Privacy and Public School Students

Laurie L. Mesibov

Since September 11, 2001, many public institutions have been trying to strike the proper balance between security and privacy. In public schools, striking that balance has been the subject of intense debate, extensive policy making, and lawsuits for years. Public school students, and adults, have the same concerns about privacy. They want control over who searches their possessions and their bodies and who has access to information about them.

Students and their parents who think school officials have acted in a way that does not properly respect students' privacy may challenge the action. Occasionally the challenge results in litigation. The U.S. Supreme Court hears only a small fraction of the cases it is asked to review, so its decision to hear three cases involving student privacy in its 2001–2 term is noteworthy. This article provides a brief overview of the two issues before the Court: searches of students and student records.[1]

Searches of Students

As concerns about discipline, drugs, and violence at schools have increased, so have school officials' need and desire for authority to search students and their belongings. At the same time, schools must respect students' rights, including their right to privacy.

Everyone wants safe and orderly schools.[2] Schools are special places, with a special mission,[3] and students, in part because of their youth, need protection. The Constitution guarantees students constitutional rights, even though schools might be safer and more orderly if it did not.[4] However, when students are at school or are involved in school activities, their rights often are more limited than if they were elsewhere.[5] This certainly is true when the issue is a student's right under the Fourth Amendment to the U.S. Constitution to be free from unreasonable searches of his or her person or property.

In 1985, in *New Jersey v. T.L.O.*, the U.S. Supreme Court for the first time stated directly that the Fourth Amendment applies to schools and that students' legitimate expectations of privacy must be balanced against schools' need to maintain a safe environment for teaching and learning.[6] In that case the Court established the standard for searches of students by school officials:

- The Fourth Amendment's prohibition of "unreasonable searches" applies to searches of public school students conducted by school officials. The legality of a search of a student depends on the reasonableness, under all the circumstances, of the search.
- School officials do not need a search warrant to search a student under their control.
- School officials need "reasonable suspicion" to search a student. Reasonable suspicion is a less demanding standard than probable cause (the standard generally applied in assessing the lawfulness of a search as part of a criminal investigation).[7]
- Students have a reasonable expectation of privacy in personal articles carried inside their purses, wallets, and book bags, as well as in their clothing and on their bodies.[8]
- If a student gives a valid consent to a search, schools officials may proceed with or without reasonable suspicion. However, a student's consent may be subject to claims that the student did not understand what he or she was consenting to or that the consent was not voluntary.
- In situations in which a student has no legitimate expectation of privacy, the Fourth Amendment does not restrict searches by school officials.

As concerns about discipline, drugs, and violence at schools have increased, so have school officials' need and desire for authority to search students and their belongings.

Elements of a Reasonable Search

T.L.O. set out a two-part test to determine whether a search by school officials is reasonable under the Fourth Amendment. The first part of the test requires that a search be reasonable at its inception. This condition is met if school officials have reasonable suspicion that the search will uncover evidence that the student has violated or is violating either a law or a school rule. Reasonable suspicion may be based on personal observation or information

The author is an Institute of Government faculty member who specializes in public school law. Contact her at mesibov@iogmail.iog.unc.edu.

from others. Courts evaluating whether reasonable suspicion existed at the time of the search have considered the reliability of the information and of its source; the need to conduct an immediate search without additional information; the nature of the violation of a law or a school rule; and information that the school already had about the problem and the individual student.

The U.S. Supreme Court will soon rule on whether a school may conduct random, suspicionless drug testing of students in marching bands and other extracurricular activities.

In reaching their conclusion about the presence of reasonable suspicion, school officials are entitled to rely on "common-sense conclusions about human behavior."[9] The results of the search do not affect its reasonableness at inception. That is, positive results do not turn an unreasonable search into a reasonable one.

The second part of the *T.L.O.* test requires that the scope of the search be reasonably related to the circumstances that justified it. This means that a search must be reasonably related to its objectives and not excessively intrusive in light of the age and the sex of the student and the nature of the infraction. This requirement is the basis for many rulings finding strip searches for missing property unconstitutional.[10] Strip searches for illegal drugs, however, have more often been upheld when grounds to search have existed.[11]

Application of the *T.L.O.* Standard in North Carolina

The North Carolina Court of Appeals has decided two student search cases.[12] Neither case breaks new legal ground. In each case a student raised the issue of the involvement of "school resource officers" (law enforcement officers working regularly in public schools) in the search—a fact not present in *T.L.O.* However, the court did not find it necessary to decide whether resource officers act as law enforcement officers subject to the warrant and probable-cause requirements of the Fourth Amendment or act as school officials subject to the less demanding reasonable-suspicion standard established in *T.L.O.*

In the first case, an assistant principal found a pellet gun in a student's book bag, and, as a result, the student was adjudicated delinquent for possessing a weapon on school property.[13] The student wanted the evidence suppressed and challenged the constitutionality of the search because of the school resource officer's actions, which included handcuffing him. The court found that the assistant principal, acting on an unsolicited tip followed by the student's

THE *EARLS* CASE: DRUG TESTING OF PARTICIPANTS IN EXTRACURRICULAR ACTIVITIES

In *Earls v. Board of Education of Tecumseh Public School District No. 92 of Pottawatomie County*, a school district policy made high school students' participation in any extracurricular activities contingent on their consenting to random, suspicionless drug testing. All students choosing to participate were required to take an initial drug test and to agree to periodic random, suspicionless testing (as well as testing if the school had individualized suspicion). Several students sued the district over the policy's application to members of the show choir, the marching band, and the academic team. (The drug testing of athletes was not challenged.)

The federal district court ruled in favor of the school board, but the Tenth Circuit Court of Appeals reversed the decision, finding that the board did not have sufficient justification for the policy. The court applied the factors that the Supreme Court used in *Vernonia*: the students' expectation of privacy, the character of the intrusion, the nature and the immediacy of the governmental concern, and the efficacy of the solution. Looking at the first two factors, the court found that participants in extracurricular activities have a somewhat lesser expectation of privacy than nonparticipants and that the invasion of privacy was not significant, given the manner in which the drug tests were conducted.

However, looking at the third factor, the court found in favor of the students. Given the paucity of evidence of an actual drug abuse problem, the immediacy of the district's concern was greatly diminished, as was the efficacy of the district's solution. The court saw "little efficacy in a drug testing policy which tests students among whom there is no measurable drug problem." The court explained that "any district seeking to impose a random suspicionless drug-testing policy as a condition of participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing will actually redress the problem."[1]

The school board stopped the testing and appealed to the Supreme Court. The Court agreed to hear the case during its 2001–2 term.

Note

1. Earls v. Board of Educ. of Tecumseh Public Sch. Dist. No. 92 of Pottawatomie County, 242 F.3d 1264, 1277, 1278 (10th Cir.), *cert. granted*, 122 S. Ct. 509 (Nov. 8, 2001).

uncooperative and disruptive behavior when approached, had reasonable cause to search his book bag. While the search was in progress, the assistant principal asked the resource officer to help control the student. The court found that the officer was involved solely to allow the assistant principal to search the book bag without interference or danger. The *T.L.O.* standard was satisfied because a school official conducted the search and had reasonable grounds to do so.

In the second case, after a student was found in possession of a knife on public school grounds, she was adjudicated delinquent and placed on supervised probation.[14] She appealed, claiming that the knife was obtained through an unreasonable search. The principal had received information from a substitute teacher that students from another school were planning to come onto the campus to fight and that a student at the school would be involved. On the basis of his experience, the principal was concerned that the intruding students would have weapons. He, the school resource officer, and two off-duty law enforcement officers confronted the four students, all girls. The girls responded to the principal evasively and with profanity and gave false names. Shortly after their behavior and responses to his questions heightened the principal's suspicions, the resource officer searched D.D.'s purse.

The student argued that the *T.L.O.* standard should not apply because she was not enrolled in that school and because law enforcement officers participated in the investigation and the search. The court concluded that, despite the student's not being enrolled in the school, the *T.L.O.* standard was appropriate. The law enforcement officers' involvement was minimal relative to the principal's. At most they acted "in conjunction with" the principal to further his obligations to maintain a safe, educational environment and to report truants from other schools.

Searches without Individualized Suspicion

T.L.O. and many lower court cases have answered many questions regarding whether school officials have had reasonable suspicion that a search of a particular student or a specific, identifiable group of students would turn up evidence of a violation of a law or a school rule. However, one of the major questions *T.L.O.* left unresolved is the reasonableness of searches when school officials believe that a law or a school rule is being violated but do not have reasonable suspicion about a particular student or group of students. Suppose, for example, that school officials have reliable evidence that drug use among students, especially athletes, is increasingly a problem. These school officials have a legitimate concern, but they do not have "individualized suspicion" about specific students.

In settings other than schools, the U.S. Supreme Court has held that a search may be conducted without individualized suspicion when "the privacy interests implicated by the search are minimal, and . . . an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion."[15] In *T.L.O.* itself the Court indicated that exceptions to the need for individualized suspicion could be made when

> *the privacy interests implicated by a search are minimal and where "other safeguards" are available "to assure that the individual's*

Many schools have policies that permit school officials to search student lockers at any time, with or without reasonable suspicion. Such policies are assumed to eliminate any expectation of privacy in a locker. No North Carolina court has ruled on the constitutionality of this type of policy.

> *reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"*[16]

In *Vernonia School District 47J v. Acton*, the only student search case decided by the Court since *T.L.O.*, the Court addressed the issue of mandatory random drug-testing of students participating in athletics.[17] In reaction to an increase in drug use by high school students, especially among athletes, a school district in Oregon established a mandatory urinalysis drug-testing program. Students had to consent to the tests as a prerequisite to participating in high school athletics. A student who wanted to play football refused to consent and then sued the school district, claiming that the mandatory search violated the Fourth Amendment.

The Court ruled that the search was reasonable and therefore constitutional. Reasonableness is determined by balancing the intrusion into the individual's privacy interest against the search's promotion of a legitimate government interest. The Court considered three factors: (1) the nature of the privacy interest, (2) the character of the intrusion, and (3) the nature and the immediacy of the government interest, and the efficacy of the search as a means of meeting that interest. The Court ruled that deterring drug use among athletes justified the policy, in light of the district's evidence that a problem existed, the athletes' lowered expectation of privacy inherent in participation in sports, and the minimal intrusion on student privacy because of the manner in which the drug tests were conducted.

The Court did not rule on the issue of random, suspicionless drug testing of all students or even of students participating in extracurricular activities besides athletics.[18] Challenges to school policies involving suspicionless testing since *Vernonia* have had mixed results; courts have decided in favor of students in some cases and in favor of school officials in others.[19]

A clearer picture of the constitutionality of these searches should soon emerge. The U.S. Supreme Court has agreed to hear *Earls v. Board of Education of Tecumseh Public School District No. 92 of Pottawatomie County,*[20] and its decision will clarify the scope of *Vernonia*. (For the details of the *Earls* case, see the sidebar, opposite.)

Student Records

A second issue involving student privacy arises inevitably in schools. Schools gather and maintain a wealth of information about the students whom they enroll: academic performance, health, race, family, disciplinary actions, attendance, extracurricular activities, socioeconomic status, and involvement with the department of social services and law enforcement agencies.

Not surprisingly, school officials frequently find themselves balancing the need to disclose information about an individual student against the student's interest in keeping the information confidential. In this balancing, school officials' choices are guided by the federal Family Educational Rights and Privacy Act of 1974, commonly known as FERPA or the Buckley Amendment.[21] FERPA applies to all public schools in North Carolina and to the State Department of Public Instruction because these entities receive federal funds.

FERPA resolves many issues related to confidentiality of student records. This statute was enacted nearly thirty years ago for two purposes.[22] First, FERPA ensures that parents, those acting as parents, and students once

they turn eighteen have access to the information that a school or a state education agency maintains about a student.[23] Second, FERPA protects students' privacy by prohibiting disclosure of information about them without parental consent except in situations in which Congress has decided that the benefits of disclosure outweigh the benefits of confidentiality. Sometimes the need to share information is obvious, as in a medical emergency or when a child enrolls in a new school. At other times, such as for certain educational research projects, the benefit is less direct but nonetheless real.

FERPA does not control access to all information that school employees have about students. It controls access only to "education records," those records that are directly related to a student and maintained by an education agency or institution or by a person acting for the agency or the institution.[24] It makes no difference whether the information is located in the student's official record, in the special education office, or in the central office.

By contrast, observations that a school employee makes about a student but does not record are not education records. Also, records that instructional, supervisory, and administrative personnel make and keep for themselves as memory aids (known as "sole possession notes") are not education records if they are not available to anyone other than a temporary substitute for the record maker.[25]

FERPA establishes several basic rights for parents:

- Parents have the right to be informed about their rights under FERPA.
- Parents may inspect and review their child's education records but only records with information about their child.
- Parents may request that a school change the information in their child's records if they believe that the information is inaccurate or misleading or otherwise in violation of the child's privacy rights. Parents have the right to a hearing to challenge the contents of the education records. They also have the right to place their own statement in the child's records explaining their view about the contested information. This statement must accompany the contested information if it is disclosed to anyone.
- Parents have the right to control the disclosure of the information in their child's education records unless a specific exception allows the school to disclose information without the parent's consent.

FERPA Cases before the U.S. Supreme Court

The *Gonzaga University Case*: Individual Lawsuits for Damages

A former student, John Doe, sued Gonzaga University (Spokane, Washington) for violating his rights under FERPA, along with other claims. Doe argued that Gonzaga had disclosed confidential information about him, without his consent, to the Office of the Superintendent of Public Instruction, the Washington state agency that certifies teachers. Doe charged that university officials had ruined his chances for a teaching career by telling the agency that he allegedly had raped another student. A jury agreed and awarded Doe $150,000 in damages for the FERPA violation, along with damages for other claims. The state court of appeals reversed the jury award.[1] Doe appealed to the state supreme court.

One issue facing the court was whether individuals can sue for damages for FERPA violations. Several courts have held that FERPA itself does not give rise to a private cause of action.[2] However, Doe used the FERPA violation as the basis for a claim under a federal civil rights statute that provides a remedy for federally conferred rights. The act is popularly known as Section 1983 for its location in the United States Code.[3] The state supreme court ruled that FERPA does give rise to a federal right enforceable under Section 1983.[4] The U.S. Supreme Court has agreed to review this decision.[5]

The *Falvo* Case: The Meaning of "Education Records"

On November 27, 2001, the U.S. Supreme Court heard a case, *Owasso Independent School District v. Falvo*, dealing with a FERPA issue so basic that its not having been resolved long ago is surprising. The issue is the meaning of the term "education records." Specifically the issue is whether, in the absence of parental consent, allowing students to grade one another's homework and tests as their teacher goes over the correct answers aloud in class violates FERPA's prohibition against the release of education records.

Kristja Falvo's children attended public school in Oklahoma. Some of their teachers had them exchange papers and grade one another's work. When students got their own papers back, they called out their grades to the teacher. Falvo complained to the school counselors and the superintendent that this practice embarrassed her children. Although the school offered the children the option of confidentially reporting their grades to the teacher, the school district was not willing to issue a flat ban on students' trading papers. Falvo sued the district, claiming that the practice violated both the privacy rights implicit in the Fourteenth Amendment and FERPA.

The district court found no violation of either the Fourth Amendment or FERPA. Falvo appealed. The Tenth Circuit Court of Appeals found no violation of the Fourth Amendment but ruled that allowing students to grade one another's papers, even without calling out grades to the teacher, violates FERPA by allowing the disclosure of education records without parental consent.[6] (Remember that FERPA defines "education records" as records that contain information directly related to a student and that

- Parents have the right to complain to the FERPA Office in the federal Department of Education if they believe the school has violated FERPA.

Schools must respect these rights and fulfill corresponding responsibilities. First, schools must notify parents annually of their rights under FERPA. Further, schools must maintain a record showing all organizations, agencies, and individuals (except school officials and employees) that have requested or obtained access to a student's education records and indicating the legitimate interest each had in obtaining the information.

Most important, school officials must have specific written consent from a student's parent before disclosing personally identifiable information in that student's education records (or before giving access to the records themselves) unless disclosure is made under one of the exceptions in FERPA.[26] The most significant exceptions are as follows:[27]

- Disclosure to other school officials, including teachers, with a legitimate educational interest. For example, a teacher who is having problems with a student may look at the student's records to learn whether the problem is new or has been addressed previously. A teacher who is merely curious about a student's academic performance or disability status, however, has no legitimate educational interest and should not have access to the records.
- Disclosure in connection with an emergency if information is necessary to protect the health or safety of the student or other people.
- Disclosure to another school or school system in which the student seeks or intends to enroll. The student's parents must be notified of the disclosure and receive a copy of the records that were sent to the enrolling school if they want a copy.
- Disclosure in response to a judicial order or pursuant to a lawfully issued subpoena.[28] A school must make reasonable efforts to notify the parents in advance of disclosing the information.
- Disclosure to state and local officials in connection with the state's juvenile justice system, under specific conditions.
- Disclosure to organizations conducting studies for, or on behalf of, education agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, or improving instruction, with conditions.

are maintained by an education agency or institution or by a person acting for the agency or the institution.) The court explained that when one student puts a grade on another student's paper at the teacher's direction, and then the teacher records at least some of the grades for his or her use (as the teacher did), the first student is acting "for the school district." The school board appealed, arguing that student work that is created, used, or kept in the classroom and not made part of a student's institutional record does not meet the definition of education record.

The U.S. Supreme Court announced its decision in February 2002. In a 9-0 ruling, it reversed the decision of the court of appeals, holding that peer grading does not violate FERPA.[7] The Court explained that student papers in the hands of other students for grading are not education records. The papers do not meet the statutory definition because they are not records "maintained" by the school, nor are the students "acting for" the school. In addition, the Court noted that under the court of appeals' interpretation of FERPA, the federal government would become more involved in specific teaching methods and instructional dynamics in classrooms than Congress is likely to have mandated.

The holding in the case is limited to the narrow point that, assuming a teacher's grade book is an education record, grades on students' papers are not covered by FERPA before the teacher has recorded them. The Court did not decide whether grades on individual assignments are education records once the teacher has recorded them. However, it did say that FERPA "implied" that education records are institutional records kept by a single central custodian, such as a registrar. Justice Antonin Scalia, though concurring in the judgment, disagreed with that view.

Notes

1. Doe v. Gonzaga Univ., 992 P.2d 545 (Wash. App. 2000).
2. Fay v. South Colonie Cent. Sch. Dist., 802 F.2d 21 (2d Cir. 1986), Tarka v. Cunningham, 917 F.2d 890 (5th Cir. 1990).
3. 42 U.S.C. § 1983.
4. Doe v. Gonzaga Univ., 24 P.3d 390 (Wash. 2001), *cert. granted*, 122 S. Ct. 865 (2002). The Washington Supreme Court relied on Blessing v. Freestone, 520 U.S. 329, 329–30 (1997). The Court in that case held that, to determine whether a particular statutory provision gives rise to a federal right, a court must examine three factors: (1) whether Congress intended the provision in question to benefit the plaintiff, (2) whether the right protected by the statute is so vague and amorphous that its enforcement would strain judicial competence, and (3) whether the statute imposes a binding obligation on the states.
5. In the *Falvo* case, discussed in the next section of this sidebar, the U.S. Supreme Court assumed, without deciding, that FERPA provides private parties with a cause of action enforceable under Section 1983.
6. Falvo v. Owasso Indep. Sch. Dist. No. I-011, 233 F.3d 1203 (10th Cir. 2000), *rev'd*, 534 U.S. ___ (Feb. 19, 2002), available at www.supremecourtus.gov/opinions/01/pdf/00-1073.pdf (visited Feb. 25, 2002).
7. Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. ___ (Feb. 19, 2002, available at www.supremecourtus.gov/opinions/01/pdf/00-1073.pdf (visited Feb. 25, 2002).

- Disclosure to accrediting organizations to carry out their accrediting functions.
- Disclosure of directory information, if certain conditions are met. "Directory information" is information in education records that would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student's name, address, telephone number, date of birth, awards, and participation in officially recognized activities.[29] Directory information may be disclosed without consent only if parents have been told that such disclosure is possible and have been given the opportunity to direct the school not to disclose any directory information about their child.

If a school official violates FERPA, the U.S. Department of Education may investigate and then may terminate federal financial assistance, but only if the secretary of education finds that the school has failed to comply and will not comply voluntarily. This simply does not happen: schools that have not complied with the law promise to comply in the future. Although cutting off federal aid is the sole remedy in FERPA itself, in a few cases, parents have successfully sued for damages under another federal statute.[30] The U.S. Supreme Court has agreed to review a case that presents this issue (see the sidebar on page 40).

FERPA's fundamental principles are clear and can be outlined even in this very brief summary. Although these principles are well understood and the statute and its regulations[31] specifically address many situations faced by school officials, new questions about FERPA's meaning continue to be litigated. In addition to the question of whether parents may sue for violations of FERPA, the U.S. Supreme Court recently decided a case involving the definition of "education records" (see the sidebar on page 40).

Conclusion

This article only skims the surface of two student privacy issues: searches at school and education records. Even within these two areas, many issues have not been fully discussed—for example, the confidentiality of special education records, searches of students' lockers, and use of metal detectors and drug-detection dogs. Other privacy issues have not been addressed at all, among them the confidentiality of information told to a school counselor, limitations on gathering certain personal information, disclosure of information to and from the juvenile justice system, and the use of students as research subjects.[32]

Nonetheless, several conclusions may be drawn from this discussion. First, the days when school officials were considered as acting in place and on behalf of parents are gone, at least within this context. Second, students have privacy interests that must be respected by school officials. Third, these officials have substantial guidance from the well-developed law of student searches and student records. Fourth, important questions about searches and records remain unresolved, though some of them will be answered this year. Finally, the law affecting student privacy will continue to evolve as school officials and students operate in a changing school environment.[33]

Notes

1. For a more comprehensive review, *see* EDUCATION LAW IN NORTH CAROLINA (Janine M. Murphy ed.; Chapel Hill: Principals' Executive Program, The Univ. of N.C. at Chapel Hill, 2001); and JAMES RAPP, EDUCATION LAW (Newark, N.J.: Matthew Bender, 2001).

2. "The General Assembly finds that all schools should be safe, secure, and orderly. If students are to aim for academic excellence, it is imperative that there is a climate of respect in every school and that every school is free of disruption, drugs, violence, and weapons. All schools must have plans, policies, and procedures for dealing with disorderly and disruptive behavior." N.C. GEN. STAT. § 115C-105.45 (hereinafter G.S.). "Each local board of education shall develop a local school administrative unit safe school plan designed to provide that every school in the local school administrative unit is safe, secure, and orderly, that there is a climate of respect in every school, and that appropriate personal conduct is a priority for all students and all public school personnel." G.S. 115C-105.47(a).

3. "It is the intent of the General Assembly that the mission of the public school community is to challenge with high expectations each child to learn, to achieve, and to fulfill his or her potential." G.S. 115C-105.20. "It is the policy of the State of North Carolina to create a public school system that graduates good citizens with the skills demanded in the marketplace, and the skills necessary to cope with contemporary society. . . ." G.S. 115C-408.

4. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 511 (1969).

5. Students' rights often are more limited than those of adults. School officials' power over students is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995).

6. New Jersey v. T.L.O., 469 U.S. 325 (1985).

7. For a discussion of the reasonable-suspicion standard as it applies in criminal cases, see the article on page 13.

8. For a discussion of the meaning of "reasonable expectation of privacy" in the context of criminal and employment matters, see the articles on pages 13 and 33.

9. *In re* Murray, 136 N.C. App. 648, 652, 525 S.E.2d 496, 499 (2000), quoting United States v. Cortez, 449 U.S. 411, 418 (1981).

10. Thomas v. Roberts, 261 F.3d 1160 (11th Cir. 2001) (holding that strip searches of fifth graders for missing $26 were unconstitutional).

11. Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991), Cornfield v. Consolidated High Sch. Dist. 230, 991 F.2d 1316 (7th Cir. 1993) (approving strip searches because illegal drugs can be concealed on person's body).

12. A state court might find that its state constitution requires adoption of a standard for searches of students that is stricter than the *T.L.O.* standard. The N.C. Court of Appeals did not do this; it adopted the *T.L.O.* standard.

13. In re *Murray*, 136 N.C. App. 648, 525 S.E.2d 496.

14. *In re* D.D., ___ N.C. App. ___, 554 S.E.2d 346 (2001), *review denied*, 2001 N.C. LEXIS 1294 (N.C. Dec. 18, 2001).

15. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 624 (1989).

16. New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985), quoting Delaware v. Prouse, 440 U.S. 648, 654–55 (1979).

17. Vernonia School District 47J v. Acton, 515 U.S. 646 (1995).

18. "I comprehend the Court's opinion as reserving the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school." *Id.* at 666 (Ginsburg, J., concurring).

19. Willis v. Anderson Community Sch. Dist., 158 F.3d 415 (7th Cir. 1999) (striking

School officials may search a student's book bag if they have reasonable suspicion that the bag contains evidence of a violation of a law or a school rule.

down policy that required all suspended students to submit to drug test at end of suspension, because there was no causal connection between offense of fighting and suspicion of drug use); Todd v. Rush County Sch., 133 F.3d 984 (1998) (upholding on health and safety rationale, random drug testing of all students who wanted to participate in extracurricular activities or park at school); Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052 (7th Cir. 2000) (upholding drug and alcohol testing of students participating in extracurricular activities or parking at school, because court was bound by precedent of *Todd v. Rush;* striking down policy requiring testing student drivers for nicotine); B.C. by and through Powers v. Plumas Unified Sch. Dist., 192 F.3d 1260 (9th Cir. 1999) (striking down random, suspicionless search of students by drug-sniffing dogs, in absence of evidence of drug problem); Tannahill *ex rel.* Tannahill v. Lockney Indep. Sch. Dist., 133 F. Supp. 2d 919 (N.D. Tex. 2001) (striking down policy requiring consent to random drug tests as condition of participation in extracurricular activities, because testing program was not specifically targeted to special needs of drug crisis).

20. Earls v. Board of Educ. of Tecumseh Public Sch. Dist. No. 92 of Pottawatomie County, 242 F.3d 1264 (10th Cir.), *cert. granted*, 122 S. Ct. 509 (Nov. 8, 2001).

21. 20 U.S.C. § 1232g. FERPA is the most important statute controlling access to student records. Other federal statutes and some state statutes also affect the privacy of student records. For a more detailed discussion, *see* Thomasin Hughes, *Releasing Student Information: What's Public and What's Not*, 32 SCHOOL LAW BULLETIN 12 (2001).

22. Traditional legislative history of FERPA as first enacted in 1974 is not available because it was offered as an amendment sponsored by Senator James Buckley rather than being the subject of committee consideration. The Joint Statement in Explanation of Buckley/Pell Amendment, the major source of legislative history for the amendment, was introduced several months later. It is available at www.ed.gov/offices/OM/fpco/Legislativehistory.html (visited Feb. 7, 2002).

23. This article uses "parent" to cover all adults who have decision-making authority under FERPA (an eligible student, a parent, a guardian, a custodian, or a person acting in place of a parent). "Eligible student" means a student who has reached eighteen years of age or is attending an institution of postsecondary education. "Parent" means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian. 34 C.F.R. § 99.3.

24. 20 U.S.C. § 1232g(a)(4). A "record" is any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audiotape, film, microfilm, and microfiche. 34 C.F.R. § 99.3.

25. 20 U.S.C. § 1232g(a)(4); 34 C.F.R. § 99.3.

26. 20 U.S.C. § 1232g(a)(4). Note that when FERPA allows a school board to disclose information, it does not mandate that the board do so. Other statutes and policies may require the board to disclose information when FERPA allows it.

27. 34 CFR § 99.31.

28. John Rubin, *Subpoenas and School Records: A School Employee's Guide*, 30 SCHOOL LAW BULLETIN 1 (1999).

29. 20 U.S.C. § 1232g(a)(4).

30. Fay v. South Colonie Cent. Sch. Dist., 802 F.2d 21 (2d Cir. 1986), Tarka v. Cunningham, 917 F.2d 890 (5th Cir. 1990) (both holding that parent or student may bring FERPA claim under 42 U.S.C. § 1983, which allows lawsuits when claim is that right protected by federal statutes has been violated).

31. 34 C.F.R. § 99.

32. For information on limitations on gathering certain personal information, *see* the Hatch Amendment, codified at 20 U.S.C. § 1232h. For information on disclosure of information to and from the juvenile justice system, *see* www.ed.gov/offices/OESE/SDFS/actguid/infshare.html (visited Feb. 7, 2002).

33. For additional information, readers may consult their local school boards, use the resources cited in note 1, and research privacy issues online. Two useful sites are www.ed.gov (the federal Department of Education) and www.dpi.state.nc.us (the State Department of Public Instruction and the State Board of Education).