

Hot Topics for Elementary Principals



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Child Custody Issues in Schools



MARRIAGE COUNSELOR

“The secret to a long marriage? Never get divorced!”

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Important Definitions Nebraska Parenting Act

- **Custody** includes "legal custody" and "physical custody." NEB. REV. STAT. § 43-2922(7).
- **Legal Custody** – "the authority and responsibility for making fundamental decisions regarding the child's welfare, *including choices regarding education and health.*" NEB. REV. STAT. § 43-2922(13) (emphasis added).
- **Physical Custody** – "the authority and responsibility regarding child's place of residence and exertion of continuous parenting time for significant periods of time." NEB. REV. STAT. § 43-2922(20).

Important Definitions Nebraska Parenting Act

- **Joint Legal Custody**– mutual authority and responsibility "for making mutual fundamental decisions regarding the child's welfare, *including choices regarding education and health.*" NEB. REV. STAT. § 43-2922(11) (emphasis added).
- **Joint Physical Custody** - mutual authority and responsibility "regarding the child's place of residence and the exertion of continuous blocks of parenting time by both parents over child for significant periods of time." NEB. REV. STAT. § 43-2922(12).

Important Definitions Nebraska Parenting Act

- **Parenting Functions**– "those aspects of the relationship in which a parent or person in the parenting role makes fundamental decisions and performs fundamental functions necessary for the care and development of a child." NEB. REV. STAT. § 43-2922(17).
- **INCLUDES:** "Attending to adequate education for the child, including remedial or other special education essential to the best interests of the child." NEB. REV. STAT. § 43-2922(17)(c).

Child Custody Documents

- Property Settlement Agreement
- Parenting Plan
- Temporary Orders
- Decree

Custody Determinations Alone Are Not Necessarily Conclusive

"Regardless of the custody determinations in the parenting plan, unless parental rights are terminated, both parents shall continue to have the rights stated in section 42-381." NEB. REV. STAT. § 43-2929(4) (Nebraska Parenting Act).

In any divorce decree or modification, "regardless of the determination of the court relating to the custody of a minor child, (1) each parent shall continue to have full and equal access to the education and medical records of his or her child unless the court orders to the contrary"

NEB. REV. STAT. § 42-381.

Ugly Divorces



Ugly Divorce

- Mom and Dad have 3 kids in the district
- Dad has been gone, then moves back
- Modified order says:
 - Mom has legal/physical custody
 - Dad gets kids every other Wednesday night
- Dad asks for notification any time Mom is notified
 - School agrees, then gets tired of it...
- Dad comes to 3 different lunch periods every day, and Mom finds out and says, "You can't let him do that."

Ugly Divorce Questions

- Are schools required to notify both parents?
 - Generally, no
 - Unless required by law, such as special education
- Are schools required to honor requests for visitation?
 - Generally, no
 - Consider other parent visitation policies, such as lunch
 - Often abused by non-custodial parent

Uglier Divorce

- Mom and Dad divorced during the summer
- At the start of school, Mom brings in the order
 - Joint legal/physical custody, every other week
 - Mom ultimately makes education decisions
- Dad's plane is delayed, so asks Grandma to pick up
- Mom's coworker sees Dad's delay on Facebook
- Mom calls school and says
 - "I only authorize you to release my son to Dad, otherwise you have to call me."
 - "I get final say."

Uglier Divorce

- Does Mom have recourse if you release the kids to Grandma?
 - No!
- Does Dad have recourse if you don't release the kids to Grandma?
 - No!
- Both parents' rights are superior to yours
- Unless it was negligent to release student, schools win these cases

Ugliest Divorce

- Dad cheats on Mom, and all *hell* broke loose
- Joint physical/legal custody
- Dad starts dating "the other woman"
- Dad comes to school and authorizes his girlfriend to pick up the kids, sign documents, etc.
- Mom is irate, and "revokes" all consent
- Dad brings girlfriend to IEP meeting; Mom leaves
- Mom starts showing up every day to make sure "she" doesn't pick up the kids

Ugliest Divorce

- Can you grant Dad's authorizations? Can you deny them at Mom's request?
 - Yes!
 - Their remedy is the custody case
- Can Dad invite his GF to the IEP meeting?
 - Maybe, if she has particular knowledge of the child
- What if Mom and girlfriend get into a screaming match?
 - Call the police

Cases

- *Crowley v. McKinney*, 400 F.3d 965, 968-70 (7th Cir. 2005) (although divorce does not sever the parental relation with the child, it "does not follow that a public school is to be charged with knowledge of the contents of the divorce decrees of its students' divorced parents or that it must allow itself to be dragged into fights between such parents over their children. On the contrary, the more children of divorced parents there are, the greater the burden on schools of arbitrating the quarrels of divorced parents."
- *Pauley v. Anchorage Sch. Dist.*, 31 P.3d 1284 (Ak. 2001), *narrowed by Lane v. City & Borough of Juneau*, 421 P.3d 83 (Ak. 2018) (distinguishing between scope of qualified immunity for municipalities and that of its employees)

KSB POLICY 5020 Rights of Custodial and Non-Custodial Parents

The school district will honor the parental rights of natural and adoptive parents unless those rights have been altered by a court.

The term "custodial parent" refers to a biological or adoptive parent to whom a court has given primary physical and legal custody of a child, and a person such as a caseworker or foster parent to whom a court has given legal custody of a child.

The district will not restrict the access of custodial and non-custodial parents to their students and their students' records, unless the district has been provided a copy of a court order that unambiguously prohibits access to the records or child by either parent. If the district is provided such a court order, school officials will follow the directives set forth in the order.

The district will provide the custodial parent with routine information about his or her child, including notification of conferences. The district will not provide the non-custodial parent with such information on a routine basis, but will provide it upon the non-custodial parent's request unless it has been denied by the courts.

A non-custodial parent who wishes to attend conferences regarding his or her child will be provided information about conference times so both parents may attend a single conference. The district is not required to schedule separate conferences if both parents have been previously informed of scheduled conference times.

If either or both parents' behavior is disruptive, staff members may terminate a conference and reschedule it with appropriate modifications or expectations.

Custody, Access, & Parental Decisions

TYPE OF CUSTODY	RIGHT TO INSPECT AND REVIEW EDUCATIONAL MATERIALS	RIGHT TO REQUEST AMENDMENT OR REMOVAL OF RECORDS	RIGHT TO ATTEND IEP MEETINGS	RIGHT TO CONSENT TO EVALUATIONS, TO IEP, AND IDEA MATTERS	RIGHT TO FILE FOR DUE PROCESS AND MEDIATION
SOLE CUSTODY (Legal Custody)	Yes	Yes	Yes	Yes	Yes
NON-CUSTODIAN (visitation or physical custody)	Yes	Yes	Yes	No	No
JOINT LEGAL CUSTODY	Both parents have this right	Both parents have this right	Both parents have this right	Each parent has right; Only one signature required	Each parent has this right

Parents' Rights in Special Education



"So, is it safe to assume he behaves like this at home as well?"

Who is a parent for SPED purposes?

- Parent, as defined in Rule 51, is:
 - Biological or adoptive parent of a child
 - Foster parent
 - Legal guardian
 - Individual acting in place of parent, with whom child lives, or person who is legally responsible for child
 - Surrogate parent who has been appointed pursuant to 92 NAC 51.009.10B - NOT HHS!!!

Who is a parent for SPED purposes?

- Bio or adoptive parent must be presumed to be the parent unless the parent does not have legal authority to make educational decisions
- Judicial degree or order can identify a specific person or persons to act as the "parent" or to make educational decision on behalf of child

Who is included at IEP meeting?

- Both parents – even if one parent has sole custody
 - Caveat:
 - If there is a court order precluding a parent from participating in a child’s education or otherwise barring the parent from school grounds

Who is included at IEP meeting?

- If there is a court order barring a parent from school grounds, limiting parent’s ability to be in contact with other parent and/or child
 - Get parent input on phone
 - Convene two separate meetings

You be the judge

- Fourth grader with autism lived with mother and stepfather.
- In 2010, family court gave mother exclusive authority to make educational decisions
- In 2013, order for “Protection from Abuse” required bio-dad not to contact mother and child, stay 100 yards away from both, and to relinquish any firearms

You be the judge

- IEP meeting held in August 2013, bio-dad not invited or included
- Protection order lifted February 2014
- IEP meeting held May 2014, bio-dad included but checked for weapons at door; stepdad included at mom's request as "someone who was familiar with the student"

You be the judge

- Father alleged that the district violated IDEA by not including him in the 2013 IEP meeting and by allowing his ex-wife's spouse to attend the 2014 meeting.
- Is the district in violation of the father's right to participate?

You be the judge

- A – No, the mother had sole educational decision-making authority
- B – Yes, the father is a required member of the August meeting
- C - No, the father had no IDEA rights as long as the protection order was active

You be the judge

- Based on court findings in *Cape Henlopen Sch. Dist.*, (2014):
- Parent’s rights may be limited by court order
- Here, 2010 decree specifically granted educational decision-making authority to mom and dad possessed no educational rights under IDEA

You be the judge

- Also, judicial decree prohibiting dad from contacting mom and child also in effect – would have been direct violation of a court order if district had included dad in 2013 IEP meeting
- Regarding stepdad’s participation, parents have the right to invite “other individuals who have knowledge or special expertise regarding a child to be a member of the child’s IEP team

You be the judge

- Determination “shall be by the party. . . who invited the individual to be a member of the IEP team.”
- District may have been in violation of IDEA if they did not allow stepdad to attend the meeting at mom’s request

Parents with restraining orders

- Phone call conference at the IEP meeting
- Case manager, IEP team calls the parent separately
- Convene two meetings
- Allow advocate in place of parent

Consent

- Consent = Parent fully informed in native language or other mode of communication about action they are giving consent, agree in writing, understands consent is voluntary and may be revoked at any time
- There is no requirement that consent be provided by both parents
- Warning: A court order can change this! Check the court order

Consent

- If a parent sends an advocate in his/her place, the advocate may not consent on behalf of parent
 - IDEA requires a parent's consent
- If court order provides for joint custody and contains nothing that says both parents must consent, one signature is enough under IDEA

Revoked Consent

- Who can revoke consent:
 - Either parent in absence of court order
 - Either parent with joint custody
 - The parent with educational decision-making authority
 - Need not be the parent that initially consented to services
 - Parent without decision-making authority is not considered a parent under the definition of IDEA

Revoked Consent

- Non-consenting parent with joint decision-making authority can revoke consent for services under IDEA, *Letter to Ward, 56 IDELR 237, OSEP 201*
- If a parent revokes consent, the district must:
 - Provide prior written notice
 - Cease providing services
 - Any subsequent evaluation requests by either parent is to be treated as a request for an initial evaluation

Revoked Consent

- There is no limit to the number of times a parent can revoke consent for services and then request initial evaluations again
- Family court could get involved to determine whether the student should be classified
- If the cycle becomes harmful to the student and rises to neglect, a referral to protective services is required

Releasing Documentation

- No legal requirement to give notice to other party when documents are released to one parent
 - Nothing precluding it
- IEP and educational records must be sent upon request to noncustodial parent who retains the right to review educational record

What Can You Do With Violent Elementary Students?

I drink because you pretend to throw the ball, Dave.



Seclusion and Restraint

- Lots of guidance and recommendations
- Nothing in state or federal law prohibits it or requires a policy
- BUT . . .
 - Check your policies
 - Training
- Policies and training could establish standard of care

At School/NDE

- Termination/Nonrenewal/Cancellation.
- Rule 27
 - Shall make reasonable effort to protect the student from conditions which interfere with the learning process or are harmful to health or safety.
 - Shall not discipline students using corporal punishment.
 - Resolve discipline problems in accordance with law, school board policy, and administrative regulations and policies.
 - Shall not show disrespect for or lack of acceptance of others.
 - Shall provide leadership and direction by appropriate example.
 - Shall appropriately control his or her emotions.

Child Abuse

- Knowingly, intentionally, or negligently causes or permits a minor child to be:
 - Placed in a situation that endangers his or her life or physical or mental health; or
 - Cruelly confined or cruelly punished.
- Penalties range from no minimum to a maximum of life in prison

Assault

- 1st, 2nd, or 3rd Degree
- Penalties range from no mandatory minimum to a maximum of 50 years in prison

Criminal Court Defenses

- 28-1409 - Use of force in self-protection
 - The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

Criminal Court Defenses

- 28-1409 - Use of force in self-protection
 - (1) the belief that force is necessary must be reasonable and in good faith;
 - (2) the force must be immediately necessary, and
 - (3) the force used must be justified under the circumstances.
- See [28-1409](#) and [28-1414](#) for rules and exceptions.

Following deleted from 28-1413:

- The use of force upon or toward the person of another is justifiable if:
- The actor is a teacher or a person otherwise entrusted with the care or supervision for a special purpose of a minor and:
 - [t]he actor believes that the force used is necessary to further such special purpose, including the maintenance of reasonable discipline in a school, class or other group, and that the use of such force is consistent with the welfare of the minor[.]

Criminal Court Defenses

Following remains in 28-1413:

The use of force upon or toward the person of another is justifiable if:

(1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian, or other responsible person and:

(a) Such force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his or her misconduct; and

(b) Such force used is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress, or gross degradation;

Civil Court

Constitutional Standard - "Shocks the conscience"

• So severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to brutal and inhumane abuse of official power literally shocking to the conscience.

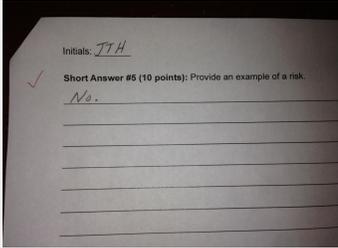
• Whether conscience-shocking conduct has occurred is tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

Civil Court

Negligence Standard

• Negligence is defined as doing something which an ordinary, prudent person would not have done under similar circumstances or failing to do something which an ordinary, prudent person would have done under similar circumstances.

Corporal Punishment SCOTUS



Ingraham v. Wright

430 U.S. 651 (1977)

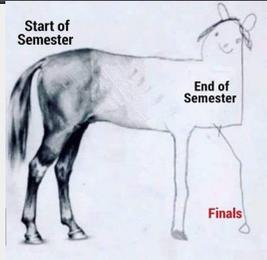
- 5-4
- Paddlings – kept one junior high student out of school for several days and another full use of his arm for a week.
- Cruel and Unusual punishment clause of 8th Amendment
 - applies to criminal convictions
 - Does not apply to corporal punishment in school

Ingraham v. Wright

430 U.S. 651 (1977)

- “Reasonable” CP authorized and limited by common law.
- Common law only prohibits “excessive” CP
- “Public school teachers and administrators are privileged at common law to inflict only such corporal punishment as is reasonably necessary for the proper education and discipline of the child[.]”

Nebraska



Corporal Punishment in Nebraska

- LB 955 by Chambers in 1988
- Introduced at request of pediatrician
 - "My feeling is that violence **unless for self-protection**, has no basis in our current school system."

Committee Hearing

- Supported by now ACLU Nebraska:
 - "NCLU readily acknowledges that government has a compelling interest in seeing that children are educated, and **this necessarily entails a compelling interest in assuring that there is order in public schools.**"

Committee Hearing

SENATOR [JERRY] CONWAY: ... [I]s corporal punishment that particular term, defined some . . . in the statutes elsewhere; or did you purposely not define it or?

SENATOR [ERNIE] CHAMBERS: It's a term that is so well known in terms of its meaning. There have been court cases dealing with this subject that it doesn't require a definition.

Corporal Punishment in Nebraska

- Amended into LB 316 in 1988
- No floor debate of corporal punishment
- LB 316 passes
- 79-295
 - "Corporal punishment shall be prohibited in public schools."

Daily v. Board of Educ.

256 Neb. 73 (1999)



Daily v. Board of Educ.

256 Neb. 73 (1999)

- Corporal punishment is reasonably understood to be:
 - (1) **the infliction of bodily pain**
 - (2) **as a penalty for disapproved behavior**
- It's prohibited!

79-258

- Administrative and teaching personnel may take actions regarding student behavior . . . which are:
 - **reasonably necessary**
 - to aid the student
 - further school purposes **or**
 - prevent interference with the educational process.

Daily v. Board of Educ.

256 Neb. 73 (1999)

"We determine that § 79-258, while obviously not authorizing corporal punishment, does provide authority for school teachers and administrators to use physical contact short of corporal punishment **to the degree necessary** to preserve order and control in the school environment."

Daily v. Board of Educ.

256 Neb. 73 (1999)

- "Moreover, the statute **authorizes an acceptable level of incidental physical contact**, as is necessary for teachers to promote personal interaction with their students."
- A certain amount of incidental physical contact is virtually unavoidable for people working together in a social environment."

Daily v. Board of Educ.

256 Neb. 73 (1999)

- "Contact that does not cause pain is simply not CP."
- "CP also does not include physical contact that is not **intended** to punish a student for disapproved behavior but is instead **intended** to preserve order in the schools or intended to protect persons or property from harm."***
 - ***Intent often inferred from what happened immediately preceding physical contact.

Daily v. Board of Educ.

256 Neb. 73 (1999)

- **Not corporal punishment:**
 - Grabbing face and turning to face teacher
 - Touching student to remove a pencil from hand
 - Grabbing student by his shoulders, restraining him ("had to kind of fight him to get him back to his seat", and returning him to his seat)
- **Corporal punishment**
 - Smacking kid on back of head hard enough to make cry
 - Slapping a student
 - Forcing S to stand on tiptoes with fingertips outstretched against wall or crouch and bend over and remain in cramped, painful positions for a long time

Other Reported Nebraska Cases

- *Johanson v. Board of Educ.*, 256 Neb. 213 (1999) – declined to determine if placing **soap on student’s tongue** was CP; labeled “unprofessional”
- *Cornhusker Christian Children’s Home v. Department of Social Services*, 227 Neb. 94 (1987) – court implied that **spanking on the buttocks with an open hand or suitable instrument** for the purpose of inflicting temporary pain is CP.

Other States – Actions that are CP

- Slapping a student
- Striking student’s head against locker
- Kicking a student
- Placing student in headlock
- Kneeing student in the back
- Choking and pulling on student’s neck
- Dragging
- Head-butting
- **Compelling exercise**
- **Requiring position holds**
- Sticking with pins
- Taping head to tree
- *Rush v. Board of Educ.*, 312 Ill. App. 3d 473(Ill. App. Ct. 3d Dist. 2000) – 16 year teacher allowed students to trade class detentions for electric shocks from a small engine.

CP in Other States

- hitting student in mouth, grabbing and squeezing student’s neck, punching student in chest, and throwing student headfirst into lockers
- hitting student with metal weight lock, **blinding student** in one eye
- forcefully punching student with closed fist in the upper chest/collarbone area
- wrestling coach allegedly instituted, permitted, and encouraged team members to repeatedly beat athlete’s bare torso until it turned red, known as “**red bellies,**” as a means of discipline and a way to force an unwanted member to quit team which has a no-cut policy
- slapped, pulled up, and pushed toward door
- grabbing student in **chokehold and causing student to lose consciousness** and fall to the pavement resulting in student **breaking his nose** and **fracturing teeth**

CP in Other States

- squeezing child ears, stepping on insteps, grabbing child's neck, forcing child to the floor, hitting legs and head with tissue box, pulling hair, and verbally abusing child
- tapping student on head with grade book
- throwing student into blackboard
- dragging student across room and banging student's head against metal pole
- head-butting
- Hitting with water bottle
- Hitting with plastic bat
- repeatedly striking 13-year-old student with a metal cane, including once on the head as he was doubled over protecting his chest
- Placing child in "basket hold"

CP in Other States

- Handcuffing student
- runs, burpees, push-up, and lunges
- forcing student with asthma was required to do jumping jacks, sit-ups, and walking

NOT CP in Other States

- Momentarily grabbing student's wrist and elbow and escorting from class
- Under circumstances and although noting teacher's choice of method was inappropriate, teacher's act of grabbing and squeezing student's neck was not CP and was justified given that student repeatedly disobeyed teacher's command to be seated and given that student first touched teacher by forcing her hand from doorframe notwithstanding slight bruising and red marks on student's neck as well as temporary loss of breath
- After blocking teacher from intercepting another student, tried to evade teacher by going under her elbow or arm, collided with teacher's elbow, hips, and ribcage, then crashed into door, hitting head resulting in injury
- PE teacher's horseplay and "rough-housing" with student not CP although during one incident student's head was shoved in a trash can and student was pulled out by his legs

Questions?

First Amendment Issues

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"Not only did I get off on the wrong foot,
I put it in my mouth and then shot myself in it."

Unique Aspects of 1A in Elementary

- Equal Access Act only applies to "secondary schools" but not "elementary schools" as defined "in state law"
- "[T]he Supreme Court has not squarely defined the First Amendment rights of elementary school students, and student age is an appropriate consideration...."
- Most courts *assume* *Tinker* applies
- Younger students are "more impressionable"
 - *Bethel*: "especially" concerned about younger students
 - *Lemon*: "impressionable age of the pupils"
 - *Good News Club*: "elementary school children are more impressionable than adults"

Religion in Elementary Schools



Gilio v. Sch. Bd.

905 F. Supp. 2d 1262 (M.D. Fl. 2012)

- J.G. was in 4th grade
- J.G.'s church organized Easter egg hunt and provided invitations for young congregants to hand out at school
 - "Why: To have fun and learn the true meaning of Easter"
- Board had 2 policies on distributing "literature from outside organizations"
 - 9700: "b. When the event or activity is sponsored by a religious institution/organization, the flyer may not contain a proselytizing message (i.e., promote the benefits of the specific religion)"

Gilio v. Sch. Bd.

905 F. Supp. 2d 1262 (M.D. Fl. 2012)

- Board had 2 policies on distributing "literature from outside organizations"
 - 5722: administration could deny materials which "[s]eek to establish the supremacy of a particular religious denomination, sect, or point of view over any other religious denomination, sect, or point of view[.]"
- Students were permitted to distribute birthday invites, Valentines cards, etc.
- Substitute teacher asked principal
 - "We are not allowed to pass out fliers related to religious events or activities. Thank you for your understanding."

Gilio v. Sch. Bd.

905 F. Supp. 2d 1262 (M.D. Fl. 2012)

• School's arguments:

- By giving approval of anything to be distributed, it becomes "school-sponsored speech"
- We get "greater leeway" in limiting student expression in elementary schools
- 4th graders have a right to avoid proselytizing messages
- Tinker doesn't apply in elementary school

Gilio v. Sch. Bd.

905 F. Supp. 2d 1262 (M.D. Fl. 2012)

• Court: Oh, come on!

- The school's vigilance toward not violating the Establishment Clause proves too much
 - The invitation had the church's address and J.G.'s mom's info
- *Tinker* applies and elementary students have First Amendment rights
- No material and substantial disruption
- Student distributions are different than other outside groups' religious distributions
- Both policies on their face and as applied to J.G. are unconstitutional



M.V. v. Liverpool Cent. Sch. Dist.
487 F. Supp 2d 117 (S.D.N.Y. 2007)

- M.V. distributed a religious "Halloween tract" in 3rd grade
- Distributed "Cleo" in 4th grade, which "analogizes the recovery of a lost dog to Christian salvation"
- Warned that she could get "in big trouble" for distributing those types of flyers
- School allowed countless other groups to distribute flyers and information
 - Policy said flyers must serve educational purpose and be for the "good of all our children"
- In 5th grade, M.V. asked to distribute the following:

Flyer 1

JESUS SAVES!!

Hi! I am [M.B.] and would like to tell you about Jesus Christ and God His Father.

1. God sent his son (Jesus Christ) to come down on Earth and die on the cross for our sins.
2. God loves us so much he made a way for us to get to Heaven (which is why he sent his son here to die on a cross).
3. Here is a verse from the Bible for you to read: (In Romans 10:9) That if thou shalt confess with thy mouth the Lord Jesus, and shalt believe in thine heart that God hath raised him from the dead, thou shalt be saved. Jesus said, "Ye must be born again."
4. I am going to ask you to please take the time to pray the simplest prayer (which can be like) Dear Lord Jesus, please forgive me, I am a sinner and don't want to die and burn in a pit of fire for an eternity! Please come into my heart and by my personal Lord and Savior. In Jesus name I pray. Amen.

Flyer 2

Hi! My name is [M.B.] and I would like to tell you about my life and how Jesus Christ gave me a new one. I asked Him to come into my heart and save me from my sins. This is what he has done for me.

1. Jesus Christ helped my parents decide to get remarried in November and then I will get to see my dad every day.
2. He helped [me] memorize Bible verses and say them in front of my church.
3. He helped me learn piano and play psalms and hymns and sing with grace in my heart to the LORD.
4. God cared enough about me that He gave me the victory over thinking about something bad that happened to me.
5. Now that I am saved, God gave me a peace in my heart and the truth that I am going to heaven instead of the other place.

PRAISE THE LORD!

M.V. v. Liverpool Cent. Sch. Dist.
487 F. Supp 2d 117 (S.D.N.Y. 2007)

- School made many arguments, including the "tender age" of 5th graders and the "Endorsement problem"
- Court
 - The school day is normally a "closed forum" but the school clearly created a "limited public forum" by practice
 - *Hazelwood* governs speech the school "promotes"; *Tinker* governs speech the school "must tolerate"
 - There was no evidence of material and substantial disruption
 - You can't selectively invoke age
 - No Endorsement problem, because the purpose, effect, and entanglement do not exist or were dreamt up after the fact
 - Policy is unconstitutional on its face because the subjective analysis is a "virtual prescription for unconstitutional decision making"



Taylor v. Roswell Indep. Sch. Dist.
713 F.3d 25 (10th Cir. 2013)

- "Relentless" group students active in 2 schools in NM
- Strong anti-abortion views
- Campaign "to put God back into the schools"
- Really clever tactics
 - Began by giving 220 McChicken sandwiches to students/staff
 - Next, they gave hot chocolate and candy canes with religious messages on them ("affirmation rocks")
- Never reprimanded, told to stop, or directed to follow the policy

Taylor v. Roswell Indep. Sch. Dist.
713 F.3d 25 (10th Cir. 2013)

- In January, they began the "Rubber Fetus Doll" campaign
 - 2,500 dolls
 - 2 inches tall
 - Card attached explained the doll "was the actual size and weight" of a 12-week old baby
 - One side of the card directed people to a pregnancy resource center
 - Other side had Psalm 139:13-14 ("You wove me in my mother's womb")



Taylor v. Roswell Indep. Sch. Dist.
713 F.3d 25 (10th Cir. 2013)

- Set up tables and began distributions at 7:30 AM
- Principal saw students throwing "small rubber balls" which were "dismembered heads" of the dolls
- Several female students stopped to complain
- Principal took the dolls and told them they could get them at the end of the day
- Students had distributed 300 dolls in once school and a similar amount in the other

Taylor v. Roswell Indep. Sch. Dist.
713 F.3d 25 (10th Cir. 2013)

- "Both schools experienced doll-related disruptions that day."
 - Dismembered dolls stuck on pencils and all over school
 - Stuck to the "popcorn ceilings"
 - Dolls were used to plug toilets
 - Covered in hand sanitizer and lit on fire
 - Removed the dolls' heads and inverted the bodies to make them look like penises
 - Hung them outside their pants' zippers
 - Thrown across classrooms
 - Took "8-10 minutes" of instructional time
 - Honors freshman English class was cancelled due to name calling

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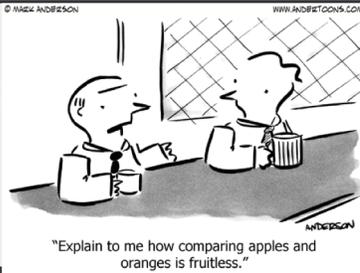
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- Relentless students were told no more distribution
- Group tried to distribute again on Valentine's Day when other students were distributing things
- Those students did not have to get prior approval
- Relentless then began distributing other items: bracelets, stickers, plastic Easter eggs, pencils, and dog tags with anti-abortion messages
- Start of next school year, they "surreptitiously" left 1,000 donuts in the faculty lounges of both schools with Galatians 6:9 stickers
- Donuts were confiscated due to "health concerns"

Taylor v. Roswell Indep. Sch. Dist. 713 F.3d 25 (10th Cir. 2013)

- Relentless sued for free speech and religious violations, and argued that the policies were unlawful
- Parties **agreed** that 1st Amendment applied and the school could confiscate dolls from students who misbehaved
- Court
 - Clearly this is not school-sponsored speech
 - There was material and substantial disruption, and the school "reasonably forecast" that there would be future disruption
 - "The dolls' small size made them tempting projectiles and toilet-clogging devices."
 - This is not "banning leafleting because of litterbugs," because inside the school walls it's about order and safety

What about outside groups?



Other Unique Speech Issues

Iowa ACLU tells schools to vet guest speakers carefully after group hands out anti-gay, anti-Mormon materials

An After School Satan Club could be coming to your kid's elementary school



Other Unique Speech Issues

"The School District is not required to maintain this open forum and is free to close it rather than allow FFRF to distribute materials," FFRF Staff Attorney Andrew Seidel wrote in a March 3 letter to the district. "We do not think schools should be a battleground for religious ideas. But when schools allow the Gideons to prey on children, their message of eternal damnation for any who don't believe in their God must be countered."



Pro-Bible district changes mind about religion in school after being forced to hand out Satanic fliers

Quick Notes Religious Opt-outs

- Districts have broad discretion to excuse individual students from lessons on religious/conscientious grounds
- Students generally do not have a federal or state right to excusal from generally applicable curriculum for religious purposes
- School officials may neither encourage nor discourage students from requesting such excusal
- Excusal or denial will be based on policy—read it now!

Takeaways

- Assume *Tinker* applies, and document disruption
- Review your policies!
 - Is there a difference between student distribution and outside group distribution?
 - Are you consistent in permission requirements (policy or practice)?
- Be consistent with "time, place, and manner" restrictions
 - Before/after school vs. during school
 - Take-home folders **vs.** in-class distribution **vs.** the bulletin board or information table

New Title IX Regulations

TITLE IX

I know what you're thinking....



"This may be a problem."

Title IX

▪ "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

• Purpose: To combat the "corrosive and unjustified discrimination against women in the American educational system."

--Senator Bayh of Indiana

**What Is Discrimination
"On The Basis Of Sex"?**

- Any disparate treatment based on a person's sex
 - Does not require hostility or intent to harm; difference in treatment is enough
 - Usually proved by circumstantial, not "smoking gun" evidence
- Includes "sexual misconduct"
- Includes pregnancy and related medical conditions
- Includes gender stereotyping (and maybe sexual orientation and gender identity)

General Duties Under Title IX

- Upon notice of sexual harassment or sexual violence occurring within an educational program/activity:
 - Report to appropriate admins/coordinator
 - Take prompt and effective action to:
 - End the misconduct
 - Prevent its recurrence
 - General expectation:
 - Conduct investigation and
 - Institute remedies as appropriate
 - Prompt timeline for completion

Title IX Coordinator

- "Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under [Title IX], including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part"
- 34 C.F.R. § 106.8(a)

Elementary Title IX Issues So Far This Year.....

- Upper elementary student sexually assaulted preschool student on the bus
- 2nd grade student kissed and groped 3rd grade student on the bus
- 5th grade boy exposed himself to peers on playground
- Elementary students in the background of party snaps, which include sexual activity by high school students

The New Regulations



"I don't make the rules, folks — I just carry them down the mountain."

Formal Title IX Complaints

- District must only investigate written complaints
- Title IX Coordinator must file if district has "actual knowledge" and the reported conduct could create a hostile environment *even if the student who is complaining does not wish to make a formal complaint.*
 - Actual knowledge = any teacher in the elementary and secondary context"
 - must file if two or more complaints about the same person/situation

Single Investigator Model Prohibited

- Same person can't investigate, determine guilt and impose consequences
- But SDA requires Principal to do all those things
- District may not be able to name superintendent Title IX Coordinator under this model
 - Who is next in line? ;-)

Investigation Must follow Formal Processes

- Notice to parties
- Time for students to prepare for interview and to have someone present when interviewed
- Must be allowed to ask questions and follow up questions to other party
- Copies of all evidence and draft report
- Chance to submit a written response
- Formal Written Report

Decision of Guilt and Consequences Must follow Formal Processes

- Must be up chain of command
- Formal Written Report
- Parties must be provided copies

Appeals

- Do not have to provide a chance to appeal
- Must provide same appeal rights to both parties
- SDA implications?

- So how would the new regulations apply to elementary school issues?

