

Current Developments in Education Law in the United States of America

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Abstract

Recent developments in education law in the U.S. are more important than being 'current'. What has developed is the clear identification of a major shift in the relationship between schools and society. No longer can the current developments be viewed as snapshots of interest. Recent cases mark the end of an era. The era of students' rights is coming to a close. What begins is the 're-empowerment' of school authorities. In the last decade, the United States Supreme Court has taken a different view of the character of the nation's schools.

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Introduction

Much of what has recently developed in education law in the U.S. is more important than its being 'current'. What has developed is the clear identification of a major shift in the relationship between schools and society. No longer can the current developments be viewed as snapshots of interest. Recent cases mark the end of an era; the era of students' rights is ending. What begins is the era of 're-empowerment' of school authorities. In the last decade, the United States Supreme Court has taken a different view of the character of the nation's schools.

For the Court, schools have become dangerous places. Schools are the depository of drugs and weapons. They are no longer safe places for our children. In order to respond to the safety needs of America's children, the Court has done its part by finding alternative ways to look at what have come to be known as legal guarantees. No longer can a student expect that the local school will permit entry each morning without being searched. No longer can a student expect to try out for the school football team unless he/she submits to urinalysis. No longer can an African American, Hispanic or Native American student expect to attend a school with white students. Consistent with re-empowerment, is the concomitant step toward paternalism and a revival of 'in loco parentis'. The concern for schools to return to being places of safety has caused recent courts to create a legal theory for 'peer harassment' issues. Along with the new power to control students, comes the duty to protect those students from each other.

The development of the discipline of education law in the United States in many ways can be attributed to the recognition of students' rights. The 60's and 70's saw a Supreme Court telling a nation that 'students do not shed their constitutional rights at the schoolhouse gate'.ⁱ Schools in the U.S. that had been racially segregated were told that separation of children by race was 'inherently unequal'.ⁱⁱ

The Change in Students' Rights

In the area of students' rights, what could be recognised as an erosion of those rights had its beginning in the first U.S. Supreme Court student search and seizure case - *New Jersey v. T.L.O.*³ In *T.L.O.*, the Court presented a two-edged sword. On one side, *T.L.O.* crystallised the application of a definitive judicial standard for school searches. The Court said, 'the search of a student by a school official will be justified at its inception where there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school'.⁴ While students' rights advocates may have heralded the case, school authorities looked at the other side. The Court could have required school authorities to obtain a warrant before searching students. Yes, the Court created a standard that would have to be followed; however, it was a lesser standard than *probable* cause.⁵ The Court spent some time describing what they saw as a potentially restrained school official unless provided with reasonable legal standards. The Court noted:

Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of school children, as well as the enforcement of rules against conduct that would be permissible if undertaken by an adult. Events calling for discipline are frequent occurrences and sometimes require immediate effective action. Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship.⁶

While some saw the glass half full and others saw it half empty, certain school practices were definitely curtailed as a result. It was clear that for personal searches, school officials would need individualised suspicion. Mass, dragnet searching of student groups would be impermissible. Strip searching, which had always been invalid for lower courts, would be difficult to defend. Indeed,

many student searching practices which had been guided only by school officials' discretion, now became a matter of law. While the law was not difficult to master, it was more than what had amounted to total discretionary authority.⁷ Therefore, between the period 1985 and 1993 students enjoyed some level of legal protection against unreasonable searches.

Strip Searching

The first hint at a possible change came with regard to upholding a strip search. In *Cornfield By Lewis v. School Dist. NO. 230*, a 16 year-old special education high school student, Brian Cornfield, was observed by a teacher's aide outside the school building with a suspicious bulge in his crotch area.⁸ The observation was corroborated by another teacher and a teacher's aide - both male. However, no action was taken. The following day one of the aides and the same teacher saw Brian boarding the school bus. They observed that once again Brian had an unusual bulge in the crotch area of his sweatpants. He was asked to accompany the teacher and the aide to the office. When confronted with their suspicion, Brian grew agitated and began yelling obscenities. At Cornfield's request, his mother was phoned to get consent for a search. She refused. Nevertheless, the school personnel proceeded. Believing that a pat down would be excessively intrusive and ineffective at detecting drugs, they escorted Cornfield to the boys' locker room to conduct a strip search. After making certain that no one else was present in the locker room, they locked the door. The teacher then stood about 15 feet from Brian, and the aide was standing on the opposite side, approximately ten to twelve feet away. They had him remove his street clothes and put on a gym uniform. They visually inspected his naked body and physically inspected his clothes. Neither man performed a body cavity search. They found no evidence of drugs or any other contraband.

Suit was filed in federal district court. The school district was granted a summary judgement. On appeal, the student argued that school personnel did not have reasonable suspicion to conduct the strip search. Cornfield asserted that the information on which he was searched was untrue. Rejecting this argument, the court noted that regardless of whether the information was true, school personnel did reasonably believe the information to be true. Therefore, the reasonable suspicion prong of the *T.L.O.* test was satisfied.

Surprisingly, Cornfield did not argue that the strip search exceeded reasonable scope. Nevertheless, the court spent some time exploring the scope issue. Allowing the suspicion prong to bleed into the scope prong, it opined that

[A]s the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness. What may constitute reasonable suspicion for a search of a locker or even a pocket or pocketbook may fall well short of reasonableness for a nude search.⁹

The court reads *T.L.O.* to provide only *some* guidance for handling scope issues: 'Although the Supreme Court in *T.L.O.* identified age as one of the factors used to evaluate the reasonableness of

a search, it did not elaborate how age mattered'.¹⁰ In an interesting visit to the annals of child psychology, the court maintained that a strip search is *more harmful* to children as they become older.

The impact of the search will also vary with the age of the child. Perhaps counterintuitively, a very young child would suffer a lesser degree of trauma from a nude search than an older child. As children go through puberty, they become more conscious of their bodies and self-conscious about them. Consequently, the potential for a search to cause embarrassment and humiliation increases as children grow older.¹¹

It is ironic that the court would first advance a somewhat reversed developmental psychology theory and then hold that given staff 'suspicions that Cornfield was crotching drugs, their conclusion that a strip search was the least intrusive way to confirm or deny [their] suspicions was not unreasonable'.¹² It is also puzzling as to why no argument was raised regarding Cornfield's disability. He was a student with behavioral disorders. Does not a special education student's social/emotional/psychological (in his case somewhat less than normal) condition mitigate against using high level intrusive search methods?

Cornfield is important for a number of reasons. The case helps confirm that *Williams By Williams v. Ellington* decided two years earlier, was not an aberration. Both courts rely on the same curious application of the *T.L.O.* reasonableness standard. In both cases the suspicion prong analysis is used to justify a strip search. In other words, the nature of the contraband being sought can justify the level of intrusiveness. Surely this twist ignores a plain reading of *T.L.O.*: '[T]he measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction'.¹³ The Court did not say *nature of the contraband*. The criteria for selecting a search method is the age and sex of the child - not the type of contraband to be seized. If it were otherwise the focus of attention would be on school authorities maximising on their success in obtaining the contraband regardless of the cost to students' psychological well-being.

Drug Testing and the Future of Suspicionless Searching

Monumental in its ushering in the era of 're-empowerment' of school authorities, *Vernonia School District v. Acton*, upheld the use of suspicionless drug testing of student athletes as a condition for trying out for an athletic team.¹⁴ On the surface, the case may appear narrow in its application. In rendering this decision the Supreme Court reworked some of the important guarantees that were thought to be well in place as a result of *T.L.O.* The Court did not agree with the lower court's assessment of the extent of the school's drug problem which would raise it to a level of compelling interest.

According to the testimony of several of the district's teachers, there were few discipline problems in the schools prior to 1985 and only a few students used drugs or alcohol. However, this situation changed markedly between 1985 and 1989. Teachers and administrators noticed that there were more disciplinary problems and student drug use as well as a 'glamorisation' of drug culture. In addition, athletic coaches reported an increase in the number and severity of injuries which they attributed to drug use. After instituting drug education programs and employing other methods such as the use of drug-sniffing dogs, the principal of the school, Mr. Aultman, and the school faculty decided to establish a drug testing policy. This was unanimously adopted by the Vernonia School Board. James Acton, a seventh grade student at Washington Grade School, tried out for the football team in the fall of 1991. During the first practice, he was given the consent form for his parents to sign. Both James and his parents decided that they should not sign the form and James was suspended from the athletic program for the season. James had no history of drug problems and there was no reason for the district to suspect that he might have a problem.

In reviewing these facts, a 6-3 majority Supreme Court provided some interesting perspectives on school searches. By way of announcing the test that it would use for this case, the Court explained that while *T.L.O.* was based on individualised suspicion of wrongdoing, 'it explicitly acknowledged that "the Fourth Amendment imposes no irreducible requirement of such suspicion"'.¹⁵ It noted that since *T.L.O.*, it had decided *Skinner*, *Von Raab* and *Sitz* all of which upheld suspicionless searches. In those cases the government set aside the privacy rights of the individual in order to ensure the public's safety. This justification was considered sufficient to set aside the individualised suspicion requirement.¹⁶

In applying a modified 'special needs' balance of interest test, the Court began by looking at the students' side. It noted that the Fourth Amendment only protects society-recognised expectations of privacy. The expectations must be legitimate. While students may have privacy rights, they are children who are subjects of the state while in school. While *T.L.O.* held that the relationship between pupil and teacher is more than delegated power of parents (*in loco parentis*), it 'did not deny, but indeed emphasised, that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults'.¹⁷ As students, they are routinely required to submit to various physical examinations and be vaccinated. Therefore, students within the school environment have less expectation for privacy than members of the population generally.

As a consequence the Court classified the student athletes' expectation of privacy as low. The Court then turned to the question of scope. What is the character of the intrusion that urinalysis imposes? The answer depends on the 'manner' in which the urine sample is monitored. In looking at the great care with which the school program was implemented, the Court concluded that 'Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible'.¹⁸

The Court then turned to the school side of the balancing test. It noted that the lower courts erred in reading *Skinner* and *Von Raab* to require that the government show a 'compelling interest' before it can engage in a suspicionless search. In those cases, the government interest did

rise to the level of compelling simply because of the nature of the events-but not that it had to. Whether the high degree of concern is necessary in this case or not the Court thought it was nevertheless met. It went on to note that the ‘importance’ of the government’s concern for the ‘Nation’s schoolchildren is at least as important as enhancing efficient enforcement of the Nation’s laws against the importation of drugs (*Von Raab*) or deterring drug use by engineers and trainmen (*Skinner*)’.¹⁹

The Court did go a bit further with its analysis of the government’s interest. It noted that to set aside the individualised suspicion requirement, as it did in *Skinner* and *Von Raab*, the government must have an ‘immediate’ concern. In the Court’s view, the description of the problem in *Vernonia* ‘[I]s an immediate crisis of greater proportions than existed in *Skinner*’.

As to the efficacy of addressing the problem with the program as practiced by the school district, the Court gave high marks. On this point, the dissent was particularly critical of the policy for not using a less intrusive means of dealing with the problem. In other words, the school could have dealt with the problem by engaging in accurate accusatory searches based on reasonable individualised suspicion. The majority responded by noting that ‘We have repeatedly refused to declare that only the “least intrusive” search practicable can be reasonable under the Fourth Amendment. ... In many respects, we think testing based on “suspicion” of drug use would not be better, but worse’.²⁰

In a very short concurrence, Justice Ginsburg wrote to highlight the scope of the holding. As if to obtain assurance from the majority, she wrote:

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.²¹

Whether *Acton* can be used for suspicionless drug testing of students other than athletes is a bit fuzzy.

Written by Justice O’Connor, the effort made by the dissent nearly exceeds the majority. The majority was criticised for dispensing with the long standing individualised suspicion requirement based on policy considerations. Whether a blanket search is better than a regime based on individualised suspicion should not be up to judges. It also suggested that the school district may have overreacted to their time of crisis. It finds nothing in the record to support the need for suspicionless drug testing of its student athletes. For the dissent, the policy ‘sweeps too broadly, and too imprecisely, to be reasonable under the Fourth Amendment’.²²

The decision raises questions. How ‘disastrous’ must a school problem be in order to meet a compelling state interest requirement sufficient to engage in suspicionless searching? Can the school err on the side of caution or must it wait for the drug problem to get out of hand? Part of the rationale of the majority focused on the fact that student athletes have a low expectation of privacy because of locker room routines. Does the decision apply to extracurricular student

activities other than sports? If the drug problem were bad enough would that constitute more interest on the side of the school and therefore permit the school to engage in suspicionless testing of the entire student body?

What of the use of metal detectors as a condition of entering the school building? Schools that have become safety conscious have done so not only because of an increase in the presence of drugs. The introduction of dangerous weapons is the predominant problem for many schools. Part of the solution has been to subject every individual entering a school building to screening by metal detection devices. Of course, metal detectors being used as a condition of entry, is a form of suspicionless search. What conditions need to exist in order for a school to set aside the individualised suspicion requirement and use metal detection for being admitted to a school building?

It appears that if there is a perceived 'danger' of drugs and weapons in a particular school and if that danger is immediate, the officials would be justified in setting aside individualised suspicion. Of course, the justification for this exception to what is a recognised constitutional requirement came out of a context of drug testing for student athletes. Whether it means that schools can set this requirement aside for all other types of searches and for all other types of students continues to be a developing area of education law. The lower courts are now faced with having to apply *Acton* to an increasing level of litigation regarding school searches.

Current Applications for Students' Privacy Rights

One such application came in June of 1996 in *Thompson v. Carthage School District*.²³ Carthage High School was located in a small rural community of Arkansas. On the morning of October 26, 1993, a school bus driver told Norma Bartel, the high school principal, that there were fresh cuts on seats of her bus. Concerned that a knife or other cutting weapon was on school grounds, Bartel concluded that all male students in grades six to twelve should be searched. After the search began, students told Bartel that there was a gun at the school that morning. Bartel and science teacher, Ralph Malone, conducted the search by bringing each class of students to Malone's classroom. The students were told to remove their jackets, shoes, and socks, empty their pockets, and place these items on large tables in the science room. Bartel and Malone then checked the students for concealed weapons with a metal detector. Malone would pat down a student if the metal detector sounded, as it often did because of the metal brads on the students' jeans. Malone and Bartel also patted the students' coats and removed any objects they could feel in the coat pockets. Lea Thompson was a ninth grade student at the time of the search. Neither Bartel nor Malone had reason to suspect that Lea had cut the school bus seats or had brought a weapon to school that morning. Lea's class was one of the last to be searched in the science room. Malone searched Lea's coat pocket and found a used book of matches, a match box, and a cigarette package. Considering these items to be contraband, Malone showed them to Bartel and she brought them to her office. Bartel found only cereal in the cigarette package but discovered a white substance in the match box. She took the match box to the superintendent, who turned it

over to a deputy sheriff. A test revealed that the white substance was crack cocaine. After a hearing, Lea was expelled for the remainder of the school year.²⁴

At trial, the federal district court held for the student. It ruled that Lea's expulsion was wrongful because the search had violated his Fourth Amendment rights. It reasoned that school officials had no individualised suspicion that Lea was carrying a weapon or other contraband. There was no adequate basis in the evidence to justify the initial decision to search all the boys. In addition, the court noted that school authorities seized the match box after they knew that Lea did not possess a knife or gun. On appeal, the United States Court of Appeals for the Eighth Circuit reversed the lower court. At the time of trial, the lower court did not have the guidance of *Acton*. The 8th Circuit noted:

The district court concluded that the broad search for knives and guns was not justified at its inception because the Carthage School District was not facing a serious, on-going, problem with such dangerous instrumentalities. In our view, the analysis is inconsistent with *Vernonia*. Principal Bartel had two independent reasons to suspect that one or more weapons had been brought to school that morning. Though she had no basis for suspecting any particular student, this was a risk to student safety and school discipline that no reasonable guardian or tutor could ignore. Bartel's response was to issue a sweeping, but minimally intrusive command, 'Children, take off your shoes and socks and empty your pockets'. We conclude that Bartel's decision to undertake this generalised but minimally intrusive search for dangerous weapons was constitutionally reasonable.²⁵

The 8th Circuit went on to say that in a school setting, Fourth Amendment reasonableness does not turn on hairsplitting argumentation. If Lea had emptied his own coat pocket, the cigarette package and match box would have become contraband in plain view. It is not constitutionally significant that teacher Malone emptied the pocket after Lea put his jacket on the table. Moreover, once Bartel and Malone reasonably decided to quickly search many children's pockets for dangerous weapons, it would not be realistic to require them to abort the search of a particular child who does not appear to be in possession of such contraband.

Thus, *Thompson* appears to suggest that the general diminution of privacy rights, although initially confined by the Supreme Court to athletic participation, has been more broadly interpreted for application to the daily attendance of all pupils.

The Right of Students' to Attend Schools Free of De Jure Segregation

Separating children by race for school attendance became unconstitutional in 1954.²⁶ For nearly half a century there was an assumption that a desegregation order would continue in perpetuity. Once a federal district court found a school district was liable for having run a dual school system (one for minorities and one for whites) the court would forever maintain vigilance over that school

district to ensure that it would never again separate pupils by race.²⁷ However, in 1991 that the United States Supreme Court ruled that there could be an end to desegregation.²⁸ In *Dowell v. Board of Educ. of the Oklahoma City Public Schools, Indep. Dist. No. 89*, the Court held that a desegregation decree may have an end. The end would come when the school district achieved 'unitary' status. It defined unitary status as existing when the school district (acted in) 'good faith since (the decree) was entered and (had eliminated), in light of every facet of school operations, the vestiges of past de jure discrimination ... to the greatest extent practicable'.²⁹ The *Dowell* case came out of a situation where the school district had stopped busing its pupils. As a result the school district became 'resegregated'. Therefore, it was important to know whether a school district would be held to maintaining a certain racial balance forever or whether, regardless of what resulted from the stopping of the working of the desegregation plan, the school district need only refrain from future acts of discrimination. The fact that the Oklahoma City schools would be resegregated if the order was lifted, was not dispositive of qualifying for unitary status. If the school district achieved unitary status, the results would not be attributed to the purposeful acts of school authorities. Once the initial segregation is 'eliminated to the greatest extent practicable', a resegregation of the system, while unfortunate, would be constitutionally permissible.

Current Applications for Students' Rights in Desegregation

Being shown that there was a way to qualify for unitary status and, thus, be able to stop costly and unpopular busing programs, school districts have begun to approach the federal district courts. Given the Supreme Court definition of 'unitary', schools are petitioning as did Oklahoma City, to be released from their decrees. So far every major school district since 1991 that has petitioned for release has been granted.³⁰ If the result of being released from a desegregation decree means that the school district now returns to educating children in separate schools by race, what was it all for? Why have hundreds of school districts bused black, white, and Hispanic children out of their neighborhoods to attend school? The *Brown* decision recognised that schooling children separated by race branded African Americans with a sense of inferiority that is 'inherently unequal' as a tolerable form of education. However, what exactly in the education of children in separate schools is the source of the badge of inferiority? Is it the separate schools or is it that the separate schools are required by law. The Court, in effect, has decided it is the latter. In 1954, society was ready to believe that if states stopped requiring children to go to separate schools, racial discrimination might stop. Perhaps the experiment failed. As the federal court noted in the recent Delaware case:

The continued existence of racial discrimination in our society as a whole, and the effect of that discrimination on the ability of a black child to enter school on an equal footing with more privileged white schoolmates, are not matters in dispute. ... And, indeed, as the years have passed since *Brown I* and *II*, it has become apparent that the school desegregation process has been unable to

eliminate or overcome racial discrimination in the 'myriad factors of human existence' outside the school environment, as predicted by the Supreme Court.

...³¹

Given the trend, it can be expected that by the turn of the century many of our nation's schools will return to being segregated. There are several generations of children who have now been schooled in desegregated settings. However, future generations will have the experience of their grandfathers. They will be schooled in racially segregated schools, albeit not as a result of law. While de facto segregation may not be a violation of the Equal Protection Clause of the Constitution, what are the long term effects of educating children separated by race? Can anything that is healthy come from such an arrangement?

Other Current Developments in Desegregation Law

Representing one of the bolder attempts to provide for educational quality as part of the desegregation effort, Kansas City, Missouri stands alone. When the Kansas City public schools (KCMSD) first came under court supervision in 1985, the Federal District Court for the Western District of Missouri ordered major improvements for the entire school system.³² The program of 'desegregative attractiveness' was designed to entice families who had fled the city to return. The court was committed to making the Kansas City school system so attractive that white families would prefer it to suburban or private schools. The cost of the initial phase of the improvement program exceeded one billion dollars. The court held the City of Kansas City and the State of Missouri jointly liable for the bill. After paying for nearly ten years, the State of Missouri argued that the federal court exceeded the scope of its remedial authority. Ultimately, the Supreme Court agreed.

In a 5-4 reversal, the Supreme Court ruled that the federal district court had exceeded its discretion in ordering the Kansas City, Missouri School District and the State of Missouri to pay more than \$1.3 billion dollars for salary increases because test scores were below national norms.³³ However, the lower court made no particularised findings about the extent to which student achievement had been reduced or what part of the decline was attributable to segregation. Among its extensive remedies, the desegregation order included mandates to restore the KCMSD to the highest level of classification awarded by the State, to reduce class sizes, to improve educational opportunities by developing student-centered programs, to implement a substantial capital improvements plan to upgrade the deteriorating facilities of the KCMSD, and to initiate a state-funded effective schools program that included substantial cash grants to local schools. The court also commissioned a study on magnet school programs. However, in 1987 a salary assistance program was ordered to help comply with various components of the remedial order. A number of years later when salary increases were actually ordered, the scope of the order was challenged.

In deciding the scope of authority issue, the Chief Justice, writing for the majority, relied on language in *Swann v. Charlotte Mecklenburg Board of Education*³⁴ along with *Milliken v. Bradley I*³⁵ and *II*³⁶ to emphasise that federal district courts do not have limitless power to fashion

remedial desegregation orders. In so doing, he turned to the three part test enunciated in *Milliken II* to guide the extent of a district court's authority. The first element of the test is that the nature of a desegregation remedy must be determined by the nature and scope of the constitutional violation. Second, the decree must be remedial in so far as it is designed to restore the victims to the position that they would have been in but for having suffered from discrimination. Third, a court must take into account the interests of state and local authorities in managing their own affairs.

In his discussion of desegregative attractiveness (the essence of the federal district court remedy), Rehnquist maintained that the district court's pursuit of such a goal could not be reconciled with precedent, thus, limiting its remedial authority. Using a form of reduction to the absurd, he conceded the possibility that if more money is spent per pupil in the KCMUSD, there would be a greater likelihood that students not already in the system will enrol. However, he feared that such a rationale would not be subject to any objective limitation, especially in light of how the case had already provided too many examples of the unfettered authority of the trial court. He concluded that the pursuit of desegregative attractiveness and the resulting court ordered salary increases simply went too far beyond the acceptable means of implementing a segregation remedy.

Turning to the quality education programs issue, Rehnquist noted that similar concerns led to the same result. He pointed out that the State did not seek a declaration of partial unitary status with regard to these programs. Instead, he acknowledged that the State challenged the authority of the trial court to order indefinite funding until national norms are met. The State acted on the assumption that since there was no mandate for the indefinite extension of the remedy, this approach would be one indication that improvement had been achieved. Rehnquist opined that by failing to adopt the correct approach the lower courts unnecessarily complicated their task. More specifically, he found that after the trial court failed to make any findings about the need to continue funding for the quality education programs, the Eight Circuit tried to piece together an after-the-fact justification from the record rather than remand for more information.

Under the circumstances, Rehnquist rejected the use of test scores as a measure of the success of integration efforts. He opined that the role of the trial court should have been to decide whether the reduction in achievement by minority students attributable to prior *de jure* segregation had been remedied to the extent practicable by providing the KCMUSD with a precise statement of its obligation. He buttressed his position by relying on his observation that the trial court failed to identify the incremental effect that segregation has had on minority student achievement or the specific goals of the quality education programs.

Thomas's concurrence criticised the lower court's decision to integrate primarily black schools without even addressing whether the racial composition of the schools was the product of segregative laws. Ginsburg's dissent noted that since *de jure* segregation had been in effect for so long, the seven year old court order should have been given more time to take effect.

Missouri v. Jenkins sends a mixed message. Looking at the glass half-empty, it can be concluded that the Court has had enough. The federal district court in Missouri went too far for too long and now its time to get back to normal. On the other hand, the glass may be half-full. Arthur Benson, the attorney for the original plaintiffs, thought that O'Connor's concurrence

offered some hope. He noted how she opined that the lower courts might still justify a large portion of the school desegregation plan if it were based on improving education for city students rather than desegregative attractiveness for suburban students.³⁷ He referred to Justice O'Connor's remarks in her concurrence that: '[T]he District Court may be able to justify some remedies without reliance on these goals. But these are questions that the Court rightly leaves to be answered on remand'.³⁸ Benson even held out the possibility that Judge Clark could justify the salary increases by the need to improve education for students within the district.

Given the history and extent of the litigation aimed at eradicating school desegregation, whether in the KCMUSD, or nationally, perhaps the only certainty is that further legal actions are likely to follow.³⁹

Students' Right to be Free from Sexual Harassment - A Current Issue

Except for criminal child abuse statutes, pupils had little to protect their need for safety in the school setting. Title VII of the Civil Rights Act of 1964 has protected employees against sexual harassment, but the statute was not seen as providing protection for pupils. However, that was to change in 1995. For the first time a federal appeals court ruled on a case involving a student seeking money damages for peer harassment. In *Doe v. Petaluma City School District*, a female junior high school student asserted that the school counsellor had a duty under Title IX to prevent her from being sexually harassed by other students.⁴⁰ The harassment took the form of a *hostile environment*.

The alleged harassment began when Jane Doe was in seventh grade. She informed school officials of the harassment and asserted at trial that they did not respond adequately. Most of the harassment was verbal, in the form of statements about Jane having a hot dog in her pants or that she had sex with hot dogs. For example, in seventh grade two male students said to Jane, 'I hear you have a hot dog in your pants'. This was repeated by a number of other students in the following weeks. By this time there was a rumor spreading around the school about her and hot dogs. Jane reported those incidents to the counsellor. He did nothing. Throughout that year the harassment from students continued with Jane reporting it to the counsellor every other week. The harassment continued during eighth grade as well with the addition of girls chiming in. Some girls wanted to fight Jane because she was reporting the harassment. She was told by the counsellor that the comments from the boys were sexual harassment but the girls' comments were not because girls could not sexually harass girls. When Jane's father inquired what the counselor could do, the counselor responded by saying, 'Boys will be boys'. By the spring of Jane's eighth grade experience she reported being called a 'hot dog bitch', 'slut', and 'hoe' (slang for whore) by girls who were trying to get her to fight. The counsellor said he could not stop the girls from talking to Jane because of their free speech rights. By this time students had taken to writing statements on the bathroom walls every day i.e. 'Jane is a hot dog bitch'. Jane stopped going to the bathroom during the day. Jane's father inquired of the counsellor why he had not reported these incidents to the vice principal so the perpetrator(s) might be punished. The counselor responded, 'I didn't

advise her because I didn't feel it was important'. By March of 1992 Jane transferred to another public school but the comments continued there. Jane then transferred to a private girls' school.

The lower court held in part that:

[N]o damages may be obtained under Title IX (merely) for a school district's failure to take appropriate action in response to complaints of student-to-student sexual harassment. Rather, the school district must be found to have intentionally discriminated against the plaintiff student on the basis of sex. The school's failure to take appropriate action ... could be circumstantial evidence of intent to discriminate. Thus, a plaintiff student could proceed against a school district on the theory that its inaction (or insufficient action) in the face of complaints of student-to-student sexual harassment was a result of an actual intent to discriminate against the student on the basis of sex.⁴¹

As announced by the court, the theory applies to those actions against the school district or against school officials as agents. In her lawsuit Jane Doe also sued the school counsellor under Section 1983 (Constitutional tort) *as an individual*. The motion to dismiss that part of the complaint based on the counsellor having 'qualified immunity' was denied.

Therefore, the question before the Ninth Circuit was - can Doe sue the counsellor under Sec. 1983 as an individual? In order for a plaintiff to overcome a claim of qualified immunity, the court noted that there must be a violation of 'clearly established' law.⁴² A divided court ruled that at the time of the violations it was not clearly established that Title IX required the counsellor to know he had a duty to act. It said:

[I]t is not reasonable to charge Homrighouse at the time in question with the kind of knowledge, foresight, or even ingenuity required to anticipate that Title VII analogies might be used in this fashion to hold him individually liable to Doe under Title IX.⁴³

As if to forewarn, the court concluded that 'If Homrighouse engaged in the same conduct today, he might not be entitled to qualified immunity'.⁴⁴

In a vigorous dissent, it was argued that the law that would guide school officials to know to stop harassment among students *was* well established at the time of the incidents. It noted that the school district had received a letter from the Office of Civil Rights that notified the school district that it had a duty to prevent the kind of peer harassment that occurred against Doe. In addition it maintained that pre-existing case law regarding harassment in the school setting was sufficiently analogous. That the doctrine of qualified immunity being excepted only when clearly established law is violated does not require that there is a prior case with facts exactly on point.⁴⁵

This case poses some important caveats for school policy makers. In the first instance, it appears that more attention must be paid to reports of students being harassed by other students.

Failure to investigate peer harassment activities, as noted by the lower court could be used as evidence to build a case against school districts for intentionally discriminating. Notwithstanding the implication for districts and administrators as agents, it appears as though administrators 'as individuals' may not be eligible for qualified immunity if the movement toward Title VII analogies for peer harassment continues.

While the Ninth Circuit presented a likely theory, there was no doubt in the decision of the Eleventh Circuit one year later. On February 14, 1996 the Eleventh Circuit held that the Monroe County Board of Education was in violation of Title IX by having engaged in 'hostile environment' form of sexual harassment, *Davis v. Monroe County Board of Education*.⁴⁶ While the Ninth Circuit ruled that student-to-student hostile environment sexual harassment had not been committed, it was only because Title VII analogies for Title IX guarantees had not been sufficiently settled at the time of the incidents. Regarding the school counsellor's conduct, the court noted that 'if Homrighouse engaged in the same conduct today, he might not be entitled to qualified immunity'.⁴⁷

However, in *Davis*, a fifth grade female (LaShonda) had been sexually harassed by a fellow fifth grade boy (G.F.) for a period of six months between December 1992 and May 1993. Over this period G.F. attempted to fondle LaShonda, did fondle her, directed offensive language toward her. In December, for instance, G.F. attempted to touch LaShonda's breasts and vaginal area, telling her, 'I want to get in bed with you,' and 'I want to feel your boobs'. Two similar incidents occurred in January 1993. In February, G.F. placed a doorstop in his pants and behaved in a sexually suggestive manner toward LaShonda. Other incidents occurred later in February and March. In April, G.F. rubbed against LaShonda in the hallway in a sexually suggestive manner. G.F.'s actions increased in severity until he finally was charged with and pleaded guilty to sexual battery in May 1993.

LaShonda reported G.F. to her teachers and her mother after each of the incidents and, after all but one of the incidents, the mother called the teacher and/or the principal to see what could be done to protect her daughter. Despite the parent's requests for protection, the school failed to protect LaShonda. Following one incident, for example, LaShonda and other girls whom G.F. had sexually harassed asked their teacher for permission to report G.F.'s harassment to the principal. The teacher denied the request, telling the girls, '[i]f he [the principal] wants you, he'll call you'.⁴⁸ After LaShonda told her mother of another incident of harassment, adding that she did not know how much longer she could keep him off her, her mother spoke with Principal Querry and asked what action would be taken to protect LaShonda. Querry responded, 'I guess I'll have to threaten him [G.F.] a little bit harder,' and he later asked LaShonda 'why she was the only one complaining'.⁴⁹ LaShonda and her mother also asked that LaShonda, who had an assigned seat next to G.F. be allowed to move to a different seat. Even this request was refused and she was not allowed to move her seat away from G.F. until after she had complained for over three months. School officials never removed or disciplined G.F. in any manner for his sexual harassment of LaShonda.

In their complaint before the federal district court, LaShonda's parents alleged that G.F.'s uncurbed and unrestrained conduct severely curtailed LaShonda's ability to benefit from her elementary school education, lessening her capacity to concentrate on her schoolwork and causing her grades, previously all As and Bs, to suffer. The harassment also had a debilitating effect on her mental and emotional well-being, causing her to write a suicide note in April 1993.⁵⁰

The school board was granted a dismissal by the district court. It held that students were not in state custody during school hours and thus the school did not owe students a duty of protection from harassment by fellow students which could form the basis of a federal civil rights claim. In addition, the failure to protect the child from the classmate's advances did not violate Title IX.⁵¹ Reversing, the Ninth Circuit ruled that the district court failed to recognise the nature of the claim for hostile environment sexual harassment. It noted that the evil Davis sought to redress through her hostile environment claim was not the direct act of a school official demanding sexual favors, but rather the officials' failure to take action to stop the offensive acts of those over whom the officials exercised control.⁵²

The court spent some time analogising Title VII hostile environment claims for application in Title IX actions. It noted that the U.S. Supreme Court first opened the door for the analogy when it decided *Franklin v. Gwinnett County Public Schools*.⁵³ In *Franklin*, the Court recognised a private right of action under Title IX for injunctive relief and compensatory damages. The Ninth Circuit also noted that Title IX's legislative history suggested that Congress intended similar substantive standards to apply under Title IX as had been developed under Title VII. This included a hostile environment theory. It also noted that in *Doe v. Petaluma* the court looked to the Department of Education's Office of Civil Rights finding that 'an educational institution's failure to take appropriate response to student-to-student sexual harassment of which it knew or had reason to know is a violation of Title IX' and that '[i]f the harassment is carried out by non-agent students, the institution may nevertheless be found in noncompliance with Title IX if it failed to respond adequately to actual or constructive notice of the harassment'.⁵⁴

The application of Title VII principles of hostile environment to Title IX claims by students recognises that a student should have the same protection in school that an employee has in the workplace.⁵⁵

The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection. The damage caused by sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalises sexual harassment as accepted behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school.⁵⁶

Thus, the Ninth Circuit concluded that as Title VII encompasses a claim for damages due to a sexually hostile working environment created by co-workers and tolerated by the employer, Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment. The court noted, '[a]female student should not be required to run a gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education'.⁵⁷

Once the hostile environment theory was attached, the court iterated the elements of proof required: (1) that she is a member of a protected group; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment; and (5) that some basis for institutional liability has been established. The first three elements were satisfied by the complaint along with all reasonable inferences therefrom. Consideration of the fourth element required the court to ask four questions as first announced in *Meritor Savings Bank v. Vinson*: (1) the frequency of the abusive conduct; (2) the conduct's severity; (3) whether it is physically threatening or humiliating rather than merely offensive; and (4) whether it unreasonably interferes with the plaintiff's performance.⁵⁸ The court found that the facts went far beyond simple horseplay, childish vulgarities or adolescent flirting.

Finally the fifth element was considered. The court noted that the principal was told of the harassment on several occasions and that at least three separate teachers had factual and repetitive knowledge of the incidents. Yet, they failed to take prompt and remedial action to end the harassment. Interestingly, in a note the court recognised that the Board had no policy prohibiting the sexual harassment of students in its schools and had not provided any policies or training to its employees on how to respond to student-to-student sexual harassment.⁵⁹

Given *Davis*, there would seem to be support in the judiciary for a broad application of Title VII principles when it comes to protecting students. When the Supreme Court first used a Title VII theory through Title IX to cover teachers harassing students, it was simply a matter of time before the theory would be extended to peer harassment. However, the *Davis* case goes even a bit farther than did *Doe* in conditioning the application of the hostile environment theory for peer situations. In *Doe*, the 'intentional' requirement was left intact. The Ninth Circuit simply defined intentional for school officials' purposes. In other words, callous indifference which meets the intentional requirement is present when school officials do not take the situation seriously and fail to take prompt action to stop the harassment.

In *Davis*, the need to meet the intentional standard has been bypassed. In the words of the court:

[w]hen an educational institution knowingly fails to take action to remedy a hostile environment caused by a student's sexual harassment of another, the harassed student has 'be[en] denied the benefits of, or be[en] subjected to discrimination under' (quotes in the original) that educational program in violation of Title IX, 20 U.S.C. s 1681 (a).⁶⁰

Practitioners should take heed of the facts in *Davis*. Perhaps the question can be answered: 'who is responsible for taking action'. More than one school official was responsible for the district's failure to take action. Both the student's teachers and principal were identified as actors who should have taken action and did not. Special attention should be paid to the note which was developed as part of the court's treatment of the liability issue. It will be recalled that the court noted that the local 'Board had no policy prohibiting the sexual harassment of students in its schools, and had not provided any policies or training to its employees on how to respond to student-on-student sexual harassment'.⁶¹

How much peer harassment is going on in our nation's schools? Recent data suggests that as many as nine and a half million students enrolled in American secondary schools have experienced sexual harassment at some time during their school careers. Of students who state that they have been harassed 19% indicate the harassment was or is frequent.⁶² 'Peer to peer sexual harassment is four times more common than adult to student harassment'.⁶³ Until now the problem could be left for school counsellors. However, as with much of that which has been shaped by the law in today's schools, the interaction of adolescents, once turned aberrant cannot be left to nature or to school psychologists. Training in education law continues to rank among the highest priority. Take note of the words of the *Davis* court, '[a]female student should not be required to run a gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education'.

Some Opposition to the Application of Title IX for Peer Harassment

Barely one month after the Eleventh Circuit decision in *Davis*, the Fifth Circuit ruled in opposite. In *Rowinsky v. Bryan Independent School District*, the court ruled that Title IX could not apply to cases of peer harassment unless a number of conditions were met.⁶⁴ It noted that:

In the case of peer sexual harassment, a plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex. Thus, a school district might violate title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing that harmed boys.

In the *Rowinsky* case, an eighth grade girl had been repeatedly exposed to sexual innuendo and actual unwanted fondling at the hands of an eighth grade boy while riding the school bus. However, the school authorities did take action once incidents were reported. Unfortunately, school disciplinary action did not dissuade the boy from continuing the harassment. Eventually the boy moved away from the school.

Given the Fifth Circuit's interpretation of Title IX for use under a peer harassment theory, it appears that schools will be liable only if they do nothing once a report of peer harassment is made. It appears as though school officials will not be responsible for effecting a positive result.

Conclusion

Many of the current developments in education law in the United States have come through changes in students' rights. As the U.S. Supreme Court continues to shift to the right, additional changes can be expected. Most of the changes in the last half-decade have occurred in the area of privacy rights. Although, if the right to be free from having to attend a segregated school is considered, the position that students' rights are ending becomes credible. Thus far, students seem to have been able to hold on to their due process rights as first recognised in 1971.⁶⁵ If the trend continues, perhaps school officials will not have to provide even an informal hearing before removing a pupil from school. The often announced 'get tough' policies of 'automatic suspensions' may be legalised. Whatever the future holds, it is clear that the legalised permissiveness of the 70s and 80s has come to an end. Perhaps students did not know what to do with their freedom. So, the courts are taking it back.

Keywords

Current	United States
Education	Law

Endnotes

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- i. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505 (1969) (wearing of black armbands to protest the Vietnam War was protected speech).
 - ii. *Brown v. Board of Educ. of Topeka (Kan.)*, 347 U.S. 483, 494 (1954).
 3. 469 U.S. 325 (1985).
 4. *Id.* at 326.
 5. 'The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause ...'. U.S. Const. Amend IV (police are required to have probable cause before searching a citizen).
 6. *Id.* at 339-40.
 7. See generally Rossow, L.F. & Stefkovich, J.A. (1995) *Search and Seizure in the Public Schools* (2nd ed) (extended treatment of the subject of school searches).
 8. 991 F.2d 1316 (7th Cir. 1993). See Rossow, L.F. & Parkinson, J. (1994) *Yet Another Student Strip Search Upheld: Cornfield By Lewis v. Consolidated High School District No. 230*, 36 School Law Rep., Mar. 1994 at 3.

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9. *Id.* at 1321.
 10. *Id.*
 11. *Id.* at n.1.
 12. *Id.* at 1323.
 13. 469 U.S. at 341-42.

 14. 115 S.Ct. 2386 (1995). See generally Rossow, L.F. & Parkinson, J. (1995) *High Court Upholds Suspicionless Drug Testing of Student Athletes: Vernonia School District v. Acton*, School Law Reporter, Sept. 1995 at 1. Rossow, L.F. & Stefkovich, J. (1995) Commentary, *Vernonia School District v. Acton: Suspicionless Drug Testing*, 102 Ed.Law Rep. 897 (Oct. 19, 1995). See *infra* note 40.
 15. *Id.* at 2391 (citing *T.L.O.* at 342, n.8).
 16. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).
 17. *Id.* at 2392.
 18. *Id.* at 2393.
 19. *Id.* at 2395 (citations omitted).
 20. *Id.* at 2396.
 21. *Id.* at 2397.
 22. *Id.* at 2407.
 23. No. 95-2276, 1996 WL 354645 (8th Cir. June 28, 1996).
 24. *Id.* at *1.
 25. *Id.* at *4.
 26. *Brown v. Board of Educ. of Topeka (Kan.)*, 347 U.S. 483, 494 (1954).
 27. *Dowell v. Board of Educ. of the Oklahoma City Public Schools, Indep. Dist. No. 89*, 890 F.2d 1483 (10th Cir. 1989).
 28. *Board of Educ. of the Oklahoma City Public Schools, Indep. Dist. No. 89 v. Dowell*, 498 U.S. 237 (1991).
 29. *Id.* at 238.
 30. See *Coalition to Save Our Children v. State Bd. of Educ. of Delaware*, 901 F. Supp. 784 (Del. 1995)(on August 14, 1995, the Wilmington, Delaware school district was released from its forty year old decree); *Keyes v. School Dist. No. 1, Denver, Colorado*, 902 F. Supp. 1274 (Colo. 1995)(On September 12, 1995, the Denver City School District was released from its thirty year old order); *Stanley v. Darlington County Sch. Dist.*, Civ. A. No. 4:62-7749-22, 1996 WL 294369 (D.S.C. May 24, 1996)(consolidated school district released from twenty-five year old decree).
 31. *Coalition to Save Our Children*, at 823.
 32. 639 F.Supp. 23 (W.D. Mo. 1985).
 33. 115 S.Ct. 2038.
 34. 402 U.S. 1 (1971).
 35. 418 U.S. 717 (1974).

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36. 433 U.S. 267 (1977).
 37. William H. Frievogel, *Nixon May Challenge Area's School Desegregation Plan; Ruling Clears Way for Local Control, Attorney General Argues*, ST. LOUIS POST-DISPATCH, June 14, 1995, at 1A.
 38. *Jenkins*, *supra*, note 1, at 2056, 2061 (O'Connor, J., concurring).
 39. For an extended treatment of this case, see Russo, C.J. & Rossow, L.F. Comment, *Missouri v. Jenkins Redux: The End of the Road for School Desegregation or Another Stop on an Endless Journey*, 103 Ed. Law Rep. 1 (Nov. 2, 1995). See also Rossow, L.F. & Parkinson, J., *An End in Sight for Desegregation: Missouri v. Jenkins*, School Law Reporter Oct. 1995 at 1.
 40. 54 F.3d 1337 (9th Cir. 1995). See also Rossow, L.F. & Parkinson, J., *Ninth Circuit Rules on Sexual Harassment: Doe v. Petaluma City Sch. Dist.*, School Law Reporter, July 1995 at 1.
 41. *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1576 (N.D. Cal. 1993).
 42. 1995 WL 276816 at *4.
 43. *Id.* at *5.
 44. *Id.*
 45. *Id.* at 7.
 46. 4 F.3d 1186 (11th Cir. 1996). See also Rossow, L.F. & Parkinson, J., *Another Circuit Rules on Sexual Harassment: Davis v. Monroe County Board of Education*, School Law Reporter, May 1996 at 1.
 47. *Id.* at 1452.
 48. *Id.* at 3
 49. *Id.*
 50. *Id.*
 51. *Aurelia D. v. Monroe County Bd. of Educ.*, 862 F.Supp. 363 (M.D. Ga. 1994).
 52. 74 F.3d at 7.
 53. 503 U.S. 60 (1992).
 54. *Id.* at 1573 (citing *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993).
 55. 74 F.3d at 6 (citing *Franklin*, 503 U.S. at 74-75).
 56. *Id.* at 7.
 57. *Id.*
 58. 477 U.S. 57, 64-65 (1986).
 59. *Id.* at n.7.
 60. *Id.* at 7.
 61. *Id.* at 8 n.7.
 62. Paterson, F.R.A., *A Remedy of Her Own: Sexual Harassment in America's Public Schools 4* (May 12, 1995)(unpublished manuscript on file with Frances R. A. Paterson, University of Oklahoma, Department of Educational Leadership and Policy Studies, Norman, Okla.). See generally American Association of University Women, *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools* (1993).
 63. *Hostile Hallways* at 11.
 64. 80 F.3d 1006 (5th Cir. 1996).

65. *Goss v. Lopez*, 419 U.S. 565 (1975).