



AALS

Education Law Section Newsletter

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December 2008

Message from the Chair

Section Members:

Greetings! I hope your year is proving to be productive and rewarding. It certainly has been for the Education Law Section. Our members have been active in scholarship and service in education law and broader issues as well. I thank you for sharing your professional activities with us for inclusion in this newsletter and for your continued commitment to advancing education law scholarship. The new Education Law Listserv (email educlaw@loyno.edu) will hopefully further advance the sharing of information, ideas, scholarship and education law events.

The upcoming Education Law Section meeting at the AALS Annual Meeting promises to be intriguing and thought provoking. The Education Law Section, in conjunction with the Sections on Law and Mental Disability and Student Services, is hosting a panel presentation entitled "Campus Violence: Prevention, Response and Liability." In the past several years colleges and universities have experienced an increase in the incidents of mass violence on campus, yet the legal issues surrounding prevention and liability for campus violence are not fully identified let alone understood. Members of the panel will discuss the legislative, administrative and judicial reactions to events of mass violence. Laura Rothstein is a professor and former Dean at the Louis D. Brandeis School of Law at the University of Louisville and has written numerous books, articles, and other works on disability discrimination. She will discuss different aspects of disability law as they relate to mass violence on campus, including privacy issues and the duty to warn. Nancy Chi Cantalupo is the Assistant Dean for Clinical Programs at the Georgetown University Law Center and an Adjunct at the George Washington University Law School. She will examine the typical administrative reactions to the most common type of campus violence – peer sexual harassment and gender-based violence – to draw lessons about appropriate responses to episodes of mass violence. Darby Dickerson is the Vice President and Dean of the Stetson University College of Law and is a frequent speaker and author on the topic of campus safety and security. She will focus on the legal and policy issues related to the collaborative team

models universities adopted as a result of the Virginia Tech tragedy. Helen de Haven is an associate professor at Atlanta's John Marshall law school and a former Dean of Students and faculty member and at the Appalachian School of Law at the time of the 2002 rampage shooting. She will analyze university liability for acts of mass violence. The papers presented at the section meeting will be published in the Journal of College and University Law.

We hope you can all join us at the Annual Meeting and take part in this important discussion. Please note that the Section business meeting will be held immediately following the program. If you are interested in serving on the Executive Committee or becoming involved in the Section please email me at rgarda@loyno.edu.

Finally, I would like to thank Kristi Bowman, Section Secretary, for her work on this newsletter, Emily Gold Waldman, Section Treasurer, for her budget work, and Mark Bauer for agreeing to be Chair in 2009.

I look forward to seeing you in San Diego.

Rob Garda
Chair, AALS Section on Education Law

Inside This Issue

Message from the Chair 1
Case Digests..... 2
Fitzgerald v Barnstable School Committee 2
Education Law Section Events..... 2
Upcoming Education Law Conferences 3
SSRN Launches Education Law Abstracting Journal..... 3
Selected Education Law Publications..... 4
Acknowledgements 6

Case Digests

The Big News in Education Law During 2008

This year, four cases on the Supreme Court's docket may have a significant impact on elementary and secondary public school settings. Three of the four cases bear on teachers' and administrators' rights:

- *Crawford v. Metropolitan Government of Nashville and Davidson County*, argued October 8, involves the dismissal of an employee soon after she cooperated in a sexual harassment investigation. Crawford, formerly a school district payroll coordinator, alleges she was subjected to retaliatory discharge; the employer claims she was dismissed because of financial improprieties. Lower courts held for the employer.
- *Pearson v. Callahan*, argued on October 14, is relevant to school districts because of the questions it presents about qualified immunity (the underlying case involves a police search of a private residence for drugs). In *Pearson*, the Court appears likely to rule on whether lower courts hearing civil rights claims should first determine whether a government official is subject to immunity, or evaluate whether a constitutional violation occurred.
- *Ysura v. Pocatello Education Association*, argued on November 3, presents a conflict between an Idaho law which does not permit government agencies to deduct from employees' paychecks for political reasons, and public employee unions that raise First Amendment claims of free speech and association. The unions won in the appellate court.
- *Fitzgerald v. Barnstable School Committee*, scheduled for argument on December 2, presents the question of whether Title IX is the exclusive remedy for sex discrimination claims in public schools (see article below).

A transcript of oral argument in each case heard by the Court is available on the Court's website by the end of the same day at: http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html.

AALS

Education Law Section Events

In San Diego

Section Program. Campus Violence: Prevention, Response and Liability. Thursday, January 8, 2009, 10:30-12:15. The program is co-sponsored by the Student Services and Law and Mental Disabilities sections. Panelists were selected from those who responded to a call for papers. The papers presented at the meeting will be published in the *Journal of College and University Law*.

Fitzgerald v. Barnstable

School Committee

On June 9, 2008, the Supreme Court granted certiorari on a question that has split the circuits over the past two decades: whether students alleging sex discrimination at the hands of federally funded educational institutions can bring suit only under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88, or whether they can also sue under 42 U.S.C. § 1983. That question is presented by *Fitzgerald v. Barnstable School Committee*, a First Circuit case on which the Supreme Court will hear oral argument on December 2, 2008.

In *Fitzgerald* – a case involving a kindergartner's claim that a third-grader on the school bus was forcing her to lift her skirt, pull down her underwear, and spread her legs – the First Circuit joined the Second, Third, and Seventh Circuits in holding that Title IX provides the exclusive remedy for sex discrimination by federally funded educational institutions. *Fitzgerald*, 504 F.3d 165, 176-80 (1st Cir. 2007); see also *Bruneau v. S. Kortright Cent. Sch.*, 163 F.3d 749 (2d Cir. 1998); *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857 (7th Cir. 1996); *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168 (3d Cir. 1993). The First Circuit reasoned that Title IX's remedial scheme – which the Supreme Court has held to include a private right of action – was sufficiently comprehensive to preempt counterpart actions under Section 1983. By contrast, the Sixth, Eighth, and Tenth Circuits have ruled that students can bring both Title IX and Section 1983 claims on the same set of facts. See *Communities for Equity v. Michigan High School Athletic Ass'n*, 459 F.3d 676 (6th Cir. 2006); *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997); *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996).

The Supreme Court's answer to this question will be significant because Title IX, unlike the Equal Protection Clause, does not permit plaintiffs to sue individual school officials for monetary relief. In addition, although the underlying standards for liability under the two statutes are similar, they are certainly not identical.

Section Meeting. The section meeting will be held immediately following the Section program on Thursday, January 8, 2009 at 12:15 p.m., immediately preceding the AALS Luncheon. We'll elect next year's officers and start to plan the 2010 AALS program. The brief meeting provides a good opportunity to become involved in the Section.

Upcoming Education Law Conferences

- February 13, 2009. **Educational Inequity: Costs, Causes, and Effects Conference**, sponsored by Duke Forum for Law and Social Change. Location: Duke University School of Law, Durham NC, (participants were solicited).
- February 21-24, 2009. **National Conference on Law and Higher Education**, sponsored by Stetson University College of Law and NASPA. Location: Orlando, Florida, (presenters are solicited, this annual February conference is always held in Florida).
- April 2, 2009. **Looking to the Future: Legal and Policy Options for Racially Integrated Education in the South**, sponsored by The Civil Rights Project/Proyecto Derechos Civiles at UCLA, the University of North Carolina Center for Civil Rights at the UNC School of Law, and the University of Georgia Education Policy and Evaluation Center. Location: UNC Law School (submission deadline has passed).
- April 2-4, 2009. **Commonwealth Education Policy Institute Annual Education Law Conference**. Location: Norfolk, Virginia (submission deadline has passed, proposals are usually due in October for this annual April conference which is always held in Virginia, although the specific city varies).
- April 7-9, 2009. **SocioLegal Studies Association Annual Conference**. Location: De Montfort University, Leicester, England (submission deadline is February 1, this conference is usually planned over British universities' "Easter Break," is hosted on a rotating basis by universities throughout England thus the specific location varies, and often has an Education Law strand but does not in 2009).
- July 20-23, 2009. **Annual Education Law Conference**. Location: Portland, Maine (submission deadline is not yet available online, this annual conference is usually in late July or early August and always held in Maine).
- September 30-October 2, 2009. **Australia and New Zealand Education Law Association Annual Conference**. Location: Melbourne, Australia (submission deadline not yet available online, this conference is usually held in late September or early October and the location rotates throughout Australia and New Zealand).
- November, 2009. **Education Law Association Annual Conference**. Location: not yet announced (submissions are usually due in the spring for this conference customarily held in November, the location varies).
- January, 2010. **AALS Education Law Section Program**. Location: New Orleans, Louisiana. Traditionally, the Section program has rotated between elementary/secondary education and higher education topics. The program often is assembled via a call for papers. During the past few years, the Section also has called for poster presentation proposals.

SSRN

Launches Education Law

Abstracting Journal

Wouldn't it be wonderful if you could receive a weekly email notifying you of five of the latest and greatest education law articles and essays posted on SSRN? And wouldn't it be even more wonderful if an author, title, or abstract piqued your interest and all you had to do was click on a link to be automatically directed to the full abstract with the opportunity to download the article immediately? Such a dream is a reality, ladies and gentlemen. It is the SSRN Education Law Abstracting Journal, founded in February 2008, sponsored by the Michigan State University College of Law, and edited by Kristi Bowman, Associate Professor of Law at MSU-College of Law (full disclosure: she also is the author of this short article, admittedly a shameless promotion of the abstracting journal).

Articles included in the SSRN Education Law Abstracting Journal during 2008 are included in this newsletter as current and forthcoming publications. To have an article, essay, or abstract included in the journal, upload it to SSRN and select "Education Law" as a subject matter journal during the uploading/submission process. The journal includes all articles about education law in subsequent e-mail publications and only declines to include articles not about education law and policy issues. Accordingly, inclusion in the journal is not a substitute for publication in a law review, other academic journal, or as a book chapter—but it is an additional way for your work to reach your target audience, and even more quickly than formal publication. There is no cost for uploading your work to SSRN or including it in the journal.

Any faculty member whose institution has an SSRN-Legal Scholarship Network site subscription (according to SSRN, nearly all major US law schools do) can subscribe to the journal free of charge. Simply type <http://ssrn.com/lisn/index.html> into your web browser, click on "Subject Matter eJournals" in the left-hand column, scroll down to "Education Law" and click on "subscribe." It's that easy. If your school does not have a site subscription, please contact Sandy Barnes at SSRN for subscription information, sandy_barnes@ssrn.com, 206-366-0918.

Selected

Recent & Forthcoming

Education Law Publications

The SSRN Education Law Journal is the primary source for the following list of publications.
Most of these publications are available for downloading at <http://ssrn.com/ljn>.

- DOUGLAS E. ABRAMS, *OUR PROMISE: ACHIEVING EDUCATIONAL EQUALITY FOR AMERICA'S CHILDREN* (Carolina Academic Press, 2008).
- MICHELLE ADAMS, "Parents Involved in Community Schools v. Seattle School District No. 1 - Stifling the Potential of *Grutter v. Bollinger*," Boston University Law Review (2008).
- ANITA L. ALLEN, "Undressing Difference: The Hijab in the West," Berkeley Journal of Gender, Law & Justice (2008).
- JACOB NIELSEN ARENDT, "The Impact of Public Student Grants on Drop-Out and Completion of Higher Education - Evidence from a Student Grant Reform."
- RACHEL S. ARNOW-RICHMAN, "Employment as Transaction."
- WILLIAM W. BASSETT, "Changing Perceptions of Private Religious Schools: Public Money and Public Trust in the Education of Children," Brigham Young University Law Review (2008).
- BRIAN J. BILFORD, "Harper's Bazaar: The Marketplace of Ideas and Hate Speech in Schools," Stanford Journal of Civil Rights and Civil Liberties (2008).
- DEBORAH L. BRAKE, "Title IX: A Pragmatic Feminism," Cleveland State Law Review (2008).
- DEBORAH L. BRAKE, "The Heart of the Game: Putting Race and Educational Equity at the Center of Title IX," Virginia Sports & Entertainment Law Journal (2008).
- ALAN E. BROWNSTEIN, "The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School Sponsored Activities," UC Davis Law Review (Forthcoming 2008-09).
- KRISTI L. BOWMAN, "Rebuilding Schools, Rebuilding Communities: The Civic Role of Mississippi's Public Schools after Hurricane Katrina," book chapter excerpted in Mississippi Law Journal (2008).
- KRISTI L. BOWMAN, "The Evolution Battles in High School Science Classes: Who is Teaching What?" Frontiers in Ecology and the Environment (2008).
- SCOTT BURRIS, "Regulatory Innovation in the Governance of Human Subjects Research: A Cautionary Tale and Some Modest Proposals" Regulation & Governance (2008).
- AARON H. CAPLAN, "Visions of Public Education in *Morse v. Frederick*," J. of Educational Controversy (2008).
- LEAH M. CHRISTENSEN, "Sticks, Stones, and Schoolyard Bullies: Restorative Justice, Mediation and a New Approach to Conflict Resolution in Our Schools."
- SEAN CROSTON, "Incorporating Fourth Amendment Standards in a Model Policy for School Officials' Use of Force to Restrain & Detain Students."
- RID DASGUPTA, "Diversity Rationale Overlooked by the Supreme Court: Qualifying the Role of Two International Human Rights Conventions."
- JOSH PAUL DAVIS & JOSHUA D. ROSENBERG, "The Immanent Structure of Free Speech Doctrine: Bong Hits, Jesus, and the Role of the Public Schools in Controlling Student Speech."
- MARC O. DEGIROLAMI, "The Constitutional Paradox of Religious Learning," Boston College Law Review (Forthcoming 2009).
- DARBY DICKERSON, "Background Checks in the University Admissions Process: An Overview of Legal and Policy Considerations," Journal of College and University Law (2008).
- DARBY DICKERSON, "Change or Be Changed: The Impact of Outside Forces on Campus Risk Management" Campus Activities Programming (2008).
- AMY DILLARD, "SLOPPY JOE, SLOP, SLOPPY JOE: How USDA Commodities Dumping Ruined the National School Lunch Program," Oregon Law Review (Forthcoming 2008-09).
- ANDRÉ DOUGLAS & POND CUMMINGS, "Progress Realized?: The Continuing American Indian Mascot Quandary," Marquette Sports Law Review (2008).
- MARTHA FINEMAN AND KAREN WORTHINGTON, eds., CHILDREN IN THE DISCOURSES OF RELIGION AND INTERNATIONAL HUMAN RIGHTS, (Ashgate Press, Forthcoming 2008).
- MATTHEW L.M. FLETCHER, ED., AMERICAN INDIAN EDUCATION: COUNTERNARRATIVES IN RACISM, STRUGGLE, AND THE LAW (Routledge, 2008).

Selected

Recent & Forthcoming

Education Law Publications (cont.)

- LESLIE YALOF GARFIELD, "Adding Colors to the Chameleon: Why the Supreme Court May Adopt a New Compelling Governmental Interest Test for Race-Preference Student Assignment Plans," *Kansas Law Review* (2008).
- RICHARD W. GARNETT, "Can There Really Be 'Free Speech' in Public Schools?," *Lewis & Clark Law Review* (2008).
- PATRICK M. GARRY, "How Strictly Scrutinized?: Examining the Educational Benefits the Court Relied Upon in *Grutter*," *Pepperdine Law Review* (2008).
- STEVEN G. GEY, "School Vouchers and the Problem of the Recalcitrant Constitutional Text," *Journal of Law & Education*, (2008).
- IRIS GOODWIN, "Ask Not What Your Charity Can Do for You: *Robertson v. Princeton* Provides Liberal-Democratic Insights into Cy Pres Reform," *Arizona Law Review* (Forthcoming 2008-09).
- JENNIFER ANNE GRAVES, "The Effect of Year-Round School Calendars on Academic Performance."
- DANIEL S. GREENSPAHN, "Stop Making a Federal Case Out of Education: A Constitutional Right to Learn after *Rodriguez* (1973) and *Seattle* (2007)."
- MURAD HUSSAIN, "Freedom of Speech and Adolescent Public School Students," *Journal of the American Academy of Child and Adolescent Psychiatry* (2008).
- DAN M. KAHAN, DONALD BRAMAN, GEOFFREY L. COHEN, PAUL SLOVIC & JOHN GASTIL, "Who Fears the HPV Vaccine, Who Doesn't, and Why? An Experimental Study of the Mechanisms of Cultural Cognition."
- STEPHEN KANTER, "*Bong Hits 4 Jesus* as a Cautionary Tale of Two Cities," *Lewis & Clark Law Review* (2008).
- ALENA KIMAKOVA, "Trade, Income Inequality and Investment in Education."
- ASHISH KOTHARI, "Should Teachers be Entitled to Minimum Wages?"
- PETER F. LAKE, "Still Waiting: The Slow Evolution of the Law in Light of the Ongoing Student Suicide Crisis," *Journal of College and University Law* (2008).
- ROBERT MACCOUN, PHILIP J. COOK, CLARA MUSCHKIN & JACOB L. VIGDOR, "Distinguishing Spurious and Real Peer Effects: Evidence from Artificial Societies, Small-Group Experiments, and Real Schoolyards," *Review of Law & Economics* (Forthcoming 2008-09).
- KENNETH L. MARCUS, "Higher Education, Harassment, and First Amendment Opportunism," *William & Mary Bill of Rights Journal* (2008).
- AMALIA R. MILLER & LEI ZHANG, "Intergenerational Effects of Welfare Reform."
- MARTHA MINOW, "The Government Can't, May, or Must Fund Religious Schools: Three Riddles of Constitutional Change for Laurence Tribe" *Tulsa Law Review* (2008).
- MARTHA MINOW, RICHARD A. SHWEDER & HAZEL MARKUS, EDS, *JUST SCHOOLS: PURSUING EQUALITY IN SOCIETIES OF DIFFERENCE* (Russell Sage Foundation 2008).
- SEAN R. NUTTALL, "Rethinking the Academic Narrative on Judicial Deference in Student Speech Cases," *New York University Law Review*, (2008) (note).
- ARARAT OSIPIAN, "Misdeeds in the US Higher Education: Illegality versus Corruption."
- ARARAT OSIPIAN, "Higher Education Corruption in Ukraine as Reflected in the Nation's Media."
- ARARAT OSIPIAN, "Higher Education Corruption in the World Media: Prevalence, Patterns, and Forms."
- ARARAT OSIPIAN, "The World is Flat: Modeling Educators' Misconduct with Cellular Automata"
- MARY-ROSE PAPANDREA, "Student Speech Rights in the Digital Age."
- RAFAEL I. PARDO & MICHELLE R. LACEY, "The Real Student-Loan Scandal: Undue Hardship."
- WENDY PARKER, "Desegregating Teachers."
- DEAN HILL RIVKIN, "Legal Advocacy and Education Reform: Litigating School Exclusion," *Tennessee Law Review* (2008).
- KURT W. ROTTHOF, "Could Affirmative Action Be Efficient in Higher Education?," *Economics Letters* (2008).
- CRISTINA RODRIGUEZ, "Against Individualized Consideration," *Indiana Law Journal* (2008).
- MITCHELL H. RUBINSTEIN, "Parents as Quasi-Therapists Under the Individuals with Disabilities Act," *University of Cincinnati Law Review* (2008).
- KERRY A. RYAN, "Access Assured: Restoring Progressivity in the Tax and Spending Programs for Higher Education," *Seton Hall Law Review* (2008).
- KATHRYN A. SAMPSON, "Life Cycle of the Disability Term."
- PAUL M. SECUNDA, "Mediating the Special Education Front Lines in Mississippi," *University of Missouri-Kansas City Law Review* (2008).

Selected

Recent & Forthcoming

Education Law Publications (cont.)

- DAWINDER S. SIDHU, "A Spectrum Theory Concerning the Use of Animals by Individuals with Disabilities in Postsecondary Institutions."
- DAVID SIMON, "Race-Conscious Assignment Policies in Primary Education: Does the Framework of *Grutter vs. Bollinger* Apply to *Parents Involved in Community Schools vs. Seattle School District, No. 1?*."
- GARY J. SIMSON, "To Teach or Not to Teach," *University of Toledo Law Review* (2008).
- STEVEN DOUGLAS SMITH, "Educating for Liberalism," *UC Davis Law Review* (Forthcoming 2008-09).
- MARK STRASSER, "Death by a Thousand Cuts: The Illusory Safeguards Against Funding Pervasively Sectarian Institutions of Higher Learning," *Buffalo Law Review* (2008).
- JOHN E. TAYLOR, "Tinker and Viewpoint Discrimination."
- LAUREL S. TERRY, "The Bologna Process and Its Impact in Europe: It's So Much More Than Degree Changes," *Vanderbilt Journal of Transnational Law* (2008).
- RONALD TURNER, "The Voluntary School Integration Cases and the Contextual Equal Protection Clause," *Howard Law Journal* (2008).
- HEIDIVON RAVENBERG & TARY TOBIN, "IDEA 2004: Final Regulations and the Reauthorized Functional Behavioral Assessment."
- VIVEK WADHWA, RICHARD B. FREEMAN & BEN RISSING, "Education and Tech Entrepreneurship."
- SARAH WALDECK, "The Coming Showdown Over University Endowments: Enlisting the Donors," *Fordham Law Review* (Forthcoming 2008-09).
- EMILY GOLD WALDMAN, "Returning to *Hazelwood's* Core: A New Approach to Restrictions on School-Sponsored Speech," *Florida Law Review* (2008).
- EMILY GOLD WALDMAN, "A Post-Morse Framework for Students' Potentially Hurtful Speech (Religious and Otherwise)," *Journal of Law & Education* (2008).
- ASHLIE C. WARNICK, "Accommodating Discrimination."
- MARK C. WEBER, "The IDEA Eligibility Mess," *Buffalo Law Review* (Forthcoming 2008-09).
- JORDAN BLAIR WOODS, "*Morse v. Frederick's* New Perspective on Schools' Basic Educational Missions and the Implications for Gay-Straight Alliance First Amendment Jurisprudence," *Columbia Journal of Gender and Law* (2008).
- R. GEORGE WRIGHT, "Doubtful Threats and the Limits of Student Speech," *UC Davis Law Review* (2008).

Acknowledgements

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And finally, opinions expressed here are not necessarily those of the Section and are not intended to represent the position of the Association of America Law Schools.