



# STUDENT CIVIL RIGHTS CLAIMS



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# Student Civil Rights Claims

## *Presenters*

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# Special Education – What Is It???

- Individuals with Disabilities Act  
(20 U.S.C. §1400 *et seq*)

Supposed to move **FAST!!!!!!!!!!!!!!!!!!!!!!!!!!!!**

- Focus on **educational needs**
- **No damages!!!!**
- Quick one or two tier administrative process
- Appeals should not delay remedy to student  
(Stay put rights; obligation to pay while appeal)



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# Special Education

## What are Educational Needs?

**Academics**



**Speech & Language**



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# Special Education

## What are Educational Needs?

### Social Skills



### Medical & Mental Health



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# Special Education Exhaustion of Administrative Remedies

- 20 USC §1415

## **(f) IMPARTIAL DUE PROCESS HEARING**

Whenever a complaint has been received [with respect to the identification, evaluation, and educational placement of the child] the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.



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# Special Education Exhaustion of Administrative Remedies

- 20 USC §1415

## **(i) Right to bring civil action**

[A]ny party aggrieved by the findings and decision made [in a due process hearing], shall have the right to bring a civil action [within 90 days from the date of the decision], which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy



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# Special Education Exhaustion of Administrative Remedies

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# Special Education Exhaustion of Administrative Remedies

## The Old Cases

*Robb v. Bethel Sch. Dist. No. 403*, 308 F.3d 1047 (9th Cir. 2002) – cannot “avoid the exhaustion requirement simply by asking for relief that administrative authorities [cannot] grant”

*Witt v. Clark County School Dist.*, 197 F.3d 271 (9th Cir. 1999) – “If a plaintiff is required to exhaust administrative remedies, but fails to, federal courts are without jurisdiction to hear the plaintiff's claim.”



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# Special Education Exhaustion of Administrative Remedies

## The New Case

*Payne v. Peninsula Sch. Dist.*, 653 F.3d 863 (9th Cir. 2011)

1. The exhaustion requirement is not jurisdictional
2. Non-IDEA claims that do not seek relief under the IDEA are not subject to an exhaustion requirement

But this just promoted the chaos of parent attorneys seeking money damages through various “non-IDEA claims” that actually didn’t fit.



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# Special Education Addition of Civil Rights Claims

- The past decade – parent attorneys tried to be creative by adding the following claims and more and more were **successful**:
  - Section 504 and ADA – Disability Discrimination and Access (federal)
  - Unruh and California Disability Act – Disability Discrimination and Access (state)
  - Title VI – Race Discrimination

.....and why do this?



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# Special Education Addition of Civil Rights Claims



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# Special Education

## *Fry v. Napoleon*



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# Special Education

## *Fry v. Napoleon*

### Fun Facts

- Ehlena Fry – born in India and adopted before her 1<sup>st</sup> birthday by a couple in Michigan; she suffers from cerebral palsy
- Ehlena's pediatrician prescribed a service dog in 2008 as she was entering kindergarten to assist with mobility and promote her independence; her local community raised most of the \$13,000 required to train "Wonder."
- Wonder could pick things up, open and close doors and provide a support as Ehlena transferred from her walker to a chair.
- Her school first said okay but then put so many restrictions, the Frys found another district that would accept Wonder.
- After 7 years serving Ehlena, Wonder retired. By then Ehlena had learned how to do most things on her own.



# Special Education

## *Fry v. Napoleon*

### Supreme Court Decision

- Why would the Supreme Court take the case – to address the IDEA exhaustion issue – this was not really about ADA rights at all.
- **Primary holding:**
- If, in a suit brought under a statute other than the Individuals with Disabilities Education Act (IDEA), the remedy sought is not for the denial of a free appropriate public education (FAPE), then exhaustion of the IDEA's procedures is not required.
- To determine whether a plaintiff in such a suit seeks relief for the denial of a FAPE, a court should look to the gravamen of the plaintiff's complaint.



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## *Fry v. Napoleon*

### Supreme Court Decision

#### The Test

First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school?

Second, could an adult at the school have pressed essentially the same grievance?

When the answer to those questions is **yes**, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject.

But when the answer is **no**, then the complaint probably does concern a FAPE.



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# Special Education Jury Verdicts and Settlements

- Very little in this emerging area.
- Student attorneys not really looking for cash – other than for themselves; *don't think like civil attorneys*
- Parents may not even be seeking damages
- Generally has resulted in low settlements cash-wise.



# Student on Student Injuries

- Bullying on and Off Campus
- Immunities/Duty of Care





# Federal Civil Rights Cases Immunities and Defenses

- Eleventh Amendment
  - School Districts are *STATE* agencies
- Government Claims
  - Often overlooked by student attorneys without civil law background
- Qualified Immunities for School Employees



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# Student on Student Injuries Bullying and Social Media What is Bullying?



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# Student on Student Injuries Bullying - Definitions

## What is NOT bullying.....



# Student on Student Injuries Bullying – Federal Court Claims

- California Laws are strong

For a summary:

<https://www.stopbullying.gov/laws/california.html>

- Federal Court (Civil Rights) Claims – why?
  - No claims requirement
  - LONGER statutes of limitation



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# Student on Student Injuries Bullying – Federal Court Claims

- Equal Education Opportunities Act (race, color, sex, national origin)
- Title VI (race of national origin)
- Section 504 (disability)
- ADA (disability)
- IDEA
- Title IX (sex)
- §1983 (constitutional violations)



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# Student on Student Injuries Bullying and Social Media



## Cyber/Off Campus Bullying



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# Student on Student Injuries Cyber/Off Campus Bullying

- Key Ninth Circuit decisions

Wynar v. Douglas County Sch Dist, 728 F.3d 1062 (8/29/13)

C.R. v. Eugene School District, 835 F.3d 1142 (9/1/2016)

But 9<sup>th</sup> Circuit has not really addressed cyberbullying



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# Student on Student Injuries Cyber/Off Campus Bullying

## Wynar v. Douglas County School District

Violent and threatening instant messages from home to classmates about planned school shooting; 90 days expelled

- "its pretty simple / I have a sweet gun / my neighbor is giving me 500 rounds / [Douglas High School] is gay / I've watched these kinds of movies so I know how NOT to go wrong / I just cant decide who will be on my hit list / and thats [sic] totally deminted [sic] and it scares even my self".
- "and ill probably only kill the people I hate?who hate me / then a few random to get the record." I bet I could get 50+ people / and not one bullet would be wasted."



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# Student on Student Injuries Cyber/Off Campus Bullying

## Wynar v. Douglas County School District (Nevada)

- Student handbook covered “intimidating, harassing, threatening, or disruptive” behavior
- State law allowing discipline without consideration of location
- “The messages presented a real risk of significant disruption to school activities and interfered with the rights of other students.” – Ninth Circuit



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# Student on Student Injuries Cyber/Off Campus Bullying

## Wynar v. Douglas County School District

"The challenge for administrators is made all the more difficult because, outside of the official school environment, students are instant messaging, texting, emailing, Twittering, Tumblring, and otherwise communicating electronically, sometimes about subjects that threaten the safety of the school environment."

But she also wrote this was an easy "nexus" case and Supreme Court had been passing on these cases.



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# Student on Student Injuries Cyber/Off Campus Bullying

## C.R. v. Eugene School District

- Seventh grader hassled 2 sixth grade disabled students in public park
- Had been negative encounters at the school
- 5 minutes after school let out; 100 feet from school; vague boundaries
- Student seen by employee riding by; reported to school



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# Student on Student Injuries Cyber/Off Campus Bullying

## C.R. v. Eugene School District

- Interviewed students who reported vulgar and sexual taunting
- 2 day suspension under school's "door-to-door" policy
- 9<sup>th</sup> Circuit held no question sexual harassment but discipline for off-campus behavior question of first impression (although looked to Wynar)



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# Student on Student Injuries Cyber/Off Campus Bullying

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# Student on Student Injuries Cyber/Off Campus Bullying

## C.R. v. Eugene School District

- Still a “nexus” test – how closely tied to school?
  - Involved students
  - On a path that begins at the schoolhouse door
  - A few hundred feet away
  - No clear boundary
  - Minutes after school
- But this won't apply to cyberbullying...



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# Student on Student Injuries Cyber/Off Campus Bullying

## C.R. v. Eugene School District

These statements might...

- “A student who is routinely subject to harassment while walking home from school may be distracted during school hours by the prospect of the impending harassment”
- “A student's ability to focus during the day could be impaired by intrusive worries about whether she or he would once again face uncomfortable and sexually intimidating comments immediately after school lets out.”
- “Administrators could also reasonably expect students to discuss the harassment in school.”
- “Administrators likely could not disregard the possibility that the older students would continue to harass their targets if they encountered one another in the hallways or the school yard.”



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# Student on Student Injuries

## Duty of Care

Walsh v. Tehachapi, 997 F.Supp.2d 1071 (2/4/14)

- 13 year old committed suicide after 3 years of bullying for being gay
- Title IX, Equal Protection + state causes of action
- “Courts generally have imposed a duty to prevent suicide only where the defendant has physical custody and substantial control over a person, or where the defendant has special training or expertise in mental illness and has sufficient control over a person to prevent the suicide.”
- “It is unclear whether a duty to prevent suicide could similarly be imposed on a school. ”



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# Student on Student Injuries

## Duty of Care

**Walsh v. Tehachapi, 997 F.Supp.2d 1071 (2/4/14)**

- “There is a factual question as to whether Defendants' conduct caused Decedent to suffer an uncontrollable impulse to commit suicide.”
- “Under California law, if a defendant's negligence causes the decedent to suffer a mental condition in which the decedent cannot control his suicidal impulses, the defendant's negligence is considered the proximate cause of the death and the defendant may be held liable, but if the decedent was able to control his suicidal impulses and had the ability to refrain from committing suicide if he so desired, then the suicide is deemed a superseding event that breaks the chain of causation between the defendant's negligence and the death, and in that case, the defendant is not liable.”



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# Student on Student Injuries Settlements and Verdicts - Bullying

- *Hernandez v. LAUSD* (11/15/07) - \$800,000 verdict  
Severely autistic child injured by bully in school
- *Ronquillo v. LAUSD* (12/17/10) - \$42,000 settlement  
School allows bullies to injure child at recess (\$7600 medical)
- *Confidential v. Confidential* (3/26/12) - \$1,350,000 settlement  
Middle School student; claim of bullying by classmates; failure to enforce anti-bullying policies  
Verbal; anti-gay; anti-Semitic; attempted suicide (overdose on medication)



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# Student on Student Injuries Settlements and Verdicts - Title IX

- *Raza v. Lane Community College* (9/16/16)- \$175,000 settlement

Failure to address complaints regarding student who was repeatedly and threateningly harassing and stalking plaintiff. Claimed college obstructed efforts to get restraining order; Plaintiff Pakistani-Muslim and Defendant a Marine; questioned her; sat and stared at her; secrecy around investigation; just assurances taken care of; FERPA claims

- *L.S. v. Tacoma Sch. Dist.* (4/24/14) - \$750,000 settlement

Student stalked and raped Plaintiff in high school bathroom. Claims district knew of threat for a year; knew student was “infatuated” and followed student around; district MSJ failed.



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# Constitutional Claims

- School Fees
- Free Speech
- The Establishment Clause
- Search and Seizure



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# SCHOOL FEES - THE RULES (*Hartzell*)

- General Rule: You cannot require students to pay money to gain access to a school or district educational activity, or to materials and supplies necessary for full and equal access to that activity, unless there is a statute that allows it.
- “A pupil enrolled in a school shall not be required to pay any fee, deposit, or other charge not specifically authorized by law.” (Title 5, CCR § 350)



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# SCHOOL FEES - THE RULES (*Hartzell*)

- “Educational activities” are both curricular and extracurricular
- Whether or not credit is awarded does not matter
- A fee waiver program does not make an impermissible fee permissible
  - The standard is not ability to pay
  - “‘Free’ means ‘free’”



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# AB 165

Put *existing* rules in the Education Code and Regulations

- No longer based on court decisions
- Includes a “no two tier” provision
- No modifications regarding allowable fees
  - No challenge to any on “list of 20”
  - No new exceptions either



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# AB 165

- “Pupil fee” and “educational activity” are specifically defined
- “Educational activity” means “an activity offered by a school, school district ... that constitutes an integral fundamental part of elementary and secondary education, including, but not limited to, curricular and extracurricular activities.”



# AB 165

- “Pupil fee” specifically includes:
  - A fee “as a condition for registering for school or classes, or as a condition for participation in a class or an extracurricular activity, regardless of whether the class or activity is elective or compulsory, or is for credit”
  - “A security deposit, or other payment, that a pupil is required to make to obtain a lock, locker, book, class apparatus, musical instrument, uniform, or other materials or equipment”
  - A required purchase “to obtain materials, supplies, equipment, or uniforms associated with an educational activity”



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# AB 165

Adds impermissible fees to uniform complaint procedure

- Can be anonymous
- A classroom notice is required
- Return of fees to all payers is mandated

Includes an annual review requirement, and fee review in annual audits

- Confirmation every fall, by the Superintendent
- Return of any impermissible fees is mandated
- Loss of administration revenue if there is a fee-related audit exception two straight years, even if for different fees, until remedied



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# Some Permissible Fees/Charges

- Food (subject to free lunch program)
- Admission to dances, games, events and other “purely recreational” activities
- Reimbursement for lost/damaged school property
- “To and from school” transportation
- Field trips/excursions (subject to waivers)
- Standardized PE apparel, but . . . .
- Actual cost of “fabricated” personal property the student wants to keep
- Parking of vehicles on school grounds





# Some Permissible Fees/Charges

- Community classes primarily for adults in civic, vocational, literacy, health, homemaking, and technical and general education, not to exceed the cost of maintaining the community classes
- Rental or lease of personal property needed for District purposes, such as caps and gowns for graduation ceremonies
- Outdoor education camp programs, so long as no student is denied the opportunity to participate
- Actual cost of duplicating public records, student records, or a prospectus of the school curriculum
- Medical and accident insurance for athletic team members, so long as there is a waiver for financial hardship



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# What You CAN Do

- Donations
  - Must be voluntary
  - The context as a whole determines voluntariness
  - Attitude will matter
- Fundraising
  - Must be voluntary regarding amount raised
  - A reasonable attendance requirement is permissible



# Public School Students' Free Speech Rights

Both the First Amendment of the United States Constitution and Article I, Section 2, of the California Constitution guarantee every person the right of free speech and expression.



# The *Tinker* Case

*Tinker v. Des Moines School District* (1969) 393  
U.S. 503, 511

- Public school students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”



# California Law

Education Code Section 48907 states, in pertinent part:

- Students of the public schools shall have the right to exercise freedom of speech and of the press, including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, *the wearing of buttons, badges, and other insignia*, and the right of expression in official publications, whether or not such publications or other means of expression are supported financially by the school or by use of school facilities, except that **expression shall be prohibited which is obscene, libelous, or slanderous. Also prohibited shall be material which so incited students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the *substantial disruption of the orderly operation of the school.***

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# Students Cannot Be Disciplined Solely for Expressive Speech

Section 48950 states in pertinent part:

- School districts operating one or more high schools ... shall not make or enforce any rule subjecting any high school pupil to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus, is protected from governmental restrictions by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.





# Regulating Student Speech

- In California, school districts can restrict or censor student speech if that speech:
  - 1) Poses a substantial threat of disruption or
  - 2) Advocates lawless acts, use of drugs or alcohol or irresponsible sex.



# Regulating Student Speech

- School officials must demonstrate that the expression would “substantially interfere with the work of the school or impinge upon the rights of other students.”
- Expression that involves, lewd, vulgar, obscene, or plainly offensive speech may be restricted by educators. *Bethel Sch. Dist. No. 403 v. Fraser* (1986) 478 U.S. 675



# The First Amendment

- The First Amendment to the United States Constitution protects freedom of speech, as well as the publication of printed materials and the distribution of those materials.
- Whether outside groups (including religious groups) are allowed to distribute materials to students at school is entirely within the control of the District, by choosing to designate each of its campuses as either a closed or limited open forum.



# Limited Open Forum

- A public secondary school that **grants an offering to, or opportunity for, one or more noncurriculum-related student groups to meet on school premises during noninstructional time** has established what is referred to as a “limited open forum.”
- Limited open forum schools must allow all “noncurriculum related student groups” an opportunity to meet on school premises during noninstructional time.



# Restrictions in a Limited Open Forum

- In maintaining a limited open forum the District may restrict free expression as follows:
  - Enforce reasonable time, place and manner restrictions in light of the purpose to be served by the forum.
  - The restrictions must be viewpoint neutral.
  - The restrictions must not be arbitrary and capricious.



# The Distribution of Written Information to Students must be Viewpoint Neutral, but at the same time, shall not violate the Establishment Clause

- The requirement that restrictions be viewpoint neutral means that the District cannot prevent distribution of materials to students because they contain religious content.
- At the same time, Establishment Clause concerns must also be considered when religious-related materials are involved.





# Establishment Clause

- The Establishment Clause of the First Amendment guarantees every person the right to freely exercise his or her religion, and it prohibits the government from both the establishment of religion and the “excessive entanglement” between church and state.
- A California Court of Appeal holds that, as a matter of law, an individual’s free speech rights are **subordinate** to the Establishment Clause.

*DiLoreto v. Board of Education of the Downy Unified School District*, (1999) 74 Cal. App. 4th 267, 87 Cal. Rptr. 2d 791, 800.



# The Establishment Clause Prohibits Excessive Entanglement Between Church and State

- The U.S. Supreme Court adopted a three-part test for determining whether governmental action establishes religion  
(*Lemon v. Kurtzman*, 403 U.S. 602 (1971).)



# Three-Part *Lemon* Test to Avoid a Violation of the Establishment Clause

- The school activity must satisfy three conditions:
  1. Have a secular purpose;
  2. Its primary effect must neither advance nor inhibit religion; and
  3. It must not foster excessive school entanglement with religion.



# Distribution of Overtly Religious Materials

Court decisions have established that distribution of any materials of an overtly religious nature would violate the Establishment Clause because:

- They have a religious purpose; or
- Could bear the imprimatur of the District
- And thus could result in excessive entanglement with religion.



# Religious Flyers With Permission Slips Cannot Be Distributed In Public Schools

- In the case of *Culbertson v. Oakridge School District*, (9th Cir. 2001) 258 F.3d 1061, 1065, the Ninth Circuit Court of Appeal, held that an endorsement of religion--and thus violation of the Establishment Clause--exists where teachers distribute parental permission slips for religious organizations.



# Parental Permission Slips on Religious Materials Distributed to Students

- The court held that parental permission slips given by teachers during school hours would result in a “nod of encouragement” to the club's religious program." *Id.* at 1065.
- By so doing, teachers would stop being neutral, and instead would be endorsing the religious program at issue.



# What are Overtly Religious Materials?

- Items that promote religion in general or a particular religion;
- Contain a discussion of religious beliefs or benefits to be gained from religion;
- Proselytize (i.e. encourage converting to a particular religion);
- Contain statements related to the religious purpose of the organization.
- As a school district charged with educating young, impressionable students, it is even more important that the District not distribute overtly religious materials.

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# No Obligation to Distribute Overtly Religious or Proselytizing Materials

- In *Hills v. Scottsdale USD* (9th Cir. 2003) 329 F.3d 1044, the court held that the District is “not obligated to distribute material that, in the guise of announcing an event, contains direct exhortations to religious observance....” (Id., at 1053)
- In support, the court cited a prior case holding that a religious club could not “pray and proselytize” through its advertising.



# Example of Overtly Religious or Proselytizing Materials

- The issue in *Hills* was that a summer camp led by an off-campus Christian group had its flyers taken down, due to the nature of the religious affiliation.
- The court specifically noted that the school district could have refused language in the plaintiff's original version of his summer camp brochure, which stated, **"Did you know that if a child does not come to the knowledge of JESUS CHRIST, and learn the importance of Bible reading by age 12, chances are slim that they ever will in this life? We think it is important to start as young as possible!"**

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# No Obligation to Distribute Materials Containing Proselytizing Language

- School districts are not legally obligated to distribute materials that, in the guise of announcing an event, contain direct exhortations to religious beliefs, religious observances, or any other type of proselytizing messages.
- Exclusion of such overtly religious materials would not be based on viewpoint, but on subject matter, because the District is entitled to refuse to distribute literature that itself contains proselytizing language.
- Accordingly, not only is there no legal duty to distribute overtly religious materials, but doing so would likely constitute a violation of the Establishment Clause.

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# Gay and Lesbian Organizations Must be Permitted in Schools with a “Limited Open Forum”

- In *Colin ex rel. Colin v. Orange Unified Sch. Dist.* (2000) 83 F. Supp. 2d 1135, a group of students sought and obtained a preliminary injunction after the school board denied them approval to form a "Gay-Straight Alliance Club" at their high school and also sued pursuant to the Equal Access Act.
- The court held that the District and Board of Education violated the students' rights under the Equal Access Act and their First Amendment rights of expression and association by voting to deny the application to form the club.



# Gay/Lesbian Clubs are Permitted to Publicize Flyers and Announcements

- In reaching its decision in *Collins*, the court noted that once recognized, student groups are permitted to meet on campus during noninstructional time, publicize the group, post flyers, and make announcements.
- The court also rejected the school district's attempt to require the gay club to be renamed with a different title that was less "divisive" and less likely to be perceived as "derogatory" or affiliated with an outside adult organization. (The Board's suggested alternatives include the "Tolerance Club" and "Tolerance for All." )
- The court noted that a student group's speech and association rights are implicated in the name that it chooses for itself.

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# Student Speech in Official School Newspapers is Legally Protected

- By the First Amendment to the United States Constitution.
- Protection for student speech in official school newspapers is also set forth in the California Constitution, Article I, Section 2, which provides in pertinent part:
  - a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

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# Education Code Section 48907...

- There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to any limitation of student expression under this section.
- "Official school publications" refers to material produced by students in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee.
- Nothing in this section shall prohibit or prevent any governing board of a school district from adopting otherwise valid rules and regulations relating to oral communication by students upon the premises of each school.

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# *Tinker* Standard of Restricting Speech

- School officials must justify their decision by showing “facts which might reasonably have led school authorities to forecast substantial disruption of, or material interference with school activities.”
- *Tinker* does not require certainty that disruption will occur, “but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption.”



# Restricting Student Speech That Attacks Members of Minority Groups

- Students cannot hide behind the First Amendment to protect their right to abuse and intimidate other students at school. **Public school students who may be injured by verbal assaults on the basis of a core identifying characteristics such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses.**



# Restricting Student Speech That Attacks Members of Minority Groups

- California schools are required by law “to minimize and eliminate a hostile environment on school grounds that impairs the access of pupils to equal educational opportunity.” Cal. Educ. Code § 201(f).
- “A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.” Hazelwood Sch. Dist. v. Kuhlmeier (1988) 484 U.S. 260,266 108 S. Ct. 562



# Student Speech That is Not Protected

- Lewd, vulgar, obscene, plainly offensive speech
- Threats
- Proselytizing speech
- Speech that poses a substantial threat of disruption
- Speech that advocates lawless acts, use of drugs or alcohol, or irresponsible sex
- Speech that substantially interferes with the opinion of other students to obtain an education
- Speech that infringes on reasonable campus rules or interrupts classes
- Verbal assaults or harassment on the basis of race, religion, sexual orientation or other protected category

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# Searches of Students and Employees

- ✓ Scope of the 4th Amendment in Schools
- ✓ “Reasonable Suspicion”
- ✓ Exceptions/Unique Situations
- ✓ Applying “Reasonable Suspicion”
- ✓ Potential Consequences of Violations



# FOURTH AMENDMENT



“The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable searches and seizures**, shall not be violated, and no **warrants** shall issue, but **upon probable cause**, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

➤ U.S. Constitution, Fourth Amendment (emphasis added)

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# Search and Seizure

## *Definitions*

- **What is a “Search”?**

- An intrusion or invasion into a person’s objective, reasonable expectation of privacy

- **What constitutes a “Seizure”?**

- A “seizure” occurs where there is some meaningful interference with an individual’s possessory interest

***Students and employees are protected from unreasonable (unlawful) search and seizures conducted by public school officials.***





# Search and Seizure

## *Fourth Amendment*

The United States Supreme Court has held Fourth Amendment constitutional protection extends to searches and seizures of **students** by public school officials, with the following exceptions:

- Warrants are not required; and
- The probable cause standard (more probable than not) does not apply. Rather, a lower standard, reasonable suspicion, applies.

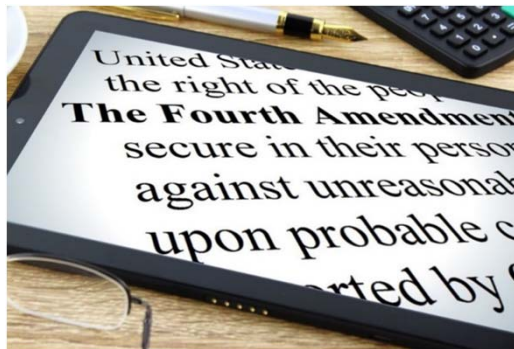
➤ *New Jersey v. TLO* (1985) 469 U.S. 325



# Search and Seizure

## *Fourth Amendment*

- “Searches and seizures by **government employers** or supervisors of the **private property** of their **employees**...are subject to the restraints of the Fourth Amendment.”
  - *O’Connor v. Ortega* (1987) 480 U.S. 709, 715



# Search and Seizure

## *Fourth Amendment*

- Public employers may—without violating the Fourth Amendment—search employee work areas for noninvestigatory, **work-related purposes** and for investigations of **work-related misconduct**, so long as the search meets a **reasonableness standard**.
  - *O'Connor v. Ortega* (1987) 480 U.S. 723, 725-26



# Search and Seizure

## *Policy Considerations*



### Student Expectation of Privacy:

- Students have a reasonable expectation of privacy in **personal items** (e.g. backpack, handbag, pockets etc.)
- Lesser expectation of privacy on **school premises** during school hours



# Search and Seizure

## *Policy Considerations*



Source: <https://www.flickr.com/photos/stubey32/5525100038>

### Employee Expectation of Privacy:

- Employees have a reasonable expectation of privacy in **personal items** (e.g., briefcases, handbags, clothing on person, etc.)
- Arguably higher expectation of privacy than that of students



# Search and Seizure

## *Policy Considerations*

### Safe Learning Environment

- Case by case basis
- Sliding scale
- Where there is REASONABLE articulable suspicion that a serious violation has occurred or will occur, deference is given to school officials to conduct a search and/or seizure



# Search and Seizure

## *Legal Standard*

The search is “reasonable” if the school official can provide facts to show the search was:



Justified at its inception;

AND



Reasonably related in scope to the circumstances which justified the interference in the first place





# Search and Seizure

## *Reasonable Suspicion*

- **“Justified at its Inception”** = there are *specific, articulable facts* for suspecting that the search will turn up evidence that the student or employee has violated or is violating either the law or the rules of the school.
- **“Reasonably Related in Scope”** = the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.



# Search and Seizure

## *Reasonable Suspicion*

- The reasonableness standard will **not** apply to a workplace search if the purpose of the search is solely to obtain evidence of criminal activity.
- “The crucial question is not whether the investigation involves actions arising out of [an employee]’s duties, but whether the investigation’s *objective* is to discipline the [employee] within the department or to seek criminal prosecution.”
  - *Cerrone v. Brown* (2d. Cir. 2001) 246 F.3d 194, 200 (Emphasis added.)

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# Search and Seizure

## *Consent*

- If a student or employee **voluntarily consents** to the search, then the search is reasonable.
- Consent given under *duress, coercion or threat* is **NOT** voluntary consent.



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# Search and Seizure

## *“Reasonableness” Factors*

- Gravity of rule/law violated (e.g., tardiness vs. weapons or drugs)
- Age of student
- Sex of student
- Disciplinary record or other relevant history (e.g., known juvenile criminal record)
- Exigent circumstances requiring immediate search (e.g., to prevent violence or destruction of evidence)
- Reliability of information leading to suspicion

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# Searches Must Be Reasonable In Scope

- **Consider** the type of search: locker, backpack, cell phone, handbag, desk, metal detector, etc.
- The **greater** the reasonably suspected violation, the greater the justification for the search.



# Searches Must Be Reasonable In Scope



- **Consider** the initial basis for conducting the search.
- **Strong** initial basis for search may create basis for wider scope of search.
- **Further** search may be justified if, in the course of the search, evidence of another violation is found.
- **If items** were not found where expected at the inception of the search, wider scope of search *may* be justified.



# Search and Seizure

## *Strip Searches*

- In California, Strip Searches are prohibited
  - Educ. Code, § 49050: No school employee shall conduct a search that involves:
    - (a) Conducting a body cavity search of a pupil manually or with an instrument.
    - (b) Removing or arranging any or all of the clothing of a pupil to permit a visual inspection of the underclothing, breast, buttocks or genitalia of the pupil.

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# Search and Seizure

## *Pat Down Searches*

- **Pat down** searches of students are allowed where reasonable suspicion of contraband exists.
  - *Safford USD v. Redding* (2009) 129 S.Ct. 2633
- **But...pat down searches** at a high school graduation or prom, without individualized reasonable suspicion, are unreasonably intrusive.
  - *Herrera v. Santa Fe Public Schools, et al.* (U.S. Dist. Ct., New Mexico) 2011 WL 2433050





# Search and Seizure

## *Random Searches*

- School policy authorizing **random, suspicionless searches** of students' personal items in classrooms during school day unreasonable and held unconstitutional. *Doe ex rel. Doe v. Little Rock School District* (8th Cir. 2004) 380 F.3d 349
- BUT, a **blanket school search** may be justified where school officials receive specific information giving them reasonable grounds to believe students' safety is in jeopardy. *Thompson v. Carthage Sch. Dist.* (8th Cir. 1996) 87 F.3d 979
- “**Furtive gesture**” in moving to hide an article from school official does not create reasonable suspicion justifying search without additional facts. *In re William G.* (1985) 40 Cal.3d 550.



# Search and Seizure

## *Administrative Searches*

- **Administrative search** doctrine justifies searches for a regulatory purpose despite the absence of reasonable suspicion.
- This doctrine has been applied to uphold the use of metal detectors, some canine searches and certain drug tests provided adequate notice is given that such inspections will occur and there are adequate safeguards to minimize the intrusion.
- Application of this doctrine to other areas (e.g., locker rooms) is not clear.

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# Search and Seizure

## *Administrative Searches*

- Random drug testing involving participants in extracurricular activities have been held to be reasonable. *Vernonia Sch. Dist. 47J v. Acton* (1995) 515 U.S. 646
- Large-scale administrative searches using magnetometers are generally reasonable; they are minimally intrusive and identify need for more intrusive search. *Doe ex rel. Doe v. Little Rock School District* (8th Cir. 2004) 380 F.3d 349



# Search and Seizure

## *Administrative Searches*

- The California Attorney General has opined that students being forced to leave backpacks behind in the classroom to be sniffed by drug-detection dogs constitutes an unconstitutional seizure of the student's possessions. (83 Ops.Cal.Atty.Gen. 257, 260 (2000).)
- But, the California Supreme Court held students themselves may be seized (i.e., detained) by school officials without "reasonable suspicion." (*In re Randy G.* (2001) 26 Cal.4th 556, 565-567.) Of particular note, the Court held, "Different interests are implicated by a search than by a seizure, and a seizure is 'generally less intrusive' than a search." (*Ibid.*)
- Although it is not certain how a court would rule on the issue of seizure of backpacks, we recommend refraining from ordering students or employees to leave their belongings to be sniffed by search canines.

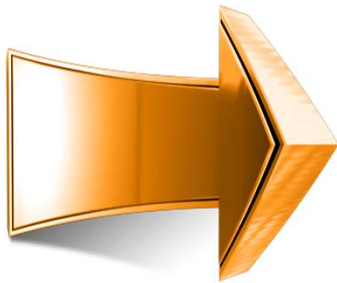


# Search and Seizure

## *Cell Phone Searches*

Reasonableness of a cell phone search **depends** on several factors:

- Are there **policies in place** prohibiting possession, display, or use of cell phones? If so, cell phone is contraband.
- **Which portion** of the cell phone school policy did student violate?
- **Extent of student violation** of school policy (possession versus use) may result in diminished expectation of privacy in the cell phone.



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# Authority to Regulate Student Use of Smart Phones/Digital Devices

## Educ. Code, § 48901.5:

- District can regulate possession or use of any electronic signaling device by students on campus, while attending school-sponsored activities or while otherwise under the supervision or control of the school district employees.
- District cannot prohibit student from possessing or using an electronic signaling device that is determined by a licensed physician or surgeon to be essential for the health of the student and use of which is limited to purpose related to the health of the pupil.



# Search and Seizure of Student Smart Phone

- In order to justify any level of search into the contents of a student's smart phone, the school official must have articulable facts supporting a reasonable suspicion that (1) a specific law or school rule is being violated through the use of a smart phone, and (2) the search into the contents of the smart phone is directed at finding evidence to support such a violation of that certain law or school rule.



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# Confiscate Student Smart Phones

- **YES**: Confiscate student's smart phone for violating District policy prohibiting possession or use of smart phone during instructional time
- **NO**: Confiscate student's smart phone for violating District policy prohibiting possession of smart phone during instructional time then reading text messages, listening to voicemail and/or calling other students from phone





# Search and Seizure

## *Consequences of Unreasonable Searches*

1. Subsequent criminal proceedings could be jeopardized because evidence resulting from search could be excluded.
2. School officials risk civil liability for violation of civil rights.
  - *Bilbrey v. Brown, et al.* (9th Cir. 1984) 738 F.2d 1462 (Student sued principal, teacher, and board members for violation of civil rights for pat-down and clothing removal in search of drugs, where insufficient justification for search.)
3. *Note:* Expulsions based on unreasonable searches are not subject to exclusionary rule or being overturned.
  - *Gordon J. v. Santa Ana Unified School Dist.* (1984) 162 Cal.App.3d 530.)



# Civil Liability for Violation of Civil Rights

- School Districts may be sued for violations of civil rights (commonly violation of First and Fourth Amendment rights)
- School Districts have Eleventh Amendment immunity to many lawsuits seeking money damages, but not suits arising under state law
- *Ex Parte Young Doctrine* may nonetheless allow a lawsuit seeking injunctive relief
- Successful plaintiffs may be entitled to an award of attorneys' fees



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# Civil Liability for Violation of Civil Rights

- Employees may be sued for violations of civil rights
- Employees in their official capacity are entitled to qualified immunity (depending upon the reasonableness of the employee's actions)
- If qualified immunity is available, employees may be sued in their individual capacity for alleged acts beyond the course and scope of employment
- Successful plaintiffs may be entitled to an award of attorneys' fees



# Thank you!

For questions or comments, please contact

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