

Inside School Law

Fall 2002

Sensible strategies and preventive practices for NSBA National Affiliates

In the High Court

A look at this term and the years ahead

By Julie Underwood, NSBA General Counsel

The U.S. Supreme Court made a number of important decisions this past term. A total of 79 cases were decided, and NSBA entered four of them as friends of the court. The decisions in these four cases—a voucher case, a drug testing case, and two cases of privacy rights—are summarized below.

What's ahead for the Supreme Court? It has been eight years since a new justice was appointed, making this the most stable high court since the 1820s. But stability has not brought solidarity; in fact, the division appears to be getting more pronounced. The patterns are becoming familiar, and the 5-4 split decisions more frequent.

Considering the split in the Senate and the pending mid-term elections, guessing at possible retirements on the court would only be guessing. The Bush administration has already lost two judicial nominations in the Senate Judiciary Committee. If the Senate moves any further to the Democratic side, the administration will have little chance of getting conservative nominations through the Senate.

It is also highly unlikely that any of the conservative justices will choose to retire

while the Democrats hold a majority of Senate seats, and it is similarly unlikely that any of the liberal justices will retire during a Republican administration. This is true even for the eldest and most liberal of the justices, Justice John Paul Stevens. So it appears that the current bench will remain unchanged for another two years, with the precarious balance and split votes continuing.

Vouchers and the Constitution

Zelman v. Simmons-Harris

The Cleveland voucher program gives tuition money to families with children in kindergarten through the eighth grade, with preference given to students from families whose income is less than 200 percent of the poverty level. Tuition checks, although made payable to the parent, are mailed directly to the child's school. The parent is then required to endorse the check over to the private or public school in which the child is enrolled.

In the 1999-2000 school year, 3,761 students enrolled in the program, and 60 percent of the enrollees were from families at or below the poverty level. Of these students, 3,632 (96 percent) were enrolled in sectarian schools.

In a 5-4 split, the Supreme Court ruled that Cleveland's school voucher program does not violate the First Amendment's Establishment Clause. Chief Justice William Rehnquist, writing for the court, found that the program was enacted for the valid secular purpose of providing Cleveland's poorest children with educational alternatives to the

Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy."

—Justice Stevens in dissent.

city's admittedly failing public school system. He concluded that the program was consistent with previous cases, because it is neutral in all respects toward religion and is merely one of several educational opportunities that the state of Ohio provides its schoolchildren.

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About NSBA

The National School Boards Association is the nationwide organization representing public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education through local school board leadership. Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards across the United States and the school boards of the District of Columbia, Hawaii, and the U.S. Virgin Islands.

About the National Affiliate Program

The National Affiliate Program extends NSBA's services directly to local school districts. School districts are eligible to join provided they are members in good standing of their state school boards association.

About the Council of School Attorneys

The Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

The majority rejected the Sixth Circuit's reasoning that the prevalence of Catholic schools in the program created a perception of government endorsement of religion. Instead, the court concluded that a reasonable observer would infer that the predominance of religious schools was a product of demographics rather than a design by the state to advance religion. The majority asserted, "That no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of numerous independent decisions of private individuals, carries the imprimatur of government endorsement."

Drug Tests for Students

Board of Education of Independent School District No. 92 of Pottawatomie Co. [Tecumseh] v. Earls

The Tecumseh School District in Oklahoma adopted a mandatory drug-testing policy for all public high school students participating in extracurricular activities. The policy required students to consent to random, suspicionless drug testing via urinalysis. Lindsay Earls, a student, challenged the policy on the grounds that it violated the Fourth Amendment right to be free from unreasonable searches.

The Supreme Court reversed the Tenth Circuit in a 5-4 decision written by Justice Clarence Thomas. The majority of the justices concluded that the drug-testing policy was constitutional. They conceded that students participating in extracurricular activities other than athletics are not subject to the same level of physical intimacy and communal undress as student-athletes.

Further, they found that students who participate in "competitive extracurricular activities voluntarily subject themselves to many of the same intrusions of their privacy as do athletes." The majority concluded that testing students who participate in extracurricular activities for drugs is a reasonably effective means of addressing the school district's legitimate interests in detecting, deterring, and preventing student drug use.

Peer Grading and Privacy

Owasso Independent School District v. Falvo

Several teachers had students grade each other's assignments and tests and

then call out the grades for the teacher to record. A parent objected to this peer grading and filed suit, alleging that the grading practice violated her children's right to privacy under the Fourteenth Amendment and the Family Educational Rights and Privacy Act (FERPA).

The Supreme Court held in favor of the district, finding that peer grading does not violate the provisions of FERPA. The court held that under FERPA, the grades must be "maintained ... by a person acting for [an educational] agency or institution." That definition, the court said, would suggest grades that are kept in a record room file or secure database. In this case, the court said, the student grades were not "maintained" but only handled for a few moments before being recorded by the teacher.

Secondly, the court took exception to the notion that the student graders were "acting for" the educational institution. The court stated that the students were merely assisting the teacher when they graded assignments, not acting on behalf of the school as an institution.

The majority found that individuals may not sue a school for a violation of the nondisclosure provision in FERPA.

Private right of action under FERPA

Gonzaga University v. Doe

A Gonzaga School of Education student was accused of committing a date rape. The results of the investigation were turned over to Gonzaga's dean of education. Believing this information prohibited her from signing the moral character affidavit supporting the student's application for teacher certification, she provided the information to the state department of education as part of the certification process.

The student sued the university, alleging that it violated his rights under the Family Educational Rights and Privacy Act when the information was released without his prior consent. The Supreme Court held that a student may not sue a university for damages under FERPA or under Section

1983 to enforce FERPA.

Based on the statutory language of FERPA and its legislative history, the majority stated, there exists no individual right to sue. The focus of FERPA is on the aggregate, not the individual, the court said, and its

provisions "serve primarily to direct the U.S. Secretary of Education's distribution of public funds to educational institutions."

Finally, the majority found that individuals may not sue a school for a violation of the nondisclosure provision in FERPA .

No Child Left Behind—Update

What your district should have in place NOW

By Julie Underwood, NSBA General Counsel

Key provisions in the No Child Left Behind Act of 2001 (P.L. 107-110) were outlined in the Summer 2002 issue of *Inside School Law*, available online in the Affiliates Only section of NSBA's National Affiliate Web site (www.nsba.org/na). Here's what your school district should already have in place for compliance with the new law:

- States and districts must issue annual report cards to the public on student performance.
- All states must participate in the fourth- and eighth-grade reading and mathematics sections of the National Assessment of Educational Progress (NAEP).
- All limited English proficient (LEP) students must be assessed each year in their English oral language, reading, and writing skills.
- Students who attend schools that were in the first year of school improvement during the 2001-02 school year are eligible for transfer to another school.
- Students who attend schools that were in school improvement status for two or more years prior to the enactment of NCLB must be offered the opportunity to transfer to another public school or receive

supplemental services.

- Districts must develop criteria for and a list of approved supplemental service providers.
- Districts must provide technical assistance to schools in school improvement status.
- Newly hired teachers who work in a program supported with Title I, Part A funds must be "highly qualified."
- Newly hired paraprofessionals who work in a program supported with Title I, Part A funds must have completed at least two years of postsecondary school, hold an associate degree, or otherwise meet a rigorous state or local standard of quality and demonstrate their knowledge and ability through a formal state or local assessment.
- Public school districts must certify each year that none of their policies prevent or deny participation in constitutionally protected prayer in elementary and secondary schools.
- States must determine a baseline and timeline for adequate yearly progress using 2001-02 data.
- Districts must provide an annual report to the state on progress toward meeting the state's measurable objectives.

Diversity and 'Affirmative Action'

Where are we going?

By Edwin C. Darden
NSBA Senior Staff Attorney

Public school board members continue to struggle with the legal hurdle of achieving racially diverse classrooms. Courts are no help, issuing splintered and sometimes conflicting decisions. Predictions persist that the U.S. Supreme Court will soon intervene. The following are examples of recent legal activity on this issue:

- *Lynn, Mass.*—A state court will soon decide on a voluntary (not tied to desegregation) policy that considers race in school transfers.
- *Pasadena, Calif.*—Declining to decide on the school district's race-sensitive admission policy itself, the 9th Circuit federal court ruled against the plaintiffs, saying they could not challenge an on-the-books policy that was never implemented.
- *Huntington Beach, Calif.*—The California Supreme Court refused to disturb a lower court's ban on the district's race-sensitive transfer policy involving high schools.
- *Charlotte-Mecklenburg, N.C.*—The district opened schools this year with the most segregated student body in 25 years, due to a court decision forcing the return to neighborhood schools.
- *Little Rock, Ark.*—A federal judge eased court supervision of the desegregation plan, warning the district not to let racial distinctions revive.

From Desegregation to Diversity, A School District's Self-Assessment Guide on Race, Student Assignment, and the Law, a recent publication from NSBA's Council of Urban Boards of Education, offers advice on how to make student-assignment policy decisions that best serve the educational goals of local school officials while minimizing the legal risks.

For ordering information, see www.ns2k.com/nsba/pubs/index.cfm.

NSBA Resources on NCLB

NSBA has put together several sources of information to assist public schools in implementing the No Child Left Behind Act, including timetables, notice requirements, policy guidelines, FAQs, and summaries of major provisions. These resources can be found on NSBA's Web site at www.nsba.org/cosa/hot_topics/child.htm and at www.nsba.org/advocacy/behind.htm.

The NSBA Council of School Attorneys has also published an NCLB manual based on a briefing held in Denver in October 2002. You can order the manual online at www.nsba.org/cosa/PubSem/index.cfm.

Is It Really Illegal to Say the Pledge in School?

Newdow v. U.S. Congress

By Julie Underwood, NSBA General Counsel

Michael Newdow, whose daughter attended school in Elk Grove Unified School District in California, objected to the school district's practice of a daily recitation of the Pledge of Allegiance in its schools. Objecting that his daughter had to listen to the words "under God" when her classmates recited the Pledge, he filed suit in federal court, claiming that including the phrase "under God" in the Pledge violated the Establishment Clause of the First Amendment.

On June 26, 2002, the Ninth Circuit Court of Appeals, in a 2-1 split, ruled that inclusion of the words "under God" constituted an Establishment Clause violation. The circuit court found that even though reciting the Pledge is voluntary, the fact that nonparticipating students are required to listen to the Pledge amounts to government religious coercion because students are

placed in the untenable position of choosing between tacitly participating in a religious affirmation or protesting.

The dissenting judge, on the other hand, found the inclusion of the words "under God" no more than a *de minimis* (or legally trifling) affirmation of religion, like the phrases "in God we trust" and "God bless America." He pointed out that the Supreme Court has upheld the use of these phrases on the grounds that they are mere ceremonial references to religion.

The following day, the court issued a stay of the decision. The defendants, including Congress, President Bush, and the school district, have filed petitions requesting a rehearing. Until the court makes a decision, school districts—even those in the Ninth Circuit, which includes Alaska, Arizona, California, Idaho, Hawaii, Montana, Nevada, Oregon, and Washington—may continue to recite the Pledge in their classrooms.

Coming in the next issue . . .

- **Avoiding the legal pitfalls in textbook and curriculum decisions**
- **Sex education and "abstinence only" curricula**
- **Teaching alternate theories of evolution**