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Overview

As public school districts across the nation begin another school year, safety and security remain at the top of every school board agenda. While the tragedy of Columbine High School focused attention on policies related to student-on-student violence, the horrific events of September 11, 2001 have caused school systems to reevaluate their policies and procedures as they relate to outside school threats as well.

On the federal legislative scene, the newly enacted No Child Left Behind Act emphasizes the need for school systems to do all that is necessary to early identify and intervene in matters involving students with emotional/behavioral problems. When coupled with existing efforts to curb bullying and student-on-student harassment, the need to be more aggressive and proactive in building policies designed to create and maintain a safe and secure environment for students and staff, through the early detection and prevention problems, has never been greater.

As the 2002-2003 school year moves forward, a continuing issue area involves the clash between the privacy interests and protections of students (and their families) and the prerogatives of school officials to gather and share sensitive information. While the United States Supreme Court did, in a limited sense, address the nature and extent of student privacy interests in New Jersey v T.L.O (1985) and Vernonia v Acton (1995), the prerogatives of school officials to (a) seek out and collect personal information, and (b) share that information with administrators, teachers, counselors, social workers and other school staff remain unclear.

Recent Decisions

This past term, three student-related decisions of the United States Supreme Court offer some guidance. The three decisions are Owasso ISD v Falvo (decided on February 19, 2002), Gonzaga University v Doe (decided on June 20, 2002), both involving the Family Educational Rights and Privacy Act (FERPA), and Board of Education v Earls (decided June 27, 2002) involving student random drug testing.

Owasso ISD v Falvo: This case involved the practice by some public school teachers of allowing students in their classrooms to exchange tests, papers, and other assignments, and to score the papers (referred to as "peer

grading"), as the teacher read the correct answers to the entire class. Once the grading was complete, students would report their own grade to the teacher (either by calling it out from their desk, or reporting it at the teacher's desk). Both the peer grading process and the recording of the scores were in contention in this case. The parent who brought the case claimed that this teaching method "embarrassed her children." More specifically, the parent cited the requirements of FERPA requiring school officials to have parental consent prior to the release of "sensitive information" about their child.

A federal district court did not agree with the parent. Quoting directly from FERPA the court held that grades put on papers by other students are not, at that stage, records "maintained by an educational agency or institution or by a person acting for such agency or institution." On appeal, the Tenth Circuit reversed the district court and held that students marking other student's papers are education records. The peer grading process represents an impermissible release of the information to the student grader. Subsequently, the Tenth Circuit's decision was reversed and the United States Supreme Court remanded the case.

In its decision, the Supreme Court neither resolved the question of whether FERPA creates a private right of action nor did it directly address student privacy rights. Instead, it narrowed the focus of the case and held that the peer-grading process did not fall within the FERPA definition of "education records." A student grade, said the court, does not become a part of the record until the teacher records it in her grade book. Student graders in classrooms only handle the assignments for a few moments. They are not "acting for" the teacher or the school. Education records are those kept by a single central custodian (e.g., a registrar).

An often-neglected aspect of Owasso is Justice Kennedy's discussion of parent rights to challenge and classroom teacher methodologies. It is doubtful, he said, that Congress intended the requirements of FERPA to give parents the prerogative "to challenge the accuracy of the grade on every spelling test and art project the child contemplates…. It would force all instructors to take time, which otherwise could be spent teaching and in preparation, to correct an assortment of daily assignments." Teachers would be forced "to abandon other customary practices, such as group grading of group assignments." If the Tenth Circuit's interpretation of FERPA is accepted, said Justice Kennedy, "the federal power would exercise minute control over specific teaching methods and instructional dynamics in classrooms throughout the country." Such was not the intent of Congress.

Gonzaga University v Doe. This case involved a private educational institution and an alleged violation of FERPA. At the time, the State of Washington required that all applicants for teacher certification obtain and submit an affidavit of good moral character from their graduating college. After overhearing one student tell another that a particular student (one who had applied for the affidavit of good moral character) had engaged in sexual misconduct, a University teacher certification specialist launched an investigation. The specialist also contacted the state agency responsible for teacher certification, identified the student by name, and discussed the allegations. Subsequently the student, who did not know of the investigation, was denied the certification affidavit.

The student successfully brought suit in a state court, where he built his case both on tort and contract law, and used 42 U.S.C. 1983 to enforce alleged violations of FERPA (nondisclosure of personally identifiable information without consent). A jury awarded him both compensatory and punitive damages on the FERPA claim. On appeal the Washington Court of Appeals ruled that FERPA does not create individual rights enforceable under Section 1983. Subsequently, the Washington Supreme Court agreed with the Court of Appeals, but it held that FERPA's nondisclosure provision does create an enforceable right under Section 1983.

This past June, the United States Supreme Court took a different position. By a vote of 7-2, the high court held that since no clear and unambiguous language exists in the federal statute, there is no personal right of action for private persons under FERPA enforceable under 42 U.S.C. 1983. "Where a statute provides no indication that Congress intends to create new individual rights," said Chief Justice Rehnquist, "there is no basis for a private suit under Section 1983." FERPA directs the U.S. Secretary of Education to enforce the provisions of the law through the withholding of funds.

Board of Education v Earls. In this case high school students and their parents challenged a local school board's student activities drug testing policy. Under the policy all middle and high school students had to consent to urinalysis testing for drugs in order to participate in all competitive extra curricular activities. Seeking remedy under 42 U.S.C Section 1983, the parents alleged that the policy violated the Fourth Amendment of the United States Constitution. A federal district court ruled for the school board. On appeal, since the policy called for suspicionless drug testing of students, in a situation where the school board could not demonstrate the existence of identifiable drug abuse among a sufficient number of students to be tested, the Tenth Circuit held that the policy violated the Fourth Amendment. Subsequently, by a vote of 5 to 4, the United States Supreme Court reversed the Tenth Circuit.

In an opinion written by Justice Thomas, the Supreme Court held that the drug testing policy is constitutional. Because the policy serves an immediate and important need (i.e., the need to detect, prevent and deter the substantial harm of childhood drug use and abuse), the necessary immediacy and the reasonableness of the school system's policy is demonstrated.

Undergirding Justice Thomas' rationale are the special needs existing in the context of public schools. Citing Tinker v Des Moines (1969), New Jersey v T.L.O. (1985), Vernonia v Acton (1995), he reasoned, "While school children do not shed their constitutional rights when they enter the schoolhouse, Fourth Amendment rights are different in public schools than elsewhere; the reasonableness inquiry cannot disregard the school's custodial and tutelary responsibility for children."

In his opinion, Justice Thomas specifically spoke to student privacy. A student's privacy interest, he said, is "limited in a public school environment where the state is responsible for maintaining discipline, health, and safety…. Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults." It is important to note that, in addition to the policy serving a legitimate interest of the school officials [preventing, deterring, and detecting drug use] the policy: (1) was not solely punitive, (2) required confidentiality of all information [drug testing information was kept separate from the student's educational record], (3) involved parental notification, (4) was minimally intrusive in nature, and (4) was released to personnel solely on a "need to know' basis.

Policy Implications. In the "post-Columbine and 9/11 era," the Owasso, Gonzaga and Earls decisions foster a judicial climate in which it is possible to develop student disciplinary policies that enable pre-emptive actions. More specifically, these three decisions:

- Evidence an attitude of judicial restraint.
- Reaffirm the discretionary authority of school officials and teachers.
- Limit the scope of the personally identifiable information and educational records provisions of FERPA.
- Reiterate the importance of confidentiality of sensitive, personal information, and the release of such information solely on a "need to know" basis.

- Narrow the privacy interests and expectations of individual students, within the special environment of a school, when school officials act in the best interests of all students.
- Negate the enforcement of FERPA by private parties (e.g., parents and students) through court action.
- Affirm the school's custodial and tutelary responsibility for children within the special environment of the school.
- Leave matters of pedagogy, including classroom management and student discipline, to educators.
- Underscore the importance of school officials being free to take immediate and appropriate action.
- Encourage the enactment of policies that enable early intervention in student disciplinary issues, long before these issues grow into serious problems.

Cases Cited

Board of Education v Earls, 122 S.Ct. 2559 (2002)

Gonzaga University v Doe, 122 S.Ct. 2268 (2002)

New Jersey v T.L.O., 105 S.Ct. 733 (1985)

Owasso ISD v Falvo, 122 S.Ct. 934 (2002)

Tinker v Des Moines, 89 S.Ct. 733 (1969)

Vernonia v Acton, 115 S.Ct. 2386 (1995)

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Note: The views expressed in this commentary are those of the author.