EDUCATION REPORTER

NUMBER 192 — *THE NEWSPAPER OF EDUCATION RIGHTS* — JANUARY 2002

Triple Win for Parents' Rights in New Jersey

Parents win on appeal in nosy questionnaire case!

RIDGEWOOD, NJ — A federal appeals court ruled last month in *C.N. v. Ridgewood Board of Education* that parents can go forward with their lawsuit against the Ridgewood School District and that the charges of constitutional violations can proceed in federal court. This lawsuit stems from the school district's 1999 administration of an intrusive survey using federal Goals 2000 funds. (See court decision on page 3.) This decision reverses a Feb. 15, 2001 District Court ruling in favor of the school board.

At issue was a 156-question survey called "Profiles of Student Life: Attitudes and Behaviors," which probed students about their personal lives and activities. The survey included questions about sex, drugs, suicide, incriminating behavior, spirituality, tolerance, and other personal matters. (See *Education Reporter*, January 2000.)

Question 108 asked students "how many times, if any, in the last 12 months have you used LSD?" The acceptable answers were "0"; "1"; "2"; "3-5"; "6-9"; "10-19"; "20-30"; or "40+" times. Question 101 was: "Have you ever tried to kill yourself?" Acceptable answers were "No"; "Yes, once"; "Yes, twice"; "Yes, more than two times."

Question 56 asked students to incriminate themselves by divulging how many times they had "stolen something from a store." Question 59 asked if they had "damaged property just for fun"? Questions 105-107 asked if they had used heroin, opium, morphine, alawan, PCP or Angel Dust. Students at Ridgewood High School and two middle schools, some as young as 12 years old, completed this survey under the assurance of anonymity.

Some parents were shocked that such an "intrusive" and "offensive" survey was given to their children. Seven parents filed complaints with the U.S. Department of Education's Family Policy Compliance Office (FPCO), charging that the school district violated the PPRA by using a federal grant to administer the survey without obtaining prior written parental permission. Several parents also initiated legal action.

When the federal District Court ruled against these parents, they appealed to the Third Circuit Court of Appeals. "The Appeals Court ruled unanimously in our

(See Appeal, page 2)

Parents' rights bill becomes law!

TRENTON, NJ — On Jan. 7, 2002, the acting Governor for the state of New Jersey signed into law The New Jersey Student Survey Bill (A3359), immediately following its approval in the state Senate. Often called the New Jersey Protection of Pupil Rights bill, it takes the federal requirement for written parental consent beyond federally-funded surveys to include all surveys given in the state's public schools that ask students to give personal information. (See bill text below.)

Scott Garrett

The new law requires that schools obtain informed written parental consent before giving surveys or tests asking for information about political affiliations, potentially embarrassing mental and psychological problems, sexual behavior and attitudes, family income and other personal family matters, legally privileged matters, and more. It also imposes monetary penalties for school districts found in violation of its provisions. "It's a solid, wonderful law," asserts New Jersey Eagle Forum leader Carolee Adams.

When details of the Ridgewood "Profiles of Student Life" questionnaire surfaced two years ago, Mrs. Adams and State Assemblyman E. Scott Garrett collaborated on a bill (A2351) to protect students from intrusive school surveys. (See *Education Reporter*, June 2000.)

This bill passed both houses of the New Jersey legislature in 2000, but was vetoed by then-Governor Christine Todd Whitman. After Whitman's veto, bills requiring informed parental consent were re-introduced in both the state Assembly and Senate.

Carole Nunn

Many parents are thrilled that New Jersey's PPRA has finally become law. "It is reassuring to know that students in New Jersey will no longer have to endure violations of their privacy rights simply because they go to public school," said parent Carole A. Nunn, whose child completed the "Profiles" questionnaire in 1999. This survey prompted a lawsuit that recently yielded a victory for parents. (See story at left.)

"The new law is but one step in defending our children from ever-greater government control," Assemblyman Garrett points out. "Ask any audience of parents, 'Who knows and loves your children more — you or the bureaucrats?' and the response is predictable."

Carolee Adams adds: "It's important that simultaneous judicial and legislative actions are bringing more attention to the travesty of intrusive surveys in our schools. With such a dual approach, we are better assured of victory for our families and our freedom.

Will New Education Law Leave Every Child Behind?

H.R. 1 increases federal spending, control

WASHINGTON, DC — Shortly before Christmas, U.S. House and Senate conferees working on the 1000-plus page education bill resolved their differences and brought the federal leviathan to a vote. H.R. 1 passed the House by 381 to 41 and the Senate by 87 to 10. Its price tag of $26.5 billion is $8 billion more than President Clinton's last education bill and $4 billion more than President Bush requested. The Bush White House pushed hard for the bill, and the president signed it on January 8.

H.R. 1 contains Rep. Todd Akin's pro-parent amendment.

Titled "Leave No Child Behind," H.R. 1 proposes to achieve this lofty goal by making schools accountable to the federal government. Sen. Paul Wellstone (D-MN) called the bill "a stunning federal mandate" that strikes at "the essence of local control."

Education analysts note that H.R. 1 continues a failed strategy that began with President Lyndon Johnson's "Great Society" in 1965, which promised to "close the gap" between achieving and non-achieving students. Eagle Forum President Phyllis Schlafly, wrote: "Even though the government's own evaluations prove that billions of dollars have produced no measurable results, this law's only approach is still more federal spending and control."

H.R. 1 requires every state to implement its own standards and tests. The National Assessment for Education Progress (NAEP) will be used as a check to ensure that states are not dumbing-down their standards and tests in math and English. The NAEP is mandated at least biannually, and states are responsible for getting schools to participate, although the law does not require schools to participate.

When President Bush proposed testing as the way to hold schools accountable, he selected NAEP as the only ac-

(See H.R. 1, page 4)

ASSEMBLY Bill No. 3359

STATE OF NEW JERSEY
209th LEGISLATURE

INTRODUCED MARCH 26, 2001

Sponsored by: Assemblyman E. SCOTT GARRETT, District 24 (Sussex, Hunterdon and Morris)
Assemblywoman Marion Crecco, District 34 (Essex and Passaic)
Co-sponsored by: Assemblyman Talarico

SYNOPSIS

Allows school districts to administer certain surveys to students only after receiving written informed parental consent.

CURRENT VERSION OF TEXT

As Introduced.
(Sponsorship Updated As of: 6/15/2001)

An Act concerning certain surveys conducted by school districts and supplementing chapter 36 of Title 18A of the New Jersey Statutes.

Be It Enacted *by the Senate and General Assembly of the State of New Jersey:*

1. a. Unless a school district receives prior written informed consent from a student's parent or legal guardian and provides for a copy of the document to be available for viewing at convenient locations and time periods, the school district shall not administer to a student any academic or nonacademic survey, assessment, analysis or evaluation which reveals information concerning:
(1) political affiliations;
(2) mental and psychological problems potentially embarrassing to the student or the student's family;
(3) sexual behavior and attitudes;
(4) illegal, anti-social, self-incriminating and demeaning behavior;

(See Assembly No. 3359, page 2)

EDUCATION *BRIEFS*

A Hillsborough, NC student who scored 1600 on the SAT says his success was due to learning how to read before he entered school. Orange High School senior Michael Shiver said the fact that his parents taught him to read so early gave him an advantage throughout his academic career.

Intel Corp. chief says the U.S. helps educate the world but fails at home. In a recent speech, CEO Craig Barrett said that the bulk of his company's research and development is done here, but this is changing due to the lack of trained personnel. Barrett lamented that U.S. students rank near the bottom of the industrialized world in math and science competency by the time they reach 12th grade. "We fire football coaches after the first year of a losing record," he stated, "but we continue to let the public school system take children and basically degrade them on a relative basis to their international counterparts."

New fad gives teachers microphones rather than help with discipline. About 4,000 schools now have classroom microphone systems so that teachers can be heard above students' noise. These techy new mikes use infrared technology to prevent interference, and cost between $1,000 and $1,500 per classroom to install.

Thousands of Wisconsin students were taken on "field trips" in November to see Harry Potter at the invitation of local theaters. Some principals and teachers claimed the outing provided an opportunity to push reading, but not all parents or educators agreed. Some criticized what they viewed as a "family outing" during the school day. "A field trip should have educational value, but this was purely entertainment," said Leah Vukmir, president of Parents Raising Education Standards in Schools.

The Ithaca (NY) City School District mandates "tolerance" grades for elementary school children. Students in the 1st and 2nd grades are evaluated on how well they "respect

(Continued at right)

Education Reporter (ISSN 0887-0608) is published monthly by Eagle Forum Education & Legal Defense Fund with editorial offices at 7800 Bonhomme Ave., St. Louis, MO 63105, (314)721-1213; fax (314) 721-3373. Editor: Sue Kunstmann. The views expressed in this newsletter are those of the persons quoted and should not be attributed to Eagle Forum Education & Legal Defense Fund. Annual subscription $25. Back issues available @ $2. Periodicals postage paid at Alton, Illinois.
Web site: **http://www.eagleforum.org**
E-mail: **education@eagleforum.org**

Appeal

(Continued from page 1)

favor," explains parent-plaintiff C. N., "but the school district has now filed a petition for a rehearing with the three original justices. To succeed at this effort, these three judges would have to agree to a rehearing."

Another Victory

While a rehearing remains uncertain, Ridgewood parents have another victory to celebrate. In a 15-page letter to Ridgewood School District Superintendent Frederick J. Stokley dated Dec. 18, the U.S. Education Department's FPCO announced the results of its two-year investigation of parental complaints about this survey. The letter states: "This Office finds that the District violated PPRA when it administered the 'Search Institute Profiles of Student Life: Attitudes and Behavior Survey' without the prior written consent of the Complainants."

The Department of Education letter confirmed that the school district violated all four requirements of the PPRA: (1) the survey was funded with federal education (Goals 2000) funds; (2) the students were "required" to participate in the survey; (3) the survey asked questions that would reveal information in three of the prohibited information categories; (4) the school district did not obtain prior written consent from the parents.

ASSEMBLY Bill No. 3359

(Continued from page 1)

(5) critical appraisals of other individuals with whom a respondent has a close family relationship;
(6) legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;
(7) income, other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under a program; or
(8) social security number.
b. The school district shall request prior written informed consent at least two weeks prior to the administration of the survey, assessment, analysis or evaluation.
c. A student shall not participate in any survey, assessment, analysis or evaluation that concerns the issues listed in subsection a. of this section unless the school district has obtained prior written informed consent from that student's parent or guardian.
d. A school district that violates the provisions of this act shall be subject to such monetary penalties as determined by the commissioner.

2. This act shall take effect immediately.
STATEMENT

This bill provides that prior to a school district administering certain academic or nonacademic surveys, assessments, analyses or evaluations to its students it must receive written informed consent from a student's parent or legal guardian and must provide a copy of the document for viewing at convenient locations and time periods .

These requirements would only apply if information is revealed concerning (1) political affiliations; (2) mental and psychological problems potentially embarrassing to the student or the student's family; (3) sexual behavior and attitudes; (4) illegal, anti-social, self-incriminating and demeaning behavior; (5) critical appraisals of other individuals with whom a respondent has a close family relationship; (6) legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers; (7) income, other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under a program; or (8) social security numbers.

If a district violates the provisions of the bill, it would be subject to such monetary penalties as will be determined by the commissioner.

This bill is modeled on 20 U.S.C.A. 1232h, commonly referred to as the Protection of Pupil Rights Amendment. This law provides, in part, that school districts must receive written parental consent before students are required to fill out any survey, analysis, or evaluation that is funded with moneys from the federal Department of Education and that deals with certain sensitive issues.

More Briefs

others of varying cultures, genders, experiences, and abilities." Tolerance is the first thing now noted on progress reports under "Lifelong Learning Skills," ahead of reading, writing, science, and social studies.

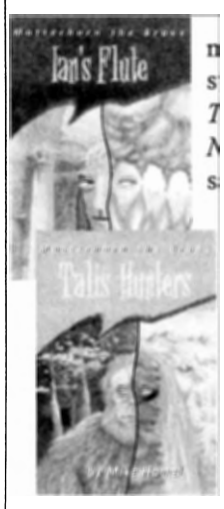
The mayor of Philadelphia agreed in December to a state takeover of the city's public schools. The move places the troubled 220,000-student school system, 10th largest in the nation, in the hands of a five-person panel controlled by the state. The *New York Times* reported (12-22-01) that Pennsylvania Governor Mark Schweiker "took the lead in executing the takeover," which "is believed to be the largest such action of its kind." The state is expected to hire the private company, Edison Schools, as a consultant for the district and to manage 60 of Philadelphia's worst schools.

More citizens are crusading to protect children from porn in public libraries. After witnessing teens accessing porn on library computer terminals in Upper Arlington, Ohio last year, local Christian Coalition Chairman, Charles Reed, spoke out before the library board and the city council on the need for filters. He then contacted local radio and television stations and convinced them to air his story. In 1998, Seattle-area librarian Heidi Borton resigned her position after failing to persuade her local library board to protect children from internet porn. She now travels around the country speaking on behalf of filters for public computers used by children.

Book of the Month

Matterhorn the Brave, a series by Mike Hamel, Matterhorn Press, 2001, 180 pps., $12.99 each plus s&h

Are you looking for wholesome, moral reading for your children to replace the books recommended by your local public school library, which are often laden with violence, suicide, obscenities and sexual situations? Are you looking for an engaging alternative to the occult humanism of *Harry Potter*? Then author Mike Hamel's new series of children's adventures, based on the Judeo-Christian worldview, may fit the bill.



Matterhorn is a morality tale in the style of C.S. Lewis's *The Chronicles of Narnia*. It is the saga of four ordinary children who have extraordinary adventures, and who learn what it means to serve their Maker along the way. The series' first book, called *Ian's Flute*, introduces Matterhorn the Brave, the central character. Matterhorn is a brave knight when he isn't busy being Matt Horn, a bright, energetic, 12-year-old boy. The exploits of Matterhorn and his friends transcend time and place, and author Hamel describes their activities with creativity and imagination.

Since *Ian's Flute* and *Talis Hunters* — the series' second book — were published, Hamel has received a flood of encouraging mail from satisfied parents. "I absolutely love the Matterhorn books," one parent enthused. "Where else can you get a well-told story that combines timeless values with quantum physics? My kids are already asking when the next one is coming out."

Renee Sanford of Portland, Oregon, co-author of the *Living Faith Bible*, wrote: "Mike Hamel uses the English language to create pictures that delight the ear and the imagination. Now children near and far will be able to enjoy his storytelling gift in the tales of *Matterhorn the Brave*."

Hamel explains that his *Matterhorn* characters first came to life as bedtime stories he told his children when they were young. "After years of prodding from my family, I'm finally telling these tales to a wider audience," he admits. His stated desire is "to deliver an action-packed, fun read based on a solid moral foundation, and to provide wholesome role models that children will want to imitate."

Visit www.matterhornthebrave.com or write P.O. Box 1240, Colorado Springs, CO 80918.

FOCUS: *C.N. v. Ridgewood Board of Education*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 01-1637

C.N., individually and as Guardian Ad Litem of J.N., a minor;
L.M., individually and as Guardian Ad Litem of V.M., a minor;
M.E., individually and as Guardian Ad Litem of J.E., a minor,
Appellants

v.

RIDGEWOOD BOARD OF EDUCATION; FREDERICK J. STOKLEY; JOYCE SNIDER; RONALD VERDICCHIO; ROBERT WEAKLEY; JOHN MUCCIOLO; ANTHONY BENCIVENGA; SHEILA BROGAN

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 00-cv-01072)
District Judge: Honorable Nicholas H. Politan

Argued November 9, 2001
Before: MCKEE, RENDELL, and STAPLETON, *Circuit Judges*

(Filed: December 10, 2001)

OPINION

Appellants C.N., et al., appeal from a grant of summary judgment in favor of the Ridgewood Board of Education and individually named defendants. C.N. urges that it was inappropriate to grant summary judgment without affording the opportunity to conduct discovery. We agree with C.N.'s contention. We will REVERSE in part and AFFIRM in part, the Order of the District Court, and REMAND for proceedings consistent with this Opinion.

Because we are writing solely for the parties who are familiar with the facts and the procedural history, we will focus on the reasons for our decision. Our review of a grant of summary judgment is plenary, and the case is properly before us under 28 U.S.C. §1291, since it is an appeal from a final judgment.

The District Court granted summary judgment to the Board of Education and to the individual Defendants on their proffered defenses of qualified immunity. Although both statutory and constitutional claims were raised, the District Court's opinion analyzes the statutory claims more closely. There is only one statutory provision before us on appeal, the Protection of Pupil Rights Amendment (P.P.R.A.), 20 U.S.C. § 1232h, which provides that parental consent must be secured prior to requiring students to submit to a survey or testing eliciting responses in any of several enumerated categories.

Under *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658 (1978), § 1983 liability can attach to local governmental units when the allegedly unconstitutional action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690. In order for the Board of Education to be liable for the administration of the survey, the students must have been required to take the survey, and the requirement must have been in compliance with Board policy, not in violation of it.

In determining that there could be no liability as to the Board, the District Court equated a letter submitted by the Superintendent of Schools that informed parents approximately two months prior to the survey's administration that the survey would be administered voluntarily and anonymously with "Board policy." The Court reasoned that because the Board policy was that the survey be voluntary, it was not "required" as specified in the statute, and the Board had not violated the students' rights. Yet, the record reveals that the Superintendent is a non-voting member of the Board. A different Board member, Sheila Brogan, was actually assigned to the community group responsible for the survey. C.N. did not have the opportunity to depose her, nor to depose the remaining Board members to determine their understanding of Board policy. On summary judgment, it is initially the burden of the moving party — as to Board policy, the Board of Education — to demonstrate that there are no genuine issues of material fact, and that there are no unexplained gaps in the material facts presented. *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 743 (3d Cir. 1996). The party opposing summary judgment must then come forward and demonstrate by specific facts that there is a genuine issue for trial. *Id.* We have two problems with the District Court's grant of summary judgment as to the Board. First, the letter from the Superintendent does not conclusively establish Board policy. Second, even if the letter is probative as to the Board policy, C.N. never had the opportunity to challenge or probe through discovery what was offered as, and what actually was, the Board's policy.

C.N. repeatedly sought discovery. The Magistrate judge sua sponte foreclosed discovery initially and, despite repeated requests, the Court never permitted discovery to proceed. Because in order to withstand a Motion for Summary Judgment the non-moving party must demonstrate at a minimum sufficient evidence to demonstrate a genuine issue of fact (see, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)), and the evidence was not within plaintiff's control absent limited discovery, it was necessary for C.N. to have discovery in order for the Court adequately to weigh the propriety of a grant of summary judgment in favor of the Board. Consonant with the provisions of Fed. R. Civ. P. 56(f), the attorney for C.N. submitted an Affidavit explaining why C.N. needed discovery in order to withstand the Motion for Summary Judgment. App. at 287-89. In *Anderson*, 477 U.S. at 250 n.5, the Supreme Court noted that Rule 56(f) provides that "summary judgment be refused where the non-moving party has not had the opportunity to discover information that is essential to his position." *Id.* The burden on the non-moving party is thus premised on the assumption that "both parties have had ample opportunity for discovery." *Id.* On the facts before us, it was premature to grant summary judgment without allowing at least limited discovery.

The District Court granted summary judgment as to the remaining individual defendants based primarily on qualified immunity. Throughout its opinion, the District Court focused on the voluntary nature of the survey to support the grant of qualified immunity. However, the narrow issue of whether the survey was in fact "required" is actually a disputed fact issue based on the record. Affidavits from students, and the narrative of a conversation between a parent and one of the building principals, indicate that at least some of the students were not informed that the survey was voluntary, and that the circumstances that surrounded the administration of the survey were — given the nature of the school setting — sufficient to infer that those students were required to take the survey. Given this factual dispute, summary judgment should not have been granted on this basis. If a jury would find that the students were actually required to take the survey, then the District Court would have to address the further question in the qualified immunity analysis as to whether a teacher or principal in this setting would have reasonably understood that the survey was being administered in violation of the law. The facts that would inform these issues have not been the subject of discovery.

Qualified immunity, in the often repeated rhetoric of the Supreme Court, provides that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 817-18 (1982). The precise act in question need not have been previously held unlawful, but the "contours of the right must be sufficiently clear" that a reasonable official performing the duties of the defendant would be on notice that his actions violated that right. *Gruenke v. Seip*, 225 F.3d 290, 299 (3d Cir. 2000).

While the Supreme Court has recognized that part of the purpose of the *Harlow* standard was to prevent unnecessary discovery, it has also acknowledged that not all defenses of qualified immunity can be properly disposed of on summary judgment without at least limited discovery. *Crawford-El v. Britton*, 523 U.S. 574, 593 (1998). We believe that in these narrow circumstances, where the questions of law as to the applicability of the statute and the actions and knowledge of the principals and teachers as to the nature of the survey are fact-bound, discovery would be appropriate, if not essential. Even without discovery, the record reveals, for example, the survey materials that were furnished to the School District (and invoiced to the Board) included copies of the P.P.R.A. Both sides agree, and did not disagree before the District Court, that the survey was purchased at least in part with federal grant funds. In the job descriptions attached for the individual defendants, several had responsibility for implementing state and federal laws, for grant administration and oversight, and for other areas in which they would be expected to have known of the statutes and regulations. Whether the entire packet of survey materials were provided to each of the individual defendants, and whether each defendant was aware that the survey had been purchased with grant funds and whether compliance with the P.P.R.A. was required by the terms of the grant is a question of fact that should not be disposed of in favor of the individual defendants on summary judgment without discovery.

In addition to its qualified immunity analysis, the District Court dismissed C.N.'s constitutional and statutory claims on their merits. As in the qualified immunity analysis above, C.N. should have the opportunity to argue the merits of the violation of the P.P.R.A. after being permitted to engage in discovery. The District Court's ruling on the merits was premature. C.N. also raised several constitutional claims. We agree with the District Court that, as a matter of law, C.N. has failed to allege a violation of the Fifth Amendment protection against compelled self-incrimination. Under our standard enunciated in *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia,* 859 F.2d 276, 282-83 (3d Cir. 1988), compulsion in the Fifth Amendment context has an accepted meaning. In order for self-incrimination to be compelled, there must be a coercion that attaches significant penalties to non-compliance. While we did not define what the lower threshold of such threat would be in *Fraternal Order of Police*, we did note there that neither the parties nor we had found an "action short of firing that an employer could take that could constitute compulsion within the meaning of the fifth amendment. . . ." *Id.* at 283 and n.6. Here it was alleged that some students were informed

(See Decision, page 4)

H.R. 1 *(Continued from page 1)*

ceptable measure. "The problem remains," writes Eagle Forum Legislative Director Lori Waters, "that whoever controls the test controls the curriculum, and schools will be held accountable to the federal government, not parents."

The federal government will pay for the development and administration of both state assessment tests and the NAEP, to the tune of $490 million for FY 2002, according to the Republican Study Committee.

Science standards and testing are required by H.R. 1, but there is no NAEP check-up required until 2007. Regarding controversial subjects, such as biological evolution, the bill states that "the curriculum should help students to understand the full range of scientific views that exist, why such topics may generate controversy, and how scientific discoveries can profoundly affect society."

H.R. 1 includes language prohibiting the development and implementation of a national test as well as clarifying that NAEP should not exert undue influence on states to align their state assessments with NAEP.

Graham-Tiahrt Diluted

Parents have for years expressed concern that many tests, including NAEP, are designed to measure and shape attitudes and behavior rather than to test academic knowledge. In an attempt to address parental objections to intrusive surveys covering such topics as sexual behavior, political and religious beliefs, illegal behavior, as well as the issue of medical exams in schools, Representatives Lindsey Graham (R-SC) and Todd Tiahrt (R-KS) offered an amendment to H.R. 1 requiring parental consent for student participation in these activities.

Although Graham-Tiarht is included in the final bill, the amendment was watered down to require a one-time notice to parents at the beginning of each school year to list the surveys and medical exams that might be given, thus putting the burden on parents to discover them and opt out their children.

Kristina Twitty

Akin Amendment Adopted

The Akin Objectivity Amendment, sponsored by Rep. Todd Akin (R-MO), was more successful. This amendment states that tests should "be consistent with widely accepted professional testing standards, objectively measure academic achievement, knowledge, and skills, and be tests that do not evaluate or assess personal or family beliefs and attitudes, or publicly disclose personally identifiable information. . . ."

According to Eagle Forum education policy analyst Kristina Twitty, "This language was also made applicable to the NAEP, effectively ridding NAEP of the nosy questionnaires found at the beginning of each test."

The final bill was amended to allow test essay questions asking for students' opinions and interpretations, providing what some obervers view as a possible loophole.

Bilingual Education

Despite the fact that bilingual education has failed to teach immigrant children English and that California and Arizona have passed referenda against it (see *Education Reporter*, December 2000), H.R. 1 appropriates $750 million for bilingual ed in FY 2002 and "such sums as may be necessary for each of the five succeeding fiscal years." By comparison, Congress spent $284 million on bilingual education in FY 1999 and $319 million in FY 2000.

Kristina Twitty reports that Part A of Title III of H.R. 1 (page 465) requires recipients of federal bilingual education grants to certify that "all teachers in any language instruction education program for limited English proficient children . . . . are fluent in English." But this requirement is contingent upon Congress spending at least $650 million on bilingual education. If a lesser amount is spent, schools are not held accountable for enacting this reform. "So we have in the new bill a condition that the stronger English requirement be contingent on Congress doubling the amount it spends on bilingual programs," Twitty points out.

Rep. Tom Tancredo (R-CO) proposed an amendment to require parental consent before a child can be placed in a bilingual education program, but this was watered down to a simple parental notification requirement.

Other Provisions in H.R. 1:

Boy Scouts Prevail

An amendment to prohibit schools from barring access to the Boy Scouts remains in the law despite the opposition of Sen. Ted Kennedy (D-MA). Introduced in the House by Rep. Van Hilleary (R-TN) and the Senate by Jesse Helms (R-NC), this amendment will cut off funds to any state, district or school that discriminates against the Boy Scouts.

Hate Crimes

H.R. 1 makes funds available for programs to prevent "violence associated with prejudice and intolerance." This provision allows hate crimes initiatives to be combined with existing programs, such as the Safe and Drug Free Schools program, as well as for the development of new curricula.

House Republicans offered an amendment in conference to protect students from activities that would undermine their religious beliefs, but this amendment was defeated.

Homeschooling

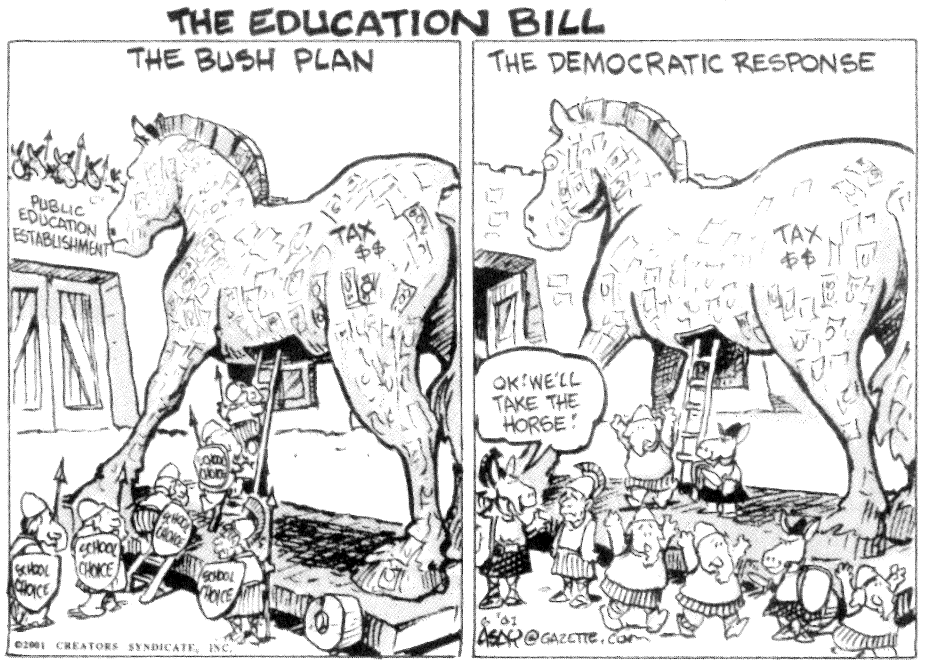
Homeschooled students are exempt from the entire education bill.

School Choice

Parents' hopes for meaningful school choice faded during the months of debate over H.R. 1. The final bill contains a provision allowing only students at schools that have been identified as failing for two years in a row to attend another public or charter (but not private) school within their districts. After five years, the state will take over failing schools.

School Prayer

H.R. 1 upholds constitutionally-protected school prayer.



Decision

(Continued from page 3)

that they would have been assigned unexcused absence had they not reported to take the survey. Like the alleged denial of promotion in *Fraternal Order of Police*, the harm that would result from compliance with the process is insufficient to constitute coercion within the meaning of the Fifth Amendment. *Id.*

We are not, however, prepared to say that C.N. could not, as a matter of law, establish any set of facts which would demonstrate violations of the other constitutional rights asserted. We believe that a conclusion as to the contours of these guarantees is specific to the factual setting and should be reached after discovery.

For the reasons cited above, we will AFFIRM the District Court's dismissal of C.N.'s Fifth Amendment self-incrimination claim, but REVERSE the remaining aspects of the District Court's Order and REMAND to the District Court for proceedings consistent with this Opinion.

TO THE CLERK OF COURT:
Please file the foregoing Unreported-Not Precedential Opinion.

/s/Marjorie O. Rendell
Circuit Judge

Supreme Court to Decide Parents' Rights

An important case for students' and parents' privacy rights is now before the U.S. Supreme Court. Oral arguments were presented Nov. 27 in *Falvo vs. Owasso Independent School District*, which originated in Oklahoma in 1998 as a class action lawsuit brought by parent Kristja Falvo. Mrs. Falvo filed suit because students were grading each other's papers and reading the grades aloud for transcription by the teacher. She charged that, by refusing to change its policy, the school district was violating family privacy rights under the Family Education Rights and Privacy Act (FERPA).

Mrs. Falvo objected to the practice of peer grading based on errors and embarrassment to students. Her son, Phillip, then in middle school, was being mainstreamed into a regular class from a reading-improvement program and was ridiculed by other students for his grades. The school district ignored Falvo's objections, although it subsequently did allow silent reporting of the grades.

The school's defenders insisted that many common school practices, from publishing an honor roll to selecting first chairs in the orchestra, would end if the plaintiffs were to prevail. A District court held in favor of the school.

The Tenth Circuit Court of Appeals reversed the District court's decision and ruled in favor of the parents. The court did not impose liability on the school, but ordered it to end the practice of peer grading for children of parents who object. The Court held that "Congress intended FERPA to preclude a teacher from revealing to one student the grades of another when written in a grade book." Therefore, the Court reasoned, "it would be incongruous to permit a teacher to disclose or allow the dissemination of those grades to other students immediately before recording them in the grade book. . . ."

The school district appealed the Tenth Circuit's decision to the Supreme Court. Observers believe that, in taking the case, the high court may be indicating that it feels the Tenth Circuit expanded FERPA too far. But parents' rights groups, including Eagle Forum which filed an amicus brief in the case, assert that FERPA protects family rights and that an expansive interpretation is much preferable to a narrow view limiting parental rights, as is being sought by the public school system and the U.S. Justice Department. "Because of mandatory school attendance laws," they point out, "families need FERPA to guard against improper behavior by school officials."

Students and their families have enjoyed rights of privacy and access with regard to school records since FERPA was enacted in 1974. FERPA prevents the unauthorized release of student records and ensures parental access. The law is administered by the Family Policy Compliance Office (FPCO) of the Department of Education. For over 27 years, students, parents and schools have generally been well satisfied with FPCO's enforcement of FERPA.