

School Law Briefing

A PUBLICATION OF
ANCEL, GLINK, DIAMOND, COPE & BUSH, P.C.

Courts Continue to Define Districts' Discretion

THE TENSION BETWEEN THE DISCRETIONARY authority vested in school boards by the School Code and their duty to bargain with unions under the Illinois Educational Labor Relations Act ("Act") has recently been the source of considerable litigation. Last year, in *Board of Education of Rockford Dist. No. 205 v. IELRB*, 165 Ill.2d 80 (1995), the Illinois Supreme Court held that an arbitration award ordering the rescission of a notice to remedy would usurp the District's sole authority under Sections 10-22.4 and 24-12 of the School Code to determine appropriate cause for dismissal and/or notices to remedy. Because Section 10(b) of the Act holds such a provision unlawful, the arbitration award was equally infirm, and the District was within its rights to refuse to comply with the award.

Since *Rockford*, the courts have had occasion to further define the line of separation between the School Code and the Act. In *Midwest Central Unit Sch. Dist. 191 v. IELRB*, 277 Ill.App.3d 440 (1st Dist. 1995), a second-year probationary teacher was notified of her non-renewal based upon her persistent failure "to manifest an open mind and willingness to support administrative initiatives," and her failure to meet standards expected by the District regarding team building. The Union grieved the action, claiming that the teacher's non-renewal violated the contract's just cause

provision. The arbitrator granted the grievance and reinstated the teacher for a third probationary year. The District refused to comply with the arbitrator's order.

The *Midwest Central* court found that, under Section 24-11 of the School Code, the school board has the sole duty and power to appoint teachers and to grant tenure. These powers are discretionary, and cannot be delegated or limited by a collective bargaining agreement. By ordering the teacher reinstated, the arbitrator had usurped the authority specifically and exclusively reserved for the school board under the School Code. The court reasoned that the arbitrator's award was in direct conflict with Section 24-11 of the School Code, and was therefore invalid for all the same reasons as in *Rockford*. Accordingly, the District had not committed any unfair labor practice by refusing to comply with the arbitration award.

More recently, in *Granite City Comm. Unit Sch. Dist. No. 9 v. Illinois Educational Labor Relations Bd. and Granite City Federation of Teachers, Local 743, IFT/AFT*, 279 Ill.App.3d 439, (4th Dist. 1996), a teacher received a disciplinary suspension without pay. The Union grieved the suspension, and the District resisted arbitration based on *Rockford*. The Appellate Court disagreed with the District, holding that the School Code is silent on the issue of disciplinary suspensions. Accordingly, an arbitrator's ruling either affirming or reversing the suspension would not be in conflict with Sections 24-12 or 10-22.4 of the School Code, and the District was obligated to participate in the arbitration.

Based on these court rulings, school boards can be assured that their decisions to dismiss teachers, issue notices to remedy or grant/withhold tenure are within their express statutory powers, and are outside the scope of bargainable matters. However, actions which are not specifically provided for in the Code, such as disciplinary suspensions, will most likely fall within the collective bargaining relationship. We will keep our friends advised of further judicial or legislative developments in this area.

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ISSUE NUMBER 2—NOVEMBER 1996

| | |
|-----------------------------|---|
| Case Law Update | 2 |
| School Board Workshop | 3 |
| Legislative Update | 4 |

School Gymnasiums: Educational or Recreational?

A recent Illinois Appellate Court decision involving a student injured in a school gymnasium has determined that governmental immunity depends more upon how a school facility is used than the school's ownership of it.

In *Ozuk v. River Grove Bd. of Educ.*, 281 Ill.App.3d 239 (1st Dist. 1996), a 13-year-old, 6'1" male student filed a premises liability action against the River Grove Board of Education. The student sought damages for injuries he sustained when he slipped and fell in the school gymnasium. He claimed that he fell while running laps in gym class because he had to run under volleyball nets and because the floor was defective.

The School District moved to dismiss the complaint under Section 3-106 of the *Tort Immunity Act* which provides:

Neither a local public entity nor a public employee is liable for an injury where the liability is based on the existence of a condition of any public property *intended or permitted to be used for recreational purposes*, including, but not limited to parks, playgrounds, open areas, buildings or other enclosed recreational facilities, unless such local entity or public employee is guilty of willful and wanton conduct proximately causing such injury. (Emphasis added.)

The injured student argued that the school gymnasium was *educational*, not *recreational*, in nature, and therefore, that the school district was not immune from liability.

If the student was correct, then the school district could be held liable under Section 3-102 of the *Tort Immunity Act*, which provides that public entities are liable when an individual is injured who has used

the facilities in a reasonably foreseeable manner and is injured by an unsafe condition, when the public entity knew about the condition and knew that it was not reasonably safe.

The Illinois Appellate Court agreed with the student and held that gym class was educational, not recreational. In so holding, the court referred to the definitions of recreation and physical education in Webster's Third New International Dictionary. The court held that "compulsory physical education and recreation have different aims: whereas the former seeks to instruct, the latter aspires merely to amuse. Accordingly, although some students may enjoy gym class, it cannot be said to be recreation."

However, the court went on to hold that public property may have more than one intended use. The Appellate Court held that "if the school gymnasium was encouraged, intended, or permitted to be used for recess, extracurricular events, or other recreational, non-compulsory activities, then Section 3-106 would apply, provided that the recreational use was more than incidental." The Appellate Court then remanded the case to the Circuit Court for a finding of whether the gymnasium was used only for compulsory physical education.

Therefore, under *Ozuk*, if a school gymnasium is regularly used for recreational purposes such as extracurricular activities and dances, a plaintiff suing a school district for damages resulting from an injury in gym class will not be able to sustain a claim of mere negligence against the District. Rather, the plaintiff will have to prove wilful and wanton misconduct on the part of the school district. School boards should review their current uses of buildings to determine whether they can benefit from *Ozuk's* protections.

School Board Policies: Avoiding the Pitfalls

You have all heard the stories recently in the news—the young boy suspended for kissing a classmate, the girl expelled for taking a Midol pill in school, the group of upstanding high school students expelled for bringing alcohol to the homecoming dance, and the young girl disciplined after bringing a knife to school to cut her chicken during lunch.

What are school boards to do? After all, the sexual harassment policy says that students *will* be disciplined for sexual harassment, the drug-free schools policy clearly states that students *shall* be expelled or suspended if drugs or alcohol are taken during school or to school activities, and the zero-tolerance weapon policy says that students who bring knives to schools *must* be expelled.

It's a delicate balance, deciding whether or not to make an exception to a policy. This type of decision goes with the territory and is one of the hallmarks of being a board member.

School boards are increasingly faced with these and similar issues in part because they have lengthy board policies covering more areas than ever before. School

boards know that they must follow their policies, but can exceptions be made? If they make an exception for one student, will that open the door for further exceptions and even liability when they apply their policy to one student and not another?

Boards of education have the unenviable job of sorting all these issues out. To help our school board friends in this difficult task, we have supplied the following suggested checklist which school boards can follow when deciding whether or not to apply a board policy to a particular student.

1. Contact your legal counsel.

Nobody enjoys spending money on legal fees. However, this advice, when followed, will likely save you money in the long run and will certainly save you headaches and sleepless nights spent wondering what to do when faced with a sticky situation. Besides, it is always helpful to bounce a question off of people who are knowledgeable in the area and have likely faced the question before. School district lawyers can make your job easier; let them help you.

2. Ensure that you have well written policies.

Board policy books do not win awards by the pound. Concise but well drafted policies generally work best and are easier to understand and apply. The policies should be broad enough to cover most situations, but specific enough to let the students, parents, and employees know the consequences of their actions. Don't hesitate to use your lawyers and their expertise to ensure that your policies conform with statutory and constitutional standards.

3. Apply the policies on a case-by-case basis.

This is an important rule, and is one that is often forgotten. Let's take the instance of student expulsions. When you expel a student, the findings of the board, or hearing officer, as the case may be, should be full of details, details, and more details. A lengthy record will show a court on review that you took the action you did after much consideration and that your decision to expel the student was not made lightly.

The same holds true for any board action; consider the facts of each situation you are faced with on a case-by-case basis. Be sure to make findings that are directly related to the unique facts of each case.

Continued on page 8

Legislative UPDATE

The Illinois Legislature has been hard at work this past session drafting numerous amendments and additions to the *Illinois School Code*. You will be happy to note that the changes are almost exclusively pro-school districts. For example, the new search and seizure provision of the *School Code* gives school districts more authority than ever to search through students' lockers, desks, and school parking lots. Also, school districts may now expel students for up to *two calendar years*.

In addition, the Illinois Legislature has finally put to rest some issues that have been plaguing school districts for years. It has added an entirely new section of the *School Code* regarding how a school district must determine the residency of its students. The Illinois Legislature has also amended the *School Code* to give school districts more authority and discretion in adopting dress codes.

Student Expulsions (105 ILCS 5/10-22.6(d))

Student discipline remains at the forefront of legislative priorities. This section of the *School Code* has been amended numerous times over the past few years, no doubt owing to an increased perception that our schools are not safe. It is certainly true that school districts are increasingly faced with difficult discipline issues and that there are now more instances of students bringing weapons to school than in recent years.

As of August 6, 1996, school districts may expel students for definite periods of time, not to exceed *two calendar years*. Previously, school districts could expel students for two *school years*.

In addition, school districts may now include a more detailed definition of "weapon" in their gun-free schools or zero-tolerance weapon policies thanks to this amendment.

The federal *Gun-Free Schools Act of 1994* currently defines the term "weapon" as a firearm only; not included in this definition are knives, billy clubs, brass knuckles, etc. This was a frustrating limitation for school districts faced with incidences of stu-

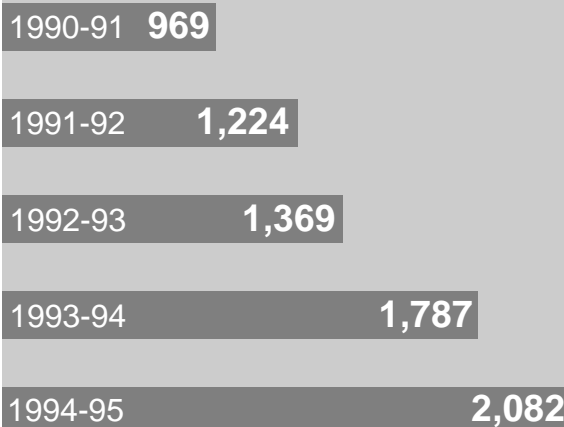
dents bringing weapons to school. The Legislature amended the *School Code* to define the term "weapon" much more broadly. The *School Code* now reads:

The term "weapon" means possession, use, control, or transfer of any object which may be used to cause bodily harm, including, but not limited to, a weapon as defined by Section 921 of Title 18, United States Code . . . knives, guns, fire arms, rifles, shot guns, brass knuckles, billy clubs, or "look-alikes" thereof. Such items as baseball bats, pipes, bottles, locks, sticks, pencils, and pens may be considered weapons if used or attempted to be used to cause bodily harm.

You will note that the law previously stated that a student could be expelled only for *bringing* a weapon to school. The law now provides that students can be expelled for possessing, using, controlling, or transferring any object which may cause bodily harm not only at school, but at all school-sponsored activities and events, or at any activities or events which bear a reasonable relationship to school.

The Illinois Legislature should be commended for making this change. School district officials and members of the legal community were baffled at the previously narrow definition of the term "weapon." School districts were constantly faced with situations where students brought other types of weapons to school, such as knives. Especially troubling for school districts, the Illinois Appellate Court in *Washington v. Smith*, 248 Ill.App.3d 534, held that a student could not be expelled for possessing an ice pick at school because she did not "brandish" the ice pick or threaten anyone with it. This case now has limited effect.

SCHOOL EXPULSIONS IN ILLINOIS



Source: Illinois State Board of Education

Transfer Students
(105 ILCS 5/2-3.13a)

In addition to the sweeping changes regarding student expulsions, the Illinois Legislature also added a new section to the *School Code*, effective August 9, 1996, regarding students who transfer from public schools from which they had been suspended or expelled.

Section 5/2-3.13(a) now provides that when a student has been suspended or expelled for (1) knowingly possessing a weapon in a school building or on school grounds; (2) for knowingly possessing, selling, or delivering in a school building or on school grounds a controlled substance or cannabis; or (3) for battering a staff member of the school, these students shall not be permitted to attend class in a new public school into which they are transferring until they have served the *entire* period of their suspension or expulsion.

Previously, students who had been expelled for the above reasons often attempted to re-enroll in a neighboring district and escape their expulsion or suspension. The law now provides that the records of students expelled or suspended for the above reasons shall indicate the date and duration of the suspension or expulsion.

Please note that this section regarding transfer students currently defines “weapon” under the *old* definition, which only includes firearms. The more expansive definition of “weapon,” including knives, brass knuckles, baseball bats, *etc.*, is not included in this section of the *School Code*.

This apparent oversight means that if a student brings a knife to school, the knife is found, and the student is expelled, if the student moves and seeks to transfer to your school, you must accept him as a new student and allow him to attend classes immediately. As always, we will follow the law in this area and will let you know if and when this section is amended to comport with the more all-encompassing definition of “weapon” that was discussed earlier. However, for the time being, it is important for you to keep this distinction in mind.

School Searches
(105 ILCS 5/10-22.6(e))

In the event that the above amendments to the *School Code* did not move you, this one will. The Illinois Legislature added a new section to the *School Code* providing for school searches and seizures. As most of you are well aware, school searches could previ-

ously be conducted without search warrants only when there were reasonable grounds for suspecting that the search of a particular student would turn up evidence that the student was violating the law or school rules.

The *School Code* now provides that school authorities may inspect and search all areas of a school, including lockers, desks, and parking lots, and may search through all personal effects left in those places by students (1) without notice, (2) without consent of the student, and (3) without search warrants.

The new statute also provides that local law enforcement officers may assist with such searches and may use specially-trained dogs. All evidence may be seized and turned over to law enforcement authorities. The statute also provides that school districts may take immediate disciplinary action against students who are found to be in possession of illegal contraband.

The General Assembly specifically stated in the statute that “students have no reasonable expectation of privacy in these places and areas or in their personal effects left in these places and areas.”

Keep in mind that the search and seizure of items that are carried by students and are located on their bodies is not provided for in the statute. Reasonable suspicion should exist before school district officials or law enforcement officers search personal effects located on the bodies of students.

Section 10/20.14 of the *Illinois School Code* was also amended to provide that school boards must establish and maintain a parent-teacher advisory committee to develop guidelines regarding pupil discipline, including school searches. School boards are also encouraged to annually review their pupil discipline policy and all other factors that are related to the safety of their schools, pupils, and staff.

Student Residency
(105 ILCS 5/10-20.12b)

The Illinois legislature has finally shed some light on the issue of student residency. Previously, the *Illinois School Code* simply provided that school districts must charge non-resident students tuition. The *School Code* did not define what “resident student” meant.

A line of Illinois cases did establish that children presumptively reside in the school district where their parents reside. This presumption could be rebutted by showing either (1) relinquishment of control and

custody of the child by the parents; and (2) the primary reason for the parental relinquishment of custody and control must not be for the purpose of the child's attending a public school in another district.

The new statute is similar to the common law rules regarding student residency that were established in Illinois cases during the past century, but provides a clearer view of exactly what "residency" means. The new section of the *School Code*, effective January 1, 1997, defines "residence" and "legal custody." As of that date, the statute will provide that the "residence" of a person who has legal custody of a pupil is deemed to be the residence of the pupil.

The Illinois Legislature defines "legal custody" as custody exercised by a natural or adoptive parent, custody granted by order of court, custody exercised under a statutory short-term guardianship, custody exercised by an adult caretaker relative, or custody exercised by an adult who can demonstrate that he or she has assumed and exercises legal responsibility for the student and provides the student with a regular, fixed, night-time abode.

Under the new statute, legal custody cannot be changed solely to allow a student to have access to an educational program. The amendment exempts homeless children and children placed in foster homes.

The new statute provides a hearing procedure by which parents and guardians can dispute a school board's findings regarding residency. Importantly, the statute provides that any person who knowingly enrolls or attempts to enroll a student on a tuition-free basis when the student is a non-resident of the district shall be guilty of a Class C misdemeanor.

Drug Use by Student Athletes (720 ILCS 5/12-4.9)

The Illinois Legislature has recognized that the use of drugs such as steroids is becoming more commonplace among child athletes who are trying to gain or lose weight. Accordingly, the Legislature passed a new section to the *Illinois Criminal Code* providing for the new crime of drug-induced infliction of aggravated battery to a child athlete.

The statute, effective January 1, 1997, prohibits individuals from distributing drugs to athletes under the age of 18 for the purpose of quick weight gain or weight loss. The statute also prohibits individuals from encouraging the ingestion of such drugs. The first vio-

lation of this statute is a Class A misdemeanor; a second or subsequent violation is a Class 4 felony.

Residency of Principals (105 ILCS 5/10-21.4a)

This section of the *Illinois School Code* regarding the duties of principals was amended, effective August 9, 1996. It now provides that residency within a school district may not be a condition of a principal's employment or continued employment, unless residency within a school district is made an express condition of the principal's employment at the time he or she is hired.

This section of the *School Code* applies both to principals hired before and after the effective date of this amendment. The statute also states that residency in a school district shall not be considered in determining the compensation of a principal or the assignment or transfer of a principal to another school within a district.

Student Promotion to Higher Grades (105 ILCS 5/10-20.9a)

This section of the *School Code* provides that teachers have the responsibility for determining grades and other evaluations of students within the grading policy of the school district.

Section (b) was added, effective August 6, 1996, to provide that school districts are discouraged from promoting students to the next higher grade level based upon any reason not related to the academic performance of the student. In other words, school districts may not promote students based upon age or any other social reasons.

School boards are allowed to adopt and enforce policies regarding student promotion that are necessary to ensure that the students meet local educational goals and objectives and that they can perform at the expected grade level prior to their promotion.

Teachers Convicted of Murder (105 ILCS 5/10-21.9)

Just in case there was any doubt, the Legislature has now prohibited school boards from hiring any person who has been convicted of committing or attempting to commit first-degree murder. This amendment became effective on August 6, 1996. As you already know, school boards are authorized to conduct criminal background investigations under this section of the *School Code*.

School Uniforms
(105 ILCS 5/10-22.25b)

The *School Code* previously provided that school boards could adopt school uniforms or dress code policies. Effective August 6, 1996, this section of the *School Code* was greatly expanded. This section now provides that school boards may adopt uniform or dress code policies that are necessary to maintain the orderly process of school function or prevent the endangerment of student health or safety.

The statute provides that all students, including transfer students, must be allowed to attend school without uniforms during a reasonable period of time to enable the students to acquire the school uniforms or otherwise comply with the dress code policy. School uniform policies must include criteria and procedures by which school boards will accommodate the needs of students from indigent families.

Importantly, this section of the *School Code* provides that if parents object on religious grounds to the dress code policy, the student in question shall not be required to comply with the policy. Thus, students whose parents object on religious grounds have an automatic waiver to the dress code policy.

For those of you with dress code policies that have not found favor with the community, you can expect to see religious objections to the dress code in the coming year. The statute simply provides that parents need only present a signed statement to the school board detailing the grounds for their objection. Once this is done, the board *must* exempt the child or children from the dress code. In other words, the board is not given any discretion, even in cases where the religious exemption seems to be concocted by the parents as an attempt to get around the dress code.

Summer School
(105 ILCS 5/10-22.33b)

This new section of the *Illinois School Code* provides that school districts may *require* certain students to attend summer school, effective August 6, 1996. School districts may conduct high-quality summer school programs for resident students who have been identified as being academically at risk in critical subject areas such as language arts (reading and writing) and mathematics. Such summer school programs are open to all students who will be entering any of the school district's grades for the next school term and who have not been identified as disabled under Article 14 of the *Illinois School Code*.

These summer school programs must be designed to raise the level of achievement and improve opportunities for success for those students who are required to attend. School districts must notify parents before the end of the school year that their child is required to attend summer school.

EEO-5 Report

School districts now have one less form to fill out. The Equal Employment Opportunity Commission (EEOC) amended sub-part M of 29 CFR part 1602, effective July 29, 1996, by discontinuing the EEO-5 Report Form 168B for individual schools and annexes.

The EEOC took this action in an effort to reduce the reporting burden on school districts and to streamline the collection of information. Elementary and secondary public school systems and districts have been required to submit EEO-5 Reports to the EEOC since 1974. The purpose behind the EEO-5 Report is to monitor the sex, race, and ethnicity of school district employees. School districts must submit EEO-5 Reports bi-annually in even numbered years.

Two types of EEO-5 Reports have been used: EEOC Form 168A which covers the entire public school system or district; and EEOC Form 168B, which covers each individual school and annex within the system or district.

School districts are still required to file EEOC Form 168A covering the entire school system or district.

Family and Medical Leave Act
Proposed Amendment

Both the United States Senate and House of Representatives introduced bills that would amend the Family and Medical Leave Act of 1993 to allow employees to take parental involvement leave to participate in or attend the educational activities and extracurricular activities of their children.

The 104th Congress failed to take action on the bills, however. Therefore, the proposed amendments are essentially dead. However, when the 105th Congress session convenes at the end of January, 1997, it may take the proposed amendment up again.

While this amendment was not passed and is not new law, it is interesting to note that Congress was willing to entertain such educational leave and may indicate a precursor for things to come. We will update you regarding the status of this proposed amendment.

Continued from page 3

4. Don't let exceptions to the policies become the rule.

What is the use of a book full of policies if you aren't going to apply them? The general rule is to be as consistent as possible when applying your policies.

5. Don't be afraid to make exceptions when they are called for.

It's a delicate balance, deciding whether or not to make an exception to a policy. This type of decision goes with the territory and is one of the hallmarks of being a board member. Almost every policy will have an "escape clause," allowing a board to act in its discretion when applying the policy. Even the Illinois statute regarding gun and weapon-free schools allows for an exception. The statute provides that students who bring weapons to school or school activities "shall be expelled for a period of *not less* than one year, except that the expulsion period may be *modified* by the board on a case by case basis." (105 ILCS 5/10-22.6). This type of language is an example of how the Illinois Legislature allows school boards to use their discretion.

6. Make sure you apply your policies as they are written.

School boards get into lots of trouble when they start creating and revising policies as they go. Apply your policies as they

are written. If the policy says that students shall not bring pagers to school and you catch a kid with a cellular phone—don't apply the pager policy to him because it's the closest thing you can find. Call your lawyers, have them draft a cellular phone policy, adopt it, and then apply it. In legal jargon, this is called due process: the students have to know what they cannot do before you punish them for doing it.

The above checklist is merely a suggested approach to policy development and usage. We hope it will prompt further discussion during your board meetings about how to apply policies and what you should consider when you want to make exceptions to them. With any luck, we won't hear any stories on the nightly news about *your* school district.

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