Gangs: Take a Fresh Look at Your Campus Policies

By Raija Churchill, Graduate Student of Law, Pepperdine University and Bernard James, Professor of Constitutional Law, Pepperdine University

What SROs and Educators Should Know About School Safety and Liability
Gangs strike and campus safety teams often fall apart. School officials and SROs respond in various ways, but two of the more common responses are denial and despair. Denial refuses to acknowledge the disruptive impact of gangs on campus. It shuts its eyes tight or looks the other way; it manages to act as if everything is going to be just fine. It takes refuge in other campus distractions and tunes out the gang issue. Despair is paralyzed by the presence of gangs and accepts it as the end of the world. It is unwilling to do anything, concluding that any meaningful school safety efforts will either violate student rights or will have a modest result out of proportion with the required high level of effort.

The current belief among a surprising number of educators that solutions to gangs are difficult to identify and implement is simply false — as a matter of law. Gang activity is simply delinquency and disruption in its traditional forms. That it involves groups of students does not make it peculiar or immune to the tools fashioned for educators by courts and legislators.

There are a variety of reasons for taking a fresh look at campus policies on gangs. First, gangs compromise the education mission. The activity collides with the rights of other students, creating a hostile climate that breeds both the threat of assault — often fulfilled — and the disruption of class work.

Second, state legislators are beginning to show impatience with local educators by enacting new laws that dictate rules for addressing gangs on campus. This is welcome news to many school officials because the laws often come with funding for implementing programs, but this predictably leads to the third most pressing justification for finding the right formula for eliminating gangs. Courts are beginning to impose liability judgments against schools that, in denial or despair, do not have an effective response to the presence of gangs on campus.

The gang-related liability cases in education law do not represent a new category of liability for school officials. Instead, courts have applied the long-standing tort liability rules on adequate supervision and intervention. All educators have a duty to adequately supervise students in their charge, and are liable when inadequate supervision directly leads to foreseeable injury.

The other traditional category of liability cases involve violations of the First Amendment when school regulations target gang members because of their expression.

Test your “Gang IQ” on the following scenarios:

1. Members of the Bloods gang surrounded a student on the sidewalk after school. They mistook him for a Crips gang member. One of the Bloods shot him, though not fatally. Another Bloods attacker had attended the school for a day or two, before telling a teacher that he “can’t come to the school no more because there’s some Crips here.” School administrators removed gang symbols from students on a nearly daily basis, but knew nothing in advance about this attack.

Did the school fail to adequately protect the victim?

Y  N

2. A student was assaulted and stabbed by a gang as he waited for the doors of his high school to open. School officials knew the violent history of one of the attackers and were aware that the student body included several gangs. The student’s parents had previously requested a transfer to another school, but the request was denied. They filed a lawsuit arguing that the school owed a duty to provide adequate supervision. The school filed a motion to dismiss the suit.

Should the court dismiss the lawsuit?

Y  N

3. A new high school student was surrounded in the hallway by gang members and assaulted. Some of the gang members were students and others were adult gang members who came on campus to participate in the attack. The day before the attack, the victim fought back in self-defense when a gang member hit him. This incident was reported to an educator, who did nothing. The victim filed a lawsuit, claiming that educators were negligent in failing to provide adequate supervision during the period between classes when the beating occurred.

Will the school be liable?

Y  N

4. Parents of a student filed a lawsuit when their son was sexually assaulted by teammates on his football team in the locker room following a practice. Students who witnessed and participated in

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the sexual assault testified that there was virtually no supervision of the locker room over a 20 to 30 minute period and that the football players were engaged in reckless and aggressive horseplay during that period. The parents argued that the sexual assault was the result of the failure to provide adequate supervision of the locker room. The educators filed a motion to dismiss on the grounds that nothing like that had ever happened before, therefore the incident was not foreseeable.

Should the court dismiss the lawsuit?

Y  N
5. A student wore an earring to school several times and each time was suspended. The policy at the school prohibited all gang activities at the schools, including gang symbols, jewelry, and emblems. The student filed a lawsuit, denying his membership in any gang and arguing that the rule violated his right of free speech and that the rule was discriminatory because girls were allowed to wear earrings.

Will the lawsuit succeed? [ ] Y [ ] N

**Gangs & The Basics of School Liability**

Nearly all of the law of school safety is in play with gangs. Most lawsuits involve claims of inadequate supervision by school officials. Some conflicts raise issues of expression under the First Amendment since many of the symbols used by gangs are communicative. Other cases raise concerns of privacy, search and seizure.

All of the relevant laws on the subject of gangs are applied in a manner that resolves doubts about liability in favor of educators when (1) policies are reasonable, (2) are implemented in response to a known or foreseeable incident, and (3) are consistently applied to all students who are similarly situated. School officials typically find themselves in trouble with student rights and the courts when they utterly fail to address gang activity, are negligent when implementing valid policies, or when they discriminate in meting out student discipline.

The Supreme Court has acknowledged that some flexibility is required for schools to maintain security and order. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). It has also held, however, that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Clearly, state and federal policymakers now expect that school officials with a gang problem will be actively at work to deter, punish, and restore the affected campuses without violating student rights.

Courts also expect that educators and SROs will stay current on what the law requires and what it permits in implementing gang policies.

**Liability for Failure to Supervise**

School districts can be held liable for failure to take reasonable steps to provide a safe environment for their students. The failure to take reasonable safety steps is not within the common law immunity for failure to prevent crime. The obligation imposed on educators and SROs is to exercise ordinary prudence, acknowledging and responding to conditions that are inconsistent with its education mission and the duty to protect the rights of other students to be free from a hostile climate.

The standard is not one of strict liability for every incident that occurs on campus, but only for those that are reasonably foreseeable. This standard has been applied in three contexts: (1) injuries that occur on school premises, (2) injuries suffered in school-sponsored events, and (3) injuries suffered off-campus at the beginning or end of the school day. The standard of due care imposed on school authorities in exercising their supervisory responsibilities is often said to be the degree of care that a person of ordinary prudence, charged with comparable duties, would exercise under the same circumstances.

The rules are applied in a common-sense fashion. On campuses with high gang activity, schools have actual and special knowledge of the potential for gang violence and under these circumstances are required to exercise reasonable care in a robust fashion. (See *Walker v. Detroit Pub. Sch. Dist.*, 2010 U.S. Dist. Lexis 131329 (E.D. Mich. 2010)). When the school is taken on the road in sponsored events, educators are still deemed to control the en-
environment where the activities take place and have a duty to adequately supervise students to prevent crimes. DesRoches v. Caprio, 156 F.3d 571, (4th Cir., Va. 1998) (search of all students’ backpacks when a fellow student reported their shoes missing after school-sponsored trip.). Rhodes v. Guarriello, 54 F. Supp. 2d 186 (S.D.N.Y. 1999) (class field trip that required sleep over in a hotel).

The most contentious category involves gag activity before and after school. The courts all agree “a school district may be held liable for injuries suffered by a student off school premises and after school hours when the injury resulted from the school’s negligence while the student was on school premises.” Brownell v. Los Angeles Unified School District, 4 Cal.App.4th 787, 795 (1992) (a high school owed a duty of care to a student who was shot by a gang member while waiting for a bus off school grounds, after school hours.). The courts have effectively lengthened the school day to include the coming and going of students.

Most state education policies have codified this by becoming “portal-to-portal” states, expanding both the expansion of authority and duty of care in permitting students to enter and leave school campuses. See Hoyem v. Manhattan Beach City School District, 22 Cal.3d 508 (1978) (school district could be liable for negligent supervision of a ten-year-old truant student who was hit by a motorcycle when he left school during school hours without authorization).

A key element in all of the supervision cases is foreseeability — schools are liable for injuries if the occurrence is a reasonably foreseeable result of conditions that were known or which should have been known by educators. The presence of gang is one easily determined by school officials and SROs within the ordinary range of their daily collaboration. As one court wrote, “the law requires ordinary care, not fortresses; schools must be reasonably supervised, not impenetrable to all gang-related violence.” Brownell v. Los Angeles Unified Sch. Dist., 4 Cal.App.4th 787, 795-97 (Ct.App. 1992). When gang incidents are brought to the attention, it is — as a matter of law — within the school’s discretion to decide to what extent to intervene. And while courts usually stand clear of imposing liability on matters of student discipline entrusted to schools, judicial intervention will occur to correct the abuse of discretion when educators negligently decide that no further action is necessary. There is really no way for educators to avoid the force of the emerging case law; schools must provide adequate supervision if schools know that gangs of violent, predatory students are enrolled.

LIABILITY FOR VIOLATING THE FREE SPEECH OF STUDENTS

Student expression is protected under the First Amendment, though the right to free speech is not absolute. Student expressive rights are reduced by the legitimate and sometimes compelling educational duties to provide a safe and effective learning environment free from disruptive and inappropriate conduct as well as to protect the rights of other students.


A National Gang Center survey suggests that youth gangs caused problems in approximately one-third of American cities, towns and counties during 2008. When they are students, gang members often take their “team colors” and activities onto the school campus. Seemingly innocent gestures — leaving a shoelace untied, calling classmates “fols” — can identify students as gang members. See Stephenson v. Davenport Cnty. Sch. Dist., 110 F.3d 1303 (8th Cir. 1997). In this environ-

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ment, schools must navigate between reasonably protecting students against violence and respecting students' First Amendment rights.

However, many emotive acts by students are not considered expression at all. Matters of style, clothing, hair length, and other symbols of individuality are simply not protected. A student must intentionally convey a specific message that will be understood by people who observe it objectively. Texas v. Johnson, 491 U.S. 397, 404 (1989); see also Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 666 (S.D. Tex. 1997) (anti-gang policy violated the First Amendment by prohibiting religious students from wearing rosaries outside their clothing). Many gang symbols are considered speech. But even when the student meets this test, the law will not uphold the expression when it is inconsistent with the mission of primary and secondary school education and creates a hostile environment. The educators can respond to the secondary effects of the speech without violating student rights. See United States v. O'Brien, 391 U.S. 367 (1968) (general rule); Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971) (hair length), cert. denied, 405 U.S. 1032 (1972); New Rider v. Board of Education, 480 F.2d 693 (10th Cir.) (hair), cert. denied, 414 U.S. 1097 (1973); Hatch v. Goerke, 502 F.2d 1189 (10th Cir. 1974) (hair); Olesen v. Board of Education, 676 F. Supp. 820 (N.D.II. 1987) (earrings); Bivens v. Albuquerque Pub. Sch., 899 F. Supp. 556 (D.N.M. 1995) (sagging pants).

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LEGISLATIVE REFORM AND GUIDELINES FOR POLICYMAKERS


§ 28A.600.455. Gang activity – Suspension or expulsion
(1) A student who is enrolled in a public school or an alternative school may be suspended or expelled if the student is a member of a gang and knowingly engages in gang activity on school grounds.
(2) "Gang" means a group which: (a) Consists of three or more persons; (b) has identifiable leadership; and (c) on an ongoing basis, regularly conspires and acts in concert mainly for criminal purposes.

This legislative reform suggests three questions that each administrator and school safety team should examine:

(1) Whether the school has received adequate notice of the risk posed by gangs.
(2) Whether the school has met the duty to provide a level of supervision adequate in light the risks.
(3) Whether any campus injury is the result of the failure to meet the duty to supervise.

I.Q. TEST ANSWERS

In the I.Q. test, schools were not liable in Questions One and Five, and are liable in Questions Two, Three and Four.

In Question One, the court ruled that state law imposed a duty to exercise reasonable care in supervising students during the school day. Immunity for liability did not apply to assaults occurring off campus if parents could show that the crisis began with the failure to exercise reasonable care while their child was on school premises. But the court ruled that in the absence of a specific warning of a gang-related threat or a prior incident, school officials exercised due care by enforcing existing campus gang and violence rules. See Brownell v. Los Angeles Unified School Dist., 4 Cal.App. 4th 787 (Cal. App. 2d Dist. 1992).

In Question Two, the court denied the school's motion. The court held that the school had a duty to adequately supervise their students and would be liable for injuries caused by inadequate supervision. Since school authorities were aware of the danger posed by the student body, "[c]ommon sense alone dictates that appropriate levels of school
supervision be provided." Therefore, the incident was foreseeable and dismissal would be inappropriate. See Speight v. City of New York, 765 N.Y.S.2d 28 (N.Y. App. Div. 1st Dep't 2003).

In Question Three, the court ruled that a school district bears a legal duty to exercise reasonable care in supervising students in its charge and may be held liable for injuries proximately caused by the failure to exercise such care. This was particularly true when the educators presented no evidence to show that it had any supervision policies in place when the assault occurred. See Luis M. v. Hayward Unified Sch. Dist., 2007 Cal.App. Unpub. LEXIS 8668 (Cal.App. 1st Dist. Oct. 26, 2007).

In Question Four, the court held that although actual or constructive notice to similar conduct is generally required, a school may be held liable for an injury that is the reasonably foreseeable consequence of circumstances it created by its inaction and a jury could find that an injury was a foreseeable consequence of the failure to provide adequate even in the absence of notice of a prior sexual assault. See Doe v. Fulton Sch. Dist., 35 A.D.3d 1194 (N.Y.App. Div. 4th Dep't 2006).

In Question Five, the court denied the student's claims. The wearing of earrings was not protected under the First Amendment because "individuality" was not a particularized message and the rule directly related to school safety the elimination of gang activity. There was no discrimination because the rule was substantially related to a legitimate objective and the symbols worn by females were also prohibited. See Olesen v. Board of Education, 676 F. Supp. 820 (N.D. Ill. 1987) and Bivens v. Albuquerque Pub. Sch., 899 F. Supp. 556 (D.N.M. 1995).

Bernard James is a Professor of Constitutional Law at Pepperdine University. Professor James is a nationally recognized expert on civil rights and education reform.

Raija Churchill is a graduate student in law and public policy at Pepperdine University.