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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

NCLB

The litigation brought by Michigan, that many legal scholars felt was dead after it was dismissed by the Chief U.S. District Judge in Detroit in 2005, has been resurrected with NEA paying the bill. Nine school district in the states of Michigan, Texas and Vermont, along with NEA affiliates in those states as well as in Connecticut, Illinois, Indiana, new Hampshire, Ohio, Pennsylvania and Utah are once again challenging the funding of the NCLB as essentially an unfunded mandate made illegal by the wording of the legislation itself. The bottom line in the suit is that the federal government promised a certain level of funding. Reasonably relying on the stated level of funding, many states implemented compliance plans. When the federal government funded at a much lower level, it left local school districts making up the differences from their own revenues – something they simply could not afford to do. Therefore, the plaintiffs allege that the federal government has imposed unfunded mandates and that local school districts should not be forced to comply unless the federal government pays the bill. Not surprisingly, the federal government's position is that it never intended to fully fund the legislation because ultimately it is the individual states' responsibility to educate the children within their state borders. *Editor's Note: This is an interesting stance for the federal government to take given that the federal government has absolutely NO constitutional power over education, such being a power reserved exclusively for the states in the federal constitution. The only way that the federal government can push its educational agenda in the states is through an item called "categorical aid" which the Supreme Court has ruled is nothing more than a contract. The federal government contracts with an individual state to give that state federal money if the state will behave in a particular manner. The NCLB is only possible because it attached itself to the most comprehensive categorical aid program to date – Title I funding for remedial reading education. If a state now accepts money under Title I from the federal government then it agrees to abide by the NCLB. Now the position of the government is that it never intended to fund the program. What then is the consideration provided by the federal government which is necessary for the "contract" to be valid? If the federal government is not providing money then, under basic contract law, they are in breach of contract which makes the contract voidable – in other words the states would no longer be required to comply with the NCLB. It is very confusing as to why the states involved don't just argue simple contract theory.*

It appears that the ability of members of the Bush administration and their relatives to financially profit from federal policy extends beyond Vice President Cheney and Haliburton. Neil Bush's company, "Ignite! Learning," which is headed by President Bush's brother Neil and is partly owned by his parents has profited from the NCLB funds for disadvantaged students. At least 13 school districts have used NCLB federal funds to buy Ignite's portable learning centers at $3,800 each. In fact, business is so good that Ignite has done business with over 40 districts and is planning to expand into the international market in Asia, Europe, the Middle East, and Africa.

Religion

Stanley v Carrier Mills Stonefort Sch. Dist., 2006 WL 2710672 (S.D. Ill. Sept. 21, 2006): During a district-wide spirit week at the Carrier Mills-Stonefort School District each day of the week had a theme and the students were encouraged to dress accordingly. On one of the days the theme was "Opposite Sex Days" on which day students were encouraged, but not required, to dress like the opposite sex. Believing that such behavior was prohibited by the Bible, Stanley held her children out of school that day choosing instead to go to the media and voice her displeasure. Afterwards, Stanley alleged that the school failed to provide special education services to one of her children and that the superintendent of the district reported her to the Illinois Department of Children and Family Services as an unfit parent. Stanley also alleged that the superintendent's mother, who was employed as a substitute teacher at the school, retaliated against her children by serving them with excessive detentions as well as questioning them about their home life. Stanley eventually moved to a different district and then filed suit on the Carrier Mills-Stonefort Schools claiming that the district violated her 14th Amendment right to Due Process and her 1st Amendment right to Free Exercise and Free Speech, as well as sexual harassment under Title IX of the Civil Rights Acts of 1964.

In finding for Stanley the court ruled that the school district had violated her due process and free exercise religion because the "Opposite Sex Day" substantially burdened Stanley's free exercise because of its coercive nature. Using a prior 7th Circuit decision, *Sherman v Community Consolidated School District 21 of Wheeling Township*, 980 F.2d 437 (7th Cir. 1992), the court held that peer pressure may, in certain circumstances, constitute actionable coercion. In the instant case the court felt that Stanley had met her burden to show that the Bible did contain a clear proscription against cross dressing and, given the manner in which it was carried out, the failure of the Stanley children to participate in cross dressing would be stigmatized and singled out. The district failed to provide a compelling state interest that would justify any limitations on Stanley's constitutional rights.

As to the allegations of retaliation, the court stated that statements do not need to rise to the level of slander in order to constitute retaliation. "A parent need only demonstrate that action taken against her would likely have chilled a person of reasonable firmness from continuing to engage in the protected activity. Finally the court also held for Stanley as regarding her Title IX hostile environment claim because of the credible allegations of sexually suggestive activities occurring within the school body, fueled by their being dressed by the opposite sex. *Editor's Note: At least in the state of Illinois, the day of Powder Puff Football expositions where male football team members dress in drag, or spirit week activities encouraging cross-dressing, should fade into the past. No longer should female students be subjected to over-inflated balloon bust lines being worn and squeezed by male classmates all in "fun." Good-bye to jock straps overstuffed with socks being worn and scratched and grabbed by females in order to "show school spirit." Finally the courts are willing to recognize that peer pressure is very real and possibly very destructive. Parents and children should have the right to say "enough is enough" and this is where the plaintiff is this suit drew the line. In these days of high stakes testing and standards, are there not better ways to foster team work and comradery than teasing and taunting individuals of the opposite sex?*

Student Rights

In re Amir X.S., No. 26219 (S.C. Nov. 6, 2006): The state of South Carolina has a law which makes it a crime for a person to intentionally interfere with or disturb students or teachers. A student who was found delinquent and sentenced to 90 days custody in a juvenile facility and one year's probation when we was found guilty of violating that law, filed suit alleging a violation of his right to free speech under the First Amendment. He claimed that the law is overly broad and vague thereby chilling protected speech. In finding for the state, the court denied that the statute was overbroad by distinguishing between conduct in general which is not protected by the First Amendment and expressive conduct (symbolic speech) which is protected. It cited *Tinker v Des Moines Independent Community School District*, 393 U.S. 503 (1969) as precedent. The law in question does not make the expression itself illegal but, using the legal "material and substantial disruption" test developed in *Tinker* the statute only regulates any disruptive conduct which might accompany the expression. Should the expression, whether verbal or symbolic, cause no disruption as was the case in *Tinker* then the challenged statute would not be called into effect. Only when an interference or disruption occurs is the statute applicable and, as such, the statute is not overbroad.

Curry v School District of the City of Saginaw, No. 04-10143 (E.D. Mich. Sept. 18, 2006): Curry was a fifth grade student in the Saginaw schools. He participated in a school project which involved creating, marketing, and selling a product. The student had to do a market survey in order to obtain permission to create the product. Curry's product was religious in nature being a candy cane made of pipe cleaners and beads and including a Christian religious message explaining the origin of the candy cane. However, when he submitted his prototype and obtained approval the religious message was not attached. When the product he started to sell did have the religious message the event manager told him to stop selling them until she could talk to the principal. The principal told Curry and his parents that the product could not be sold with the message attached, that it needed to be marketed as approved. The parents sued alleging a violation of their free speech, free exercise of religion, Establishment Clause, due process and equal protection.

The decision of the court was somewhat confusing in that it did hold that Curry's rights had been violated, but that neither the school district nor the principal was liable under Section 1983 for violating those rights. In order to find the school district liable the parents would have needed to show that the school district was deliberately indifferent to the free exercise rights of Curry and that such indifference caused inadequate training of those individuals supervising the project. As for the principal, the court found that this situation was the specific type of situation to which her defense of qualified immunity was intended to apply. The facts of the case including, but not limited to, the difficulty in identifying the type of forum involved and the need to balance state obligations under the Establishment and Free Speech Clauses of the First Amendment caused the type of grey area where public officials must have security in trying to make a good faith attempt at compliance.

Kline v Mansfield, 2006 WL 2817464 (E.D. Pa. Sept. 28, 2006): Kline engaged in a sexual relationship with teacher Mansfield while attending middle school. Mansfield and was found guilty of criminal behavior. Kline's parents sued the school district under Section 1983 which allows an individual to sue a public official who, acting under the color of state law, violates the constitutional rights of another. The court, relying on a ruling of the United States Supreme Court in *Monell v New York city Department of Social Services*, 436 U.S. 658 (1978), found for the district stating that a local government could not be sued under Section 1983 for injuries inflicted solely by an employee. To be successful, Kline would have needed to show that the school district had a policy, practice, or custom that led it to behave with deliberate indifference once the district had actual knowledge of the inappropriate behavior. The court also rejected Klein's claim of liability based on failure to train employees to recognize and report signs of sexual abuse citing again the lack of any actual knowledge and the absence of any prior instances of sexual abuse.

School Choice

Levi v O'Connell, No. 05-1772 (Cal. App. Nov. 7, 2006): Levi brought this suit on behalf of her 13 year old gifted son who currently is attending UCLA. In this lawsuit, Levi was attempting to fuse several different state and federal statutes in order to have the state pay for her son's college tuition. Under the California truancy laws her son must be receiving an education until he reaches the age of 16. The California State Constitution requires the state to provide him with a free education. The federal NCLB mandates that every child receive an adequate education. Finally, the IDEA requires a free and appropriate education be provided to all disabled students. It was Levi's contention, that since anything less than college level instruction was inappropriate for her gifted son, that to force him to attend anything less (i.e. a public middle school or high school) would be depriving him of an adequate education – for him. In finding for the state, the appeals court held that the state laws invoked clearly only apply to K-12 education and did not include a free college education. Furthermore, the court found that the boy was not disabled under the terms of the IDEA and therefore was not entitled to an IEP. The NCLB does not require that every particularized educational need of each child be met, but rather that the public schools provide a "high quality education" as a general matter. *Editor's Note: If the boy can do college work I would have found a way to consider him to have graduated from the public school system and then there would have been no issue because none of the laws cited by his mother would be applicable to a high school graduate!*

Ariz. State Bd. for Charter Schools v U.S. Dept. of Educ., No. 05-17349 (9th Cir. Sept. 25, 2006): It was determined by the 9th Circuit Court of Appeals that the for-profit charter schools in Arizona were not eligible to receive federal funds under the IDEA or the ESEA. After an audit the U.S. Department of Education concluded that both the IDEA and the ESEA "clearly provide that an elementary or secondary school must be non-profit." The court of appeals agreed stating that both the wording of the statutes and

the legislative history make it plain and unambiguous that only non-profit institutional day or residential schools are eligible for federal funding under the ESEA and the IDEA.

Technology

The website MySpace continues to cause trouble at both the K-12 level. An assistant principal at Clark High School in Bexar County, Texas has filed a civil lawsuit against two students and their parents claiming defamation, libel, negligence and negligent supervision after the students posted a personal profile of the assistant principal in a manner so as to make it look as if she had posted it herself. The profile contained lewd, defamatory and obscene comments, pictures, and graphics. One of the students is also facing criminal felony charges. The assistant principal did not learn of the site until it had been up for over a month thus being seen by potentially hundreds of people from all over the world.

The simple fact of the matter is that it is very hard for school districts to regulate internet access and behavior that is done from home and from private access addresses (as opposed to using a school assigned ULID.) What is perhaps the most disturbing is that of the educators, administrators, and school board members who registered for the NSBA's 2006 Technology + Learning Conference and completed a survey, only about 35% of them had policies to address the use of such social-networking sites. Fifty percent of the respondents had no policies and 15% didn't know whether they had policies. The most common policy is to simply block access to the site from school computers or requiring students to sign an acceptable-use policy. Very few took time to educate students on the pros and cons of such web sites. At this time, filing a private civil lawsuit and pressing criminal charges is still the most effective way to deal with at-home and/or private unacceptable students access of the internet.

Discrimination

Santamaria v Dallas Independent School District, No. 06-692 (N.D. Tex. Nov. 16, 2006): Parents of Hispanic students attending a elementary school in the Dallas Independent School District filed a suit against the district alleging that the principal used classroom assignments to segregate white and Hispanic students in order to avoid "white flight" from the school. It was alleged that the principal had essentially created a white school within the school through her power to make room assignments. Moreover, it was alleged that Hispanic and African-American students, even though just as proficient as their white counterparts, were more likely to be assigned to ESL rooms. In finding for the parents, the court concluded that there was intentional segregation because of the evidence presented of a clear pattern which could not be explained by any other reason than race. The defense presented by the principal was an odd type of "separate but equal" rationale as she stated that since all students, regardless of room assignment, were receiving the same curriculum and educational opportunity; mere physical separation was not discriminatory. This argument was not persuasive as segregation by race is "inherently" unequal. The court, however, refused to apply segregative intent to the

district as a whole because it was not shown that the district had actual knowledge of the segregation occurring in the specific school.

Personnel

Henderson v Walled Lake Consolidated Schools, No. 05-1814 (6th Cir. Nov. 16, 2006): Teresa Henderson ran into trouble with the new varsity soccer coach Russell Crawford from the time he was made head coach. He stripped Henderson of the team captaincy because of her "attitude." She, however, was not the only one who had trouble with Crawford. He informed players and parents that if anyone complained about his coaching style, which included the use of obscenities and vulgar and demeaning language, they would have their playing time reduced. He engaged in inappropriate sexual conduct and conversations with the students. When Henderson confronted him about his inappropriate relationship with one of the players, Jill Byrd, he threatened the entire team if anyone told about the relationship.

Jill's parents, however, were not unaware about the late night phone calls and e-mails that the coach was sending their daughter and the reported their concerns to the assistant principal. After a meeting with the coach and athletic director, Crawford was prohibited from communicating with team members between 9:30 p.m. and 7:00 a.m., from sending e-mails to team members unless he copied the administration, counseling team members about personal issues, conducting activities with team members off-campus unless the student's parents were present, and from engaging in any relationship with a team member that may even appear inappropriate. Even with all of these safeguards in place, it still didn't stop Crawford. Henderson quit the team after Crawford threatened her if she didn't convince Jill to come back to him. Crawford finally resigned after police officers were called to his home because of a suspected suicide attempt.

Theresa's attempt to pursue a sexual harassment lawsuit against the school district was unsuccessful. She first filed in federal district court alleging violations of federal and state civil rights statutes and denial of due process and equal protection under the 14th Amendment. The district court dismissed all claims and the decision was affirmed by the Sixth Circuit. Although the court did find that there was a hostile environment, Henderson had failed to prove that the district had "had reasonable notice of the harassment and failed to take appropriate corrective action." When the district did have notice of the inappropriate behavior toward Jill it did take corrective, albeit ineffective, measures to stop the behavior. *Editor's Note: The standard for liability for sexual harassment is no longer "knew or should have known" but rather whether the district had actual notice that harassment was occurring and then failed to act.*

Burns v Adirondack Central School District, ___ F. Supp.2d ___, 2006 WL3007704 (N.D.N.Y. Oct. 23, 2006): Burns had been a secretary for Adirondack Central School District for 15 years. During the 2003-04 school year she publicly supported her union president's candidacy for the school board, while the superintendent and other board members supported the opposing candidate. The superintendent reprimanded Burns for supporting the union president and in April 2004 informed her that her position was being eliminated. After being denied another position and after

having her grievance denied, Burns filed a complaint of illegal retaliation with the EEOC which issued her a right to sue letter. The New York federal district court, in holding for Burns concentrated on two issues: (1) whether Burns had engaged in constitutionally protected speech; and (2) whether she suffered an adverse employment action because of that speech. The court concluded that Burns' support for a political candidate was the "quintessential example of speech related to a matter of public concern" and therefore clearly protected by the Constitution. Turning to the second issue the court stated that it was settled as a matter of law that a reprimand is considered an adverse employment action and as it was directed to her protect speech that Burns had met her burden of proof.

Federal Regulations

Overtime for School Employee Volunteers: In an opinion letter dated October 20, 2006 the Department of Labor stated the requirements for overtime pay when non-exempt school district employees assist with coaching sports or other extracurricular activities. Such employees may volute without being paid overtime as long as they: (1) receive no compensation for their volunteer services other than a nominal fee; (2) they render services without employer coercion; and (3) they are not otherwise employed by the same agency to perform the same service. For example, if there is an instructional aid has a child in the school district and volunteers to aid that child's classroom there is no need to pay overtime. A school secretary could volunteer to be the secretary of the PTO of her child's school without being entitled to overtime pay. Finally, a worker could volunteer as a ticket-taker, usher, box office personnel, or security worker without triggering overtime.

Same-sex Schools and Classes: The U.S. Department of Education's Office for Civil Rights has published its final regulations under Title IX to expand flexibility to offer single-sex schools, classes, and extracurricular activities in non-vocational elementary and secondary classes so long as both sexes are treated with substantial equality. The OCR no longer requires parity, so that if a single-sex school is offered to one sex that it must be offered to both so long as the single-sex program is related to an important governmental or education objective such as to provide a diversity of educational options to parents and student or to meet the particular identified educational needs of students. The final regulations were effective November 24, 2006.

Head Start Transportation: The Department of Health and Human Services' Administration for Children and Families has issued final regulations allowing waivers from requirements to have child restraint systems and adult monitors on vehicles used to transport children enrolled in Head Start and Early Head Start programs. The waiver will apply only to the Head Start and Early Head Start children, not all children on the bus. The final regulations will become effective December 30, 2006.