



The Association of American Law Schools

December 2009

Education Law Section Newsletter

Message From the Chair

The return of the Association of American Law Schools (“AALS”) annual conference to New Orleans is a very significant event. In years past, the AALS scheduled meetings in New Orleans every few years, to give law professors a chance to enjoy the city’s remarkable heritage, architecture, attractions, and – of course – incomparable restaurants. While there was certainly a sense, that lurking beyond the fabled French Quarter and Garden District, there was another New Orleans – a New Orleans of privation, scarce resources, and crumbling institutions – few conference attendees had reason to venture to these districts, or even think about them.

I remember being quite excited that the January 2006 AALS meeting was scheduled for New Orleans. I was looking forward to

revisiting some old haunts, and absorbing the city’s uniqueness. But at the end of August in 2005, all eyes were on the weather maps in the Gulf of Mexico. Katrina appeared to be headed on a direct path to New Orleans. The “big one” that had long been discussed and feared had materialized. And still no one could have predicted that it would actually be as bad as it was.

Of course much has been written on Katrina, but in addition to the shocking loss of life and human suffering, what was most notable about Katrina was the crumbling of institutions. The storm’s direct impact from wind and rain was quite serious, but the most significant devastation occurred over the next few days when levee after levee collapsed.

Those levees are not merely a metaphor for New Orleans’ public school system. In reality,

the collapse of the levees led to the physical and institutional collapse of the New Orleans public schools, as well as most other institutions.

Although funding from the federal government has not been as high as some expected – or believe New Orleans was promised, the city has had a remarkable opportunity to rebuild, reinvent, and rethink itself for the 21st Century. The tragic loss of life can never be forgotten, but New Orleans has also had an unprecedented opportunity to rebuild its public schools.

The Annual Meeting of the Education Law Section of the AALS will consider this very topic. Five years after Katrina, what has happened to New Orleans’ public schools? Has progress been made? And what challenges does the city – indeed all of America – face in public primary and secondary education in 2009?

We are excited about the panel we have assembled for the AALS conference, and about the work of the Section over the past year. I particularly want to thank the officers, Kristi Bowman (Michigan State, Chair-Elect), Emily Waldman (Pace, Secretary), and Kim Robinson (Emory, Treasurer), as well as the Executive Committee, for their great work over the past year.

I look forward to seeing you in New Orleans – to commemorate the past, and to celebrate the future.

Sincerely,

Mark D. Bauer

Chair, Education Law Section,
AALS
Associate Dean and Associate
Professor of Law
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Supreme Court Round-Up: The Big News in Education Law

Last Term yielded some major developments in the area of education law, with the Supreme Court deciding four major education law cases: *Fitzgerald v. Barnstable School Committee*, *Horne v. Flores*; *Safford v. Redding*; and *Forest Grove v. T.A.* The articles inside provide

a brief overview of each case.

Meanwhile, thus far into the 2009-10 Term, the Court has granted *certiorari* on one education law case: *Christian Legal Society Chapter of University of California, Hastings College of Law v. Newton*. In this case, the Court will decide whether Hast-

ings Law School acted constitutionally when it refused to allow the Hastings Christian Fellowship to register as a student organization because the group would not open its membership to all students regardless of their religious beliefs or sexual orientation.

Case Digests

Fitzgerald v. Barnstable School Committee 129 S. Ct. 788 (2009)

Last Term, the Supreme Court issued a unanimous decision that ensured constitutional remedies remain available for plaintiffs experiencing sex discrimination at the hands of schools bound by Title IX as well as the Equal Protection Clause. The Fitzgeralds had challenged the Barnstable (Massachusetts) School Committee's response to a third-grade boy's harassment of their kindergarten daughter—in particular, its failure to suspend the boy from the school bus, where the harassment had occurred—arguing that it violated both Title IX's prohibition on sex discrimination and the Equal Protection Clause. The First Circuit dismissed the Fitzgeralds' Title IX claim after examining it on the merits. It then held that the potential availability of relief under Title IX preempts additional claims under 42 U.S.C. § 1983, the statute that allows private enforcement of constitutional rights. In so holding, the First Circuit joined sides in a then-existing circuit split on the question of Title IX preemption. The Supreme Court resolved that split last January, when it overturned the First Circuit's decision and insisted that Fitzgeralds' constitutional claim warranted consideration on its merits as well.

To reach its decision on preemption, the Court examined Title IX for evidence that Congress intended its remedies to be exclusive. First it considered the fact that Title IX does not contain a comprehensive remedial scheme. The statute itself only expressly provides for agency enforcement and a penalty of withdrawal of federal

funds; indeed, the authority it provides to private enforcement exists only by implication. Consequently, the Court found, Title IX's remedies do not suggest that Congress intended them to be exclusive and supplant remedies that already existed under § 1983.

Next, the Court noted that the scope of rights and protections afforded by Title IX on the one hand and the Equal Protection Clause on the other are overlapping but not identical. For example, the Title IX covers private schools that accept federal funds, while the Equal Protection Clause covers public schools. On the other hand, Title IX only applies to educational institutions, while the Equal Protection Clause allows suits against institutions and individuals alike. And even where both laws apply, conduct that may violate one does not necessarily violate the other; for example, harassment is only actionable under Title IX if school officials are deliberately indifferent and have actual notice, while harassment can violate the Equal Protection Clause if it is part of an official "custom, policy, or practice." With so much difference between the two sources of law, it is hard to imagine that Congress wanted Title IX to operate to the exclusion of 1983's remedy for constitutional violations.

The Court's analysis illustrates the significance of its decision. If Title IX preempted § 1983, an enforcement gap could potentially insulate instances of institutional sex harassment and discrimination that violate statutory but not constitutional standards. Moreover, unlike Title IX claims, which may only proceed against institutions, 1983 plaintiffs may sue individuals who were acting "under color of law" when violating the

plaintiff's constitutional rights. Finally, the Court's decision preserving § 1983 ensures that plaintiffs have the full array of enforcement incentives, including punitive damages, which some courts have foreclosed under Title IX.

-- Erin Buzuvis

Horne v. Flores 129 S. Ct. 2579 (2009)

For nearly thirty years, courts and lawyers have looked to *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), for the three-part test to evaluate whether a school district has complied with the Equal Educational Opportunities Act of 1974 (EEOA). However, in the wake of the Court's recent decision in *Horne v. Flores*, districts' obligations under EEOA and the tests for assessing EEOA compliance have become muddy.

The *Flores* case began in the poor, heavily-ELL district of Nogales, Arizona. About eight years after the first *Flores* complaint was filed, the district court found the state liable for an EEOA violation. Before ordering a particular remedy, the district court instructed the state to conduct a cost study to determine the amount of funding needed to educate ELL students. The state never conducted the cost study and in 2006 it argued in the district court that for various reasons (pedagogical changes, administrative changes, NCLB compliance, state funding changes) it was now in compliance with the EEOA. The district court held an eight-day evidentiary hearing and concluded that the violation persisted.

The Court heard oral arguments in April 2009 and decided the case this past June, splitting 5-4. The Court reversed the lower courts' decisions and ordered

Upcoming Education Law Conferences

February 20-23, 2010: National Conference on Law and Higher Education, sponsored by Stetson University College of Law, in Orlando, Florida.

March 29-30, 2010: The 14th Annual Texas Higher Education Law Conference, sponsored by the UNT College of Education and the Center for Higher Education, in Denton, Texas.

November 2010: Education Law Association Annual Conference in Vancouver, British Columbia.

January 2011: AALS Education Law Section Program in San Francisco, California.

them to revisit their "misunderst[anding about] the obligation that the EEOA imposes on states." See slip op. at 2. The majority also determined that the lower courts erred in determining "the nature of the inquiry that is required when parties such as petitioners seek relief [from a remedial injunction] under [Federal] Rule [of Civil Procedure] 60(b)(5) on the ground that enforcement of a judgment is 'no longer equitable.'" *Id.* Accordingly, because the lower courts read the EEOA too narrowly and analyzed defendants' requests under Rule 60(b)(5) too rigidly, the Court implied but did not explicitly state that the lower courts had reached the wrong conclusion about whether Nogales students continued to suffer harm sufficient to justify the injunctive relief. Additionally, the Court concluded explicitly that NCLB does not supersede the EEOA

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Case Digests — cont'd

(as some of the parties had argued) and all nine justices agreed in somewhat tangential comments that NCLB does not contain a private right of action.

The Flores decision leaves many questions unanswered. For example, the status of the Castaneda test is unclear: in this EEOA case, the Court did not invoke the test which courts have used consistently for nearly 30 years, but neither did it reject the test. Additionally, the Court emphasized numerous ways for demonstrating EEOA compliance without increasing expenditures and stated directly that “funding is merely one tool that may be employed to achieve the statutory objective” of taking “appropriate action to overcome language barriers.” See slip op. at 18. The Court seemed to question the extent to which “money matters”—a suggestion which could have substantial impact in many areas of education law. And, although the Court’s asides about NCLB’s lack of a private right of action may seem definitive, the Court did not analyze whether NCLB contained an implied private right of action before announcing this conclusion.

— Kristi Bowman

Safford Unified School District v. Redding

129 S. Ct. 2633 (2009)

When can school administrators resort to strip searches of their students to look for illegal contraband? In *Safford v. Redding*, the Supreme Court took on this question, holding that administrators at Safford Middle School in Safford, Arizona had acted unconstitutionally when they strip-searched a 13-year-old female student on the suspicion that she had brought prescription-strength and over-the-counter painkillers to school.

The events leading up to the strip search of then-13 year old Savana Redding began when a friend of hers was caught with ibuprofen and naproxen pills; the friend stated that Redding had given them to her. The assistant principal then summoned Redding to his office, where she denied any connection to the pills. Redding agreed to let the middle school assistant principal and his assistant search her backpack, where they found nothing. At that point, the assistant principal had his assistant take Redding to the school nurse’s office to search her clothes for pills. The assistant and nurse asked her first to remove her jacket, socks, and shoes; then asked her to remove her pants and T-shirt; and finally had her pull out her bra as well as the elastic on underpants, such that her breasts and pelvic area were exposed. No pills were found.

Redding filed suit, alleging that the strip search had violated her Fourth Amendment rights. The district court dismissed the case, and a three-judge panel of the Ninth Circuit affirmed. The Ninth Circuit then took the case en banc, however, and not only reversed the underlying Fourth Amendment ruling, but also held this was such a clear Fourth Amendment violation that the assistant principal was not entitled to qualified immunity. The Supreme Court then granted certiorari.

In a decision authored by Justice Souter, the Supreme Court agreed that the strip search had violated Redding’s Fourth Amendment rights. The Court explained that in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), it had held that school administrators’ searches of students would be constitutional when justified in their inception (i.e., when the search is based on reasonable suspicion that the search will turn up evidence that the student has violated the law or school rules) and permissible in their scope (i.e., when 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). Here, the Court held, that search of Redding’s backpack and outer clothing satisfied this test. But once the school administrators proceeded to a strip search, “the content of the suspicion failed to match the degree of intrusion.” The Court explained that the assistant principal had no reason to suspect that large amounts of pills were being passed around or that such pills were being stashed in “intimate places.” The Court added that *T.L.O.* should be read to require “reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing” before school administrators make the “quantum leap” from searches of outer clothes and backpacks to searches of “intimate parts.”

That said, the Court still concluded that the assistant principal was entitled to qualified immunity for having directed the nurse and his assistant to strip-search Redding. The Court noted that circuits had split on the appropriate standard for strip searches and concluded that the Fourth Amendment violation here was not clearly enough established to deprive the assistant principal of immunity. Justices Stevens and Ginsburg, by contrast, argued in partial dissent that the law here was clearly enough established to make qualified immunity inappropriate. On the flip side, Justice Thomas argued in partial dissent that no Fourth Amendment violation should have been found here.

—Emily Gold Waldman

Forest Grove v. T.A

129 S. Ct. 2484 (2009)

A provision in the 1997 Amendments to the Individuals with Disabilities Education Act (IDEA) contemplates reimbursement of private-school tuition for students who have “previously received special education and related services under the authority of a public agency,” where that public agency did not provide a “free appropriate public educa-

tion” (FAPE). Does this provision categorically prohibit any IDEA-qualifying student who has not first attended public school from being reimbursed for his private school tuition?

The Supreme Court first took up this question in *Board of Education of New York v. Tom F.*, 552 U.S. 1 (2007), but ended up not resolving the issue because Justice Kennedy recused himself from the case, leaving a 4-4 split. In *Forest Grove School District v. T.A.*, the Court returned to the matter, and concluded that the statutory text does not categorically bar reimbursement in situations where the student has not previously attended public school.

In a decision authored by Justice Stevens, the Court held that it would be inconsistent with the text and purpose of the IDEA to read the provision in question as providing the “the exclusive source of authority for courts to order reimbursement when parents unilaterally enroll a child in private school.” Rather, the Court reasoned, the provision “is best read as elaborating on the general rule that courts may order reimbursement when a school district fails to provide a FAPE.” Had Congress sought to abrogate this general rule through the 1997 Amendments, the Court reasoned, it would have done so explicitly. Moreover, interpreting the 1997 Amendments to bar reimbursement in all cases where the student had not first attended public school would undermine the general remedial purpose of the IDEA: ensuring that all children with disabilities receive a free and appropriate public education. Justice Souter, joined by Justices Scalia and Thomas, dissented, arguing that the provision in question did limit the availability of reimbursement.

—Emily Gold Waldman

Student Writing Award: the George Jay Joseph Education Law Writing Award

The Education Law Association, in cooperation with the Journal of Law and Education, is pleased to announce the 2010 Competition for the George Jay Joseph Education Law Writing Award.

The winner of the competition will be recognized at the Education Law Association's Annual Conference, and the manuscript will be published in the *Journal of Law and Education*. Additionally, the winner will be invited to present on the topic of the article at the ELA Annual Conference and receive a commemorative plaque, a year's membership in ELA, waiver of the registration fee for the 2009 conference, and national recognition via an ELA press release.

Specifications for Entries

The manuscript must meet all of the following criteria:

- **Subject Matter:** one or more legal issues within any of the various contexts of education, including public and private K-12 schools and institutions of higher education, especially current and emerging issues in elementary and secondary public education
- **Format:** double-spaced, with 12-point font and one-inch margins, with footnotes on each respective page (rather than at the end) carefully conforming to *Blue Book* citation style
- **Length:** between 35 and 55 pages including the footnotes
- **Status:** not previously published and not under review elsewhere for publication
- **Authorship:** single-authored by a law student or a student in a graduate program in education

Doctoral dissertations are not eligible; they are subject to a different ELA award; however, manuscripts that synthesize dissertations may be submitted, provided that they meet the specifications.

Submission and Selection

The author must submit the manuscript via email (as an attachment in Word format) to the chair of the selection committee for the Joseph Award Committee by July 15, 2010: perry.zirkel@lehigh.edu. The members of the committee are:

- Perry A. Zirkel, Lehigh University – chair
- M. David Alexander, Virginia Tech University
- Josie F. Brown, University of South Carolina School of Law
- Lynn Daggett, Gonzaga University School of Law
- Bruce Joseph, Jefferson Law Book Company
- Merri Schneider-Vogel, Thompson & Horton LLP

Selected Recent and Forthcoming Education Law Publications

- KEVIN D. BROWN, *Now Is the Appropriate Time for Selective Higher Education Programs to Collect Racial and Ethnic Data on its Black Applicants and Students*, THURGOOD MARSHALL LAW REVIEW (forthcoming 2009).
- KEVIN D. BROWN, *Can Public International Boarding Schools in Ghana be the Next Educational Reform Movement for Urban Minority Public School Students?* TEMPLE POLITICAL & CIVIL RIGHTS LAW REVIEW (forthcoming 2010).
- KRISTI L. BOWMAN, *The Civil Rights Roots of Tinker's Disruption Tests*, 57 AMERICAN UNIVERSITY LAW REVIEW 1129 (2009).
- KRISTI L. BOWMAN, *A New Strategy for Pursuing Racial and Ethnic Equality in Public Schools*, 1 DUKE FORUM FOR LAW & SOCIAL CHANGE 47 (2009).
- KRISTI L. BOWMAN, *Pursuing Educational Opportunities for Latino Students*, 88 NORTH CAROLINA LAW REVIEW -- (forthcoming 2010).
- LEAH M. CHRISTENSEN, *Legal Reading and Success in Law School: The Reading Strategies of Law Students with Attention Deficit Disorder (ADD)*, 12 ST. MARY'S LAW REVIEW ON MINORITY ISSUES __ (forthcoming 2010).
- DAVID S. COHEN, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 INDIANA LAW JOURNAL 135 (2009).
- PETER A. JOY & ROBERT R. KUEHN, *Lawyering in the Academic: The Intersection of Academic Freedom and Professional Responsibility*, 59 JOURNAL OF LEGAL EDUCATION (2009).
- THOMAS KLEVEN, *Federalizing Public Education*, 55 VILLANOVA LAW REVIEW (forthcoming 2010).
- KAMINA PINDER, *De Jure, De Facto, and Déjà vu All Over Again: An Evaluation of the Modern School Finance Reform Movement Through The Historical Lens of Georgia's Segregation-Era School Equalization Program*, JOHN MARSHALL LAW JOURNAL (work in progress co-authored with Evan Hanson) (forthcoming spring 2010).
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- KAMINA PINDER, *Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Education Policy*, JOURNAL OF LAW & EDUCATION (forthcoming January 2010).
- SARAH E. REDFIELD & SCOTT JOHNSON, EDUCATION LAW: A PROBLEM-BASED APPROACH (LEXIS 2009).
- SARAH E. REDFIELD, DIVERSITY REALIZED: PUTTING THE WALK WITH THE TALK FOR DIVERSITY IN THE PIPELINE TO THE LEGAL PROFESSION (Vandeplas 2009).
- DEAN HILL RIVKIN, *Decriminalizing Students with Disabilities*, 54 NEW YORK LAW SCHOOL LAW REVIEW (forthcoming 2010).
- MARK C. WEBER, *Special Education from the (Damp) Ground Up: Children with Disabilities in a Charter School-Dependent Educational System*, __ LOYOLA JOURNAL OF PUBLIC INTEREST LAW __ (forthcoming 2010).
- MILDRED WIGFALL ROBINSON & RICHARD J. BONNIE, eds., LAW TOUCHED OUR HEARTS: A GENERATION REMEMBERS BROWN V. BOARD OF EDUCATION (2009).
- ROSEMARY SALAMONE, TRUE AMERICAN: LANGUAGE, IDENTITY, AND THE EDUCATION OF IMMIGRANT CHILDREN (Harvard University Press, forthcoming 2010) .
- LOUIS N. SCHULZE, JR., *Balancing Law Student Privacy Interests and Progressive Pedagogy: Dispelling the Myth that FERPA Prohibits Cutting-Edge Academic Support Methodologies*, __ WIDENER LAW JOURNAL __ (forthcoming 2010).
- SUSAN STUART, *Participatory Lawyering & the Ivory Tower: Conducting a Forensic Law Audit in the Aftermath of Virginia Tech*, 35 J. COLL. & U. L. 323 (2009).
- SUSAN STUART, *Voices from the Bottom of the Well: No Child Left Behind and the Allegory of Equitable Education as a Gateway to Crime and Delinquency*, in OUR PROMISE: ACHIEVING EDUCATIONAL EQUALITY FOR AMERICA'S CHILDREN (Dan Weddle & Maurice Dyson, eds., Carolina Academic Press 2009) (co-author with Geneva Brown).
- SUSAN STUART, *In Loco Parentis & the Public Schools: Abused, Confused and in Need of Change*, 78 U. Cin. L. Rev. ____ (forthcoming 2010).
- SUSAN STUART, *Drugs Searches in the Public High Schools*, 44 Val. U. L. Rev. ____ (Symposium issue) (forthcoming 2010).
- JOHN E. TAYLOR, *Tinker and Viewpoint Discrimination*, 77 UMKC L. Rev. 569 (2009).
- EMILY GOLD WALDMAN, *Regulating Student Speech: Suppression versus Punishment*, 85 INDIANA LAW JOURNAL __ (forthcoming 2010).

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