

Legally Speaking

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Inside this issue:

<i>The Ghost of Words Passed</i>	2
<i>What You Say to Students Does Matter</i>	2
<i>Owasso ISD v Falvo</i>	3
<i>Dear John</i>	3



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What's So Special About Special Ed?

Part II-What Constitutes an "Appropriate" Education?

By Marcia MacKenzie, Supervisor, Exceptional Student Education Compliance, and John W. Bowen, School Board Attorney

In the last issue of *Legally Speaking*, we talked about the school district's obligation to provide a free appropriate public education (FAPE) to each child with a disability as required under the Individuals with Disabilities Education Act (IDEA). We pointed out that even if a child with severe disabilities requires a residential placement costing more than \$100,000 a year, the district is responsible for providing that placement at no cost to the parents.

This does not mean the district will have to pay for such a placement (or for any private placement at public expense) just because the parent asks for it. Parents will have to meet a very high standard in order to be entitled to a free placement outside district schools. That standard was set forth by the United States Supreme Court in the case of *Hendrick Hudson School District v. Rowley* in 1982.

In that case, the parents of Amy Rowley, a first-grade deaf student, requested that the school district provide Amy with a sign-language interpreter. The school district already was providing Amy with a hearing aid, speech therapist and tutor for the deaf at no cost to the parents. With these services the

(Continued on page 4)



Mission Statement

The mission of the School Board Attorney's Office is to provide the highest quality legal services to the Pinellas County School Board and district by ensuring timely and accurate legal advice and effective representation on all legal matters.

Who Is a Parent?

By Tom L. Wittmer, Assistant School Board Attorney

In the last issue of *Legally Speaking*, we described how a school should proceed when a stepparent of a student asks to have a conference with teachers. Shortly after that issue came out, several alert readers contacted our office and noted that the advice given in our newsletter appeared to be different from other guidance they had received in connection with the Family

Educational Rights and Privacy Act (FERPA) or Individuals With Disabilities Education Act (IDEA). That other advice was that stepparents could be considered as "parents" entitled to access to their step child's records. We respectfully disagree.

Both FERPA and IDEA give specific rights to "parents," but neither act de-

(Continued on page 4)

The Ghost of Words Passed

By Jackie Spoto Bircher, Staff Attorney



I occasionally use sarcasm to highlight my displeasure over something someone has done. Many people when frustrated, such as in dealings with a parent, student or employee, are likely to use sarcasm in describing their frustration. This article is a reminder that what you say or write can come back to haunt you if you are not careful.

Consider the case of a teacher who sent a "deepest sympathy" card to a student's new teacher. The new school placed the sympathy card in the student's cumulative file where the parent later discovered the card. Another example is a teacher who had to deal with parents in a custody bat-

tle for their child. In frustration, the teacher made sarcastic comments to a colleague that neither parent should have custody of the child. Later, when both teachers were called to testify in the custody hearing, the teacher was questioned in court concerning those statements.

Careless or inappropriate use of sarcasm can cause damage. *Merriam-Webster's Collegiate Dictionary* defines sarcasm as "a sharp and often satirical or ironic utterance designed

to cut or give pain." The teacher who sent the sympathy card likely undermined the many good things she did for the student by that one inappropriate act. What parent would not be stung to think their child was the subject of such a card?

As a lawyer representing the school district, my additional concern is that an employee would send a sarcastic e-mail, or make a sarcastic statement, that would one day be used against the employee and the district in a lawsuit. A judge could easily question whether the school was really acting in a student's best interest if sarcastic comments school employees have made about the student or parents were noted in a hearing or trial. And even though the school employee can explain that the sarcasm was a result of frustration, it is usually very uncomfortable for the employee during the testimony.

... defines sarcasm as "a sharp and often satirical or ironic utterance designed to cut or give pain."

What You Say to Students Does Matter!

By Jim Barker, Administrator, Office of Professional Standards

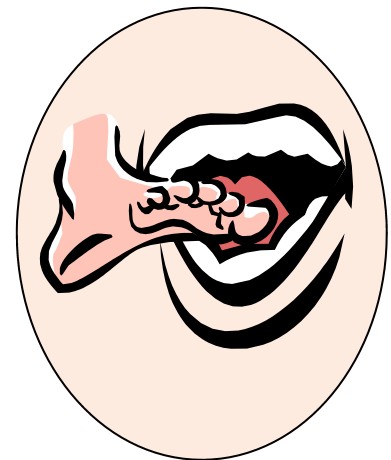
Each year a significant number of complaints are made against employees regarding allegations of inappropriate remarks toward students. **School Board Policy 8.25 (1) (n)** provides that any employee may be disciplined for "inappropriate or disparaging remarks to or about students or exposing a student to unnecessary embarrassment or disparagement." In addition, administrators and teachers are held to the standards in the Code of Ethics and the Principles of Professional Conduct of the Education Profession in Florida. Section (3) (e) of the Code states that the "obligation to the student requires that the individual shall not intentionally expose a student to unnecessary embarrassment or disparagement."

There was a time when some teachers directed students to sit in

a corner with a dunce cap on their heads or asked students to go to the chalkboard, draw a circle and place their nose in the circle as a form of discipline. Other students laughed and thought it was funny. That time has passed. Such actions today could result in disciplinary action against an employee as well as possible litigation against the employee and the district.

Singling students out based on the way they look, speak or act is inappropriate. Belittling students, tearing up their class work or homework, throwing it in the trash, calling students names or using profanity are examples of inappropriate interactions with our students. Telling a student or a group of students that they are stupid or idiots or that they are acting stupid or acting like idiots is inappropriate. Singling students out because of the way they look is

just as serious. Reading grades aloud to a class also can cause embarrassment for some and may violate student confidentiality laws. Our employees need to use care and caution in what they say to students. We need to try to keep our feet out of our mouths in order to avoid repercussions that could affect our employment.





Owasso ISD v. Falvo

By Tom L. Wittmer, Assistant School Board Attorney

On Feb. 19, 2002, the U.S. Supreme Court decided the case of *Owasso Independent School District v. Falvo*, involving students' right to privacy with respect to their records. In that case a mother challenged the practice of teachers having students grade each others' tests, papers and assignments as the teacher explains the correct answers to the entire class. The teacher then would have the students call out the grades in class and the teacher would record them.

The question presented was whether that practice violates the federal Family Educational Rights and Privacy Act (FERPA), which gives parents a right of privacy in the contents of education records maintained by the school. The federal appellate court had ruled that the practice of "peer grading" violates the federal act. The Supreme Court disagreed and reversed.

The Supreme Court ruled that "peer grading" does not violate FERPA. FERPA provides that student records "*maintained* by an educational agency ... or by a *person acting for the agency*" are confidential and should not be disclosed to others. The Court held that the students' papers are not at that point being

"*maintained*" under the statute. The Court also ruled that the student grader is not "*a person acting for*" the school. For those reasons, the graded papers did not constitute student records at the time they were graded or at the time the grades were called out to the teacher.

The Court recognized that "correcting a classmate's work can be as much a part of the assignment as taking the test itself," and stated it did not believe Congress intended to "exercise minute control over specific teaching methods ... in classrooms throughout the country." The result of this decision is that teachers can continue to have students grade each others' papers, because no privacy rights under FERPA are being violated.

Dear John ...

Q: During a training session about classroom discipline last week, one of the participants stated that certain discipline methods, such as writing students names on the board to redirect their behavior, have been declared illegal by the Supreme Court. The person stated that if an outsider can walk into your classroom and determine who is a behavior problem by what is posted, then you are breaking the law concerning confidentiality of student records and information under the Family Educational Rights and Privacy Act (FERPA). What gives?

A: That person is mistaken. The Supreme Court did recently decide a case involving confidentiality of student records and information. (See



and calling out the grades in class, the decision did give us guidance in other situations. As noted in the article, the Supreme Court ruled that the exchanged papers were not "records" at the time they were graded because they were not being "maintained" by the district at that time.

The same can be said for placing a student's name on the board when a student is misbehaving in class. There is no intent to "maintain" the student's name on the board as a record

above article.) While that case involved teachers having students exchange papers for grading

of discipline. The fact that the name being on the board conveys information about the student's discipline problem does not violate the law concerning confidentiality of student records. It is simply a method of classroom control, not record-keeping.

This answer should not be taken as an endorsement of that method of classroom control. We are simply stating that it does not violate FERPA. On the other hand, the age-old practices of making a student sit in a corner with a dunce cap on or stand in the hall outside classroom are not violations of FERPA either. The proper technique of classroom control consistent with accepted practices, state law and district policies is up to the educator. (See "[What You Say to Students Does Matter](#)" - page 2.)

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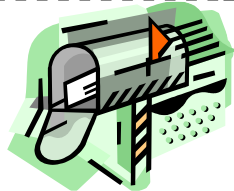
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What's So Special About Special Ed? (Continued from page 1)

trial court found that Amy was "remarkably well-adjusted" and "performs better than the average child in her class." The court also said that Amy "is advancing easily from grade to grade." Even so, the parents felt that Amy could do even better with a sign-language interpreter. The lower courts agreed and ordered the school district to provide the sign-language interpreter in order for Amy to maximize her potential.

The Supreme Court disagreed. School districts are not required under IDEA to provide enough services for each child with a disability to achieve at their maximum potential. Instead, school districts are required only to provide a "basic floor of opportunity" consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit." To satisfy the requirements of IDEA, the Supreme Court ruled that school districts must be able to show their proposed education program for a student with a disability is "reasonably calculated" to provide "some educational benefit" for the child.

What constitutes educational benefit is another question. For Amy Rowley, who was enrolled in the regular education program, "educational benefit" was measured by earning passing grades and being promoted from grade to grade. Just because a student with a disability is not making the honor roll, however, is not evidence that the student is not receiving "some educational benefit." On the other hand, if the student is not in the regular education program, "educational benefit" will be determined by other criteria, such as making progress with respect to the goals contained in the student's individualized education program (IEP). As long as the school district's IEP is "reasonably calculated" to provide "some educational benefit," the parents will not be entitled to a private school placement at public expense under IDEA.

State law, however, provides another option. In the next issue we will explain the John M. McKay Scholarships for Students with Disabilities Program.

Who Is a Parent? (Continued from page 1)

finer that term to include stepparents. FERPA has no definition of "parent" while IDEA provides that the term parent "includes a legal guardian" and a "surrogate parent" appointed pursuant to IDEA. While the federal regulations implementing IDEA provide that "parent" includes "a person acting in the place of a parent (such as a grandparent or **stepparent** with whom the child lives...)," in our opinion, the inclusion of "stepparent" goes beyond the definition of "parent" contained in IDEA and is, therefore, invalid. We still believe the better practice is to require written authorization from the parent. (See *Code of Student Conduct 4.01(1)(b)14* at page 2.)

The fact that a stepparent is involved at all

normally means that a divorce has occurred in the family. We all know that divorces can be hostile and adversarial. That hostility sometimes lasts for years. It is not difficult to imagine that a noncustodial parent may object to the stepparent living with their child having free access to their child's student records.

That is why our Board's policy is that school personnel should not release student information to a stepparent unless one of the child's parents has given written permission for that release. A stepparent denied access to student records because he or she does not have written permission is not likely to sue. An emotional noncustodial parent complaining about the stepparent having free access to his or her child's records may just sue the school district if the custodial parent has not given permission for such access.

Once the school has the written permission from one parent, the other parent cannot prevent the school from honoring that permission. If the noncustodial parent still objects to the release of student information to the stepparent, he or she always can request that the court enter an order prohibiting the release of confidential student information to the stepparent. Courts are not likely to enter such an order.