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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 Court

Special Education

Jamie S. v Milwaukee Public Schools, No. 01-928 (E.D. Wis. Sept. 11, 2007): Once again the Milwaukee Public Schools (MPS) are in the news, but this time it is not for its controversial voucher program. This month the Wisconsin federal district court ruled that from September 2000 through June 2005 the MPS and the Wisconsin Department of Public Instruction (DPI) were in violation of the "child find" provisions of the IDEA. The "Child Find" provision requires that public school districts and states locate, identify, and evaluate all children suspected of having disabilities. During the trial, the MPS and DPI were alleged to have failed to comply with the 90-day time limit for completing evaluations, of either untimely identification or complete failure to identify children in possible need of special education, and of making errors in their record keeping.
In its decision, the court found that both MPS and DPI had violated the IDEA. The MPS system failed to adequately identify disabled to students and failed to prepare individualized education plans in a timely manner. The court found that the DPI, even after being informed that MPS was not in compliance, failed to provide appropriate oversight and sanctions to bring MPS into compliance.

John M. v Board of Educ. of Evanston Twp. High Sch. Dist. 202, Nos. 06-3274/06-3739 (7th Cir. Sept. 17, 2007): The requirement for identical services as a student moves from elementary to middle school and then on to high school is not required by the IDEA. In its ruling to reverse and remand the case to district court, the U.S. Court of Appeals for the Seventh Circuit held that as a student moves through his or her education, the "status quo no longer exists" and "the obligation of the new district to provide educational services that approximate the student's old IEP as closely as possible" is sufficient. When John M. was in middle school he received co-teaching, although the service was not specifically listed in his IEP. When he moved on to Evanston Township High School, the school stated that co-teaching was not available but that he would be provided comparable services. The parents obtained a preliminary injunction forcing the high school to provide co-teaching, but the court in the instant case overturned the injunction stating that a hearing on the merits, consistent with its interpretation of the IDEA and its provisions was necessary.

Students' Rights

Laney v Farley, No. 06-6000 (6th Cir. Aug. 28, 2007): Laney was a student at West Wilson Middle School in Mt. Juliet, Tennessee. The school had a policy banning cell phones in school. When Laney's phone began ringing during class, the phone was confiscated and she was given a one-day in-school suspension. By the time her parents found out about the suspension she had already served it, so the parents sued the school district alleging a violation of her procedural due process. In ruling that the school did not violate Laney's due process, the court looked first at the United States Supreme Court case of Goss v Lopez, 419 U.S. 565 (1975) in which the Supreme Court had performed a balancing test to determine the extent to which a suspension deprives a student to his or her right to an education. Applying that test to the instant case,

the court held that an in-school suspension in Tennessee does not significant deprive the student of any educational opportunities thus does not trigger maximum procedural due process. As for Laney's claim of a liberty interest in her reputation, the court stated that "no court has held an in-school suspension to trigger the protections of the Due Process Clause arising from a student's liberty interest in their reputation. Therefore, only de minimis deprivation of property was involved so only minimal due process (notice, chance to rebut, and an impartial hearing) was afforded Laney.

B.W.A. v Farmington R-7 Sch. Dist., 2007 WL 2323400 (E.D. Mo. Aug 10, 2007): A student's right to free speech was not violated when the school forbid him from wearing a clothing bearing a picture of the Confederate Flag. Twice the student had attempted to wear the confederate flag on his clothing. First he wore a hat that had the flag and the word "C.S.A., Rebel Pride, 1861." Second, he wore a t-shirt and belt buckle with an image of the confederate flag and words "Dixie Classic." While the first time he removed the hat and put it in his backpack, this time he refused to remove the symbols so he was sent home. The parents' response was to remove him from school and filed suit.

In ruling that the school's policy was not unconstitutional the court relied on the United States Supreme Court decision in Tinker v Des Moines, 393 U.S. 503 (1969) as it has been interpreted by subsequent Circuit Court decisions. In Tinker the Supreme Court established that student speech could be limited if it created a "material and substantial disruption to the educational atmosphere." While the Court was clear that the disruption had to be actual and not merely likely, subsequent circuit court decisions had ruled that prior incidents, even those not occurring at the school, would be sufficient to trigger the Tinker restrictions. The federal district court's rational in the instant case was the to actually require disruption would be too onerous a burden on the administrators and that their anticipation of material and substantial disruption was sufficient to limit student speech. Editor's Note: What a total misinterpretation of the Supreme Court ruling in Tinker! The Missouri district court has totally ignored the words of the Court so that they might unconstitutionally extend the power and reach of the local administrators. This court has shut the school house gates on the students' constitutional rights in direct contradiction of the United States Supreme Court's decision. I didn't realize that Missouri district courts could overturn Supreme Court decisions!

Truth v Kent Sch. Dist., No. 04-35876 (9th Cir. Aug. 24, 2007): A school district did not violate the Equal Access Act when it refused to recognize a student Bible study group which refused to adhere to the anti-discrimination policies of the district. The "Truth" Bible study club wanted to organize as a recognized student organization. Unfortunately, it's by-laws divided membership in three categories – voting members, non-voting members, and attendees. The club also set various requirements for behavior and affirmation of belief for members and for inclusion at the voting member level. In finding for the school district, the court found the district's anti-discrimination policy was content-neutral and in compliance with the Equal Access Act which forbids denial of access due to a group's religious, political, philosophical, or other content.

Lowery v Euverard, No. 06-6172 (6th Cir. Aug 3, 2007): This case stems from a petition circulated by four players during the season which stated "I hate Coach Euvard [sic] and I don't

want to play for him." When the coach found out about the petition he kicked the four authors off of the team. The dismissed student filed suit alleging a violation of their freedom of speech. The Sixth Circuit found for the school stating that the coach had reasonably believed that the petition would be disruptive. Moreover, the court looked to the past decision of the United States Supreme Court which held that school athletes enjoy less constitutional protection that of their counterparts in the classroom because extra-curricular activities are a nothing more than a privilege. Given these facts, the court said that its place was not to second guess the decision of school administrators.

DePinto v Bayonne Bd. of Educ., No. 06-5765 (D. N.J. Sept. 19, 2007): School uniforms were at the center of this dispute. Elementary students for two different schools in the Bayonne district wore buttons which voiced displeasure with the mandated uniforms. The buttons were printed on a background showing the Hitler Youth in their brown shirts although the wording simply said "No School Uniforms." The district sent letters to the parents of the protesting students stating that the use of the background was offensive to many in the district and that, according to board counsel Mr. Kenneth Hampton, the buttons did not constitute free speech. The letters also threatened suspension if the buttons were worn again. The parents sought a preliminary injunction preventing the school district from disciplining the students.

In granting the injunction, the court listed three circumstances in which school districts may regulate student speech: (1) vulgar, lewd, obscene and plainly offensive speech as defined in Bethel Sch. Dist. No. 403 v Fraser, 478 U.S. 675 (1986); (2) school-sponsored speech as defined in Hazelwood v Kuhlmeier, 484 U.S. 260 (1988); and (3) speech which causes a material and substantial disruption as defined by Tinker v Des Moines Community School District, 393 U.S. 503 (1969). There is now also a fourth circumstances, speech "reasonably viewed as promoting illegal drug use" as defined by the recent Supreme Court case of Morse v Frederick, 127 S.Ct. 2618 (2007). The court stated that Fraser did not apply to the buttons because they were no "plainly offensive." Moreover, the speech was neither school-sponsored nor drug related so Hazelwood and Morse were also inapplicable. Turning therefore to the Tinker decision the court found that there was no actual material and substantial disruption or even a specific fear of such interruption. Mere apprehension that someone might become upset is not sufficient to restrict student speech.

NCLB

Not surprisingly, as NCLB comes up for reauthorization, the battle among competing groups has intensified. Perhaps the sharpest attacks have come from civil rights groups, the NEA, and the AFT. The civil rights groups were upset at the possibility of individual school districts, rather than state wide systems, being allowed to devise measures of student progress. The executive director of the Citizens' Commission on Civil Rights would allow for children in urban and high poverty schools to be held to lower standards, thereby erasing the NCLB's requirement that ALL children meet the same standards of performance. The teachers' unions were upset at a provision which would tie teachers pay to student performance.

U.S. Representative George Miller of California, Chairperson of the House Education and Labor Committee issued proposed revisions in late August that would ease penalties for schools

who just barely miss achievement goals, while strengthening accountability of state systems. Miller and a coalition of other committee members would like to amend the NCLB to allow states to use more than annual tests in reading and math to rate students (i.e. graduation rates, dropout rates, college-going rates, percentages of students successfully completing end-of-course exams for college prep courses), to give credit to states whose students are projected to reach proficiency within three years, and to test some non-English speaking students in their native language(s). The group also endorses measures to chart the progress of individual students rather than to compare this year's 3rd graders against last year's 3rd graders. Basically they would like to expand and enhance the "growth-model" introduced by the Bush administration last year.

A lawsuit filed in California accuses the Federal Department of Education's policy of labeling as "highly qualified" teachers individuals working in classrooms while in the process of earning teaching credentials. By creating this loophole, the contention is that it results in approximately 59,000 individuals nationwide as being classified as "highly qualified" even though they have not yet earned their teaching credentials. This in turn is alleged to perpetuate the clustering of inexperienced teachers in the highest needs schools.

Religion and Education

Doe v South Iron R-1 Sch. Dist., No. 063373 (8th Cir. Aug. 21, 2007): The United States Court of Appeals for the Eighth Circuit has upheld a injunction barring the South Iron School District from distributing Bibles to elementary school children on school grounds during the school day. There had been a past practice in the South Iron School District to allow members of the Gideon's International to distribute Bibles on school grounds during the school day. The school board continued this practice even after being warned about its probable illegality by the superintendent, the school board attorney and its liability insurance carrier.

In upholding the injunction, the court disagreed with the school board's argument that the school was a public forum and that to disallow the distribution would be an impermissible restriction on free speech. Instead, the court found the school buildings to be a nonpublic forum, thereby giving the board the ability to regulate the time, place, and manner of speech on its premises.

School Finance

Committee for Educ. Equality v State of Missouri, No. 04-323022 (Mo. Cir. Ct. Aug. 29, 2007): A trial court has failed to find that the Missouri system of public school funding is constitutionally inadequate or that it violates the equal protection and due process clause of the 14th Amendment. The Committee for Educational Equity (CEE), the Coalition to Fund Excellent Schools (CFES), and the City of St. Louis Board of Education and filed suit alleging that the state public school funding scheme was guilty of numerous violations of both the state and federal constitutions. In addressing the state constitutional issues the court found that funding which met the statutory minimum was sufficient; that there did not exist any requirement that funding exceed the minimum statutory amount.

In deciding the equal protection and due process issues, the court followed prior rulings of the United States Supreme Court when dealing with school funding. The court held that edu-

cation was not a fundamental right. Therefore, strict scrutiny was not triggered and all that the court had to determine was whether there existed a rational relationship between the goal and the means chosen to reach those goals. When looked at in that light, the court found that the state public school funding scheme did not violate the 14th Amendment of the United States Constitution.

In re Objections to Tax Levies of Freeport Sch. Dist. No. 145, 865 N.E.2d 361 (Ill. App. Ct. 2007): With the decision of the Illinois Court of Appeals, local school districts may want to revisit the use of their tort immunity funds. The Appellate Court of Illinois has made the following conclusions as to the use of tax money generated for the tort immunity fund: (1) Only employees engaged in risk management may be eligible for compensation from the fund; and (2) Superintendents DO engage in risk management BUT other employees DO NOT and can not be compensated from the tort immunity fund.

Personnel

O'Connor v Burungham, No. 20060090 (Utah July 31, 2007): When it comes to a claim of defamation, the high school basketball coach is not considered a "public official" therefore his burden of proof is not increased; he is not required to show actual malice before he can recover for an individual's tortuous action.

Equal Access

Page v Lexington County Sch. Dist. One, 2007 WL 2123784 (slip copy D.S.C. July 20, 2007): When South Carolina legislature introduced voucher legislation entitled "Put Parents in Charge Act" (PPICA) the Lexington School District took a stand against the act. It distributed its opposition through traditional district communication channels. When Page, a proponent of private school vouchers, saw the message on the district website he requested equal access to the district's communication system. Specifically he wanted to provide a link to his pro-voucher information on the district web site and the district refused to do so. Page sued claiming a violation of his freedom of speech.

In deciding the question, the court first considered whether the speech disseminated by the school district was government speech or private speech under the Government Speech Doctrine as outlined by the United States Supreme Court in Johanns v Livestock Mktg. Ass'n, 544 U.S. 550 (2005). Under this doctrine speech will be considered government speech if the government (1) determines an overarching message, and (2) approves every word disseminated at its behest. The government retains the "discretion to promote policies and values" of its own choice without having to do a forum analysis. This is true even if the government choose a third party (i.e. web service) to disseminate the government message. Using this interpretation the court found that the PTA newsletter was not government speech. Instead, the school district had established a non-public or "designated public" forum therefore was able to limit access to that forum to individuals and groups (i.e. PTA) which were closely related to the school district. As for the website, such speech was government speech not subject to forum analysis.