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IN THIS ISSUE

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Mission Statement

The primary purpose of the Illinois School Law Quarterly On-Line is to provide a forum for the interchange of ideas, theories, and issues on various aspects of school law among practitioners, professors, and attorneys. The emphasis is on analyzing issues in school law for the purposes of developing new theories to explain current and past developments in the law and to provide the theoretical framework which can be used to anticipate and predict future developments in school law.

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DEVELOPMENTS IN THE COURTS

Students

Exit Exams:

California: Like many states, California requires that all graduating seniors must pass an exit exam in order to graduate. Several weeks ago a case was brought by parents claiming that schools serving the poorest children do not offer the same quality of teachers, books, and school buildings that more affluent students received. As a result, of the 10.7% of the class of 2006 who have not yet passed the exams, 61% are low-income and 44% are English language learners. Consequently, the exams as currently used were discriminatory. Agree with the parents, Alameda County Superior Court Judge Robert Freedman over turned the state exit exams claiming such were in violation of the state constitution. In light of that ruling, seniors would be able to graduate from high school even if they were unable to pass the exit exam so long as they were otherwise eligible to graduate under the policies of the state of California and their individual schools. As of the end of May, Jack O'Connell, the California State Superintendent of Schools was successful in obtaining an immediate stay of enforcement of Judge Robert's ruling from the California Supreme Court. In the opinion of the supreme court, the California Court of Appeals is the appropriate forum to decide the constitutionality of the exit exams and has sent the issue to that court. So, as it stands for students graduating in June, they must pass the exit exam as well as passing all required courses.

Massachusetts: A 2003 state law requires students to pass the Massachusetts Comprehensive Assessment System (MCAS) to receive a high school diploma. In direct violation of that law, the New Bedford school district has decided that all students who meet the district's requirements for graduation will be granted a "general diploma" regardless of whether they pass the MCAS. State law only allows for the granting of a "certificate of attainment," not a high school diploma for those failing the MCAS. Governor Mitt Romney has threatened to cut state funding to the New Bedford schools if they don't fall in line with state law. The chair of school committee, who also happens to be the mayor of New Bedford, sees the district's decision as a way to fight the city's high dropout and unemployment rates. For 2006, 91% of the students have passed the MCAS. Those who don't pass the MCAS tend to drop-out. Standing in the Governor's camp, New Bedford superintendent has refused to sign the diploma. Though other school districts in the state realize that the deck is stacked against New Bedford, under their breath they are congratulating the district for taking a stand against legislation which is perceived as a continuing attack on local control.

Search and Seizure:

Myers v Indiana, 839 N.E.2d 1154 (Ind. 2005): With it's refusal to review the Indiana Supreme Court ruling in *Meyer v Indiana*, the Court essentially let stand the ruling that the 4th Amendment right to privacy, including unreasonable searches, was not violated when a school district allowed drug detection dogs to perform a suspicionless search by sniffing student vehicles in the school parking lot. The Indiana Supreme Court held that, once the dog alerted on the vehicle that provided the reasonable suspicion needed by the school to search further. The court did not

apply the higher standard of probably caused which is needed by law enforcement officials based on the United State Supreme Court ruling in *Illinois v Caballes*, 543 U.S. 405 (2005) that the use of a dog to sniff for illegal substances in unoccupied cars is not a violation of the 4th Amendment.

Student Speech:

Pinard v Clatskaine School District 6J, No. 04-35574 (9th Cir. May 1, 2006): Members of the school basketball team signed a petition and presented it to their coach asking for the coach to resign. The reason for the request of resignation was a claim of verbal abuse and intimidation by the coach. Furthermore, the players stated that they would not play in the game scheduled for that night unless the coach resigned. The school's response was that either the players agree to mediation for forfeit the privilege of playing in the game. All but one player refused to agree to those terms. The next day the players were informed that they were permanently suspended from the team. The suspension was upheld by the superintendent and the school board. The players sued claiming that the suspensions were retaliation for the exercise of their First Amendment right to freedom of speech.
The U.S. District Court dismissed the suit ruling that the player's speech was not a matter of public concern but rather an airing of a personal grievance and therefore not protected under the First Amendment. In the alternative, if it had been protected speech the district was still justified in suspending the students under the test provided by *Tinker v Des Moines* because the players behavior substantially and material interfered with the school environment. In overturning the lower court, the Ninth Circuit ruled that the petition and the complaints about the coach's behavior were protected speech. Student speech need not be on a matter of public concern in order to fall under the protection of the First Amendment. Rather such student speech was a form of "pure speech" which if the test from the *Tinker* case was correctly applied, would have necessitated a reasonable forecast by school official that substantial disruption or material interference with school activities was the probably consequence of such speech. Under the *Tinker* ruling, "a matter of public concern" is not relevant. In short, when dealing with student speech, all student speech which "is neither school-sponsored, a true threat, nor vulgar, lewd, obscene, or plainly offensive is entitled to First Amendment protection from discipline or regulation unless school officials can show facts which might reasonably have led them to forecast substantial disruption of or material interference with school activities."

Harper v Poway Unified School District, No. 04-57037 (9th Cir.): Harper is a sophomore a Poway High School. He wore a shirt inscribed with the words, "Homosexuality Is Shameful" during a "Day of Silence" observance at the school. He was suspended from school for violating a district policy forbidding "hate behavior including derogatory connotations directed against sexual orientation." In response, Harper sued the school district for a violation of his 1st Amendment rights. In failing to grant the preliminary injunction requested, the 9th Circuit relied on the wording in *Tinker* that upholds school officials restriction of student speech that "intrudes upon the rights of other students" or "collides with the rights of other students to be secure and to be let alone." The court found that the message on Harper's shirt was mentally and emotionally injurious to homosexual students.
As to Harper's Free Exercise claims, the court held that his free exercise of religion was not infringed upon because he was not disciplined for his beliefs or compelled to affirm a contrary

belief. Instead, he was disciplined for a behavior which was injurious to other students in the school. The school district's response had been narrowly tailored.

Special Education

M.P. v Independent School District No 721, No. 05-1584 (8th Cir. Mar. 8, 2006): M.P. suffers from schizophrenia. After the disclosure by the school nurse of his diagnosis, M.P. endured verbal and physical harassment by other students. He sued alleging violations of the IDEA and Sec. 504. The case was dismissed by the federal district court for failure to exhaust administrative remedies – M.P. needed to have tried to work with the school prior to withdrawing, enrolling elsewhere, and filing a law suit. The 8th Circuit reversed the lower court ruling that a disable student may file a Sec. 504 suit for damages independent of a claim under the IDEA and without first exhausting administrative remedies. In the words of the court, "failure to protect M.P. from unlawful discrimination on the basis of his disability is a claim that is wholly unrelated to the Individualized Education program process, which involves individual identification, evaluation, educational placement, and free, appropriate education decisions."

Religion

An attempt to maintain separation of church and state at a graduation at Russell County High School's graduation in Kentucky resulted in a disruptive show of might over right and discrimination against the minority. A Kentucky federal district court had issued a temporary restraining order barring official prayer at the graduation. In response, the student chosen to make the opening remarks made sure to center her remarks around God and her faith, the Baptist minister and members of his church stood at the entrance of the graduation with signs bearing religious messages, parents grumbled that schools had been ruined by removing prayer and corporal punishment, and the principal when making his remarks was interrupted by students shouting out The Lord's Prayer followed by raucous cheering from the crowd. All in all, a fine showing of the best side of Christianity and the Southern Baptist Church!

Anderson v Town of Durham, No. 04-591 (Me. Apr. 26, 2006): After the U.S. Supreme Court ruling in *Zelman v Harris* which upheld the constitutionality of the Cleveland voucher program, a bill was introduced into the Maine legislature to change state law so that tuition payments allowed by public school districts to private nonsectarian school for the education of high school students when those school districts do not operate a high school themselves, could now also be paid to private religious schools as well. The bill didn't pass, so a group of parents brought suit claiming the current law outlawing state tuition payments to religious schools violated their 14th Amendment right to Equal Protection under the law. In the case of *Eulitt v State of Maine*, 386 F.3d 344 (1st Cir. 2004), the First Circuit ruled that, although *Zelman* allowed payment to sectarian schools it did not require the same, thus Maine was not required to fund tuition at religious schools. The Maine Supreme Judicial Court followed the First Circuit's lead and also ruled that there was no violation of the First Amendment right to free exercise of religion or the 14th Amendment by the limitation by Maine law of tuition payments only to nonsectarian private schools.

Vouchers to private religious schools were defeated in Florida when the state senate defeated a proposed constitutional amendment aimed at overturning the recent Florida Supreme Court ruling that the state's private school voucher program violated the Florida State Constitution. The Florida Constitution forbids the use of public money for religious education and instead requires a uniform system of free public schools. Not surprisingly, Governor Jeb Bush was not pleased with the failure of the proposed constitutional amendment to pass.

Kiesinger v Mexico Academy and Central School, 00-1356 (N.D.N.Y. Mar. 31, 2006): As a fund raiser for the senior class trip, students of the class of 1999 gained approval of the superintendent to sell bricks to be placed in a walkway on school grounds. The bricks could be inscribed with a message by the purchaser. The only restriction on a message was that it could not be vulgar, obscene, or contain "lover interest" messages. Some of the bricks which were laid contained religious messages specifically referencing a Christian God. In order to put to rest the growing controversy over the messages, the school board voted to remove any brick with an identifiable religious message. A suit was filed and upon reaching the New York federal district courts, it was held by the court that removing the bricks constituted a violation of the patron's freedom of speech.
In making its decision, the court rejected the school's argument that *Hazelwood v Kuhlmeier*, 484 U.S. 260 (1988) was the ruling case thereby allowing the school district the power to regulate speech so long as the regulation was reasonably related to a legitimate pedagogical concern. Instead the court looked to a 2nd Circuit ruling, *Peck v Baldwinsville Central School District*, 426 F.3d 617 (2005) which stated that "restrictions on school-sponsored speech is, prima facie, unconstitutional, even if reasonably related to legitimate pedagogical interests." The court went on to apply the Lemon Test. In applying those three prongs, the issue passed the first prong because the sale of the blocks was for the secular purpose of funding a senior class trip. Addressing the second prong, the court held that an objective observer aware of the history of the walkway would view the walkway as a collection of individual messages, not a state endorsement of a particular religion or religion over non-religion. Finally, the court found no excessive entanglement because once purchased and laid there was no further connection between the individual purchasing the brick and his or her religious affiliation, that there would be between the school and a business buying the brick.

Desegregation

The State of Nebraska has enacted an interesting new law affecting the Omaha Public Schools which has resulted in the Omaha Branch of the NAACP filing suit in federal court against the governor of the State of Nebraska and the state Commissioner of Education. The novel law divides the Omaha Public Schools into three racially and ethnically identifiable schools – African-American, Hispanic, and white. The complaint filed by the NAACP states, "The state's action unlawfully creates racially identifiable school districts and prohibits those districts from providing plaintiffs and other OPS students opportunities to attend racially and socioeconomically diverse schools that are enjoyed by other students in Nebraska." The law was in response to the Omaha Public Schools' recent problems with school boundaries after they

were unsuccessful in including some suburban school districts into the city's attendance zones. The author of the law was the state's sole African-American senator, Ernie Chambers.

No Child Left Behind (NCLB)

Over 1,700 schools nationwide have now failed to meet NCLB standards in math and reading for five straight years. This means that they are now vulnerable to some of the harshest remediation measures such as mass firings, closure, or state take-over. The number of schools facing these harshest sanctions has increase by 44% this past year. The response of the Federal Department of Education the trend is not encouraging, it does show that the NCLB is doing its job by identifying underperforming schools. Seven states, California, Georgia, Illinois, Michigan, New Jersey, New York, and Pennsylvania account for almost 70% of those schools facing restructuring.

Not a single state will have a "highly qualified" teacher in every core course by 2006 as required under the NCLB. Alaska, Delaware, Idaho, Iowa, Minnesota, Montana, Nebraska, North Carolina, Washington, the District of Columbia, and Puerto Rico face loss of federal funds because they didn't make sufficient effort to comply by the deadline.

North Carolina and Tennessee will be allowed flexibility in measuring student progress. These two states have been approved to track year-to-year the progress of individual students rather than measuring progress by larger groups. If students are judged to be on course to meeting proficiency in reading and math in three or four years, they will be counted as meeting NCLB goals. Current methods require showing that the students are actually proficient.

Employment

Cioffi v Averill Park Central School District, 2006 WL 853259 (2d Cir. Apr. 4, 2006): Louis Cioffi was employed as the athletic director by the Averill Park Central School District. Cioffi became aware of and reported incidents of hazing among football team members to the district superintendent. Although the incident was handled, Cioffi was critical about the way in which the school district dealt with the situation and sent a letter stating as much to the superintendent. At Cioffi's request the letter was forwarded to the school board. Shortly thereafter, under media and public scrutiny the lid blew off the situation. The student who had been victimized filed a criminal complaint. Teachers and students were arrested. The football coaching staff was suspended. Finally the school board met in executive session and reached an informal consensus to eliminate the athletic director's position in next year's budget. Cioffi caught wind of the decision, called a press conference in which he alleged retaliation. Indeed, the board eliminated his position and Cioffi returned to the classroom as a social studies teacher. Cioffi filed suit. In finding for Cioffi, the 2nd Circuit court concluded that both in content and context the letter to the school board and Cioffi's statements at the press conference addressed matters of public concern and therefore were constitutionally protected. Given the short time frame between the letter and the board's decision to eliminate his position was sufficient evidence that an adverse employment action had occurred.

Mayer v Monroe County Community School Corporation, No. 04-1695 (S.D. Ind., March 10, 2006): This case reaffirms that ability of schools to regulate the speech of teachers in the classroom without fear of violating their freedom of speech. Mayer was a probationary teacher under a one-year contract with the Monroe County Schools in Bloomington, Indiana. During a class discussion over an article on peace marches, Mayer voiced her opinion that she favored peace over war and was opposed to the war in Iraq. When a parent complained, Mayer met with the parent and the principal. During the meeting the principal made it very clear that Mayer should not be voicing her opinions on the Iraq war and peace in the classroom. In addition, the principal later issued a memo to all teachers instructing them to refrain from promoting a particular position on the Iraq war.

This discussion on peace, however, was not the only complaints which the principal had received regarding Mayer. Parents had also complained about Mayer's poor teaching techniques and poor communication skills with students and parents. As a result of parent complaints as well has personal classroom observations, Mayer's contract was not renewed for another year. Mayer filed suit alleging that her dismissal was because of her exercising her freedom of speech therefore was unconstitutional.

In holding that Mayer's First Amendment Rights were not violated, the U.S. District Court in Indiana explained that in order for a free speech claim to succeed a public employee must show that he or she was speaking "as a citizen upon a matter of public concern," [*Connick v Myers*, 461 U.S. 138 (1983)] and that his or her interest in speaking out as a concerned citizen outweighed that school's interest in "promoting the efficiency of the public services it performs through its employees." [*Pickering v Board of Education*, 391 U.S. 563 (1968)]. The court found that since Mayer was speaking during instruction time and her speech was directed at the students that she was not speaking "as a citizen" thus her speech was not protected.

Finance

Nagy v Evansville-Vanderburgh School Corporation, No. 82S01-0409-CV-428 (Ind. March 30, 2006): When the school district started to charge a $20 student services fee, a parent filed suit claiming that the fee was in violation of the Indiana Constitution which guaranteed a tuition-free public education. Upon reaching the Indiana Supreme Court, the court ruled that, indeed, the $20 fee did violate Article 8, Sec. 1 of the Indiana Constitution. In reaching that decision the court focused on the definition of "tuition" looking at both the historical context and the accepted dictionary definition of the word in the mid-nineteenth century. After its review, the court found that when drafted, "tuition" was only meant to cover fees for instruction. Therefore, any programs, activities, projects, services, or curricula deemed to be part of the instructional program by the state board of education would require public funding while those activities falling outside of the curriculum could be paid for by the students through a system of fees.

RECENTLY PASSED LEGISLATION

Here is a list of bills passed by the Illinois General Assembly which may be of interest to school administrators. Information, including summaries included on these pages was obtained from the website of Illinois Association of School Boards (www.iasb.com).

SB 6% Salary Limitation: This bill addresses some of the consequences of last year's SB 27 (Public Act 94-0004) – specifically exempting some salary components from the 6% salary limitation. The bill: states that a school district reorganization constitutes a change in employment, thus exempting the salary from the 6% limitation, gives the local school district an opportunity to dispute the TRS penalty calculation, places a July 1, 2011 expiration date on the changes, exempts from the 6% salary limitation "overload" work salary, exempts from the 6% salary limitation salary increases from an in-district promotion, exempts from the 6% salary limitation salary paid to a teacher when the teacher is 10 or more years from retirement eligibility, exempts from the 6% salary limitation salary paid to a teacher from the State over which the school district has no discretion (Master Teacher stipend), requires TRS to prepare a report that gives details of the costs and payments of the program, and gives school districts 90 days (instead of 30 days) to pay the contribution to TRS.

SB 585 Open Meetings: This bill amends the Open Meetings Act to address changes in technology. Under the bill, a "meeting" under the Open Meetings Act now includes all gatherings of a quorum of the public body, whether in person or by telephone call, video or audio conference, electronic means (such as e-mail, chat, and instant messaging), or other means of contemporaneous interactive communication for the purpose of discussing public business.

SB 859 Teacher Termination: Failure to disclose previous convictions for a sex offense on an employment application is now among the reasons to revoke a teacher's certificate.

SB 860 Principal Mentoring: This bill was spearheaded by the Center for the Study of Education Policy of the Department of Educational Administration and Foundations at Illinois State University through the Illinois State Action for Education Leadership Project (SAELP), a project of the Wallace Foundation and Illinois State University. It requires all first year principals to go through a mandatory one-year mentoring program, if State funding is available. If State funding is not available, the mentoring will be optional. The cost of this program is estimated to be $2 million in the next fiscal year. The bill also requires the Superintendent or Board of Education to evaluate each principal by February 1st of the final year of the principal's contract. If a principal is not evaluated by February 1st, the principal's contract is automatically extended for one year. Other provisions of the bill include: requiring the State Superintendent to convene a group of interested parties to examine principal recertification; requiring principals in their first five years to take an Administrator Academy in each of the six Illinois Professional School Leader Standard areas; creating the "master principal endorsement" through a statewide "group serving principals"; developing a quicker route for National Board Certified Teachers to become certified principals; and creating a new teacher leader endorsement.

SB 2303 Good Samaritan Law: This bill provides that any person who is certified in first aid or has completed a course of instruction in first aid, who in good faith provides emergency care without fee to any person shall not, as a result of his or her acts or omissions, except willful and

wanton misconduct on the part of the person, in providing the care, be liable to a person to whom such care is provided for civil damages.

SB 2795 School Consolidation: This bill contains the Governor's school district reorganization proposal. The bill is designed to "add greater flexibility and efficiency to the reorganization process, only include options that ensure any reorganization will be approved by the voters, ensure no reorganization will raise taxes without a approval by voters in affected districts, and consolidate Articles 7A, 11A, 11B, and 11D of the School Code into new Article 11E". It would: eliminate minimum EAV and population requirements for formation of unit districts and school district combinations; eliminate size limits for school district conversions; authorize elementary districts within the same high school district to consolidate even if they are not contiguous; allow a unit district to be formed from a high school district *and any* elementary district that approves consolidation (may only be formed from dual territory with tax rates suggesting the newly formed district can be viable at unit district rates); allow a high school district to combine with a unit district as long as both districts approve and are physically contiguous; standardize requirements for resident signatures or board approval of petitions for all types of reorganizations; and standardize hearing requirements and review and approval by the Regional Office of Education for all types of reorganizations.

SB 2882 Class Size Grants: This bill amends the current Class Size Reduction Grant Act to create a pilot program to be implemented and administered by the State Board of Education and provides that grants shall be awarded to schools to defray the costs and expenses of operating and maintaining classes of no more than 15 pupils per teacher per class.

SB 2898 Self-Medication: Included in provisions that require a public or nonpublic school to permit the self-administration of medication by a pupil with asthma, this bill adds the requirement that the school also permit the self-administration of medication by a pupil with allergies.

HB 1463 Drivers Licenses and Truancy: This bill provides for the cancellation of the drivers' license or permit of any person under 18 certified to be a chronic or habitual truant and prohibits the issuance of a driver's license or permit to an unmarried person under 18 years of age who fails to maintain school attendance. The bill provides that each school district shall establish written criteria for the school superintendent to use in determining whether a pupil's failure to attend school is the result of extraordinary circumstances of economic or medical necessity or family hardship and provides for quarterly notice by every local school district to the Secretary of State of the names of students no longer enrolled.

HB 4986 Agriculture Education and the FFA: This bill provides that a school district that offers a secondary agricultural education program must include a State and nationally affiliated FFA chapter that is integral to instruction and is not treated as an extracurricular activity.

HB 5331 Working After Retirement: This bill allows TRS annuitants to work for a school district for 120 paid days or 600 paid hours in each school year through June 30, 2011. The law was scheduled to expire on June 30, 2006.

HB 5375 Reporting of Child Abuse: This bill contains agreed language among legislators, the Alliance, and other interested parties regarding mandating reporting of child abuse or sex abuse

of a minor. The bill states that "If an allegation is raised to a school board member during the course of an open or closed school board meeting that a child who is enrolled in the school district of which he or she is a board member is an abused child as defined in Section 3 of this Act, the member shall direct or cause the school board to direct the superintendent of the school district or other equivalent school administrator to comply with the requirements of this Act concerning the reporting of child abuse."