

**In The
United States Court of Appeals
For The Third Circuit
No. 1-1637**

**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; and M.E., Individually
and as Guardian ad Litem of J.E.,
a Minor,**

Plaintiff-Appellants

vs.

**Ridgewood Board of Education,
Frederick J. Stokley, Joyce
Snider, Ronald Verdicchio,
Robert Weakley, John Mucciolo,
Anthony Bencivenga, and Sheila
Brogan,**

Defendant-Appellees

**On Appeal From Judgment
Entered on February 15, 2001, by
the United States District Court
for the District of New Jersey,
Dismissing With Prejudice the
Complaint of the Plaintiffs**

Hon. Nicholas H. Politan

Civil Action No. 00-1072

**Brief for Amicus Curiae
Eagle Forum Education & Legal Defense Fund
Filed in Support of Plaintiff-Appellants
Supporting Reversal**

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CONSENT TO FILING AMICUS BRIEF

All parties, through their counsel, have consented to the filing of an Amicus Curiae brief by Eagle Forum Education & Legal Defense Fund in this matter. David B. Rubin, on behalf of Defendants/Appellees, granted consent to Karen Tripp, Counsel for Eagle Forum Education & Legal Defense Fund, in a telephone conversation with her on June 5, 2001. F. Michael Daily, Jr., on behalf of Plaintiffs/Appellants, granted consent to Karen Tripp in a telephone conversation with her on or about May 29, 2001.

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CONCISE STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE, ITS INTEREST IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE

Eagle Forum Education & Legal Defense Fund (“Eagle Forum ELDF”) is an Illinois nonprofit corporation organized in 1981. Eagle Forum ELDF defends individual liberty, respect for family integrity, and private enterprise. In particular, Eagle Forum ELDF defends the rights of parents to raise children against intrusions on family values and privacy.

SUMMARY OF ARGUMENT

“Have you ever tried to kill yourself?” That was question number 101 in a survey given to students, some as young as age 12. The acceptable answers were **“No”**; **“Yes, once”**; **“Yes, twice”**; **“Yes, more than two times.”**

This question, similar to dozens of others in the questionnaire at issue, implies that this shocking activity is commonplace, even acceptable. Question 108: “How many times, if any, in the last 12 months have you used LSD (‘acid’)?” Acceptable answers: “0”; “1”; “2”; “3-5”; “6-9”; “10-19”; “20-39”; “40+”. Like the above suicide question, this question pretends that the main issue -- and the expected answer -- is how frequently the objectionable activity occurred. After completing the 156-question survey, impressionable students are likely to be more accepting of suicide, drug use, and other illegal and

immoral activities, all without their parents having seen the questions beforehand.

As every attorney knows, the mere asking of a question can convey a powerful message to an impressionable audience. “When did you stop beating your wife?” is an example of an unacceptable question. There are constitutional and statutory limits on offensive questioning of innocent students without prior parental consent. Most would agree that asking students to declare “how often they go to church each week” is unacceptable. In the absence of parental consent, questions concerning how often they have attempted suicide, taken illegal drugs, or had sex are equally objectionable.

Parental consent, like any consent, must be informed to be valid. A parent cannot consent to an offensive question about suicide without being told that such question will be asked. A parent cannot consent to detailed questions about illegal drugs without being told that such questions will be asked. There is no legitimate reason for withholding such information from the parents, who have every right to see beforehand what will be presented to their children. Any State interest in asking innocent children these questions cannot extend further than the parental right to provide or withhold consent.

There was no informed parental consent here. The seven-page questionnaire was not distributed to parents before, during or after its administration to their children. Nor was the objectionable content conveyed

to parents in a meaningful manner. The information that was provided to parents was misleading as to the content of the survey and its administration. Parents reasonably expect that questionnaires administered in class will relate to academics; this questionnaire violated reasonable expectations, without notice. Administration of this questionnaire in class infringed on Constitutional and federally established rights of parents.

ARGUMENT

Many parents rightfully object to asking their children in the coercive atmosphere of a classroom questions, unrelated to academics, about how many times they have attempted suicide or engaged in illegal or immoral activity. **Parents have a constitutional right to informed consent, and that consent was lacking here.**

Point I demonstrates how the notice to parents was inadequate, perhaps intentionally so, in disclosing the objectionable content of the questionnaire to parents; thus consent was lacking. Point II shows the infringement on the Fifth Amendment rights of students. Finally, Point III shows that the administration of the questionnaire was in violation of the Protection of Pupil Rights Amendment, a federal statute.

I. Informed Parental Consent Requires Disclosure of Objectionable Material, Which Was Lacking Here.

Consent means nothing unless it is informed. *See, e.g., Stark v. Perpich*, 590 F. Supp. 1057, 1061 (D. Minn. 1984) (ordering survey administrators first to disclose its contents, followed by the statement to respondents that “[t]here is absolutely no penalty for refusing to participate. Further, if you do agree to participate and have a change of mind, you may withdraw from the survey at any time. Do you wish to participate in the survey?”). Here, defendants’ notice to parents:

- failed to disclose any of the questions about immoral activity;
- failed to disclose the question about frequency of attempted suicide;
- failed to disclose questions about frequency of illegal drug use;
- failed to disclose questions about frequency of other illegal conduct;
- failed to disclose that a parents’ group had objected to the questionnaire; and
- failed to ask students if they “wish to participate in the survey” (*Stark, supra*).

See Letter from Frederick J. Stokley to parents dated September 1, 1999 (hereinafter “Stokley 9/1/99 Letter”) (Brief of Defendants in Support of Motion for Summary Judgment at 25a). This lack of disclosure deprived the parents of their right to withhold consent.

Defendants have not provided, and cannot provide, any legitimate justification for their lack of disclosure to parents. There was no academic reason to keep the questionnaire secret before it was administered. The questionnaire itself is only 7 pages long. There was no legitimate reason not to distribute it to parents prior to administering it to their children. It can even be easily loaded onto the internet for convenient parental access. The questions could have been fully disclosed to parents, thereby enabling informed consent. But they were not, which rendered meaningful consent by parents impossible.

The disclosure made to parents was deceptive. *See* Stokley 9/1/99 Letter. It never even stated that the questionnaire would be administered to students in class. Instead, it said that a “survey *will be made available* to young people in grades 7-12” -- falsely implying that students could pick up the questionnaire for completion later, such as at home. (Italics added.) In fact, administration of the questionnaire was a substitute for compulsory classes, and students were instructed to complete the questionnaire on the spot.

The disclosure provided to parents failed to indicate that their children would be questioned about attempted suicide, use of LSD or heroin, and other illegal or immoral activity. Euphemisms were used to mislead parents about the direct and intrusive nature of the questioning. No mention was made of inquiring about attempted suicide. No mention was made of questions about illegal drugs. No mention was made of questions about illegal activity. The

Stokley 9/1/99 Letter did not even state that students would be questioned about their highly personal conduct.

While defendants argued that it was a “good deed” to ask students intimate questions unrelated to academics, *see* 2001 WL 387417, *1 (court below repeating defendants’ argument), it is not a good deed to provide inadequate and misleading disclosure to students’ parents. Parents have a right to know what state officials are asking their children, just as attorneys have a similar right and duty with respect to questions asked of their clients.¹ Notice is not valid unless based on accurate and full information, including information about how to object that was lacking here. *See Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795 (1983); *Greene v. Lindsey*, 456 U.S. 444, 449 (1982); *Memphis Light, Gas, & Water Div. v. Craft*, 436 U.S. 1, 13-15 (1978).

The Stokley letter attached additional information that was also misleading. Instead of simply attaching the 7-page questionnaire, it attached a different survey that was very different from the real one. *See* Brief of Defendants in Support of Motion for Summary Judgment at 26a. The attachment, “10 Developmental Assets,” lacked any offensive questions and

¹As Appellants advise in discussing parental interest under the Due Process Clause, parents’ interest in the care, custody, and control of their children is “perhaps the oldest of the fundamental liberty interests recognized’ by the Supreme Court.” Appellants’ Brief at 24, quoting *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000).

created the false impression that the student questionnaire would be similar. The attachment said, "Find a teen you know and take this survey with them" -- suggesting that the future survey would be administered in a similar informal manner. *Id.*

Misled about the contents of the questionnaire, parents' opportunity to make a trip to the school to review the questionnaire itself was inconsequential. School officials knew that parents might object to the questions, and that a parents' group, the 1998-99 Federated Home and School Association, had previously refused to endorse it. Affidavit of C.N. in Support of Application for Preliminary Injunctive Relief, dated June 30, 2000 (hereinafter "C.N. Aff. 6/30/00") ¶ 6. But the Stokley 9/1/99 Letter did not disclose that some had already objected and that many questions would likely offend some parents. Nor did the letter inform parents of when the questionnaire would be available for review, or when it would be administered to students.

The above disclosure cannot possibly be adequate as a matter of law. Intrusive questioning of children about attempted suicide and illegal and immoral conduct requires prior notice to parents that is meaningful. The notice provided here falls far below that requirement.

The court below omitted any recognition that impressionable students are influenced by questionnaires and tests, perhaps more so than lectures. Students, naturally, focus more on tests and are trained to accept the premises

of questions. It is incorrect and harmful to teach students, through questionnaires, that a substantial percentage of their peers attempt suicide. National Institute of Mental Health U.S. Suicide Rates by Age, Gender, and Racial Group (1997), <http://www.nimh.nih.gov/research/suichart.htm>; World Health Organization Suicide Rates by Gender, USA, 1950-1997, and Suicide Rates by Gender and Age, USA, 1997, http://www.who.int/mental_health/documents/suicide/unitstate.pdf (In 1997, only about one in 10,000, between the ages of 15 and 24, committed suicide.) It is just as easy to insert offensive assumptions into questions of students as it is for attorneys to sneak arguments into questions of witnesses. The defenders of witnesses and students have every right to object before an offensive question is answered.

II. These Students Have a Fifth Amendment Right Not to be Asked Incriminating Questions Without Parental Consent, Even if Promised Confidentiality.

A mere promise of confidentiality does not negate Fifth Amendment rights. *See United States v. Haynes*, 390 U.S. 85, 99 (1968) (rejecting government attempt to bypass the Fifth Amendment with “restrictions upon the use by state and federal authorities of information obtained as a consequence of the registration requirement,” and thereby overturning enforcement of the registration requirement). No promise of confidentiality can guard against

court orders, police investigations, or human wrongdoing or error in protecting the confidentiality. *See Clavir v. United States*, 84 F.R.D. 612, 614-615 (S.D.N.Y. 1979) (rejecting a confidentiality-based objection to disclosure because “no government official has the power to promise that information will be kept confidential in the face of a lawful demand for discovery backed up by an order of the court”). Here, the promise of confidentiality provided to the students was an implied contract, to be broken at the option of the promisor. A rational school official could decide to break the promise and analyze a student’s answers in search of leads to investigate. *See Merriken v. Cressman*, 364 F. Supp. 913, 921 (E.D. Pa. 1973) (holding a questionnaire given to students to be unconstitutional).

The court below sought to distinguish the *Merriken* precedent based on how the program there was “initially designed.” 2001 WL 38417, *9 n.12. But the intent of the questioner is irrelevant to the Fifth Amendment right of the person being questioned. There, as here, the parents “had been deceived,” and it matters little whether the deceit concerned the intent of the questioner or the effect of the questioning. *Id.* The questionnaire asked students to incriminate themselves by saying how many times they had “[s]tolen something from a store” (Question 56); “[d]amaged property just for fun (such as breaking windows, scratching a car, putting paint on walls, etc.)” (Question

59); used heroin, opium, morphine, alawan, PCP or Angel Dust (Questions 105-7). C.N. Aff. 6/30/00 Exh.I.

Would any attorney advise a client to incriminate himself based merely on a promise of confidentiality? No. There is no recognized legal privilege of secrecy in filling out questionnaires. With respect to the LSD question, for example, no attorney would advise a student that he should admit to using LSD more than 40 times in the past year. Should the promise of confidentiality be broken for any reason, the student could be prosecuted for his admission to the full extent of the law. The student responses are vulnerable to subpoenas in civil and criminal litigation, as well as criminal investigations.

The court below relied on its finding that incriminating responses by students would not be used against them. 2001 WL 38417, *10. This is reversible error. If any student who filled out the questionnaire later becomes the subject of litigation, it would then be easy for a criminal investigator or civil litigant to match the responses to the student -- particularly if the student is a minority. Gender and ethnicity were asked in Questions 3 and 4; home environment was determined in Question 5; school grades determined in Question 10; and skipping school days ascertained in Question 31. Combined with over 100 other questions about habits, it would be easy for an attorney to match questionnaire response sheets to individual students -- and then use the incriminating responses against the student. If there is any doubt, then the

student can simply be asked under oath how he responded to the first 25 or so questions, and then find the answer sheet that corresponds. The out-of-state company holding the answers is fully subject to legal process.

The Fifth Amendment protects against this type of state-mandated self-incrimination. *Haynes*, 390 U.S. at 95-100; *Marchetti v. United States*, 390 U.S. 39, 58-60 (1968) (invalidating enforcement of registration requirement for gamblers, and rejecting government argument for a narrower remedy of restrictions on use of the gathered incriminating information). Students and their parents should be told that promises of confidentiality are no guarantee that incriminating answers will not be used against them through legal process or otherwise. While this risk is arguably low, the Fifth Amendment does not contain an exception based on the level of risk of incrimination. Instead, the narrow exceptions to the privilege against self-incrimination are limited to incremental increases in risks after self-incrimination and “the withholding of evidence essential to the ends of justice,” neither of which is applicable here. *Brown v. Walker*, 161 U.S. 591, 600 (1896) (quotations omitted); *Rogers v. United States*, 340 U.S. 367, 374-75 (1951). Here, the police department was active in recommending the questionnaire, and it has a duty to act on the results. The State cannot use its authority to solicit incriminating admissions by students, unsuspected of wrongdoing, unless there is informed consent by their parents.

III. The Court Below Erred in Finding Compliance with the Protection of Pupil Rights Amendment Based on a Prior Intent by Some that the Questionnaire Be Voluntary.

The Protection of Pupil Rights Amendment (PPRA), 20 U.S.C. § 1232h(b), states:

(b) Limits on survey, analysis, or evaluations

No student shall be required, as part of any applicable program, to submit to a survey, analysis, or evaluation that reveals information concerning --

(1) political affiliations;

(2) mental and psychological problems potentially embarrassing to the student or his family;

(3) sex behavior and attitudes;

(4) illegal, anti-social, self-incriminating and demeaning behavior;

(5) critical appraisals of other individuals with whom respondents have close family relationships;

(6) legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers; or

(7) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program),

without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of an unemancipated minor, **without the prior written consent of the parent.** (Emphasis added.)

In response to this statutory requirement of prior written parental

consent, the court below held that:

Clearly, then, the survey was intended to be voluntary. As such, the PPRA is not applicable and written parental consent was not necessary.

2001 WL 387417, *7. The court based its finding of intent on the September 1st letter by Superintendent Stokley and a portion of instructions to teachers about the questionnaire.

But that begs the issue -- *did the schools in fact administer the questionnaire in a voluntary manner?* All evidence is that the questionnaire was compulsory:

- plaintiff's affidavit indicates that it was administered in a compulsory manner;
- the questionnaire itself, on its face, appears to be compulsory;
- students were given the questionnaires in a classroom as a substitute for compulsory class attendance; and
- no student declined taking the questionnaire, and some surely would have spent their time elsewhere had it been voluntary.

C.N. Aff. 6/30/00 ¶¶ 14-15 & Exhs. I & Z. The school principal himself admitted that the students "were not told it was voluntary." *Id.* Exh. Z. At a minimum, an issue of fact has been raised as to whether the questionnaire was administered in a voluntary manner.

The court below erred in allowing administrators to sidestep the PPRA requirement for “prior written consent of the parent” merely by telling parents that the questionnaire would be voluntary. *See* 2001 WL 387417, *7. That approach eviscerates the PPRA requirement for written parental consent. Administrators could simply tell parents that a survey, no matter how offensive, is voluntary, and then implement the survey in a compulsory manner without obtaining prior written consent from parents. That is contrary to the plain meaning of the PPRA.

The court below erred in holding that declarations to render voluntary an objectionable questionnaire are sufficient. What matters is whether the questionnaire was in fact administered in a voluntary manner -- and the overwhelming evidence is that it was not.

CONCLUSION

The requisite parental consent to the questionnaire was lacking. We respectfully request that the decision below be reversed.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies that she is a member of the Bar of the United States Court of Appeals for the Third Circuit, having been admitted on June 11, 2001.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Federal Rule of Civil Procedure 32(a)(7)(B). It has a total of 3,254 words.

Karen B. Tripp, Esq.

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing document were served, by delivery to Federal Express (third-party commercial carrier) for overnight delivery, postage/shipping prepaid, to counsel of record listed below, pursuant to Fed. R. App. P. 25(b) and LAR 31.1, and that the same document was filed, by delivering an original and ten copies to Federal Express (third-party commercial carrier) for overnight delivery, postage/shipping prepaid, to the Clerk of the Court, pursuant to Fed. R. App. P. 25(a)(2)(B)(ii) and LAR 31.1, on this 18th day of June, 2001, at the following addresses:

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