



# *ILLINOIS STATE EDUCATION LAW AND POLICY JOURNAL*

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## Mission Statement

The primary purpose of the *Illinois State Education Law and Policy Journal* (formerly *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**

### **No Child Left Behind**

Now that the NCLB is five years old and faces reauthorization, the sides seem to continue moving farther apart. One observation which has emerged is that the higher on the educational “food chain” a person sits, the more favorable his or her impression of the federal legislation. Federal bureaucrats and politicians are the ones who continue to sing the praises of the cornerstone of the Bush administration’s educational policy, while teachers and their union, the National Education Association, is the ones with the most complaints.

One major area of contention is the stress caused by the extensive and continual testing. Teachers are overwhelmed by the sheer volume. Supporters of the NCLB criticize the ability of each state to set its own standards, alleging that some states have consciously lowered their standards so as to fair better under the provisions of the NCLB; a strategy which ultimately harms the children who are intended to be helped by the legislation.

Several Virginia school boards are even willing to stand up against the NCLB on principle by challenging the mandate to give most English learners reading tests that mirror those taken by their native-speaking peers. The superintendent of the Fairfax schools told his district that it needs to focus on Virginia standards and goals and not worry about the threat of federal sanctions. How to test English language learners is one of the focal points of the reauthorization. The U.S. Department of Education expressed displeasure in the past about the way Virginia limits its testing of English language learners. Consequently, should the school choose this as their battle ground it is most certainly going to get the attention of the Bush administration.

Democratic Congressional leaders call the NCLB too punitive in its sanctions on schools, and have pledged to increase the funding originally promised under the law. It is the Democrat’s allegation that, while in power, the Republicans underfinanced the NCLB by \$56 billion. In the meantime, the NCLB continues to face litigation claiming that the law is imposing unfunded mandates thereby directly contradicting the wording of the legislation itself. The named plaintiffs include nine school districts in Michigan, Texas, and Vermont along with NEA affiliates in Connecticut, Illinois, Indiana, New Hampshire, Ohio, Pennsylvania, and Utah. The bill, however, is being footed by the NEA. The federal government is arguing that it never intended to fully fund all of the educational reforms.

In a recent move, the NAACP has received permission to join the lawsuit which the state of Connecticut has filed against the federal government over the NCLB. The NAACP has joined on the side of the federal government in an attempt to ensure that the outcome of the litigation does not encourage the circumvention of other civil rights statutes.

The Bush administration is lobbying for changes in the NCLB which would place more emphasis on science, give poor students private school vouchers, and force states to develop standards and tests linked to what high school graduates should know and be able to do. The private school voucher component failed when the NCLB was first adopted and, with a democratically controlled Congress, is unlikely to be passed this time around either.

## Religion

*Stanley v Carrier Mills Stonefort School District*, 2006 WL 2710672 (S.D. Ill. Sept. 21, 2006): The plaintiff's children attend school at the Carrier Mills-Stonefort School District. During a district-wide spirit week, one day's theme was "Opposite Sex Day" where students were encouraged to dress in clothing of the opposite gender. Citing religious objections, Stanley refused to let her children attend on that day. She also chose to speak to the press about her objections. In her suit she claims that the school district retaliated against her for exercising her freedom of speech and religion by denying one of her foster children special education services, by the superintendent reporting her to social services as an "unfit parent," and by subjecting another of her children to excessive questioning and detentions. In the end Stanley ended up moving so that her children could attend school in a different district and filed suit against the offending district.

In reaching a decision, the court combined Stanley's due process and free exercise claims and found that Stanley had presented valid legal claims that the school district had infringed upon Stanley's constitutional rights. In the case of Stanley's First Amendment free exercise of religion claim, the court found that the district had substantially burdened Stanley's free exercise because of the coercive effect of the "Opposite Sex Day." Relying on an earlier case, *Sherman v community Consolidated School District 21 of Wheeling Township*, 980 F.2d 437 (7<sup>th</sup> Cir. 1992) the court stated that peer pressure may, in certain circumstances, constitute actionable coercion. Since the court agreed that the Bible contains a clear proscription against cross-dressing, the refusal of Stanley to allow her children to participate on religious grounds in an event which bore the imprimatur on the school district opened her children to be singled-out and bear the stigma of non-participation. This information showed a clear burden while the school district showed little to no benefit for promoting such activity.

Regarding Stanley's claim that the superintendent's reporting of her to DCFS was retaliation, the court found that statements did not need to rise to the level of slander per se in order to be considered retaliation. Instead, all that need to be shown was that the action was sufficient to chill the activity of the individual against whom the report was made. The court also stated that Stanley did not need to exhaust all administrative remedies before alleging retaliation in the withholding of special education services. Finally, the court also upheld Stanley's Title IX hostile environment claim since evidence was presented that sexually suggestive activities occurred throughout the "Opposite Sex Day" because of the atmosphere caused by the district sanctioned cross-dressing.

*Child Evangelism Fellowship of S.C. v Anderson Sch. Dist. Five.*, No. 06-1819 (4<sup>th</sup> Cir. Dec. 15, 2006): The Anderson School district had a policy that required a user fee for outside groups to use district facilities. There were, however, three types of groups or for use deemed in the best interest of the district for which the fees were waived. When the district was sued it eliminated the "best interest" provision but added a waiver for groups who had long used district facilities. The 4<sup>th</sup> Circuit ruled that both the old policy with the "best interest" provision and the new policy "with long standing use" provision were violative of the First Amendment because it allowed unfettered discretion to the district to determine to whom it would grant a use fee waiver. The U.S. Supreme Court had already stated that "administrators may not possess unfettered discretion to burden or ban

speech, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.”

*Doe v Tangipahoa Parish School Board*, 0530294 (5<sup>th</sup> Cir. Dec. 15, 2006): A taxpayer filed suit challenging the Tangipahoa Parish School Board’s practice of opening its meetings with a prayer. The prayers were Christian in nature. The three-judge panel hearing the case split three ways. Judge Barksdale stated that the school board possibly fell under the exception for legislative prayer but that the strictly Christian nature of the prayers violated the requirement under the legislative prayer exception that any prayer could not favor one religion over another. What Barksdale left open to speculation is where other prayers which were not so openly Christian would be allowed. Judge Stewart agreed with Barksdale that the prayers were unconstitutional but ruled that the legislative prayer exception did not apply to school boards because they are deliberative bodies rather than legislative bodies. Finally, Judge Clement ruled that the legislative prayer exception did apply to deliberative bodies such as school boards. Moreover, Judge Clement found no problem with the prayers being used by the school board arguing that the legislative prayer objection does not forbid sectarian prayer. What all this means is that as of now the prayer admitted as evidence were found to be unconstitutional, but the lower court ruling that all invocations are unconstitutional no longer stand.

### **Desegregation/Affirmative Action**

*Parents Involved in community Schools v Seattle School District No. 1*, Docket No. 05-908; *Meredith v Jefferson county Board of Education*, Docket No. 05-915: After hearing oral arguments in two cases dealing with the use of race as a criteria in making admissions decisions in K-12 schools, it appears that the topic of affirmative action might not be as settled as previous thought after the two cases out of the University of Michigan in 2003. Both the Seattle School District and the Louisville School District had plans for determining the assignment of students to specific attendance center which took race into consideration. While there are many similarities between the plans, one major difference is that, until 2000, Louisville/Jefferson County schools was under court ordered desegregation to erase all vestiges of prior *de jure* segregation in the state. Not surprisingly, the Bush administration opposes the plans in both districts because decisions are made on the color of the students’ skin. While some Justices did show support for the concept of diversity in an educational setting, others raised the old concern of “reverse discrimination” and the use of illegal racial quotas. From the questions raised it appears that Kennedy (the new swing vote), Roberts, and Scalia feel that the plans in question to violate the constitution, while Souter, Bader-Ginsburg, and Breyer were in agreement with the need to consider race to some extent to insure that the schools remain integrated. Now we just need to wait for the final decision by June 2007.

### **Personnel**

*Mayer v Monroe County Community School Corp.*, No. 06-1993 (7<sup>th</sup> Cir. Jan. 24, 2007): Mayer, a probationary teacher in Bloomington, Indiana used a discussion about an article

on peace marches against the U.S. military actions in Iraq to voice her personal support for the peace marchers. When the district failed to renew her contract, she sued stating that she had been fired for exercising her constitutionally protected freedom of speech. When looking at the case, the 7<sup>th</sup> Circuit framed the question as “whether teachers in primary and secondary schools have a constitutional right to determine what they say in class.” This was not a new question for the 7<sup>th</sup> Circuit having held in an earlier case *Webster v New Lenox School District No. 122*, 917 F.2d 1004 (7<sup>th</sup> Cir. 1990) that teacher did not have a constitutional right to teach that the earth is much younger than the text book stated. According to the court, the district is charged by state law to determine curriculum and teachers can be required to follow that curriculum – including refraining of expressing private opinions to the contrary. The First Amendment “does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system.”

### **Students**

*Lee v Pine Bluff School District*, No. 05-2011 (8<sup>th</sup> Cir. Jan. 8, 2007): Sharon Lee brought suit against the Pine Bluff School District for actions leading to the death of her son. Lee had completed a consent form, a medical form, and an emergency form required by the district prior to allowing her son to go on a school band trip. She indicated on the medical form that her son had no physical problems that would prohibit exercise and gave the band director permission to seek emergency medical treatment if necessary. During the trip the boy became ill and was confined to the hotel room. At no time did the band director seek medical attention for the boy. When the group returned home, Lee’s son was hospitalized where he later died from cardiac arrest brought on by undiagnosed diabetes. In reviewing the numerous constitutional violations alleged by Lee, the 8<sup>th</sup> Circuit started by stating that the Fourteenth Amendment Due Process Clause does not guarantee certain minimal levels of safety and security except in the narrow circumstances of “incarceration, institutionalization, or other similar restraint.” Given that this was a voluntary trip which the student could have asked to leave at any time, the narrow circumstances did not exist.

*Crowley v McKinney*, 400 F.2d 965 (7<sup>th</sup> Cir.): Crowley, the non-custodial parent, had the equal rights under the terms of his divorce decree to control the education of his children. He became extremely involved in his son’s school affairs by attending public meetings to take the superintendent and principal to task over alleging insufficient response to the alleged bullying of his son on the playground. He showed up to observe recess and volunteered to be a playground monitor. He demanded that the school send him copy of all correspondence, information on school events, and progress reports – even providing self addressed stamped envelopes to be used for the mailings. Ultimately he sued the district for emotional distress and violating his constitutional right to guide the education of his children. In its ruling the 7<sup>th</sup> Circuit stated that non-custodial parents do not have the same right to manage their children’s education as to custodial parents. While non-custodial parents have the right to help choose the school, they do not have the legal right to manage the child’s education therefore there was no constitutional due process claim. However, the court did recognize Crowley’s right to public criticize the behavior of the

school administrators. Since arguably the district's decision to deny him access to school premises could have been based on his exercise of his right to free speech, the court remanded the case for trial on that issue.

### **Federal Regulations**

The Department of Labor is soliciting input as to the functioning of the Family Medical Leave Act to see if any revisions are necessary. More specifically, comments are being sought in the following areas: (1) definition of "eligible employee;" (2) the definition of "serious health condition;" (3) definition of "day;" (4) the impact of using paid leave as opposed to unpaid leave; (5) different types of leave, specifically intermittent leave; (6) whether being assigned to "light duty" as opposed to being put on leave counts against FLMA leave; (7) the implications of modifying an employees duty to take into account a serious health condition; and (8) whether the prohibition of waiver of FMLA rights applies to settling past claims. Comments are due by February 2, 2007.

### **STATE LEGISLATION**

The past legislative session was not very eventful for the educational community in Illinois. Below are listed some new laws or regulations which, at a minimum, have been sent to the Governor for his signature.

#### **Boards of Education**

One bill which could have a major effect on administrators in the state of Illinois is **HB 4310–Oath of Office for School Board Members**. In addition to requiring that newly elected board members take an oath of office, the bill also give the board carte blanche to micro-manage the superintendent and his administrators in practically every aspect of school management. Through policy the board will direct the budget, building plans, location of building sites, hiring and firing of employees, and curricular issues. What is extremely telling is that those provision requiring board members to receive mandated training to better carry out their duties was eliminated from the bill prior to passage.

Another bill which was sent to the Governor which assigns additional duties and responsibilities to board members was **HB 5375–Mandated Reporting of Child Abuse**. Under this bill, board members are added to the list of mandated reporters for any instance of abuse which is brought to a board member's attention during the course of an open or closed school board meeting.

Under **SB 585–Open Meetings Act–Electronic Communication** a "meeting" under the Open Meetings Act will now include all gatherings, 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. To constitute a quorum, only those members

physically present will be counted, although others may “attend” through electronic means.

Under **SB 2191–Financial Literacy Instruction** high school students in Illinois enrolled in consumer education will receive instruction in the basic concepts of financial literacy including installment purchasing, budgeting, savings and investing, banking, understanding simple contracts, State and Federal income taxes, personal insurance policies, and the comparison of prices.

**SB 2303–Good Samaritan–First Aid** protects those individuals certified in first aid by the American Red Cross or the American Heart Association, who in good faith provides medical care, from being liable for civil damages unless the person’s conduct rises to the level of willful and wanton misconduct.

Information about the Abandoned Newborn Infant Protection Act will be provided under health education rather than sex education under the provisions of **SB 2455–Abandoned Newborns Education**

The Governor’s plan for school district reorganization in Illinois is contained in **SB 2795–Reorganization of School Districts**. According to the Governor, 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 approval by voters in affected districts. . .” The bill 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 2898–Self Administration of Medication–Allergies** allows students with asthma/allergies to not only carry and self-medicate with inhalers, but to also self-administer medication with an epinephrine auto-injector.

In response to a fairly recent United States Supreme Court decision which allows the state to use the right of eminent domain to take private property from one individual and give it to another private individual to be used for a purpose more to the liking of the state, **SB 3086–Eminent Domain** forbids that taking private property by the state for private development unless the property being taken is within a “blighted area” and the



state has entered into a written agreement wherein the new “owner” agrees to undertake a development project within the blighted area that specifically explains why the condemned piece of property is crucial for the development. The state will be responsible for reasonable relocation costs to the individual(s) displaced by the condemnation action.

## **Personnel**

**HB 4987–Behavior Analyst** amends the Children with Disabilities Article of the School Code to include in the definition of "professional worker" a school behavior analyst.

Of importance to those individuals such as retired superintendents who are serving as interim administrators in another district, **HB 5331–TRS Annuitant Work Days** now allows them to work for a school district for 120 paid days or 600 paid hours in each school year through June 30, 2011.

Under **SB 859–Teacher Certification Revocation** the failure to disclose on an employment application any previous conviction for a sex offense becomes a reason to revoke a teacher’s certificate.

The Center for the Study of Education Policy was the main force behind **SB 860–Principal Mentoring and Evaluation** which restructures the process for the mentoring, evaluation, and induction of new principals in Illinois. This bill contains the following components:

- Establishes a new principal mentoring program on July 1, 2007 to allow experienced principals to serve as mentors to new principals during their first year as principal (subject to annual appropriations)
- Any principal hired on or after July 1, 2007 must participate in the mentor program for the duration of his/her first year as principal
- Principals serving as mentors must have a minimum of three years of experience as a successful, instructional leader, attend mentor training sessions, and meet other requirements as stipulated by the Illinois State Board of Education
- The mentor and new principal will complete a verification form developed by the Illinois State Board of Education to certify mentor program completion
- An assistant principal acting under an administrative certificate for 5 or more years hired on or after July 1, 2007 as a principal by the same school district where he/she served as assistant principal may opt to participate in the mentor program. The employing school district may require participation of this principal in the mentoring program

The bill also recommends that continuing professional development for renewal of an administrative certificate must include:

- Completion of an Administrators' Academy course in each of the 6 Interstate School Leaders Licensure Consortium standard areas in the first five years of serving as an administrator in a position that requires certification

- If the certificate holder evaluates certified staff, he/she must complete a one-day teacher evaluation course and participate in an additional 6 hours of Administrators' Academy-approved coursework
- Introduces a "Master Principal" designation program
- Requires each school district to establish a principal evaluation plan that must include the job duties and the standards to which the principal is expected to conform
- The evaluation, in writing, must be conducted by the superintendent, his/her designee, or a school board member who holds a registered Type 75 State administrative certificate
- Provides that failure to evaluate a principal at least once in the final year of the principal's contract by February 1st of each year is evidence that the principal is performing his/her duties and responsibilities in at least a satisfactory manner. Failure to evaluate by the February 1st date automatically extends the principal's contract for a period of one year beyond the expiration date of the contract
- Creates an alternative route to administrative certification for certain National Board certified teachers on or before July 1, 2007

### **School Finance**

Under **SB 176–Budget Implementation (Education)** the education-related provisions of the budget. The bill allows for the Transition Assistance payment to school districts to guarantee that no school district receives less state funding in Fiscal Year 2007 than it did in Fiscal Year 2006. The foundation level is increased by \$170 per pupil, from \$5,164 to \$5,334. Finally, procedures are established to distribute the Arts Education funding increases.

### **School Safety and Health**

The Child Murderer and Violent Offender Against Youth Registration Act is created under **HB 4193–Violent Offender Against Youth Registration Act**. Law enforcement officials must now notify school districts if a resident of the school district has registered as a violent offender against youth. School district must also check the newly created Statewide Child Murder and Violent Offender Against Youth Database, in addition to the statewide sex offender data base.

Much of the other legislation dealing with school safety and health concerned registered sex offenders. **HB 4222–Sex Offenders-Monitoring** requires the Department of State Police to be more proactive in (1) developing official information relating to the number of sexual offenders and sexual predators who are placed on parole, mandatory supervised release, or extended mandatory supervised release subject to electronic monitoring. The electronic monitors must be able to identify the offender's current location and provide timely reports of the offender's presence, alerting the Department of the offender's presence within a prohibited area. This information must be shared with local law enforcement.

Most of the other legislation dealing with school safety also concern sex-offenders. **HB 5249–Sex Offender-Day Care** prohibits a child sex offender from residing within 500 feet of a child care institution, day care center, or a part-day child care facility. The bill also adds day care center, part-day child care facility, child care institution, and schools providing before and after school programs for children under 18 year of age to the list of facilities in which child sex-offenders may work. **SB 3016–Sex Offender Registration** requires the principal or teacher of a public or private elementary or secondary school to notify the parents of children attending the school during school registration or during parent-teacher conferences that information about sex offenders is available to the public as provided in the Sex Offender Registration Act.

### **State Board of Education**

**HB 5550–Textbook Loans** requires the State Board of Education to loan textbooks free of charge to any student in Illinois who is enrolled in grades kindergarten through 12 regardless of whether the student is enrolled at a public or private school so long as the school in question is in compliance with the compulsory attendance laws of Illinois. The textbooks provided must be secular.

In an attempt to put into place it's "Less Red Tape Initiative" **SB 2829–Less Red Tape** makes changes in the school building code, school and district improvement plans, the waiver and modification of mandates, staff development plans, local learning objectives and assessment, criminal history records checks of school district employees, and transportation reimbursement claims in an attempt to simplify the process.

### **Students**

Should the Governor sign **HB 1463–Drivers License Cancellation** into law, anyone under 18 years of age will be unable to obtain a driving permit or driver's license unless one of the following criteria has been met:

- has been legally emancipated by marriage
- has graduated from high school or obtained a GED
- is enrolled in high school, a GED program, college, or is receiving home instruction

In addition, should the student under 18 years of age drop out of school the driving permit or driver's license shall be cancelled.

Also pertaining to youthful drivers, **HB 4768–Driver's Education–Increased Instruction** increases the number of behind the wheel hours with the parent from 25 to 50 with at least 10 of those 50 hours being at night.