

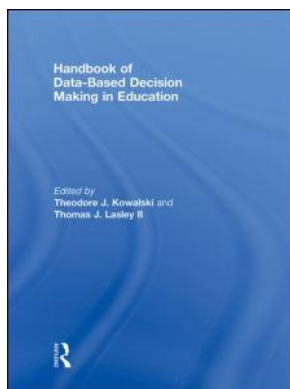
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Handbook of Data-Based Decision Making in Education

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Legal Dimensions of Using Employee and Student Data to Make Decisions

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Handbook of Data-Based Decision Making in Education

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Legal Dimensions of Using Employee and Student Data to Make Decisions

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In this day and age, data flood school districts and may include anything from student test scores and student and teacher demographic data to teacher performance evaluations, personnel salary and benefits data, other school expenditure data, student and personnel files, and curriculum. Decisions affecting students and employees are often supported, if not based on, information drawn from these various sources. Kowalski, Lasley, and Mahoney (2008) point out that making objective and analytical decisions based on informed choice is both a disposition and a skill, which ultimately achieves more effective results. We contend that, in this increasingly litigious society, making decisions in light of legal requirements, restrictions, and interpretations is also a necessity.

Whether decisions involve employees or students, school leaders must bear in mind that various aspects of the law can influence their decisions. If school district decision makers are not cognizant of the legal environment affecting education, they may make decisions they should not make or they may be afraid to make decisions they are legally permitted to make. Both types of decision can have a negative impact on the operation of schools and the learning atmosphere for students.

Recognizing the power of such informed decisions, this chapter considers the legal aspects of using data in three key areas: employee and student data for purposes of policy implementation, personnel decisions, and student-related dissemination and decisions. After a brief overview of the legal system and its relationship to data-driven decisions, the remainder of this chapter will focus on these three areas.

The Legal System

In its simplest form, as related to educational decision making, the law typically presents itself at either the federal or state level. Federal law is generally based on the United States Constitution or on laws passed by Congress. As to the latter, No Child Left Behind is a prime example of such a law. State law is generally based on state constitutions and statutes passed by state legislatures as well as on common law, which derives from past practice. All of these laws are subject to interpretation by courts, both federal and state, which resolve legal controversies.

This chapter is designed to serve as a primer for school leaders wishing to move to

a more data-based decision-making model. While it is impossible in this short time to enumerate everything a school leader should know about the law, we hope this information provides a basis upon which school leaders may move forward with some confidence in using school and district data to inform their decisions.

Using Data for Policy Implementation

At its broadest level, school districts may employ data to satisfy legal requirements, to inform policy making and, in essence, to make good policy decisions. As early as 1954, in *Brown v. Board of Education*, the Supreme Court realized the importance of using social science data in determining jurisprudence. Here, the Court cited several sources of psychological data, including the well-known doll studies, to help inform their decision that separate was inherently unequal. While the use of such data proved to be controversial, courts have come to rely on data in a variety of educational settings.

Use of data in educational policy making is greatly influenced by both federal statutes and judicial opinions. Statutes such as the No Child Left Behind Act (NCLB, 2002) create a legal regimen that necessitates action by schools in order to secure and retain federal funding. The use of data is integral to satisfying NCLB's statutory requirements.

The No Child Left Behind Act

Traditionally, education policy decisions have been influenced mostly at the state or local level in large part because the vast majority of funding for education comes from these levels and because the U.S. Constitution does not provide the national government a role in education. The national government still played a part in K-12 education as seen in special education policy, which is driven by the Individuals with Disabilities Education Act (IDEA), and Title I programs for economically disadvantaged students. In addition, the federal court system has been used several times for legal challenges of education policy based on U.S. constitutional or national statutory directives.

In recent years, however, the national government has taken unprecedented active interest in education as exhibited by NCLB (2002) and its accompanying regulations. By now, most educators are well aware of the Act's goal that all students in public education will achieve proficiency levels by certain timelines, and the controversies surrounding the funding for and implementation of the requirements of this Act. In this context, NCLB is perhaps the most profound example of the legal dimensions of using employee and student data to make decisions.

In school board and faculty meetings taking place across the country, educators worry about achieving adequate yearly progress (AYP) in the several categories mandated by the Act. Student data must now be gathered regarding attendance, graduation rates, and standardized test scores. These data must be disaggregated to identify the relative performance of boys and girls, different ethnic groups, English

language learners, special education students, migrant students, and economically disadvantaged students. Teachers must also be highly qualified to teach their subject matter (NCLB, 2002).

The data gathering and reporting requirements resulting from NCLB give rise to additional administrative burdens on school districts in a time of increased scrutiny and fiscal restraint. Fear of the sanctions that come from failing to achieve AYP drives schools to focus on raising test scores of low achievers. This in turn affects policy and curriculum decisions, and financial as well as personnel resource allocation. Thus, NCLB creates legal requirements that have altered the educational landscape and made an impact on the creation and use of student and employee data. While any detailed discussion of the entire NCLB Act far exceeds the limited scope of this chapter, it is helpful to highlight some of the aspects of NCLB that most directly implicate the use of employee and student data.

Highly Qualified Teachers NCLB requires that all school personnel teaching core academic subjects earn highly qualified status. For schools to be eligible for Title I funding, core subject teachers must possess at least a bachelor's degree, state teaching certification, and demonstrate competency in the subject area taught (NCLB, 2002). In addition to academic requirements, a teaching competency examination is required for new teachers (Rossow & Tate, 2003). Flexibility was added in 2005 regarding the highly qualified teacher (HQT) requirements for rural, secondary science teachers, and multi-subject teachers. States may now develop strategies for these teachers to demonstrate they are highly qualified in the subjects they teach by either adding time for the process or allowing for alternate methods for teachers to demonstrate they meet HQT standards (New No Child Left Behind Flexibility, 2005).

Keeping up with the HQT regulations and teachers' HQT status adds a layer of data collection for school districts. A teacher's HQT status in one or more subject areas could very well affect hiring and retention decisions.

Disclosure of Assessment Outcomes Disclosure of assessment outcomes serves as a key dimension to NCLB that concerns students. Title I, part A of the Act requires schools to adopt measures to ensure effective communication of information to parents. Assessment outcomes and school improvement actions must be articulated and disseminated in a manner that is "understandable" and "practicable" (Torres & Stefkovich, 2005). In addition to the requirement that states issue outcomes in a prompt manner, assessment results must be presented in a report format that is "descriptive, interpretative, and diagnostic" and allows school officials to comprehend and use data to address students' academic needs and to modify instruction (Torres & Stefkovich, 2005). However, schools must take care that while complying with the requirements of NCLB, they do not violate the requirements of the Family Educational Rights and Privacy Act (FERPA), a federal law that is discussed in more detail later in this chapter.

Targeted Assistance Under NCLB, schools may allocate funds directly to students with the greatest academic needs. Eligibility is determined by failure to meet expectations on statewide assessment, demonstration of a high probability for failure, or

through performance levels deemed less than proficient according to local assessments. This requires record keeping on the individual student level and school level, as schools with large at-risk populations are eligible for additional funding through a variety of sources (Torres & Stefkovich, 2005).

Targeted assistance programming must entail an ongoing review process, which regularly determines when intervention and assistance are required and/or whether the situation warrants extended time before or after school, during the summer, and/or nontraditional school year formats (Torres & Stefkovich, 2005).

Unlike the efforts to comply with NCLB, in many instances the legal ramifications of policy decisions are often not revealed until after a policy has been established and its implementation offends those affected by it. Ultimately, some of these disputes end up in court and provide guidance for others so they may avoid similar difficulties. It is perhaps instructive to examine a 2007 Supreme Court case involving two districts' attempts to use data based on race as a factor in determining the student composition of their schools.

Parents Involved in Community Schools v. Seattle Public School District No. 1

Parents Involved in Community Schools v. Seattle Public School District No. 1, (2007) concerns two school districts that relied upon an individual student race data in assigning students to particular schools so that the racial balance at each school would fall within a predetermined range based on the racial composition of the school district as a whole. The Supreme Court struck down both plans as being violations to Title VI of the Civil Rights Act, which prohibits discrimination based on race. The lesson that school leaders can take from *Parents Involved* is that while student demographic data may now be more available than they have been in the past, one must take care with how those data are put to use.

The Seattle Public School District No. 1 used race as a factor in deciding which of the city's 10 public high schools its students could attend. The district desired to maintain a racially diverse balance in its high schools so it developed a policy for deciding who would gain admittance to the more coveted schools. High school students could apply to any high school in the district. After taking into account whether a student already had a sibling attending the desired school, the district used race as a tiebreaker followed by geographic proximity. If a school's racial diversity did not fit within district guidelines, a student from an underrepresented race would have preference ahead of a student from the overrepresented race. *Parents Involved in Community Schools* filed suit in the federal district court alleging that Seattle's use of race in assignments violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and the state of Washington's Civil Rights Act. Both the district court and the Court of Appeals upheld the district's plan and *Parents Involved* appealed to the Supreme Court.

The Supreme Court also considered a similar program in Kentucky in *Parents Involved*. Jefferson County Public School District encompasses the metropolitan area of Louisville, Kentucky. The school district is racially mixed with approximately 34% African American students and almost all of the remaining 66% White. Non-magnet

schools in the district were placed in geographic clusters and students could apply to attend any school in their cluster. In order to maintain racial diversity within each school, Jefferson County developed a policy providing for a certain racial balance. If a school's racial balance fell outside the parameters of the guidelines, new students of the overrepresented race would be assigned to a different school in the cluster. A parent of a new student assigned to an undesirable school sued the district.

The Supreme Court noted that there was no legal need to desegregate in either district. Seattle had never had legal segregation and Jefferson County had satisfied its obligation to desegregate in 2000. The Supreme Court stated that while maintaining racial diversity is a worthy goal, it is not a "compelling interest" such as remedying past intentional discrimination. The districts' plans were not sufficiently narrowly tailored to meet their objectives and were therefore declared unconstitutional. One of the several things the Court found objectionable was that neither district had considered other factors that contribute to overall student body diversity as was the case in *Grutter v. Bollinger* (2003) where race was but one of many factors considered in law school admission decisions. Another problem the Court had with the plans was that districts only distinguished between Whites and non-Whites. In Seattle, at least, there were significant populations of Asians, African Americans, and Hispanics.

Both districts' policies took into consideration available student data such as location, race, and siblings. Neither, however, sufficiently considered the present legal context. While the respective school boards believed they were doing the right thing by using student racial data to promote diversity in the school enrollments throughout their districts, other more compelling legal considerations ultimately prevented them from doing so.

Using Data for Personnel Decisions

Personnel decisions are largely governed by state statutes, regulations and contract law which prescribe appropriate procedures to follow in making such decisions. In this section we concentrate largely on the issue of evaluating teachers so that determinations regarding continued employment can be made and justified in accordance with the law. The use of data in the form of performance evaluations and a record of negative incidents play an important role in such decisions.

Teacher Evaluation

Teachers, both tenured and probationary, are periodically evaluated. Probationary teachers typically are evaluated more often as they work toward tenure. Evaluations are used for two functions: assessing the teaching process for purposes of improving teacher performance, and evaluating outcomes for purposes of building a record for potential discipline or dismissal of a problem teacher (Rossow & Tate, 2003).

To perform the evaluation function in an orderly and evenhanded manner school districts need to have a teacher evaluation policy and follow it. Such policies

are usually required by state statutes, which specify the necessary elements of any policy. A district's policy must have clearly defined standards of performance and be written in understandable language. The failure of a district to have an evaluation policy may lead to a suspicion that school officials are acting in an arbitrary manner in order to discriminate against teachers (Rossow & Tate, 2003). A teacher prevailed against a school district when it did not have an evaluation policy in place in violation of state law. The teacher's contract was not renewed even though the board did not follow the mandated procedures required to take such action. As a result, the court ordered the teacher to be reinstated (*Farmer v. Kelleys Island Board of Education*, 1994).

Evaluation Procedure The evaluation policy of a school district must contain procedures that conform to the protections provided by the Fourteenth Amendment of the U.S. Constitution and state statutes. The Fourteenth Amendment protects tenured teachers from dismissal unless they have been afforded "due process." For evaluations, due process minimally requires adequate notice to the teacher of the criteria that will be used in the evaluation, and an opportunity to remediate the deficiencies cited in the evaluation. Prior to dismissals tenured teachers (and in some cases probationary teachers) are entitled to notice of the dismissal, the reasons for it, and a hearing where the teacher can hear the "charges" and have a chance to respond to them (Rossow & Tate, 2003).

Evaluation Criteria While teacher performance in the classroom makes up the largest part of the evaluation process, other factors beyond the classroom walls may be taken into consideration in making decisions regarding discipline or dismissal. Examples of these factors include relationships with other teachers, administrators and parents, standing in the community, outside employment, and even personal behavior (Rossow & Tate, 2003). Typically, the types of behavior that can lead to discipline or dismissal are regulated by state statute and fall into several broad categories. These categories usually consist of:

- (a) incompetence, generally involving a teacher's failure to control the behavior of his or her class, or failure to effectively deliver instruction;
- (b) immorality, which can include behavior in and out of school such as drug use, inappropriate sexual conduct or moral turpitude, and criminal behavior; and
- (c) insubordination, the willful failure of teachers to follow the rules, policies or directives of their principals or superintendents.

In order to show that a teacher has violated one of these grounds, a district must have proof. It is the sufficiency of the evidence the school district has gathered to support its decision that often determines the outcome of the matter (Rossow & Tate, 2003).

Teacher incompetence is a common ground for terminating teachers. It usually requires multiple evaluations over a period of time, and the most extensive documentation of all the causes for dismissal. Probationary teachers often do not get their

contracts renewed for various reasons, but they are not a major source of litigation because in most states, school districts need little or no justification for not renewing their contracts. Most court cases derive from attempts to remove tenured teachers. While the process may be arduous, school districts are often successful in removing incompetent teachers, in part because of the deference courts give to the school boards' decisions (Rossow & Tate, 2003). While proving teacher incompetence usually requires the showing of multiple incidents over time, teachers can be dismissed over single incidents that fall into the other grounds.

In building a record for dismissal, objective criteria are preferable to subjective factors and should be incorporated into the evaluation of each teacher. Objective criteria require the recording of an observation while subjective factors require some form of discretionary judgment. What is most important is whether the behavior is reasonably related to the job and can be observed (Rossow & Tate, 2003). As *Layman v. Perry Local School District Board of Education* (1998) demonstrates, the use of two subjective items in the report against a dismissed teacher was acceptable when the report also contained 20 objective items. Likewise, in *Bellairs v. Beaverton School District* (2006) the court found that a teacher's dismissal was based on evidence of a series of incidents collected over four years, appropriate legal principles, and substantial reason. On the other hand, in *Shepard v. Fairland Local School District Board of Education* (2000) a dismissed teacher prevailed when she showed that the criteria used in her evaluations were insufficient because they did not provide specific criticisms or recommendations for improvement.

Impact of Different Aspects of the Law on Personnel Decisions

The basics of teacher evaluation just presented incorporate several aspects of the law including contract law, state statutes, and the Fourteenth Amendment Due Process clause. Other laws can also influence personnel decisions made by school districts. There are federal anti-discrimination laws such as the Civil Rights Act of 1964 that prohibit discrimination on the basis of race, ethnicity, gender or religion. There is the Americans with Disabilities Act prohibiting discrimination on the basis of one's disability. There are state collective bargaining laws if the workforce is unionized. Overarching all of these aspects of the law is constitutional law, which pertaining to teachers may concern First Amendment rights of free speech and religion. Further complicating matters is the fact that these areas of law frequently overlap in any given situation.

School decision makers must consider how their use or failure to use available data can implicate a variety of legal issues. What follows are two cases where school districts attempted to dismiss a teacher. In *Macy v. Hopkins County Board of Education* (2007), the district was successful but in *Settlegoode v. Portland Public Schools* (2004), the district was not. These cases arguably turn on the district's use of data and its understanding of other areas of law that can influence the court's decision.

In *Settlegoode* the school district relied on negative evaluations of Settlegoode's teaching performance to justify not renewing her contract. Normally, such reliance is

adequate but in *Settlegoode*, First Amendment concerns ultimately carried more weight. In *Macy*, the school district overcame the teacher's claim that she was dismissed in violation of the Americans with Disabilities Act with ample evidence of inappropriate behavior.

Settlegoode v. Portland Public Schools *Settlegoode* pits contract law against constitutional law. *Settlegoode* complained about her students' treatment and educational program, which were protected by Section 504 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. This raised a matter of public concern which made her speech protected by the First Amendment. The court in this case allowed a jury to decide what it thought the reason was for the district choosing not to renew *Settlegoode's* contract; her poor evaluation at the end of the year or retaliation for speaking out in support of her students. The jury made its decision in favor of *Settlegoode* and the Court of Appeals stood by it.

Pamella *Settlegoode* was hired as an adaptive physical education teacher to work with students with physical disabilities in several schools in Portland, Oregon. *Settlegoode* began to advocate for better conditions and treatment for her students within several months after starting teaching. She tried to talk to her immediate supervisor several times with no success about the problems she was having finding places to teach her students and that equipment was often lacking, inadequate, or unsafe. Near the end of the school year she wrote a 10-page letter to the district's director of special education expressing her frustrations with both the treatment of her students and her supervisor's disregard of her concerns.

Before writing the letter, *Settlegoode's* performance evaluations had been mostly positive. She was praised as having well-planned appropriate lessons of high interest. Evaluations also stated that she was supportive and respectful of her students and "working to develop her skills in writing IEP goals and objectives which are measurable" (*Settlegoode*, 2004, p. 508). After writing the letter, *Settlegoode's* evaluations were much more negative and she no longer met the minimum standards of performance in several areas including writing IEPs and classroom management. As a probationary teacher, *Settlegoode* was not entitled to continued employment after her first year of teaching. Eventually, she was not recommended for renewal and the school board followed the recommendation without investigation. *Settlegoode* then filed suit and after a trial, a jury found for *Settlegoode* on all claims and awarded her over \$900,000 in damages. The school district appealed, but the 9th Circuit Court of Appeals upheld the verdict.

The district's greatest mistake was probably its poor treatment of students with disabilities, students protected by federal law. Its next mistake was a seemingly casual disregard of *Settlegoode's* complaints. Perhaps *Settlegoode's* supervisors did not take her complaints seriously because of her probationary status. Typically, in such cases reasons are not even needed for not renewing a contract.

One key to *Settlegoode's* case is that she was not initially complaining about her own treatment, rather the treatment of her students. The nature of her complaints amounted to a matter of public concern which then implicated First Amendment protections for *Settlegoode's* right of free speech. Once her free speech rights were recognized by the court, the issue became more complex. Then the district had to

show that it “would have taken the same action even in the absence of the protected conduct” (Settlegoode, 2004, p. 512). The jury decided that the failure of the school district to renew Settlegoode’s contract was in retaliation for expressing her free speech.

The school district failed to make appropriate use of data. It did not appear from the court opinion that the district had a protocol in place for monitoring its students to see that they were receiving the appropriate services as required by law. Nor does it appear that there was a protocol for addressing complaints by teachers. Settlegoode’s supervisors responded that writing letters was not appropriate but they did not point out the proper procedures to initiate necessary change. The only data consulted prior to the nonrenewal decision were Settlegoode’s evaluations by her supervisor, which suspiciously went from good to bad after Settlegoode wrote her first letter. The court noted that there was no evidence supporting the negative evaluations other than the word of the supervisor who was also the target of some of Settlegoode’s complaints. Finally, there was no independent investigation by the school district to verify the version of events as reported by the supervisors.¹

Macy v. Hopkins County School Board of Education A teacher claimed she was fired because she was disabled. The school district successfully claimed that the teacher was dismissed for threatening students and making inappropriate remarks about the students and their families. The teacher had experienced a head injury several years in the past that impaired her ability to behave rationally in stressful situations. She argued that her actions were a result of her disability. The court found that the district could fire her even if her actions were a result of her disability because a teacher who was not disabled could be fired for the same behavior. The district was able to support the charge of threatening the students, as Macy was convicted on criminal charges relating to the event. The district also had evidence of over 20 other incidents of misconduct (Macy, 2007). The school district in this case was protected, in part, because of its well-documented record of the incident and previous incidents over time.

Reduction in Force

Sometimes school districts are forced to dismiss teachers who have done nothing wrong in the face of budget cuts or enrollment declines. State law governs the procedures school districts must follow when a reduction in force (RIF) is necessary, but districts must be aware of federal law as well. Generally, a tenured teacher may not be laid off ahead of a non-tenured teacher if the tenured teacher is properly licensed.

In *Taxman v. Board of Education of Piscataway* (1996) an unusual scenario developed when the school board chose to reduce the teaching staff in the business department at the high school by one. Following New Jersey law and procedures, the dismissal decision came down to Sharon Taxman, who is White, and Debra Williams, who is African American. Both were hired on the same day 9 years prior to the RIF decision and both teachers had favorable evaluations and in all other aspects were

considered “tied.” Since Williams was the only minority teacher in the business department, the school board chose to apply the district’s affirmative action policy to break the tie between Williams and Taxman. Therefore, Taxman was laid off. The board’s president justified this decision by arguing that the board wanted a culturally diverse staff as it was to the educational advantage of students to come into contact with people of different cultures and backgrounds. Taxman sued, claiming the district had violated Title VII of the Civil Rights Act, which prohibits an employer to discriminate based on race.

The Court of Appeals ruled in favor of Taxman and against the school board. While the court applauded the goal of racial diversity, it found that Title VII only allows employers to make decisions based on race when attempting to remedy past discrimination or a manifest imbalance in the employment of minorities. While Williams was the only African American in the business department at the high school, African Americans were not underrepresented among teachers in the district or at the high school. The policy unnecessarily trammelled the interests of the non-minority employees as it could be used to grant racial preferences. In *Taxman*, therefore, the board used racial data and laudable goals to make an employment decision that satisfied state procedural requirements but violated federal civil rights law.

Using Student Data Appropriately

School administrators, teachers, and other school personnel, such as counselors and special services staff, often use student data as they make decisions, both about individual students and groups of students. In doing so, it is important to be familiar with both federal and state laws and regulations that pertain to the use and confidentiality of such information.

The Family Educational Rights and Privacy Act

From a federal perspective, sharing data related to student records, which is the bulk of information on students, falls under the Family Educational Rights and Privacy Act. Also known as the Buckley Amendment and commonly referred to by its acronym, FERPA, this federal law ensures students and their parents certain rights relative to student records. The general rule, subject to several exceptions, is that parents are granted access to their children’s educational records and schools may not divulge student educational records to others without the consent of the parents or students aged 18 or older (FERPA, 2000).

This law was first enacted as part of the Educational Amendments of 1974, which extended the Elementary and Secondary Education Act of 1965. Congress has amended FERPA seven times, with the most recent amendments occurring in 2000 (Daggett, 2007; Daggett & Huefner, 2001). In essence, FERPA requires compliance on the part of all educational agencies or institutions that receive federal funding. If a school district or any other educational organization receiving federal funding violates FERPA, then it could lose their funding.

Parent and Student Access Rights granted under FERPA do not apply to the students themselves unless they are 18 years old or enrolled in a postsecondary institution. Thus, students under the age of 18 are not explicitly given these rights; however, they can and do extend to students of 18 and over (referred to in the law as “eligible students”) and minor students’ parents, guardians, or persons acting in the place of a natural parent.

The law defines educational records as “records, files, documents, and other materials” that “contain information directly related to a student” and are “maintained by an educational agency or institution or by a person acting for such agency or institution” (FERPA, 2000). Student discipline records are included in FERPA but certain records may still be shared with any teacher or school official with a legitimate interest in a student’s behavior if the student’s conduct “posed a significant risk to the safety or well-being of that student, other students, or other members of the school community” (FERPA, 2000).

The United States government’s Family Policy Compliance Office explains that parents or eligible students may “inspect and review” students’ educational records. They may also request the school to correct records “which they [parents or eligible students] believe to be inaccurate or misleading.” If the school disagrees and refuses to make these changes, those persons reviewing the records may be afforded a formal hearing. If no changes are made after the formal hearing, the parent or eligible student has the right to place a written statement in the file telling why he or she contested the record (FPCO, 2007).

Access of Others FERPA also limits the access of others to a student’s educational record. In these instances, records cannot be released to a third party without the parent’s or eligible student’s written permission. Exceptions to this rule include: teachers and school officials with legitimate educational interest; schools where the students are transferring; officials with duties related to auditing or evaluation; financial aid officers; organizations conducting studies “for or on behalf of the school”; accrediting agencies; judicial orders or subpoenas; emergencies relevant to health or safety; and in accordance with state law, juvenile justice authorities. Schools must keep a record of many of these disclosures and those who receive student records are also obligated not to redisclose such records except as permitted by FERPA (FERPA, 2000).

It is sometimes difficult to determine where the line stands between educational records protected by FERPA and other materials that are not. The Supreme Court helped refine the definition when it unanimously decided that papers graded by other students in class are not student records under FERPA (*Owasso I.S.D. v. Falvo*, 2002). In *Falvo* a parent objected to the common practice of students exchanging assignments and tests and grading them in class as the teacher explains the correct answers to the entire class. The Supreme Court held that though student papers do contain information directly related to the student, they are not records under FERPA because an educational agency or institution does not maintain them (*Falvo*, 2002, p. 433).

Student papers are not maintained as contemplated by the statute, since students only handle the papers while the teacher calls out the answers. To decide otherwise

would require adherence to burdensome notice, recording and hearing procedures for schools and teachers that Congress could not have intended. The Court also noted the educational value of going over an assignment as a class, since it gives teachers a chance to reinforce the lesson and discover whether the students have understood the material (*Falvo*, 2002).

Directory Information Schools may make available “directory” information to outside sources without parental consent. However, the school must tell parents and eligible students of their intentions to disclose as well as provide “reasonable” time for these individuals to request non-disclosure. Directory information may include “a student’s name, address, telephone number, date and place of birth, honors and awards, and dates of attendance” (Family Policy Compliance Office, 2007). Each year, the school must notify parents and eligible students of their rights under FERPA in a manner at the discretion of each school. The most common ways of notification include a letter, inclusion in a student handbook or PTA bulletin, or an article in the local newspaper (FPCO, 2007).

Remedies One potentially confusing aspect of FERPA is that it does not afford private citizens a private right to legal action (*Gonzaga v. Doe*, 2002). This means parents and eligible students cannot sue for damages for violations of FERPA. Therefore, parents’ primary remedy for violations of FERPA pertaining to their child is to complain to the United States Department of Education through the Family Policy Compliance Office (Daggett & Huefner, 2001). The office then investigates whether a violation has taken place and works with the offending party to remedy the problem.

The lack of a private right of action under FERPA does not mean that parents are without remedy, however, as most states have statutes that also protect student data and provide a private right of action. In fact, state privacy laws may be a greater cause for caution than federal laws (Stuart, 2005). Stuart warns that school districts that are just complying with federal privacy laws may not have enough protection from litigation as many states have stricter laws and regulations, especially about releasing student information to third parties, than does FERPA.

One recent example of a successful action against a school district occurred when a Minnesota family sued Minneapolis Public Schools for violation of the Minnesota Government Data Practices Act (MGDPA). Two students found copies of a special education summary report about the plaintiff’s son blowing in the wind in a school parking lot and were showing that information to others in the school and calling the child “dumb,” “stupid,” and “retarded.” A state appeals court upheld the jury verdict for the parents finding that the MGDPA required school districts to establish appropriate security safeguards for all records containing student data (*Scott v. Minneapolis Public Schools*, 2006).

Other Acceptable Use of Student Data In addition to exceptions for the release of individual records mentioned above, FERPA and states generally allow the use of student data when they are part of a set of student data and the individual students cannot be identified. A typical example of this is the reporting of state test scores for

NCLB purposes. NCLB requires disaggregated reports of a range of demographic categories but lets states set a minimum number of students for each category. Part of the purpose of this requirement is to prevent a small number of students in any category from skewing adequate yearly progress (AYP) efforts. Another reason is to prevent easy identification of students when there are only a few who fit in demographic categories.

Student data may also be used to develop programs for the benefit of students as a whole. In New Jersey, local social service agencies enlisted the help of the school district to administer a survey to middle and high school students asking about such things as their community and school involvement, relationships, sexuality, stress and depression, drug and alcohol use, sexual matters, and suicide attempts. The survey was supposed to be anonymous and voluntary and the results were to be utilized to determine how to use the town's programs and resources more effectively. The U.S. Court of Appeals found that while a jury could have inferred that the survey was really involuntary, the survey was anonymous. Any personal information was adequately safeguarded and any disclosure occurred only in a way that did not permit individual identification. Furthermore, as the survey was an attempt to understand and prevent social problems confronting youth, the Court found that the goal of the survey was laudable and pursued with the best interests of the students in mind (*C.N. v. Ridgewood Board of Education*, 2005).

Individuals with Disabilities Education Act

Students receiving special education services are another potential area that can cause school leaders legal trouble. Data collection and its use in decision making can influence the outcome of these disputes. The Individuals with Disabilities Education Act (IDEA, 2004) is the federal law that primarily controls this area of education. Its accompanying regulations, state statutes that supplement IDEA and their regulations, create a morass of rules and procedures that must be followed when deciding and implementing the appropriate educational program for a student with special needs. The use of data is very important in the creation of the individual education program (IEP) of special education students. As such, the information gathered before, during, and after the development of each IEP is heavily regulated and protected. Consequently, IDEA requires much more care over student records than FERPA as states are mandated by law to give special education students greater privacy rights than general education students (Stuart, 2005). Parents have access rights to the records and must be given consent prior to disclosure of the records to a party other than those participating in the educational program of the student. Also, a school must have a designated person to safeguard the confidentiality of special education student files and keep track of who has access to the files (IDEA, 2004).

In addition to record keeping, IDEA and its regulations require procedures for virtually every step of the special education process from testing for the need of services to appealing the adequacy of the provision of services. A thorough description of these procedures is beyond the purpose of this chapter but school leaders should be aware of the importance of following procedural requirements. Failure to

do so can cost a school district a great deal more time and money than compliance would have taken originally. By the same token, careful adherence to procedures and the gathering and proper use of appropriate evidence and materials throughout the special education process can protect school districts if legal action is taken against them. There are countless cases involving special education, but two examples may prove instructive.

In one such case, parents were unhappy over the implementation of their child's IEP. E.C., a child with multiple disabilities, was supposed to receive three 45-minute speech and language therapy sessions a week on three different days but did not receive therapy on the exact days and often not for the whole 45 minutes. In an appeal of an administrative hearing, the court found that the therapy sessions were shortened due to the student's fatigue and fading attentiveness. The therapist's schedule made it impossible to be in the school at the exact times originally scheduled but she added sessions to make up for her absence on the scheduled day. The court held that the shortcomings in meeting the exact words of the IEP did not constitute a failure to provide a free appropriate public education (*Catalan v. District of Columbia*, 2007).

Another common action by parents is to move their student to a private school and try to have the school district pay for it. In these instances, it is the responsibility of the school district to show that the IEP for a student is sufficient to provide a free appropriate public education in the public school. In a Massachusetts case, parents of a student requiring an IEP unilaterally placed their child in a private school. The court found that the parents had notified the school district of the intended move in a timely manner and the hearing officer found that the IEP did not adequately address the child's specific disabilities. The school district was therefore required to pay the tuition at the private school (*North Reading School Committee v. Bureau of Special Education Appeals of Massachusetts*, 2007). These types of decisions do not always favor the parent. Therefore, it is critical that school districts create an IEP based on appropriate data to support their position.

Conclusion

As federal initiatives such as NCLB have come to drive education policy, data-driven decision making has risen in prominence. More than ever, educational leaders must develop and use information systems for making important decisions in hopes of improving education and raising student achievement scores (Kowalski, Lasley, & Mahoney, 2008). Along with NCLB, other federal and state laws, constitutional protections, and court decisions must be considered when making decisions, even those based on data.

In this chapter, we have taken a glance at how law relates to the constitutional and statutory civil rights of both teachers and students. These laws and other federal statutes protecting teachers and students with disabilities and the privacy of students, influence both policy and personnel decisions. State laws protecting students' privacy and governing the protocol, procedures, and proof required in teacher discipline and dismissal decisions further encumber the decision-making process.

The use of data to drive decision making takes place in a complex and multi-faceted legal environment. Data are used to provide the basis and support for personnel decisions, student IEP formation, and policy, curriculum, and resource allocation decisions driven by NCLB and other laws. These data, however, must be created, managed, and used in compliance with the law. The cost of litigation is high and the wise educational leader who considers these legal dimensions before making new policies and during the decision-making process will be better situated to avoid or successfully face any legal challenges to those policies and decisions. In sum, whether decisions are in response to educational policy making and implementation, personnel decisions, or addressing student needs, using data to make objective, analytical, and informed decisions has important legal implications that should not and cannot be ignored.

Note

1. Two subsequent cases *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006) and *Weintraub v. Board of Education*, 489 F. Supp. 2d 209 (E.D. N.Y. 2007) call into question whether complaints like Settlegeoode's made in a work context would still be protected speech.

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