Lemon Test and found the school district's action were not in violation of the Constitution. The action passed the first test because the censorship was based on the poster being unresponsive to the assignment, not its content per se. The method of censorship, hiding the robed figure while allowing the church to be in full view, demonstrated no intent to inhibit religion. Finally, any entanglement, if any, was *de minimis* rather than excessive. *Editor's Note: Using this case as a guide, if a school district wishes to avoid claims of censorship and/or violation of the Establishment Clause, teachers in the district should*

be schooled to require assignments to reflect primarily information learned in class. Since it should be able to be assumed that public schools would not be teaching religious components of secular subjects, this would cause disagreements about a religious response to a class assignment to fall under pedagogical concerns thus less likely to invoke the scrutiny of the courts.

The Kansas Board of Education is at it again. Several years ago it created a national controversy by removing the requirement to teach evolution from its state standards. This November the board voted six to four to once again adopt new science standards at the middle of which stands the topic of evolution. Under the new Kansas state standards, it is recommended that school districts teach specific arguments designed to discredit the theory of evolution. Perhaps most controversial, however, was the re-defining of science in the standards to as to not limit it to natural explanations. While the KBOE was careful so as not to run afoul of the Supreme Court's *Edwards v Aguillard* prohibition on requiring the teaching of evolution, the wording of the new state science standards set the stage to gradually implement the teach of creationism (a.k.a. intelligent design) so that students are capable of passing state standardized tests, also set by the KBOE.

Intelligent design has also crept into Indiana which may be the next battleground. It appears at this time that an intelligent design bill of some sort will be introduced into the legislature in the Spring 2006 session. Governor Daniels has stated that he would be reluctant to sign such a bill preferring instead to lessen mandates and leave such decisions up to the local district.

Democracy seems to have worked as it should in the Dover, Pennsylvania school district. After the school board adopted a policy requiring science teachers to point out gaps in the theory of evolution and permitting them to introduce the concept of intelligent design as a possible alternative theory to fill those gaps, an outraged community ousted all eight incumbents who were up for re-election. This occurred as the costly trial is entering its seventh week. Final arguments have not been presented and the case is in the hands of the judge.

Teachers' Rights

Curriculum: *Evans-Marshall v Board of Education of the Tipp City Exempted Village School District*, No. 04-3524 (6th Cir. Nov. 1, 2005): A high school teacher in Ohio assigned the books *Fahrenheit 451*, *To Kill a Mockingbird*, and *Siddhartha*, and showed the film *Romeo and Juliet* in her high school language arts class. All of the books and been previously approved by the school board and, since the film was PG-13 it did not need to be specifically approved. The principal, after receiving complaints from some parents, disagreed with her choice of material and, after several bad performance reviews, terminated her employment. She sued in federal district court claiming the termination was unconstitutional retaliation for her exercising her First Amendment right to freedom of speech.

In finding in favor of the teacher, the court first had to determine whether her “curricular and pedagogical choices” were constitutionally protected speech. If so then her interests needed to be balanced against the interest of the school district in regulating that speech. In order to be constitutionally protected, the speech needed to be of public concern. The court found that the curriculum addressed the public concerns of race, gender, and power conflicts in society. Since the materials had already been approved by the board, the principal’s desire to regulate her speech in order to control the work environment (and probably more likely avoid the complaints of parents) did not outweigh the teacher’s right to freedom of speech.

Editor’s Note: This case is specifically interesting because it deals with curriculum. Ever since the Supreme Court’s decision in Island Tress v Pico, the distinction between school control of curriculum as opposed to library materials has been fairly settled law. It has been the belief that the school district has almost total control (a/k/a censorship) over curricular materials. To see the court fall on the side of the teacher is novel EXCEPT that the material and prior approval from the district. It was the principal who was upset. Obviously he engaged in a power struggle he should not have engaged in. Perhaps next time when he receives complaints from his parents he will do a better job of supporting his teaching staff and board policy – that is if he gets a next time!