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IN THIS ISSUE

DEVELOPMENTS IN THE COURT AND LEGISLATION

STUDENT RIGHTS *page 88*

RELIGION AND EDUCATION *page 91*

SPECIAL EDUCATION *page 92*

TEACHERS' RIGHTS *page 93*

NO CHILD LEFT BEHIND *page 94*

VOUCHERS *page 94*

FINANCE *page 94*

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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 and Legislation

Student Rights

Ponce v Socorro Indep. Sch. Dist.: No. 06-05709 (5th Cir. Nov. 20, 2007): Discipline for entries in a personal journal which refer to a "Columbine" style attack is not considered a violation of a student's right to free speech because speech posing a direct threat to the physical safety of the school population is not speech protected by the First Amendment. Ponce, a student at a Texas high school, kept a personal journal in which he detailed the formation of a neo-Nazi group at the high school, including the group's plan to commit a "Columbine-style shooting attack." After Ponce shared some of the contents of his journal with a classmate, the classmate became concerned and notified the school district about the existence of the journal. When he was called into the principal's office, Ponce claimed that the journal was fictional and consented to a search of the backpack from which the journal was recovered. The assistant principal decided that the entries constituted a terroristic threat in violation of the student code of conduct and suspended Ponce for three days and recommended that he be placed in an alternative education program. When his parents were unsuccessful in appealing the assistant principal's decision, they removed Ponce, placed him in a private school, and sued the district alleging a violation of Ponce's First Amendment rights.

The parents sought an injunction against the school to bar placing Ponce in an alternative education program and forbid the district from informing third parties about the entries in the journal, from discussing the journal with Ponce's permission, and retaining any reference to Ponce's discipline in his permanent file. The U.S. District Court granted the injunction relying on Tinker v Des Moines, 393 U.S. 503 (1969) and stating that the evidence was insufficient to prove that there was a reasonable belief that disruption would occur. The Fifth Circuit Court of Appeals vacated the injunction, stating that the parents had failed to show a likelihood that they would prevail on their First Amendment claims because the "speech" in question was not constitutionally protected. The circuit court was guided in its decision by the wording of Justice Alito's concurring opinion in the recent United States Supreme Court decision in Morse v Frederick, 127 S.Ct. 2618 (2007). Although referring to speech relating to the use of illegal drugs, the court in the instant case expanded his analysis regarding "unprotected speech" to cover "any speech advocating a harm that is demonstrably grave and that derives that gravity from the 'special danger' to the physical safety of students arising from the school environment." The Fifth Circuit stated that school districts must take seriously such "telltale warning signs" and must be allowed "to react quickly and decisively to address a threat of physical violence against their students, without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance."

Peterson v Baker, No. 06-16180 (11th Cir. Oct. 25, 2007): Peterson, a middle school student, attempted to leave Baker's remedial reading class. Baker stood in the doorway to block his way with her arm, so he knocked her arm from the door. Claiming that she was afraid that he was going to strike her, Baker grabbed Peterson's neck and pushed him away. Although there was disagreement as to whether Baker had tried to "choke" Peterson as he claimed, there were visible marks on his neck. Baker was put on administrative leave while an investigation was done, and she soon resigned. Peterson sued claiming that Baker and the district had violated his

substantive due process, and had committed battery and intentional infliction of emotional distress. The district court granted summary judgment for all for the district and Baker.

In reviewing the case using 11th Circuit precedent, corporal punishment can violate Due Process if it is excessive and "tantamount to arbitrary, egregious, and conscience-shocking behavior." Conscience-shocking behavior would need to proven by the student by (1) proof that the school official intentionally used an obviously excessive amount of force under the circumstances; and (2) the force used presented a reasonably foreseeable risk of serious bodily injury. Given Peterson's repeated disobedience and his initiating physical contact the court found that Baker's behavior, while not appropriate did not arise to "excessive" or "conscience-shocking," therefore were not a violation of Peterson's substantive due process. Turning to Baker's claim of immunity, the court noted that Georgia law provides official immunity from lawsuits to a teacher or school administrator who is carrying out a discretionary function, unless the individual acts with malice or intent to cause harm. Again, although Baker's actions were not well thought through, they were done within her discretionary function and there was no evidence of malice.

Fitzgerald v Barnstable School Committee, No. 06-2596 (1st Cir. Oct. 5, 2007): Fitzgerald, a kindergarten student, told her parents that an older male student was subjecting her to inappropriate sexual contact. Her description of the student was not very clear, so after the parents reported the information to the principal it took several days to identify the offending male student. During questioning the student denied the allegations. During the investigation many other potential witnesses were interview, but not were able to corroborate Fitzgerald's accusations. The police conducted a parallel investigation and they also were unable to find sufficient evidence to charge the male student with a crime. Given the results of the two investigations, the district declined to discipline the student but did offer to move Fitzgerald to a different bus or to leave rows of empty seats between the kindergarten students and the older students on the bus. The parents filed a Title IX suit against the district for peer sexual harassment.

The district court dismissed the parents' claims. On appeal, the First Circuit affirmed the decision of the lower court. The court stated that the district would only be liable under Title IX if, upon receiving actual notice of harassment the district subsequently "causes" the victim to be subjected to additional harassment. The court held that the district had not acted with deliberated indifference even though it had refused to acquiesce to the demands of the parents that a monitor be placed on Fitzgerald's bus. The court stated that "this line of argument misconstrues the nature of Title IX liability for peer-on-peer sexual harassment. The statute does not require an educational institution either to assuage a victim's parents or to acquiesce in their demands. To avoid Title IX liability, an educational institution must act reasonably to prevent future harassment; it need not succeed in doing so."

Nguon v Wolf, No. 05-868 (C.D. Cal. Sept. 25, 2007): Nguon was suspended from high school for engaging in a public display of affection with another female student. The principal, when informing Nguon's mother as to the reason for her daughter's suspension, informed her that the sexual contact was with another female, thereby "outing" Nguon to her mother. Nguon sued alleging that the disclosure of her sexual orientation to her mother was a violation of her freedom of speech, her right to privacy, and her right to equal protection under the federal constitution. Starting with the equal protection claim, the court reminded those involved that the issue was not whether her behavior with her girlfriend warranted discipline, but rather whether they

were treated equally. The court found that discipline was also meted out to public displays of affection between heterosexual couples and that the discipline in Nguon's case was not imposed in a discriminatory manner. The court rejected Nguon's claim that the discipline was motivated by her sexual orientation, finding instead that the policy under which she was disciplined was for maintaining discipline and a proper school environment.

Looking next at Nugon's First Amendment claim that her behavior was protected speech, the court relied on the recent United States Supreme Court decision in Morse v Frederick, 127 S.Ct. 2618 and held that a school district could restrict student speech that is inconsistent with the school's basic educational mission. In making this decision the court rejected Nguon's allegation that the school's action constituted viewpoint discrimination against expressions of gay sexuality.

Finally, as regarding Nguon's Fourth Amendment claim to a right to privacy in her sexual orientation, the court balanced the interest of Nguon with that of the school district. Since the principal was required to inform Nguon's mother as to the reasons for Nguon's suspension, the fact that he specifically mentioned the gender of the other person involved, such a disclosure had a legitimate governmental purpose. Therefore Nguon's right to privacy was not violated.

Redding v Safford Unified Sch. Dist. #1, No. 05-15759 (9th Cir. Sept. 21, 2007): Redding, a middle school student, was observed along with several friends acting "unusually rowdy" at a school dance. Some faculty reported smelling alcohol from the group. Later in the evening a bottle of alcohol and a pack of cigarettes were found in the girl's bathroom. Another student reported that Redding and another girl were handing out prescription drugs and even turned over a pill that he had received from Redding's friend, Marissa. When the principal searched Marissa pills were recovered; pills which Marissa said she had gotten from Redding. Marissa was then stripped searched.

When Redding was questioned and her back pack was searched no drugs turned up. Redding was then also stripped searched and still no drugs were found. Redding sued the school district for an unlawful search. The lower court upheld the actions of the school stating that those actions fell within the guidelines set forth in the United States Supreme Court decision in New Jersey v T.L.O., 469 U.S. 235 (1985). The 9th Circuit agreed with the lower court finding that the search was justified at its inception because the school district had "reasonable suspicion." As to being reasonable in scope, the court stated that if "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction" then the search was reasonable in scope. Given the dangerous nature of drugs, the court found that the strip search to find possible contraband was reasonable in scope.

SAGE v Osseo Area Sch. Dist. No. 279, No. 05-2100 (D. Minn. Sept. 25, 2007): The Osseo schools have two classes of student groups, curricular and non-curricular. Curricular groups may meet before, during, and after instructional time, may use the school PA system, may receive school funds and/or engage field trips and fundraising. Non-curricular groups may meet only before and after school, may not interfere with school or district operations, may only use a community bulletin board, do not receive school funds, and may not engage in fundraising or field trips. SAGE (Straights and Gays for Equity) was classified as a non-curricular student group. It sued alleging a violation of the Equal Access Act since they were being denied equal use of school

facilities. The court found that the district was in violation of the Equal Access Act because they had created a limited open forum. Under the United States Supreme Court case of Board of Education v Mergens, 496 U.S. 226 (1990), once a limited open forum has been established, schools can not discriminate against students groups because of the content of their speech.

Religion and Education

Silent Prayer in Illinois: Since 1969 a law has been on the books in the state of Illinois that gave permission for public schools in the state to observe a moment of silence for silent prayer or reflection at the beginning of the school day. While many, if not most, constitutional scholars would agree that the law was unconstitutional at its inception because the United States Supreme Court in various cases dealing with saluting the flag, and prayer and Bible reading in public schools made it clear that making such laws optional was not sufficient to escape the First Amendment prohibition, no one had ever challenged the law. In fact, many school districts probably did not even know of the law's existence. In 1990 the General Assembly amended the law (probably in response to the United States Supreme Court's decision in Lee v Weisman), to make it clear that students could voluntarily initiate prayer so long as wit was non-disruptive and was "not sponsored, promoted, or endorsed in any manner by the school or any school employee." Again, little was done because the law conferred nothing on the students that they did not already enjoy under the Free Exercise Clause of the First Amendment. This acquiescence all came to an end in November 2007 when the Illinois General Assembly, by overriding a gubernatorial veto, passed an amendment to the 1969 law which made a moment of silence for silent prayer or reflect mandatory for all school districts in the state of Illinois.

Even though as of December 1, 2007 the Illinois General Assembly has been unwilling to pass legislation necessary to provide promised state funding to Illinois public schools, legislators felt compelled to make sure that every student would be required to be silent at the beginning of the day for prayer and/or reflection. The Governor had refused to sign the bill when it arrived on his desk stating his belief that the law was unconstitutional. And indeed, the United States Supreme Court had already spoken over 20 years ago on the constitutionality of a moment of silence for silent prayer or reflection in the case of Wallace v Jaffree, 472 U.S. 38 (1985) stating that such a mandate was a violation of the Establishment Clause. The Jaffree case dealt with a law passed in Alabama which was eerily similar to the mandate passed in Illinois in 2007. In its opinion, the Court was very clear that adding the suggestion to pray during the moment of silence was an attempt at coercion of those students standing in silence, regardless of the attempts of the legislature to, after the fact, give a whole list of possible activities which could occur during that time. The simple fact was that the only activity suggested by the state in the actual wording of the law was prayer and/or reflection.

Within days of the mandated silent prayer being put into effect, Robert Sherman, whose daughter is a student at Buffalo Grove High School in suburban Chicago, filed a law suit alleging that the law is unconstitutionally vague and that it violates the Establishment and Free Exercise of Religion Clauses of the First Amendment. On November 15, 2007 the U.S. District Court for the Northern District of Illinois issued a preliminary injunction prohibiting the implementation of the Silent Prayer law (as it is titled in the state record) citing a likelihood that Sherman would prevail on both his vagueness and First Amendment Claims. On the claim of vagueness, the court stated that "a statute which either forbids or requires the doing of an act in terms so vague

that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." The court continued that even if a law may have some legitimate applications, a vague law that chills First Amendment rights is void on its face. Specifically it concerned the court that the law which was passed failed to stated how the period of silence should be implemented, the time of day the period should be observed, how long the period should be, whether students would be required to sit or stand, or would be permitted to move about the classroom, and failed to set out penalties for students who fail to remain silent, teachers who refuse to hold the period of silence, and schools and school districts that refuse to implement that statute in whole or in part.

As to the Establishment Clause, the court stated that by including prayer as one of two options during the period of silence, the statute appears to convey to students that the period should be used for prayer. On the issue of Free Exercise, the court stated that it was possible that non-silent prayer means such as is practiced by Muslims, by reading the Bible, or religious chanting could be a violation of a student's free exercise of religion. What is particularly interesting is that Evanston-Skokie School District 65 made the decision, once it was unsuccessful in obtaining a waiver from participation in the mandated silent prayer, that it would ignore the new legislation. For those unfamiliar with District 65, one of the municipalities included in that school district is Skokie, a suburb of Chicago which is home to a large percentage of Jewish Holocaust survivors. It is either ironic or a very sad commentary on the elected representatives of the state of Illinois that it takes individuals who have actually lived through the horrors of mandated religious persecution to stand up against an unconstitutional law while hundreds of others, especially in the downstate Illinois "Bible Belt" were singing the praises of mandated prayer; bringing "their God" back into the schools!

Morrison v Board of Education of Boyd County, No. 06-5380 (6th Cir. Oct. 26, 2007): The U.S. Court of Appeals for the 6th Circuit has decided that a school district's anti-harassment policy had a "chilling effect" on the free exercise of a student's religion. The history of the case goes back to 2003 and a consent agreement that was entered into under a lawsuit filed under the Equal Access Act when the district had denied students permission to establish a Gay Straight Alliance (GSA). The consent decree required the district to adopt policies prohibiting harassment based on sexual orientation and to provide mandatory harassment training to all students. In response, in 2005 several parents filed a lawsuit alleging that the policies and mandatory training would infringe on their right to express their religious beliefs regarding homosexuality. While the 2005 lawsuit was still pending, the district amended their policies to make clear that there was no outright ban on anti-homosexual speech, and in 2006 the district court upheld these revisions but rejected the parents claim for nominal damages.

On appeal to the 6th Circuit the parents claimed that damages were based on Morrison's speech having been "chilled" under the previous policies. In finding that a claim that speech had been "chilled" did provide standing to file suit, the circuit court remanded the case to the lower court to reconsider the factual question of what policy applied to Morrison in 2004-05.

Special Education

Alexandria City School Bd. v A.K., 484 F.3d 672 (4th Cir. 2007): The Alexandria City School Board has asked the United States Supreme Court to grant certiorari to reconsider the decision of

the 4th Circuit that found that the school district had failed to provide a student with a free and appropriate public education because the district did not state, by name, the specific private day school at which he would receive services. The district is alleging that the court failed to take into account the reality that often the exact school is not known at the time that the IEP is developed. Often the IEP is developed before the IEP team knows whether a given private school will accept the student or even has space available. Moreover, the district argues that the U.S. Department of Education has consistently instructed that the word "location" in the IDEA refers to the type of educational setting in which services will be provided, not the name of a specific school.

Not truly a special education issue, it is still interesting to note that the football powerhouse and perennial Rose Bowl candidate, the University of Michigan, has received a letter from the U.S. Department of Education's Office for Civil Rights threatening to cut federal funding to the university if it fails to make the University of Michigan Stadium more wheelchair accessible. The 42-page letter describes the stadium as unfriendly to disabled fans and the University of Michigan as basically unwilling to provide in formation about the stadium to the Office for Civil Rights. Wheelchair bound fans have reported that they are "crammed" into the limited number of platforms designed for wheelchairs, but the fans in front of them stood blocking their view of the game. Not surprisingly the university, through its spokeswoman, appeared shocked and surprised at the receipt of the letter, stating that they have kept the OCR totally informed of their renovations. For example bathrooms have been remodeled to accommodate wheelchairs and concession counters have been lowered to accommodate wheelchairs – although the counters are still several inches higher than required by the Uniform Federal Accessibility Standards, and those are only those counters on the few concessions stands were any alterations have been made at all!

Board of Education v Tom F., 06-637: In a 4-4 split the United States Supreme Court affirmed the ruling of the lower court which allowed the father of a learning-disabled child to seek private school tuition reimbursement without first giving the city's public schools a chance to meet the boy's needs. This case had revolved around a 1997 amendment to the IDEA which required that children first receive special education and related services from a public agency before their families pursue reimbursement. Not wanting to enroll their son in what they considered a substandard program the parents made the unilateral decision to enroll him in a private school and then seek reimbursement for tuition.

Teachers' Rights

Katz v Medford Sch. Dist., No. 07-3785 (Ore. Cir. Ct. Nov. 9, 2007): School district policies forbidding the possessing firearms on school grounds takes precedent over a state law which allows licensed owners to carry concealed weapons in a public place. Katz, a teacher in Oregon, was licensed to carry a concealed weapon to protect herself against a violent ex-husband. When she was forbidden from carrying a concealed weapon at school she sued on the assertion that Oregon's state firearms statute preempts local government entities, including school districts, from enacting regulations regarding firearms. In the end, the court made its decision on the common definition of "ordinance" and that policies of local school districts were not policies intended by the legislature to be covered by the word "ordinance" in the state firearms statute.

No Child Left Behind

Time is running out for the reauthorization of the No Child Left Behind legislation. Leaders of the Senate and House education committees have indicated that reauthorization legislation will not be brought up before the end of 2007, leaving it very uncertain that any work on revisions of the law will be done during 2008 because of the overwhelming time commitment of presidential campaigns.

Vouchers

Utah voters have soundly defeated the most comprehensive education voucher referendum to date. The referendum failed every county in the state. The voucher program being touted by Governor Huntsman, Jr. and Republican legislative leaders would have provided tax-funded subsidies to any student, rich or poor, to enroll in a private school. The plan would have offered tax-supported subsidies of $500 to $3,000 depending on family income, for each newly enrolled private school student. The defeat marks the 11th time in 11 attempts in recent decades that voucher plans or "tuition tax credits" have been decisively rejected by the voters. One would think that elected representatives would quit bowing to the call for vouchers by the very local minority constantly lobbying them and would start listening to the obvious majority who support better funding for public schools rather than their dismantling through increased public aid to private schools.

Finance

Federal Way Sch. Dist. No. 210 v Washington, (Wash. Super. Ct. Nov. 2, 2007): The Washington state constitution mandates the state to provide a general and uniform system of public schools. Basing its expenditures on historic salary levels during the 1976-77 school year, the method in which the state provides salary funding to school districts was found to provide unequal funding in violation of the state constitution. The court also found that the current system of funding violates the rights of students, teachers, and taxpayers to equal protection under the state constitution because the disparate funding has no rational basis.