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DEVELOPMENTS IN THE COURTS

Special Education

***Disability Rights Wisconsin v State of Wisconsin Department of Public Instruction*, No. 05-4171 (7th Cir. Sept. 13, 2006):** Parents of an elementary school in Wisconsin complained when they discovered that the school was using "seclusion rooms" as a method of discipline for special education students. The students' IEPs had allowed for the use of "time outs" as an appropriate method of behavior management, but did not specify the location of the time-outs. When parents found out about the seclusion rooms, they complained to Disability Rights Wisconsin Inc. (DRW) which was the agency designated by the State of Wisconsin as its protection and advocacy agency for the physically disabled and mentally ill. Both DRW and the Wisconsin Department of Public Instruction (DPI) launched investigations into the practice. It was concluded by the DPI that this practice did indeed break several state and federal laws. When DRW requested a copy of DPI's investigative files, DPI blacked-out the names of the special education students involved before forwarding the file to DRW, citing IDEA and FERPA confidentiality requirements. DRW sued to get the names of the students.
Upon the appeal, the 7th Circuit ruled that DPI must give the names of the students involved to DRW. Unlike the lower court, the 7th Circuit found DPI's confidentiality concerns unpersuasive.

***State of Connecticut Office of Protection and Advocacy for Persons with Disabilities v Hartford Board of Education*, No. 05-1240 (2nd Cir. Sept. 15, 2006):** In a similar case, the 2nd Circuit has ruled that the Connecticut Office of Protection and Advocacy (COPA) is entitled to access to the records of special education students, including contact information for parents or guardians, in order to investigate allegations of abuse and neglect at the school. The court found that such access was required under federal protection and advocacy statutes (just as in the Wisconsin case summarized above.)

***Frank G. v Board of Educ. of Hyde Park*, No. 04-4981-CV (July 27, 2006):** When Anthony G., who attended private school from kindergarten through fourth grade, experienced a decrease in his academic performance he was evaluated by his public school and found to be learning disabled. To address his disability, the Hyde Park Central School District offered to provide him with direct consultant teacher services, a full-time-one-on-one aide, counseling, occupational therapy services, a behavior modification program, and testing modifications all to be provided in the regular education classroom containing 26 + students. After an independent evaluation, however, it was recommended that he receive individualized attention in a small class, occupational therapy, social skills training, and counseling Anthony's mother requested that he receive these services at a private school. In a somewhat split decision, the hearing officer found that, because of the large class size the public school placement was inappropriate but because of his decreasing academic performance the private school placement was also inappropriate. Instead, the hearing officer ordered the public schools to provide services at the private school but that the public school was not required to pay Anthony's tuition to the private schools.

After several levels of appeals, the federal courts ruled that the private school placement was appropriate. The Second Circuit held that parents are not barred from receiving tuition reimbursement for a private school placement even when the private school does not meet the IDEA's definition of a "free appropriate public education." The standard to be applied according to the court was whether the placement was "reasonably calculated to allow the child to receive educational benefits." In addition, and contrary to other appellate court decision, the court ruled that the IDEA does not preclude tuition reimbursement of private school tuition for a student who never received any special education or related services from the public school. It based its decision on another provision of the IDEA which allows a court to "grant such relief as determined appropriate," that that such relief included tuition reimbursement for a private school placement.

Coming to the defense of local school districts, Senator Kennedy of Massachusetts, Representatives Dingell of Michigan, Miller of California, and Whitfield of Kentucky have introduced the Protecting Children's Health in School Act of 2006 which would keep Medicare and Medicaid payments under the IDEA from being blocked by the U.S. Department of Health and Human Services. Currently, in an attempt to pare over $600 million from the budget of the Centers for Medicare and Medicaid (CMS) legislation has been introduce by the administration to deny reimbursement for transportation of special education to receive services and for administration of the programs. According to CMS, its position is that the costs of such services should come from the budgets of the local education agencies rather than from Medicare and/or Medicaid. *Editor's Note: Illinois is getting in this issue by joining the protest against CMS's proposed action. Senator Durbin and Representative Davis have joined with superintendents from Chicago, Elgin, Carpentersville, and other downstate schools to get out the word that Illinois school stand to lose up to $132 million (Chicago alone $38 million) in funding.*

Religion

***Doe v South Iron R-1 School District*, No. 06-392 (E.D. Mo. Sept. 5, 2006):** For many years the school district had allowed members of Gideon International to distribute Bibles to elementary students in classrooms. Superintendent Lewis, on advice from legal counsel, attempted to end the practice citing First Amendment concerns but was unsuccessful. Instead the school board voted to continue the practice. When the Gideons, accompanied by the elementary school principal, distributed the Bibles in a 5th grade classroom, two parents filed suit in federal court requesting an injunction barring such practices. Because of a clause in the district's insurance policy stating that the insurance company would not defend the district for behaviors known by the district to be illegal at the time such behaviors were allowed, the insurance company refused to step in and defend in the federal lawsuit. In response the board adopted a new policy requiring any individuals who wish to distribute non-school sponsored material to submit the materials to the superintendent 48 hours in advance of their proposed distribution. If the superintendent doesn't respond with the 48 hours then the groups is free to distribute the

material. Distributions are to be made infront of the administrative offices or in the cafeteria. The distribution is to be made either before or after school, before or after classes, or at lunch time. All material is to be approved unless it is libelous, illegal, obscene, commercial, endorses a specific political candidate, promotes the use of alcohol, tobacco, drugs or illegal activity, or cause a substantial disruption to the educational environment.

Based on the adoption of this new "time, place, and manner" policy and on grounds of qualified immunity, the district asked that the lawsuit be dismissed. The court refused to dismiss the action based on the district's past practice of allowing the distribution of Bible on school grounds during school time. The court stated that the district had not persuaded the court that, before the adoption of the new policy, that it had established an open forum. Instead, the court found that the appeal procedures in the new policy did not guard against an unconstitutional distribution thus the alleged violation was likely to reoccur and injunctive relief was necessary to avoid a constitutional violation. Moreover, the new policy itself was unconstitutional because it could allow the distribution of Bibles to elementary school students, in their classrooms, during the school day. The court stated that "the evidence of the School Board's behavior here raises a very strong inference that the purpose of this new policy is to promote Christianity by providing a means for Christian Bibles to be distributed to the elementary school students."

***Powell v Bunn*, No. S52659 (Ore. Sept. 8, 2006):** This Oregon Supreme Court case was another issue dealing with the time, place, and manner restriction of outside groups. The Portland Public School District had a policy which allowed a representative of the Boys Scouts of America to have access to students for the purpose of recruitment. In order to belong to the Boys Scouts, boys must profess a belief in God. The atheist parents of a child in a classroom visited by the representative filed suit alleging that the school district had violated a state law which prohibits discrimination in any public school program. Under the law "discrimination" is defined as "any act that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on age, disability, national origin, race, marital status, religion or sex." The trial court found in favor of the parents.

When the conflict reached the Oregon Supreme Court, however, the lower court's decision was reversed when the court ruled that such practice did not violate Oregon state law. The court found that, since the presentation happened during lunch, that it was a school activity as defined by the law. It went to state that just because the presentation clearly fell within the statutory definition of a school activity, it did not follow that every action of the group making the presentation would likewise be a school activity. With that distinction, the court found that there was nothing discriminatory about the presentation which was made; the plaintiff was not treated differently because of his religious beliefs or lack thereof. Any religious limitation (i.e. professing a belief in God upon joining) would occur outside of the school activity, thus were not covered by state law.

***Child Evangelism Fellowship of Maryland v Montgomery County Public Schools*, No. 05-1508 (4th Cir. Aug. 10, 2006):** The policy of the Montgomery County Public Schools, which controls the distribution of materials in the classroom, is the item of conflict in this case. After losing an earlier court decision concerning a similar policy, the school district adopted a revised policy limiting classroom distribution to materials from (1) the school district; (2) other county, state, or federal agencies; (3) parent-teacher organizations; (4) licensed day car providers operating on-campus; (5) non-profit youth sport leagues. In addition, another group could gain access to the forum if one of the approved groups sponsored or endorsed the unapproved group's message. The Child Evangelism Fellowship of Maryland (CEF), which prevailed in the earlier suit, did not fit into any of the 5 allowed groups so was denied access. The federal district court upheld the school's policy as reasonable.
Upon review, the 4th Circuit found the lower court's reasoning to be flawed because government restrictions on speech are subject to a higher standard of review that simply "reasonably related." Any restrictions must be viewpoint neutral which means, according to the 4th Circuit, "not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to protect against the improper exclusion of viewpoints." Therefore, the main question was not what type of forum had been created but whether the policy guarded against viewpoint discrimination. In answering that question, the court agreed with CEF that the school district had left itself almost total discretion to determine which "messages" would get through the policy and be distributed to the students. Specifically the policy allowed school officials to "approve" fliers from the five eligible groups, including fliers sponsored or endorsed by those groups, or withdraw approval of fliers which "undermine the intent of the policy." The intent of the policy was "establishing a forum for communications from various community groups and governmental agencies to parents without disrupting the educational environment." All of these facts combined led the court to conclude that the new policy was too open to viewpoint discrimination thus was unconstitutional.

***Borden v East Brunswick School District*, No. 05-5923 (D. NJ. July 25, 2006):** The past practice at East Brunswick High School was that the varsity football coach participated in team-prayer before the pre-game meal and before the team took the field. Several parents complained and the school district specifically instructed the coach that if he participated in any for of student-initiated prayer, including standing and bowing his head, he would be considered to be insubordinate which could lead to immediate discharge. The coach's first reaction was that he resigned, but looking at his 23 year tenure, he returned and agreed to follow the district's policy. At the same time he filed a lawsuit alleging a violation of his First and Fourteenth Amendment rights. The coach's argument was that merely bowing ones head and/or kneeling does not constitute participation therefore does not violate the Establishment Clause of the First Amendment. Moreover, prohibiting him from doing so violates his right of Free Exercise. The school district maintained that such behaviors by the coach sent a message to everyone observing such behavior that the school was endorsing such religious behavior. The district cited possible coercive effects on the students in attendance. The court, in its unpublished opinion, decided the case by asking the question of "whether a reasonable, objective observer would view the "head bowing" or "taking a knee" as government

endorsement of religion. The court found that no such endorsement would occur, thereby finding in favor of the coach. *Editor's Note: There is probably a good reason why this is an unpublished bench decision. It follows no reasonable legal reasoning or precedent. I think that it is undeniable that if a head football coach is bowing his head and/or genuflecting while a groups of students are visibly praying next to him that a reasonable objective observe could draw any other conclusion than that the state was not only endorsing religious activity but was actually sponsoring such activity. I wonder if the court would have decided differently if the religious actions, instead of overtly Christian, had been overtly Islamic (i.e. everyone on Persian rugs kneeling and bowing toward the east?)*

***Child Evangelism Fellowship of South Carolina v Anderson School District 5*, No. 04-1866 (D. S.C. July 7, 2006):** The local chapter of Child Evangelism Fellowship (CEF), a national religious organization that operates the Good News Club (GNC), a religious club open to elementary school students, contacted the Anderson School District to request permission to use the school district facilities for GNC meetings. The group was informed of the policies and procedures of the school district regarding the use of school facilities by outside community groups. One of the policies was payment of a facilities use fee. Following policy, CEF requested a waiver of the fee. The applicable policy allowed free access to three groups: (1) district schools and school-related organizations; (2) organizations involved in a "joint business/education partnership" with the school district; and (3) governmental bodies and agencies, provided the building is normally opened and staffed, no educational program is disrupted, and no special custodial service is required. The district denied CEF's request for a waiver and CEF sued alleging a violation of its Fourteenth Amendment rights to Equal Protection, its First Amendment right to free speech, its First Amendment Religion Clause, and that the policy was unconstitutionally vague and thus constituted a prior restraint on speech.

In addressing the Equal Protection claim, the court found that the school district had not treated CEF differently from any other group that had received fee waivers on the basis of religion. In addition, the court stated that there did exist a rational basis for the policy distinguishing between CEF and school organizations, the Scouts, or the YMCA, because the latter were either in a partnership with the schools in providing curriculum-related programs, or had been using the facilities for over 20 years in reliance on the district's past practices. The court also rejected CEF's free speech claim finding that the policy did not discriminate either on its face or in its application against CEF on the basis of viewpoint. In the opinion of the court, the school district had established a limited public forum which meant that it retained the ability to limit access to the forum to certain groups and/or topics. The court founded no Establishment Clause violation, finding instead that district policy treated religion neutrally. In short, the court found that the Anderson School District's refusal to grant a waiver of its facilities usage fee did not violated any of the constitutional rights of CEF.

Students' Rights

New legislation, **"The Student and Teacher Safety Act (H.R. 5295),"** was introduced this month. The proposed legislation, which was approved by a voice vote in the U. S. House of Representatives, requires school district to adopt policies which include a Congressional definition of "reasonable and permissible" searches of students on public school grounds if the district wishes to receive Safe and Drug Free School money. As introduced the definition of reasonable search is "a search by a full-time teacher or school official, acting on any reasonable suspicion based on professional experience and judgment, of any minor student on the grounds of any public school, if the search is conducted to ensure that classrooms, school buildings, school property and students remain free from the threat of all weapons, dangerous materials, or illegal narcotics. . . The measures used to conduct any search must be reasonably related to the search's objectives, without being excessively intrusive in light of the student's age, sex, and the nature of the offense." The Senate has not yet considered a companion bill.

***Guiles v Marineau*, No. 05-0327 (2d Cir. Aug 30, 2006):** Guiles, a student at Williamstown Middle High School (WMHS) wore a t-shirt with an anti-Bush statement several times with no incident. The shirt had the wording "Chicken-Hawk-in-Chief" as well as addition text alluding to the Presidents past use of drugs and alcohol. When Guiles wore the shirt on a field trip, however, a parent chaperone complained whereupon he was told to remove the shirt, turn the shirt inside out, or cover the images dealing with drugs and alcohol. Guiles chose instead to leave school for the day. The next day he returned wearing the same shirt and was disciplined. He returned for a third time wearing the shirt but this time the offending language was blacked out with duct tape on which "censored" was written. This lawsuit followed.

Under *Bethal School District No. 403 v Fraser*, 478 U.S. 675 (1986) the Vermont federal district court found the drug and alcohol messages on the shirt to be plainly offensive and inappropriate, therefore censorship from the school district was appropriate. Upon appeal, in ruling that the school district violated Guiles' free speech rights, the 2nd Circuit affirmed in part, vacated in part, and remanded the case to the district. The 2nd Circuit found that Guiles behavior was governed by *Tinker v Des Moines Independent School District*, 393 U.S. 503 (1969) rather than the *Bethal* case because his speech was (1) not school sponsored; and (2) not lewd, vulgar, indecent, or plainly offensive. Although the message on Guiles shirt may have displeased school administrators, could have been considered insulting or in bad taste, it did not rise to "plainly offensive" as that term is defined in *Bethal*, specifically it was not sexually suggestive or profane. It was indeed a political message, albeit a rather crude message. Since the court found Tinker to be controlling, then the "material and substantial disruption" test used in Tinker was also controlling. Looking at the facts of the case, the court concluded that the t-shirt neither caused an actual disruption nor was there evidence to indicate that substantial disruption was likely to occur.

The Illinois High School Association (IHSA) is thinking about following the lead of New Jersey and requiring random drug testing for all participants in state finals for football,

basketball, track, and other selected sports. The tests would be for steroids and growth hormones. A positive test result would cause the student athlete to be banned from competition for one year. Before the athlete could compete again, he or she would have to pass another drug test. Those refusing the test would be barred from competition. The reason for this proposed action is to deter high school athletes from using the harmful drugs as well as ensure the integrity and legitimacy of the state competitions.

R. L. v State-Operated School District of the City of Newark, No. 2086-05 (N.J. Super. Ct., App. Div. Aug. 14, 2006): During his freshman year of high school, R.L. to his legal guardian that the band director had made sexual advances toward him. His guardian did not report the abuse to the school, instead choosing to remove R.L. from the class. The next year, having no knowledge of the allegations from the previous year, the school district once again assigned R.L. to the band director's class. R.L. requested a transfer but would not tell his guidance counselor why he wanted the transfer, although he did finally confide in the counselor who arranged for R.L., his sister, and his aunt to meet with a social worker. No addition incidents occurred that year. In his junior year R.L. began a sexual relationship with the band director that continued until shortly before he graduated. R.L. turned 18 in July 2004, but did not report the sexual abuse to authorities until after May 2005 when he found that he was HIV positive. In October 2005 R.L.'s attorneys requested leave to file late notice of a claim against the district. The main controversy before the court was the date upon which R.L.'s claim for sexual harassment accrued; when the clock started to tick. The school district said that the date from which the filing deadline should be calculated was July 2004 when R.L. turned 18. The attorney's for R.L. argued that the date should be May 2005 when R.L. found that he was HIV positive. The trial date agreed with R.L., finding that the accrual date was May 2005. The court found "extraordinary circumstances" which allowed an extension of the time to file. Moreover, the school district suffered no substantial prejudice by allowing the late filing. The appellate court agreed with the trial court, ruling that R.L.'s claim was based on the injury caused by the HIV infection rather than the earlier sexual contact.

***Harper v Poway Unified School District*, No. 04-57037 (9th Cir. July 31, 2006):** In April a 9th circuit panel upheld 2-1 a lower California federal district court's decision no to issue a preliminary injunction barring a local school district from allowing a student to wear a t-shirt with a religious message condemning homosexuality. In making it's decision the court found that the school district's decision to ban the shirt was consistent with the United Supreme Court's decision in *Tinker v Des Moines*, pointing to an obscure statement in the dicta that individual students have the right "to be secure and to be let alone." Another judge on the panel characterized the religious statement on the shirt as a form of hate speech akin to burning a cross. The one dissenting judge voiced his opinion that the majority was attempting to interpret the right "to be secure and to be let alone" as meaning the right "not to be offended." In his opinion this amount to viewpoint discrimination by taking sides in the debate on the morality of homosexuality, stating that "No Supreme Court decision empowers our public schools to engage in such censorship nor has gone so far in favoring one viewpoint over another." *Editor's Note: I have to agree to the lone dissenting opinion. Not only has the majority chosen an obscure phrase from Tinker, it totally disregards the test established and mandated by Tinker,*

specifically that the speech cause a material and substantial disruption to the educational atmosphere. The protection of a group from being exposed to a message with which they might not agree has never been supported by any legal precedent, and in fact the Court has said that "mere exposure is not a violation of the First Amendment." This is a dangerous road to travel – selectively reading cases in an attempt to further social policy.

***White County High School Peers Rising in Diverse Education (PRIDE) v White County School District*, No. 06-29 (D. Ga. July 14, 2006):** During the 2004-05 school year the Gay Straight Alliance (GSA) club sought recognition from the principal of the high school. The group's goal was to great a "safe ground" for lesbian and gay students who experienced bullying at school. The group immediately met opposition both from the school district and the community. Once the group changed its name to PRIDE and changed its mission to include bullying and harassment of ALL students, the principal approved the group. During the March 2005 school board meeting, after PRIDE had been recognized, the principal recommended restricting student organizations to curricular groups and school programs. The board agreed with his recommendation and four groups – Fellowship of Christian Athletes, Key Club, Interact Club, and PRIDE – were determined to be non-curricular thus would not be allowed starting with the 2005-06 school year. In response, PRIDE filed suit under the Equal Access Act alleging that other non-curricular groups as such were defined by the United States Supreme Court in *Board of Education of Westside Community Schools v Mergens*, 496 U.S. 226 (1990) were still being allowed to exist at the school, therefore PRIDE had faced illegal discrimination. The court agreed with PRIDE that the school was in violation of the Equal Access Act and granted PRIDE a permanent injunction to prevent the school district from barring the group from meeting at school.

No Child Left Behind

The federal regulations **(71 Fed. Reg. 54,188, Sept. 13, 2006)** dealing with Limited English Proficiency students under the NCLB have been issued. Under the new regulations a recently arrived LEP student may be exempted from one round of the reading/language arts assessments. The definition for recently arrive LEP is a "student who has attended school in the U.S. (excluding Puerto Rico) for less than 12 months." Statistics must be maintained on recently arrived LEP students and remedial help in obtaining English proficiency must be provided by the local district.

According to U. S. Secretary of Education Margaret Spellings, the NCLB is ". . . like Ivory soap: It's 99.9 percent pure or something. There's not much needed in the way of change." This will be the administration's stance when the law comes up for reauthorization next year. Oddly enough, almost everyone else disagrees with Secretary Spelling as to the effectiveness of NCLB as currently written. The House Education Committee is currently holding hearings on possible changes to improve NCLB. A bipartisan commission is currently traveling the country to elicit input on possible improvements to the law. More than 80 organizations have signed on urging fundamental

changes to the law. The NEA has severely criticized the law. More an more school districts have left or are contemplating leaving the control of the NCLB by refusing federal funding. Yet the administration continues to claim that the NCLB is “close to perfection.”

Connecticut v Spellings, No. 05-1330 (D. Conn. Sept. 27, 2006): The federal district court in Connecticut did just what courts do when they don’t want to actually rule on the merits of a case – it dismisses the case on procedural grounds. Three of the four claims in Connecticut’s claim against the Department of Education’s NCLB were dismissed for just those reasons. The court first found that the NCLB provided a method of administrative review through the Federal Department of Education which had not been exhausted by the state of Connecticut so the federal court had no subject matter jurisdiction to hear the challenge. Moreover, the court decline to reach the merits of the case claiming “prudential ripeness” which simply means the court thought the state should give the federal government more time to meet the mandates. Basically, the court decided to adopt a “wait and see if anyone really gets hurt” attitude toward the issues presented. Regarding Connecticut’s claim that the Department of Education had acted arbitrarily and capriciously in denying the state’s request for waivers from the NCLB’s accountability provisions, the court used circular logic in determining that the denials were unable to be reviewed because the NCLB legislation gave no standards by which a court could determine the reasonableness for denying the waivers. The only bright spot for Connecticut came with the court’s refusal to dismiss the final claim that the Department of Education acted arbitrarily and capriciously in denying the state’s requests for plan amendments in violation of the Administrative Procedures Act. It was a very small light!

Teachers

***Segal v City of New York*, No. 05-3211 (2d Cir. August 3, 2006):** Sarrit Segal was a non-tenured kindergarten teacher for the New York City Public Schools. One school day Segal contacted the school counselor to report a near riot in her kindergarten classroom. When the counselor arrived to help she found Segal sitting to the side watching a group of students beat another student with no attempt to intervene. In fact, some students reported that Segal had actually encouraged the aggressive behavior. She was ultimately terminated but, while waiting for a disciplinary hearing, Segal filed suit alleging a violation of her due process rights. At the hearing Segal would have been able to challenge her termination, be represented by an attorney, call witnesses, present evidence, and make an oral presentation but she chose instead to pursue remedies through the court system. Her “stigma-plus” wrongful termination claim was based on the fact that the school district’s investigator’s report had been, as any public document, reported in the news media thereby damaging her reputation. What is meant by a “stigma-plus” claim, is that the individual claiming injury has not only lost “property” through the wrongful termination, but because of procedures used by the school (i.e. giving reputation damaging material to the media) the alleged victim has also had his or her reputation injured; he or she was stigmatized. This case was dealt with rather quickly with both the

lower District Court and the 2nd Circuit Court ruling that the prompt post-termination hearing afforded the probationary teacher was more the sufficient to protect her procedural due process rights. The court reminded readers of the opinion that probationary teachers do not enjoy the same property right in their employment as do tenured teachers, so even the claim to a right to due process is tenuous at best.

***General Dynamics Land Systems Inc. v Cline*, 540 U.S. 581 (2004):** In this case the Court held that a group of employees between the ages of 40 and 49 could not claim age discrimination for their employer's action of eliminating their retirement benefits while retaining such benefits for employees over the age of 50. With this holding, current regulation under the EEOC which prohibit any age-based preference among persons 40 or over, regardless of whether the behavior favors the younger or older person, is in the process of being amended. Under the Supreme Court decision and the proposed amendments to the EEOC regulations, it is not illegal discrimination to favor an older person over a younger person, even if the younger person is at least 40 years old (the threshold at which an individual may claim age discrimination under current federal law.) This may be of importance to school districts which would like to offer a retirement incentive to older teachers without including all teachers age 40 or older.