

THE
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Federal Appellate Court Holds NCLB May Violate Constitution--

On January 7, 2008, the United States Court of Appeals for the Sixth Circuit held that the *No Child Left Behind Act* ("NCLB") does not clearly apprise states and school districts of their funding obligations under the Act in accordance with the requirements of the "Spending Clause" of the United States Constitution.

In *School District of Pontiac, et al. v. Margaret Spellings*, No. 05-2708 (6th Cir., Jan. 7, 2008), the school districts of Michigan, Texas and Vermont, along with the National Education Association and NEA-affiliates in ten states, including Illinois, brought suit against the Secretary of the United States Department of Education.

In their suit, which was dismissed by the lower court in 2005, the plaintiffs relied on one NCLB provision which states, in part, "[n]othing

in this Act shall be construed to... mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act." 20 U.S.C. 7907(a)(2002).

The plaintiffs argued that this provision prohibited the Secretary from obligating state and school district compliance with NCLB requirements in the absence of full federal funding. The school districts sought an order declaring that states cannot be required to expend state money on federally unfunded NCLB mandates, nor could any non-compliance that results from a lack of federal funding be a basis for withholding federal funding under NCLB.

The court of appeals agreed, and reversed the lower court's dismissal of the action. It based its decision on a requirement of the Spending Clause of the United States Constitution that, as the court described, "when Congress attaches conditions

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No Automatic "Due Process" Right to Cross-Examine Witnesses at Student Expulsion Hearing--

School administrators and board members are long familiar with the constitutional notion of "due process," but the scope of what process is due in a student discipline hearing could be anything from informal questioning by an administrator to a quasi-trial complete with lawyers and a "judge" (i.e., impartial hearing officer), depending on the severity of the deprivation.

Recently, an Illinois federal judge examined the scope of due process in student disciplinary hearings in *Brown v. Plainfield Community Consolidated District 202*, 2007 WL 4180358 (N.D. Ill. Nov. 27, 2007). Specifically, the court was asked to decide whether a high school student who had been expelled for brushing the buttocks of his teacher with the back of his hand was entitled to cross-examine student witnesses who submitted statements against him during an expulsion hearing.

In the student's hearing, he was permitted to cross-examine his teacher and provide contradictory testimony, but he was not allowed to cross-examine four students who had submitted unsworn statements to the administration. The court noted that a student facing expulsion "must be given a meaningful opportunity to be heard, but the

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Reminders/Notes

- The *Smoke Free Illinois Act* became effective January 1, 2008, and prohibits smoking in public places, including public schools, places of employment, and government vehicles. The Act allows fines to be assessed against districts that fail to comply. While most of the obligations imposed by the Act are already required under the *School Code*, one provision now requires schools to post No Smoking signs at each entrance. The [required signs](#) can be found on our website.
- February 19, 2008, marks the day that school districts must create and maintain a policy on bullying. Once adopted, districts must submit the policy to the ISBE and refile them every two years. The policy must also be communicated to students and parents annually.
- The Consumer Price Index can now be found on our [website](#).

The Extra Mile is intended solely to provide information to the school community. It is neither legal advice nor a substitute for legal counsel. The Extra Mile is intended as advertising but not as a solicitation of an attorney/client relationship.

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Witnesses Cont. expulsion hearings need not ‘take the form of a judicial or quasi-judicial trial.’”

The court found that, although the student’s interest in attending school was important, “[u]nder these circumstances, the risk of erroneous deprivation and the probable value of allowing cross-examination of the student witnesses was low,” because almost all of the probative evidence came from the testimony of the teacher, whom the student’s attorney had cross-examined.

It is important to note that the court did *not* rule on whether the district would have violated the student’s constitutional right to due process had the student not been allowed to question his principle accuser, the classroom teacher.

Moreover, the court ruled that schools have a strong interest in maintaining discipline and protecting stu-

dents who come forward to report misconduct by their peers, and recognizing a right to cross-examine every witness in a disciplinary hearing would place an unnecessary administrative burden on school districts. As a result, the student was held “not [to] possess a federal due process right to cross-examine the student witnesses at his disciplinary hearing.”

The student also raised a “substantive” due process claim, alleging that the school board so far departed from its own rules and *School Code* requirements that its actions were overly harsh and arbitrary. This claim was also denied, as the board’s actions were justifiable and did not “shock the conscience.” ***Please contact Nancy Krent, Jay Kraning or Bennett Rodick regarding the impact of this decision on your student discipline procedures or with any student discipline inquiries.***

ISBE Issues Response to Intervention (“RtI”) Plan-

On January 1, 2008, the State Board of Education unveiled its [final plan](#) to provide school districts with a framework for developing their own plans regarding Response to Intervention (RtI). ISBE’s plan provides that RtI is a general education initiative through which all educators collaborate to identify and continuously monitor student outcome data to be used for making decisions regarding student instruction.

School districts must have their own RtI plans in place by January 2009. To assist districts, ISBE will: develop a Frequently Asked Questions page for its website; establish a committee to monitor statewide implementation; disseminate guidance, resources, and information; provide parent education; and oversee professional development in developing and implementing district plans.

To help determine the next steps in implementing their plans, school districts are required to complete a “District Self-Assessment” by Spring 2008. The plan puts school districts on notice that they have the responsibility of allocating resources to fund their plans with various federal funds, along with district funds.

The ISBE evaluation process will focus on the following five questions: 1) If the staff is trained, are they implementing the plan? 2) If they are implementing the plan, do they do it with integrity/fidelity? 3) If they implement with integrity/fidelity, do they sustain that level of implementation? 4) If implementation is sustained, what is the impact on student outcomes? and 5) Is there adequate support for full implementation?

Please contact Bennett Rodick, Jay Kraning, Shayne Aldridge or Nancy Krent with your RtI inquiries.

NCLB Cont. to a state’s acceptance of federal funds, the conditions must be set out unambiguously.” *Pontiac*, No. 05-2708 at 8 (citations omitted). After a detailed examination of the language and legislative history of the provision, the court held that a state deciding to participate in NCLB could reasonably understand that it need not comply with any requirements not paid for by federal dollars. Therefore, the law

failed to provide clear notice to states of their obligations under NCLB as required by the Spending Clause. The court remanded the case for further proceedings consistent with the opinion. This decision is *not* binding on Illinois school districts.

Please contact Stephanie Jones with your NCLB inquiries.