

# Inside School Law

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Sensible strategies and preventive practices for NSBA National Affiliates

## A Friend of the Court

*NSBA files 'amicus curiae' briefs with the U.S. Supreme Court*

NSBA's Office of General Counsel is often asked to enter a case as *amicus curiae*—a Latin term meaning “friend of the court”—and to file an *amicus* brief. This is a brief filed by someone who is not a party to the litigation but who believes the court's decision may affect its interest. During the U.S. Supreme Court's current term, the Office of General Counsel has filed three such briefs in cases that could affect schools nationwide. This article will explain each of the cases and the position NSBA took.

### Privacy

In the first case, *Falvo v. Owasso Independent School District*, the issue before the Supreme Court was whether having students grade each other's papers violates the Family Education Rights and Privacy Act (FERPA). Several teachers in this Oklahoma school district regularly asked students to grade each other's assignments and quizzes and call out the grades to the teacher. A parent objected to the practice and filed suit against the district, individual administrators, and board members, alleging a violation of FERPA and of Section 1983 of the Civil Rights Act. The federal district court found in favor of the school district. However, the 10th U.S. Circuit Court of Appeals reversed that finding in part, saying the grading practice violated FERPA.

NSBA's brief described peer-grading as a common instructional technique, often used in the context of class discussion, in

which students exchange papers while a teacher reviews in-class work or homework. Students mark answers, noting correct responses on classmates' papers. Many educators view peer-grading as a valuable instructional tool that enables students to learn from classmates and permits teachers to use classroom time efficiently.

The issue before the Supreme Court was whether having students grade each other's papers violates the Family Education Rights and Privacy Act

At issue was a provision of FERPA that speaks only to revealing “records” “maintained” by schools, colleges, and educational agencies or their agents. The appeals court interpreted this provision as covering peer-grading. Under that interpretation, FERPA's elaborate procedures and stringent nondisclosure provisions would not only cover files and records kept in school offices, but would also apply to grades on homework, quizzes, tests, and other student work, even when the grade is never recorded in the student's school file or record.

That holding, NSBA argued, contravenes the statute's plain meaning, defies

common sense as confirmed by legislative history, and conflicts with the settled interpretation by the Department of Education office authorized to implement FERPA. In addition, the holding would entail massive federal regulation of conventional classroom interactions of teachers and students.

The brief went on to say that the court of appeals' novel interpretation would profoundly affect how teachers across the country educate students. It would bar not only peer-grading but also many other commonly used benign and effective instructional methods that involve students' review of one another's work, teachers' evaluation of work in a group setting, and

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Sensible strategies and preventive practices for NSBA National Affiliates

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## About NSBA

The National School Boards Association is the nationwide advocacy organization for public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education in the United States 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, Guam, 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 like. The effect of such a doctrine would be to proliferate lawsuits against school districts, NSBA said. Moreover, the holding is contrary to the overwhelming weight of authority that teachers' evaluations of students are not subject to judicial review.

NSBA's brief also argued that the Supreme Court could reverse the court of appeals without determining the merits of the respondent's FERPA claim, because the provision at issue is not privately enforceable under Section 1983 of the Civil Rights Act. But even if Section 1983 were available to enforce FERPA, the school district would be immune from suit, because the respondent (in this case, the plaintiff) never established that the violations she alleged resulted from a pattern or practice of the Owasso school board.

Jerry Richardson, the attorney for the Owasso Independent School District, argued this case before the Supreme Court on Nov. 27, 2001. A decision is expected as early as this spring and by July at the latest.

## Vouchers

The second case, *Zelman v. Simmons-Harris*, involves the Cleveland voucher program. In 1995, the Ohio legislature enacted a tuition voucher program effective only in the city of Cleveland. The program was challenged in federal district court as a violation of the Establishment Clause of the First Amendment, which prohibits government from "establishing" a religion.

The district court found the voucher program unconstitutional because it provided unrestricted grants to parents in the form of scholarships to send their children to private schools, 82 percent of which were religious schools. The 6th U.S. Circuit Court of Appeals found this fact critical in ruling the program unconstitutional. The Supreme Court granted review, and oral arguments will be heard on Feb. 20, 2002. Robert Chanin, general counsel for the National Education Association, will argue the case against the voucher program.

NSBA's brief asserts that the Cleveland voucher program is inconsistent with the fundamental role of public education in American life. The American people and our courts have always recognized that public education is a primary responsibility of the states and is essential to preparing children to be successful citizens in a pluralistic democracy. Voucher programs are incompatible with these principles of public education, the brief argues, because vouchers purport to

benefit the few but do so at the expense of the many.

The brief goes on to make these arguments against vouchers:

- They represent the states' abdication of their responsibility to provide for all students and to make accountable use of taxpayer funds.
- They withdraw children from the democratic, diverse environment of the public schools.
- They do not provide any benefits to counterbalance these costs.
- They fail to offer meaningful choice, fail to improve student achievement for participating students, and fail to improve public education for students who do not participate.

Finally, the brief asserts that the Cleveland voucher program violates the Establishment Clause. The program overwhelmingly favors sectarian private schools; it does not depend on independent, private choices; it directly funds parochial instruction; and it creates a financial incentive for religious education.

The brief focuses on the argument that voucher programs controvert the mission of public schools to educate children to be productive citizens. By diverting public tax dollars to private schools, the brief concludes, voucher programs undermine the ability of the public schools to fulfill their primary functions. They are as objectionable for this reason as they are under the Establishment Clause for their direct state support of religious instruction.

## Drug testing

The third case, *Board of Education of Tecumseh Public School District, Pottawatomie County v. Earls*, involves student drug testing. In this case, the Tecumseh Public School District in Oklahoma adopted a drug-testing policy that required all students participating in competitive extracurricular activities to consent to random drug testing. Two students filed suit against the district, challenging the policy on the ground that it violated their constitutional rights to be free from unreasonable searches. The federal district court ruled in favor of the school district. The 10th U.S. Circuit Court of Appeals reversed that ruling, and the Supreme Court accepted the case for review on Nov. 8, 2001.

In 1995, in the case of *Vernonia School District v. Acton*, the Supreme Court approved the random drug testing of students as a condition of participating in athletics. Like

Tecumseh, many school districts are interested in expanding the limits of this decision to allow broader drug-testing programs.

NSBA's brief addresses the problem of drugs among young people and explains that where traditional methods of anti-drug education have failed to stop the proliferation of drugs in schools, many school boards have turned to programs of random, suspicionless drug testing in reliance on the high court's decision in *Vernonia*.

The brief argues that the decision of the circuit court majority in *Earls* unnecessarily restricts the availability of random, suspicionless drug testing under *Vernonia* in two ways. First, the decision gave little weight to the fact that the Tecumseh school board sought only to test students who volunteered to participate in extracurricular activities. The courts that have approved student drug-testing policies—including the high court in *Vernonia*—have all made it clear that the voluntary nature of the activities in question greatly reduces the privacy interests of the students involved. The fact that *Vernonia* dealt only with student athletes was not the most important issue in the case, however, and NSBA does not believe the *Vernonia* ruling should be limited to student athletes.

Second, by requiring the school district to present evidence of serious drug use among the specific student groups to be tested, the *Earls* majority usurped the school board's responsibility for managing the school district and imposed a requirement at odds with the stated goal of deterrence. While the "epidemic" of drug use found in *Vernonia* was a factor to be weighed against the students' privacy interests, it was not a determinative requirement.

Quoting *Vernonia*, the brief concludes that a program that allows schools to test students who volunteer for extracurricular activities for illegal drug use on a random and suspicionless basis is reasonable and constitutional if it meets two criteria: (1) The goal of the program is deterrence, not punishment; and (2) the "most significant element" of the policy is that it is "undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."

This case will be argued before the Supreme Court in the spring of 2002. Linda Meoli of the Center for Education Law will argue the case for the school district. For an update on these cases, check back with the Council of School Attorneys' Web site at <http://www.nsba.org/cosa>.

## New Scrutiny, New Security

*How national anti-terrorism legislation affects your schools*

By Patricia A. Brannan, Alexander E. Dreier, Catherine Guttman-McCabe, and Maree Sneed, Hogan & Hartson, L.L.P., Washington, D.C.

On Oct. 26, 2001, in response to the Sept. 11 disasters, President Bush signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (P.L. 107-56, known as the USA PATRIOT Act). The act took effect immediately. While the act addresses a wide range of measures, several provisions are likely to affect public schools directly.

### Privacy of student records

The anti-terrorism act amends the Family Educational Rights and Privacy Act (FERPA) to permit educational institutions to disclose education records to federal law enforcement officials without parental consent in some circumstances. Generally, FERPA prohibits school districts and educational agencies from disclosing student records without parental consent.

Now, by certifying that "specific and articulable facts" support the request, a U.S. Assistant Attorney General or higher-ranking official may obtain a special court order requiring an educational institution to turn over records considered relevant to a terrorism investigation. Such an order is likely to prohibit the district from informing the student of the request or the content of any records released.

Schools do not violate FERPA by responding to such an order without parental consent, and the district need not make a record of the disclosure, as FERPA ordinarily requires. The act also provides that educational institutions "shall not be liable to any person" for good faith disclosure of student records in response to such an order.

After consulting the Secretary of Education, the U.S. Attorney General will issue guidelines—directed at law enforcement agencies, not school districts—on retention, dissemination, and use of the disclosed records.

Following the Sept. 11 events, some educational institutions released student records to law enforcement officials investigating terrorism pursuant to FERPA's "health or safety emergency" exception. Now, under the anti-terrorism act, it is sufficient for law enforcement officials to present the specified court

order; a health or safety emergency is no longer necessary. The precise interplay of the new court order provision and FERPA's health or safety exception remains open to interpretation, however.

### Monitoring foreign students

The anti-terrorism act also provides for "full implementation and expansion" of the Immigration and Naturalization Service (INS) program to monitor foreign students' visas. The program, created by a 1996 anti-terrorism law, applies primarily to higher education. However, the INS program may also cover students attending public schools under certain foreign exchange programs that are approved to authorize the issuance of J visas, which include student visas. Public school districts that may be enrolling such students

While the act addresses a wide range of measures, several provisions are likely to affect public schools directly.

should consult with the exchange program and with legal counsel to determine whether they have reporting responsibilities under the foreign student visa monitoring program.

Under that program, the U.S. Attorney General is to collect information about covered students, including the student's identity; current U.S. address; nonimmigrant (visa) classification; date of visa issuance, extension, or approval of classification change; whether the student is satisfying the terms and conditions of the exchange program; and any change in the student's participation in the exchange program as a result of criminal conviction.

The INS has not yet fully implemented the program, which initially covered students from selected countries only. The 2001 anti-terrorism act requires full implementation by

Jan. 1, 2003. By that date, reporting requirements will be expanded to cover nonimmigrant foreign students of all nationalities in covered foreign exchange programs.

### Enhanced surveillance measures

Title II of the 2001 anti-terrorism act enhances surveillance measures, and thus may affect school districts that provide electronic communications services to the general public and/or to administrators, teachers, staff, or students. Many Title II provisions will "sunset," or cease to have effect unless renewed by Congress, on Dec. 31, 2005.

- **Voluntary disclosure.** Under the act, a provider of electronic communication services to the public may voluntarily disclose to law enforcement officials the contents of an electronic communication if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury requires disclosure without delay. (Whether a particular school district's computer operations constitute provision of electronic communication services to the public is open to question, as the law in this area is undeveloped.)

In some circumstances, a provider may also disclose information about a "customer" or "subscriber" (for a school district, this may include administrators, teachers, staff, students, and possibly others) if the provider reasonably believes that an emergency involving immediate danger of death or serious injury justifies disclosure.

- **Required disclosure.** The act expands the scope of technology-related information that law enforcement officials may obtain through warrants, subpoenas, and court orders. For example, it permits government officials to seek stored voice-mail messages without wiretap authorization and adds categories of customer information that can be obtained through an administrative subpoena.

- **Internet surveillance.** The act expands law enforcement officials' existing electronic surveillance authority to cover the

Internet. So-called pen-register or trap-and-trace devices may now be lawfully used to obtain dialing, routing, addressing, or signaling information transmitted by wire or electronic communication, if such information does not include communication content. It is unclear whether law enforcement agencies will now be permitted to use these devices to obtain a record of the URLs of Web sites a user has visited. Although the statute authorizes collection of "addressing" information, a record of URLs might be considered "content."

The act authorizes the government to install certain devices, such as Carnivore, to track Internet use. (Carnivore was the controversial program sponsored by the FBI that enabled government criminal investigators to intercept and collect information on the Internet.) The act as passed, unlike earlier versions, imposes no new obligation on service providers to furnish facilities or technical assistance to aid law enforcement in this regard and authorizes compensation for reasonable expenditures incurred in providing such aid.

- **Computer trespassers.** In some circumstances, the act authorizes providers to permit law enforcement officials and persons acting for them to intercept without a warrant communications of "computer trespassers" (people who access protected computers without authorization). A person who has an "existing contractual relationship with the owner or operator of the computer for access to all or part of the protected computer" is not a "computer trespasser." Therefore, most employees and students would probably not be considered "computer trespassers."

- **Interception, search, and seizure of communications and records.** The act expands law enforcement agencies' authority to intercept wire, oral, and electronic communications that relate to terrorism and computer fraud and abuse pursuant to court orders. It also amends the Foreign Intelligence Surveillance Act of 1978 (FISA)

to permit the FBI to seize, with a court order, certain business records pursuant to a terrorism or intelligence investigation. The act prohibits any person from disclosing to anyone other than those who are necessary to produce the records the fact that the FBI sought or obtained records under FISA. Lastly, the act permits courts in some circumstances to issue a nationwide search warrant.

### Computer hacking

Finally, the 2001 anti-terrorism act increases criminal penalties for certain computer hacking crimes, including accessing and transmitting destructive programs, such as viruses, to computers. School districts and others may bring suits for damages against hackers who commit such crimes if the hacker causes a loss of \$5,000 or more—for example, if the hacker damages school district equipment.

*Adapted with permission from a memorandum issued Nov. 9, 2001, by Hogan & Hartson, L.L.P., Washington, D.C.*

## Legal Clips

### New for NSBA National Affiliates

NSBA's Council of School Attorneys is now offering "Legal Clips," an informative e-mail newsletter, as an additional benefit of National Affiliate membership. This service provides participants with weekly updates on interesting legal issues that affect schools. To receive "Legal Clips" in your mailbox each week, go to the National Affiliate Web site, <http://www.nsba.org/na>, and follow the directions in the green and yellow box. Thank you, and enjoy!