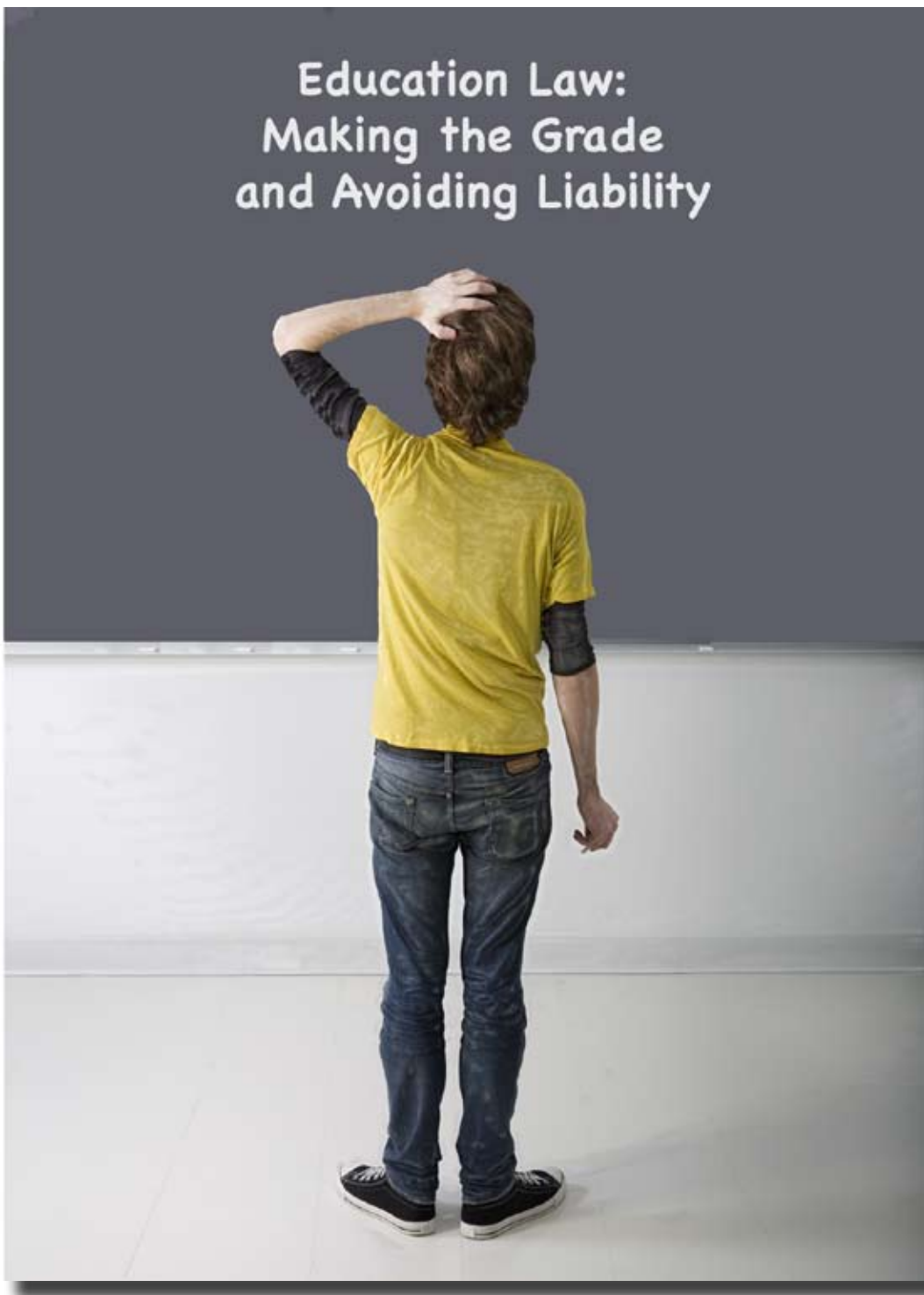


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STUDENT SEARCH & SEIZURE

in the Public Schools— A Legal Analysis

By Melissa Wurtzel O'Shea and John F. Kennedy
Cuddy, Kennedy, Ives & Archuleta-Staehlin, LLP



Any discussion of the legality of in-school searches carried out by public school officials must necessarily focus on the benchmark decision of the Supreme Court in *New Jersey v. T.L.O.*¹

In 1985, the Supreme Court, by a 6-3 vote, held that the warrant and probable cause requirements that generally apply to police-initiated searches do not apply to searches conducted by school personnel. However, a school search must be “justified at its inception” based on reasonable grounds for suspecting the search will reveal evidence of a violation of law or school rules. Additionally, the search must be reasonable in its scope and “not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” Thus, the Court adopted a “reasonable suspicion” standard which “will . . . neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of school children.”²

The *T.L.O.* standard requires educators to act in a reasonable manner, considering all the circumstances that lead up to the search and cause the educator to continue the search. Under *T.L.O.*, reasonable suspicion to initiate a search is dependent upon the totality of the circumstances. Thus, a school official need not separately analyze the importance of each observation or piece of information she acquires

when determining whether to engage in an investigation of student misconduct or search of students or property.

Pocket Searches

In the course of their duties, school officials conduct a number of different types of investigations, depending upon the nature of the problem that arises to confront them. One of the most typical school search situations occurs when a student, concerning whom suspicion has arisen, is taken to the school principal to be questioned about the matter. If the principal is not satisfied by the student's responses to the questions, and if the principal suspects that the student may have contraband on his person, the typical next step is for the principal to request or direct the student to empty his pockets. In *Stern v. New Haven Community Schools*,³ a federal district court in Michigan held that such

a pocket search was lawful because the school official had reasonable suspicion or reasonable cause to believe that the student had contraband on his person. (Since this decision used a “reasonableness under all the circumstances” test, it likely retains validity post-*T.L.O.*, provided the intrusion on the student's privacy is viewed as not unreasonable.)

Locker Searches

Where schools have a policy retaining joint ownership over lockers or advising students that the school retains ownership and control of lockers, or that students have no reasonable expectation of privacy in their locker, searches of lockers have been upheld without the need for reasonable individualized suspicion. See *Zamora v. Pomeroy*⁴; *State v. Stein*⁵; see also New Mexico Administrative Code, NMAC 6.11.2.10B.

Car Searches

Although a student's car is perhaps even more sacred to the student than his locker, the standards of reasonableness established by *T.L.O.* have been applied to such searches of student vehicles parked on school property when undertaken by school officials. *In re P.E.A.*⁶; NMAC 6.11.2.10B(4)(b).



Strip Searches

Any search can be controversial, but few are as likely to draw public criticism as strip searches. Understandably, courts have disfavored and have thus tended to scrutinize strip searches more carefully than other types of searches. To be upheld, the search must be reasonable at its inception and reasonable in scope depending upon the circumstances. The New Mexico Court of Appeals in *Kennedy v. Dexter Consol. Schs*⁷ held that due to the typical adolescent's self-consciousness about his or her body, requiring a student to strip to undergarments is sufficiently offensive to require the protection of at least individualized reasonable suspicion.

Drug Testing

Where there is no individualized suspicion or belief that the student possesses or is using drugs and/or alcohol, it has been ruled to be violative of a student's Fourth Amendment rights to require routine or random urine tests to identify users. *Odenheim v. Calstadt-East Rutherford Regional School District*.⁸ In March 1995, the U.S. Supreme Court decided *Vernonia School District No. 47J v. Acton*.⁹ There the Court upheld the use of random urinalysis drug testing of students who participate in athletic programs at secondary schools. The 6-3 decision shattered the barrier that school officials must have reasonable individualized suspicion to conduct a student search.

The use of drug-sniffing dogs to conduct general searches of student lockers and cars has been upheld on the theory that a person does not have a reasonable expectation of privacy in the air surrounding an inanimate object in a public place. Simply put, such is not a search. See *Zamora v. Pomery*¹⁰; *Horton v. Goose Creek Consol. Indep. Sch. Dist.*¹¹ The courts have split over whether a sniff of a student's person by drug-detection dogs constitutes a search and is therefore unreasonable unless based on individualized suspicion supported by specific or articulated facts.

New Mexico Cases

Within New Mexico, the courts have enunciated the following factors for consideration when determining the sufficiency of cause to search a student: the child's age, history and record in the school; the prevalence and seriousness of the problem in the school to which the search was directed; the exigency to conduct the search without

delay; and the probative value and reliability of the information used as a justification for the search. *Doe v. State*.¹²

In *State v. Tywayne H.*,¹³ two high school students attempted to enter a school dance through the wrong door. A non-school assigned police officer stationed at the dance smelled alcohol on one of the students and the student admitted to drinking beer outside the dance. The officer conducted a pat-down search and discovered a gun on one of the students. In a criminal proceeding, the student, moved to suppress the gun, arguing the search was unlawful. The Court determined that the "reasonable suspicion" standard applicable to school searches did not apply to a student search conducted completely at the discretion of a police officer. In contrast, in *In re Joshua T.*,¹⁴ a commissioned police officer, assigned and paid as the resource officer at the high school, conducted a student search during school hours when the student smelled of marijuana and became evasive upon questioning by a school official. The school official requested that the resource officer search the student. A gun was found. The Court ruled that a school resource officer needs only reasonable suspicion to search a student at the request of a school official.

Given these judicial rulings over the last several decades, courts will continue to balance the student's legitimate expectations of privacy against the school's equally legitimate need to maintain an environment in which learning can take place, based upon the reasonableness under the totality of the circumstances test. This court-imposed balancing test for search and seizure in the public schools simply provides a measure of the public's priorities by which reasonableness might be determined. So long as there is either a real or perceived threat to students or others because of drugs and violence, courts will continue to recognize that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."¹⁵

Endnotes

- ¹ *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).
- ² 469 U.S. 325.
- ³ *Stern v. New Haven Community Schools*, 529 F. Supp. 31 (E.D. Mich. 1981).
- ⁴ *Zamora v. Pomery*; 639 F.2d 662 (10th Cir. 1981).
- ⁵ *State v. Stein*, 203 Kan. 638, 456 P.2d 1 (1969).
- ⁶ *In re P.E.A.*, 754 P.2d 382 (Colo. 1988).
- ⁷ *Kennedy v. Dexter Consol. Schs*, 124 N.M. 764, 955 P.2d 693 (1998)
- ⁸ *Odenheim v. Calstadt-East Rutherford Regional School District*, 211 N.J. Super. 54 (1985).
- ⁹ *Vernonia School District No. 47J v. Acton*, 515 U.S. 646 (1995).
- ¹⁰ 639 F.2d 662.
- ¹¹ *Horton v. Goose Creek Consol. Indep. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1983).
- ¹² *Doe v. State*, 88 N.M. 347 (1975).
- ¹³ *State v. Tywayne H.*, 123 N.M. 42, 933 P.2d 251 (Ct. App. 1997).
- ¹⁴ *In re Joshua T.*, 128 N.M. 56, 989 P.2d 431 (Ct. App. 1999)
- ¹⁵ 469 U.S. at 325.

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Primer on Federal Statutes Affecting Technology On and Off School Grounds

By Yolanda R. Gallegos



Increased reliance on advanced communication technologies by schools has blurred the line between off- and on-campus activities. What is communicated off-campus can be instantaneously disseminated on-campus. An off-campus activity that would have posed no threat of liability in the past can now place a school in jeopardy of being subject to drawn out, high-profile litigation. This article will briefly

discuss some of the federal statutes affecting technology that commonly come into play on campuses. Many of these laws were passed only in the last few years and are still being interpreted by the courts. Nevertheless, familiarity with these laws can assist school officials in drafting and enforcing acceptable use policies, thus avoiding costly disputes.

Technology-Related Statutes

Electronic Communications Act of 1986

In the Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. § 2510, *et seq.*, Congress amended the Wiretap Act to extend both criminal and civil liability for wiretapping to Internet transmissions as well. The ECPA imposes liability for the intentional interception of a wire or electronic communication or the intentional disclosure of the contents of the interception. To a lesser degree, the ECPA also limits access to stored electronic communications. The statute also bars both government surveillance without a court order and access by third parties, including Internet service providers, without legitimate authorization to access the communications.

The statute provides a specific exemption from its coverage in cases where at least one party to the communication has consented to the interception. Thus, if the party carrying out the interception is a party to the communication, the statutory prohibition of the ECPA would not apply. *See* 18 U.S.C. § 2701(c). For example, there was no statutory violation when a student uploaded on YouTube the angry voice mail of the wife of an administrator at a Virginia high school after the student called her husband complaining about his decision not to call a snow day. <http://www.youtube.com/watch?v=JNfJA0Q80bA>. The student could publish the voice mail for the world to hear because he was the intended recipient of the communication. However, a school runs the risk of ECPA liability when faculty or staff members seize students' electronic devices and access e-mails, voice mails, and text messages not addressed to them. *See, e.g., Klump v. Nazareth Area School District*, 425 F. Supp.2d 622 (E. D. Pa. 2006).

The ECPA also contains an exception for the provider of the electronic communications service. This exception has been viewed generally as applying to employers. The law is not yet entirely settled on whether schools are considered a provider; however, it is more likely that this exception would be applied to schools if the school has announced a monitoring policy, obtained consent to monitor, and has followed its acceptable use policy. In this way, the school is exerting control over the electronic communications and would be acting as a provider in this sense.

Communication Decency Act

Congress passed the Communication Decency Act in 1996 to prevent minors' access to inappropriate Web sites on the Internet. *See* 47 U.S.C. § 230. The CDA prohibits the knowing transmission, by means of a telecommunications device, of "obscene" communications to any

Acceptable Use Policies

A well-drafted acceptable use policy (AUP) complies with the Children's Internet Protection Act (CIPA) for schools receiving E-rate discounts and minimizes exposure in litigation. If a school receives E-rate discounts, its AUP must include the use of filtering software. According to the U.S. Department of Education-sponsored online Alphabet Superhighway, AUPs should include:

- A description of the instructional philosophies, strategies and goals to be supported by Internet access in schools;
- An explanation of the availability of computer networks to students and staff of a school or district;
- A statement about the educational uses and advantages of the Internet;
- An explanation of the responsibilities of educators and parents for students' use of the Internet;
- A code of conduct governing behavior on the Internet;
- An outline of the consequences of violating the AUP;
- A description of what constitutes acceptable and unacceptable Internet use;
- A description of the rights of individuals using the networks in the school/district (such as the right to free speech, right to privacy, and so on);
- A disclaimer absolving the school district from responsibility, under certain circumstances;
- An acknowledgement that the AUP complies with federal and state telecommunication rules and regulations; and
- A form for teachers, parents and students to sign, indicating that they agree to abide by the AUP.

Visit <http://www.io.com/~kinnaman/aupessay.html> for a critique of the use of AUPs as well as a list of sites providing examples of AUPs.

recipient under 18 years of age.¹ Here, cell phone communications of obscene images to under-aged children would be covered.

This prohibition brings to mind the recent example where sexually explicit photos of two young girls in Allentown, Pennsylvania, were transmitted by cell phone to dozens of the girls' classmates and then off campus to others. *See* <http://abcnews.go.com/Technology/GadgetGuide/wireStory?id=4187092>. The photos were passed on from student to student, and at least 40 students of Parkland High School received the photos on their cell phones. Students who forwarded these cell phone images to others unwittingly placed themselves in jeopardy of criminal conviction under the CDA as well as local criminal statutes banning the possession of child pornography.

The CDA also bars the knowing use of an interactive computer service, such as online social networks (MySpace.com; Facebook.com; etc.), to send or display in a manner available to a person under 18 years of age obscene communications or child pornography. Violators of the CDA face penalties including up to two years in prison for each violation. For this reason, schools need to be concerned about student access to pornography on the Internet.

Schools should take note that the statute provides several affirmative defenses. These include taking good faith, reasonable, effective, and appropriate actions to restrict access by minors to the prohibited communications and restricting such access by requiring certain designated forms of proof of age, such as a verified credit card or an adult identification number or code. 47 U.S.C. § 230(c). In addition, this provision states that an "interactive computer service" cannot be considered the speaker or publisher of content of another "information content provider." *Id.* For these reasons, it is imperative that schools and school districts craft and implement acceptable use policies limiting access to particular Web sites and images. Public institutions in particular can be assured that their limitations on minor students' access to certain content will be protected from claims of First Amendment violations as a result of this Good Samaritan defense.

One case that explored the prohibitions of the CDA and the parameters of the affirmative defenses is *Doe v. MySpace, Inc.*, No. D-1-GH-06-002209 (D. Tex. Filed June 19, 2006). In this case, a 13-year-old girl created a MySpace profile and was eventually contacted by a 19-year-old male. Ultimately, the two met for a date, and plaintiffs alleged that he sexually assaulted her. The plaintiffs sued MySpace for negligence, gross negligence, fraud, fraud by nondisclosure, and negligent representation and sought \$30 million. The plaintiffs maintained that MySpace was negligent in failing to take reasonable measures to keep young children off its site and, because of this failure, was civilly liable for the injury to the girl. MySpace claimed the affirmative defense provisions of the CDA and maintained that as an "interactive computer service," under 47 U.S.C. § 230(c), it could not be treated as a publisher or speaker of the communications between the girl and the 19-year-old. The plaintiffs claimed that this provision did not apply to MySpace because MySpace was not sued for the publication of content by the girl and the young man. Rather, they claimed, the suit was based on MySpace's failure to institute safety measures to protect the girl and other minors.

The Court did not agree and held that the actual, underlying basis of the suit was that through the postings on MySpace, the girl and the young man were able to exchange personal information and to meet. Thus, if MySpace had not published the communications between the two, the sexual assault would have never occurred. The Court concluded that the plaintiffs were, in fact, trying to hold MySpace liable as a publisher of the communications—an immunity explicitly provided to interactive computer services, such as MySpace, under the CDA. The Court dismissed the claim against MySpace and found that it was immune from suit under the CDA.

This case has implications for schools that could be acting as providers of "interactive computer services." Accordingly, schools hosting Web sites or discussion boards, chat rooms, listservs, or similar lists may be considered an interactive computer service. Such schools are subject to the CDA and to criminal liability for any knowing display **by them** of obscene material. However, such schools enjoy immunity under the CDA for the content communicated by its students.



Children's Internet Protection Act

The Children's Internet Protection Act (CIPA) was enacted as a follow-up to Congress' creation of the E-Rate program, which provides for discounted telecommunications, Internet access, and internal connection services to schools and libraries. *See* 47 U.S.C. § 254(h). Under the terms of CIPA, schools and libraries that receive E-rate discounts are required to certify and adopt an Internet safety policy and to employ technological methods that block or filter certain visual depictions deemed obscene, pornographic, or harmful to minors for both minors and adults. *See* 20 U.S.C. § 9134(f)(1)

and 47 U.S.C. § 254(ah)(6).² The vast majority of public schools (about 82 percent in 2000-01) and a minority of private schools (about 10 percent in 2000-01) received E-rate funding. <http://www.sl.universalservice.org>. For this reason, the adoption of acceptable use policies and the employment of filtering devices serve not only to avoid CDA liability, but also to maintain important and valuable federally subsidized discounts.³

The passage of CIPA was very controversial as many believed the forced use of Internet filters at public institutions was an unconstitutional interference with First Amendment rights as filters often block harmless content. For example, it was reported that filters prevented an Albuquerque public school swim team from accessing swim-suit Web sites. <http://dir.salon.com/story/tech/wire/2002/09/15/filters/index.html>. The constitutionality of CIPA was challenged in *United States v. American Libraries Association*, 539 U.S. 194 (2003). However, the U.S. Supreme Court upheld the filtering requirements of CIPA as constitutionally valid. In so ruling, the Supreme Court disagreed with plaintiffs' claims that CIPA's filtering provisions are incongruous with the usual functioning of public libraries.

The significance of this decision to public schools is that their acceptable use policies that include Internet filtering software will not be considered *per se* violations of students' First Amendment rights. Moreover, for those schools both public and private receiving E-rate discounts, CIPA's filtering provisions are mandatory and must be complied with by the recipient schools.⁴

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Religion in the Public Schools: A Constitutional Balancing Act

By Ramon Vigil, Jr., Esq. and
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Cuddy, Kennedy, Ives & Archuleta-Stahlin, LLP



Public schools must delicately balance the constitutional requirements that prohibit government-sponsored religious expression with the requirements that protect the exercise of individual religious preferences. Schools routinely must defend against the claims of employees, parents, and community members that schools are either too supportive of religion or fail to respect individual rights. Some blame school problems on having “kicked God out of the school” and feel schools should support religion by allowing student prayer and observance of religious holidays. Advocates of strict separation of church and state seek limits on the degree to which religious expression infiltrates the educational process.

Any discussion about religion in school must begin with the U.S. Constitution. Two principles govern the presence of religion in a public school context: the Establishment Clause and the Free Exercise Clause of the First Amendment. Under the Establishment Clause: (1) any school action that affects religion must have a secular purpose; (2) the primary effect of the action must be one that neither advances nor inhibits religion; and (3) the action must not foster any excessive entanglement with religion. The Free Exercise Clause, on the other hand, prohibits regulation of particular religious activities unless it is narrowly tailored to promote a compelling state interest.¹

The Supreme Court has repeatedly held that the First Amendment requires school officials to be neutral in their treatment of religion.² Accordingly, the First Amendment forbids government-sponsored religious activity but protects privately sponsored religious activity. The line between the two is vital to understanding the First Amendment’s scope as it applies to school programs or functions.³

Over the past 40 years, the Supreme Court has distinguished impermissible governmental religious speech from private religious speech of students. For example, school officials may not lead their classes in prayer,⁴ nor attempt to persuade or compel students to participate in prayer or other religious activities.⁵ Such conduct is “attributable to the State” and thus violates the Establishment Clause.⁶

Similarly, school officials cannot direct that prayer be included in school-sponsored events. In *Lee v. Weisman*,⁷ the Supreme Court held that school officials violated the Constitution in inviting a clergy member to deliver a prayer at a graduation ceremony. Nor may school authorities grant religious speakers preferential access to public audiences or otherwise select speakers on a basis that favors religious speech. In *Santa Fe Independent School*

District v. Doe,⁸ the Court invalidated a Texas school’s football game speaker policy because it was designed by school officials to result in pregame prayer, thus favoring religious expression over secular expression.

Although the Constitution forbids school officials from directing or favoring prayer, the Supreme Court has clearly stated that students maintain free speech protections:

“private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.”⁹

Furthermore, not all religious speech in schools is governmental speech.¹⁰

Students may voluntarily pray at any time before, during, or after the school day¹¹ and with other students on the same terms and conditions that they may engage in other speech. Similarly, school officials possess substantial discretion to impose restrictions on or prevent disruption caused by student activities,¹² provided such rules do not discriminate against student prayer or religious speech. When schools permit student expression on the basis of genuinely neutral criteria and students retain primary control over the content of their expression, the student’s religious speech is not attributable to the state and therefore may not be restricted because of its religious content.¹³ Student remarks are not attributable to the state simply because they are delivered in a public setting.¹⁴

The following are particular applications that are the subject of case law interpreting issues related to religion in the public schools.

Worship or Prayer at School

Schools cannot sanction prayer. However, students may voluntarily pray during school and discuss religion, provided this activity does not interfere with the educational process or infringe upon the privacy rights of others. Among other things, students may read the *Bible* or other scriptures or religious texts; say grace before meals; and pray or study religious materials with fellow students during recess, the lunch hour, or other non-instructional time to the same extent that they may engage in nonreligious activities.

Religious Performances, Programs, and Gatherings

Schools may not include religious invocations, benedictions, or formal prayers at school-sponsored events. Holiday activities at school should not be religious in nature but may include the singing of some holiday songs, as long as songs with religious content are balanced with music not solely of a religious nature.



Prayer at Graduation

Public school officials may not mandate or organize prayer at graduation nor select speakers for such events in a manner that favors religious speech or prayer. Where students or other private graduation speakers are selected on the basis of genuinely neutral criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and cannot be restricted because of its religious, or anti-religious, content.

Religion in the Curriculum

Schools cannot teach religion but they may teach about religion. A comprehensive study of art, literature, history, music, and other subjects could not be adequately presented without a review or discussion about the role religion has played in those areas over time. When religion is included in the curriculum, schools must treat it with the same objectivity and educational intent expected in other areas. Such studies should not foster any particular religious tenet or demean any religious belief. However, student-initiated responses to questions or assignments reflecting their personal beliefs about a religious theme should be accommodated when appropriate.

Accommodating Religious Expression

Schools should try to accommodate students' religious beliefs unless the expression causes substantial disruption, materially interferes with the rights of others, violates the Constitution, or places an undue burden on the school. Additionally, students may be excused, without penalty, from instructional activities contrary to their religious beliefs unless their absence would defeat an overriding educational goal. Under the New Mexico Public Schools Code, schools may excuse students from school to participate in religious instruction for not more than one class period each school day with the written consent of their parents and at a time not in conflict with the academic program of the school.¹⁵ However, the school cannot assume responsibility for the religious instruction or permit it to be conducted on school property during the school day.¹⁶

Organized Prayer Groups

Students may organize prayer groups and religious clubs to the same extent that students are permitted to organize other non-curricular student activities groups. Pursuant to the Equal Access Act,¹⁷ such groups must be given the same access to school facilities for assembling as is given to other non-curricular groups, regardless of the religious content of their expression. If, for example, student groups

that meet for nonreligious activities are permitted to advertise their meetings in a student newspaper, make announcements on a student activities bulletin board or public address system, or distribute leaflets, so must groups who meet to pray. Schools may disclaim sponsorship of non-curricular groups and events in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech.

Conclusion

While some groups argue that religion has an important role to play in public education, others maintain that a strict wall of separation is needed. Although the courts have given clarity to many issues related to religion in schools, there are still many unanswered issues for legal debate and litigation. Accordingly, public schools will continue to find themselves walking a tightrope to maintain a constitutional balance of the prohibitions of the Establishment Clause and the requirements of the Free Exercise Clause.

Endnotes

- ¹ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
- ² See, e.g., *Everson v. Board of Ed.*, 330 U.S. 1, 18 (1947); *Good News Club v. Milford Cent. Sch.*, 433 U.S. 98 (2001).
- ³ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Board of Educ. V. Mergens*, 496 U.S. 226, 250 (1990); accord *Rosenberger v. Rector of Univ. Of Virginia*, 515 U.S. 819, 841 (1995).
- ⁴ *Engle v. Vitale*, 370 U.S. 421 (1962); *School Dist. of Abington Twp. V. Schempp*, 374 U.S. 203 (1963); *Mergens*, 496 U.S. at 252.
- ⁵ *Lee v. Weisman*, 505 U.S. 577, 599 (1992); see also *Wallace v. Jaffree*, 472 U.S. 38 (1985).
- ⁶ *Weisman*, 505 U.S. at 587.
- ⁷ *Id.*
- ⁸ 530 U.S. 290 (2000).
- ⁹ *Tinker v. Des Moines Ind.ep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969); *Capital Square Review & Avisory Bd. V. Pinette*, 515 U.S. 753, 760 (1995).
- ¹⁰ *Santa Fe*, 530 U.S. at 302.
- ¹¹ *Id.* at 313.
- ¹² The First Amendment permits School officials to review student speeches for vulgarity, lewdness, or sexually explicit language. *Bethel Sch. Dist. V. Fraser*, 478 U.S. 675, 683-86 (1986).
- ¹³ *Rosenberger v. Rector of Univ. Of Virginia*, 515 U.S. 819 (1995); *Board of Educ. V. Mergens*, 496 U.S. 226(1990); *Good News Club v. Milford Cent. Sch.*, 433 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).
- ¹⁴ *Santa Fe*, 530 U.S. at 302; *Mergens*, 496 U.S. at 248-50.
- ¹⁵ § 22-12-3 NMSA 1978.
- ¹⁶ *Id.*
- ¹⁷ 20 U.S.C. 4071.

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Public School RESPONSIBILITY

Under the New Mexico Tort Claims Act for Injuries to Students

By Steven Sanders

When a student is injured while at school, the tort liability of the school is determined by the New Mexico Tort Claims Act.¹ Even negligently caused injuries may not be actionable under the New Mexico Tort Claims Act. There is no waiver of immunity specifically addressed to the operation of a school. Practitioners must rely upon the building maintenance waiver as grounds for a suit against the school.² However, the courts have limited the application of NMSA 1978 §41-4-4A by disallowing a claim for negligent supervision by the schools and requiring that any injury be one that could occur to more than one individual.

In *Espinoza v. Town of Taos*, 120 N.M. 680, 905 P.2d 718 (1995) the Supreme Court held that there is “no waiver of sovereign immunity for negligent supervision of children at a playground.”³

The *Espinoza* court distinguished between negligent conduct that itself creates an unsafe condition for which immunity is waived, and negligent conduct that does not create an unsafe condition. This distinction was explained by the Supreme Court as follows:

All cases cited by Appellants concern negligent conduct that itself created unsafe conditions for the general public. In the case at bar, **the negligent conduct itself did not create the unsafe conditions. The playground was a safe area for children.** There were no gangs threatening the children, no free-roaming dogs, no influx of traffic, no improperly maintained equipment. The playground is distinct from, for example, the swimming pool at issue in *Seal*. There, the unsafe condition of the premises was a swimming pool without the superintending lifeguard protection required by statute. **Here, the playground itself, particularly the slide, was not a condition requiring supervision.** Rather, it was the day-camp undertaking and not the condition of the premises that gave rise to duty. (Emphasis added).

Thus, a practitioner must prove that the negligent conduct itself creates an unsafe condition. In *Leithead v. City of Santa Fe*, 1997-NMCA-41, 123 N.M. 353, the New Mexico Court of Appeals explained the difference between negligent supervision and negligent conduct that creates an unsafe condition. The Court held that the focus of inquiry must be on the creation of a dangerous condition on buildings owned and operated by the government by failure to “adequately perform duties that were essential to public safety ...”

However, even if the school creates a dangerous condition, that condition to be actionable must affect more than one person. It must be a danger to the public at large. *Archibeque v. Moya*, 116 N.M. 616, 866 P.2d 344 (1993).



In *Leithead*, a swimmer was injured at a public pool. Judge Richard C. Bosson, then of the New Mexico Court of Appeals writing for the Court, distinguished between a claim for negligent supervision and a claim for negligent operation and maintenance, stating that,

Plaintiffs correctly argue that when City lifeguards did not adequately perform duties that were essential to public safety, they negligently operated the swimming pool and thereby created a condition on the premises that was dangerous to Amanda and the general public.

1997-NMCA-41, ¶ 12.

Nine years later, Chief Justice Bosson, in *Upton v. Clovis Mun. Sch. Dist.*, 2006-NMSC-40, ¶¶ 23-24, 140 N.M. 205, 210-11, clarified the public versus private condition element of a claim. *Upton* involved 14-year-old Sarah, who died following an asthma attack after a substitute teacher required her to exercise more than normally. Although the school and her regular teacher were aware of her medical condition, the substitute teacher apparently was not. The effects of the attack may have been aggravated when school personnel failed to secure emergency assistance in a timely manner.

The school argued that since severe asthma was unique to only one student, there was no waiver of immunity. Justice Bosson disagreed, stating that the public-private requirement for waiver does not mean a condition that is dangerous to the entire public but rather a condition that is at least potentially dangerous to a particular class of persons that use a building or facility. He explained:

As previously applied by this Court and our Court of Appeals, **the reference to the “general public” in *Espinoza* does not mean a condition that must be dangerous to the**

entire public, but rather, at least potentially, to the particular class of people that use the building or facility in question. See *Castillo* (roaming dogs were threat to *residents and invitees* of housing development); *Callaway*, (roaming gang was threat to *prison population*); *Leithead*, (indicating lack of lifeguards was threat to *swimming public*); *Baca v. State*, (stating security officers were threat to the *attendees of the State Fair*). **The key point in *Espinoza* is that the negligence must be of a kind which makes the premises dangerous, or potentially so, to the affected public, the consumers of the service or the users of the building, including the plaintiff.** Cf. *Archibeque*, (holding administrative decision pertaining to a single individual and the specific threats posed to that individual did not qualify under the building waiver); *Espinoza*, (holding failure to adequately supervise one specific child on a playground slide did not qualify under the building waiver).

In *Castillo*, *Callaway*, *Baca*, and *Leithead*, only one person was injured but the risk posed was to a group of people using the park or building. The same is true for Sarah. **Failure to respond appropriately to an emergency medical situation is a potential threat to every student in school because such a situation can occur at any time, regardless of special health needs. The school's indifference towards Sarah's special medical needs makes it more likely that all similarly situated students were at risk as well.** The same policies that led the Uptons to rely on the school's diligence were in place for other at-risk students. This is not a case of action uniquely affecting only one student. The school's failures, if proven, created a dangerous condition for all

special-needs children, and with regard to emergency responsiveness, for every student at the school. (Emphasis added, citations omitted)

The lesson to be learned is that school neglect directed solely at one student is not actionable nor is school neglect based upon a claim of negligent supervision. The public schools are, however, responsible when their neglect implicates a potential threat to other similarly situated students. Thus the practitioner representing an injured student must evaluate the case knowing that every injury sustained by a student at school is not actionable.

Endnotes

¹ NMSA 1978 §41-4-1 et seq.

² NMSA 1978, § 41-4-A. "The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings."

³ See also *Pemberton v. Cordova*, 105 N.M. 476, 477, 734 P.2d 254, 255 (N.M.App.,1987)

About the author

Steven Sanders practices in Albuquerque where he is a frequent lecturer on employment law and trial and litigation techniques.

Technology continued from page 6

Conclusion

With this legal framework in mind, schools and school districts are well-advised to draft acceptable use policies that will properly inform students and staff of the extent to which they may expect their communications to be monitored or accessed by the school. In addition, students and staff should be clearly informed of restrictions on Internet access, e-mail communications, filters that are applied for pedagogical concerns, copyright compliance requirements, and of the consequences for failing to abide by these restrictions. With regard to the failure to comply, schools should clearly inform students and staff that any deviation from these policies and rules could result in termination of the privilege of Internet/e-mail access and disciplinary actions. For this reason, these policies and rules should be made part of a school's code of conduct.

1998, then-Governor Gary Johnson signed the "Net Indecency Law" banning Internet material that may be "harmful to minors." Under the law, dissemination by computer of material that involved "nudity, sexual intercourse, or any other sexual conduct" and "indecency" was criminalized. The American Civil Liberties and other organizations sued the governor and the state attorney general challenging the constitutionality of the statute. The Tenth Circuit affirmed the lower court's issuance of a preliminary injunction preventing the law from being enforced. *ACLU et al. v. Johnson, et al.*, 194 F.3d 1149 (10th Cir. 1999).

³ Recently, Mayor Martin Chavez took this concept a step farther and banned sex offenders from city libraries. <http://www.koat.com/news/15493567/detail.html>.

⁴ A sample acceptable use policy created by Heather Rex Gallegos of the New Mexico State Library can be found at <http://www.more.net/services/cipa/iup01.html>.

Endnotes

¹ The statute had previously also barred "indecent transmission[s]" and "patently offensive display[s]" as well. However, the U.S. Supreme Court struck down these provisions as contrary to the First Amendment in *Reno, et al. v. ACLU*, 521 U.S. 844 (1997).

² Years before CIPA was enacted, New Mexico had its own attempt to legislatively ban potentially pornographic Internet material. In

About the author

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Please Join Us

Please join us in supporting and congratulating the Honorable William G. W. Shoobridge. Judge Shoobridge was appointed to the District Court bench in the Fifth Judicial District by Governor Bill Richardson following the submission of his name by the Judicial Selection Commission. We look forward to many years of judicial service by him to the people of Lea, Eddy and Chaves Counties.



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