SCHOOL LIABILITY & EXCESSIVE FORCE

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Nearly all of the best practices associated with the safe schools movement emerges directly from legal reform that is clearly announced and capable of being put to immediate use. One area that is an exception to this trend is the law on excessive force. Educators are understandably confused over the rules on touching students.

Many school districts simply do not allow touching of any kind when it comes to students, a decision that creates uncertainty as to the effectiveness of the safe schools plan. Other schools shift the burden of using force against students to school resource officers under an assumption that law enforcement officers are somehow immune from these concerns. Many SROs suspect that the attempt to delegate the task of using force against a student is odd, particularly in cases of misconduct that raise no risk of harm and that violate only the school code of conduct.

The confusion of educators is compounded by the legal terminology used by judges when deciding excessive force cases. "Corporal punishment" is ordinarily used by educators only to describe the act of paddling a student as a formal response to misconduct. However, courts use the term to include the entire range of force directed at students in all of its forms, including informaltouching that may arise in response to an emergency or crisis.

Therefore, the excessive force cases are an important source of insight, policymaking, and training. It is essential that both educators and school resource officers understand what the law permits and requires on use of force against students. The law on reasonable use of force is not inscrutable. It empowers educators to use reasonable physical force that is applied in good faith for legitimate pedagogical purposes.

Educators risk federal constitutional liability when they subject their students to force that does not serve any appropriate pedagogical objective.

**Test your “Excessive Force IQ” on the following scenarios:**

1. A middle school student, while in gym class, began shouting a derogatory term at another student. The gym teacher incorrectly thought the student was shouting at him. The teacher rebuked the student and, while doing so, struck him on the arm with a plastic baseball bat. The student ignored the teacher’s order to go to the principal’s office. In frustration, the teacher pushed the student out of the gym and took him to the office. Later, the student was examined by a doctor who found "tenderness, faint bruising and minor swelling" on the arm.

   Did the teacher use excessive force?  
   
   Y  N

2. A high school student, upset that a vending machine failed to work properly, began to violently and repeatedly kick the machine. A teacher approached telling the student to stop. Suddenly, the student grabbed the teacher’s arms. The principal, observing this, grabbed the student by her shirt collar and led her out of the building. He threw the student onto a bench. When the student tried to stand up, the principal held her down until she surrendered. The student was taken to the emergency room with pain in her neck. She was found to have a pulled nerve that required wearing a neck brace and a steroid injection.

   Did the principal use excessive force?  
   
   Y  N

3. A student was sent to the vice-principal for violating the code of conduct but refused to enter the office. The vice-principal pushed the student toward the office causing the student’s lower back to strike the door jam. The student now suffers chronic back pain and cramping as a result of the impact. Her physicians have advised her to avoid strenuous activities involving her back.

   Did the vice-principal use excessive force?  
   
   Y  N

4. A gym teacher attempted to discipline a nine-year-old student who was not participating in class. The student refused to follow instructions and threatened to hit the coach. The SRO was called to escort the student out of the gym class. After leaving, the SRO told the student to turn around and placed her in handcuffs, telling her "this is how it feels when you break the law." The student remained handcuffed for nearly five minutes and then waited in the gym teacher’s office until the next class.

   Did the SRO use excessive force?  
   
   Y  N

5. A second-grader was sent to the vice-principal’s office for "horseing around." The student repeatedly refused to stand still against a wall for his “time-out” punishment. The administrator followed through on his warning to take the student outside and tape him to a nearby tree if he did not stand still. The vice principal used masking tape to tape his head to the tree. After about five minutes, the fifth-grade girl told the vice-principal that she did not think he should be doing that.
"The Fourth Amendment's rules on the reasonableness of searches and seizures accommodate the authority of educators to make split-second judgments in circumstances that may be tense, uncertain, and rapidly evolving about the amount of force that is necessary against a particular student."

He instructed the girl to remove the tape, which she did.

Did the vice-principal use excessive force?

Y ___ N ___

EXEMPLARY FORCE LIABILITY:
The Constitutional Branches

The excessive force cases are not easily generalized. The court decisions must be read thoughtfully to become accustomed to the manner in which judges balance the authority of educators against the right of student to be free from wrongful touching. There is no general rule that applies in all cases. The rules apply to both school officials and school resource officers who assist educators in maintaining a safe learning environment.

In modern cases, the standard for finding the use of force excessive is a high one for students in order to prove their cases. Not every touch, push or shove will be deemed to violate the rights of a student. This is true even when the force is later determined to have been unnecessary in light of the circumstances. A lawsuit over the use of force is judged from the perspective of an educator acting under the specific circumstances out of which the dispute arises.

Excessive force claims tend to constitutional nature. Although a student may file a lawsuit based on state tort law (for example, for negligent or intentional use of force), the rules that control the law come from two provisions of the U.S. Constitution. Courts first must identify the specific constitutional right involved. Different rules apply to each area: the "reasonableness" standard of the Fourth Amendment or the "shocks the conscience" standard of the Fourteenth Amendment.

FOURTH AMENDMENT EXCESSIVE FORCE CLAIMS

The Fourth Amendment rules on excessive force are predictably tilted in favor of the educator. It is grounded in the reasonableness standard of New Jersey v. T.L.O., 469 U.S. 325 (1985). In T.L.O., the Supreme Court empowered educators to apply discipline in the classroom and maintain a safe learning environment. The Court relaxed the limitations on educators under a two-step approach: (1) whether the search or seizure is justified at its inception; (2) whether the search or seizure is reasonably related in scope to the circumstances that justified interference in the first place. See, T.L.O. at 341. Later, the Supreme Court acknowledged that students are lawfully subject to a level of restraint that would be unacceptable if "exercised over free adults." See Veronia Sch. Dist. 47 J v. Acton, 515 U.S. 646, 655 (1995).

The Fourth Amendment's rules on the reasonableness of searches and seizures accommodate the authority of educators to make split-second judgments in circumstances that may be tense, uncertain, and rapidly evolving about the amount of force that is necessary against a particular student. It accepts the fact that the authority of an educator to detain a student for legitimate educational purposes necessarily carries with it the right to use some degree of physical force or threat of it to maintain a safe climate. The typical factors courts consider include:

- The severity of the misconduct by the student;
- Whether the student poses an immediate threat to the safety of others; and
- Whether the student is actively insubordinate and attempting to evade attempts at discipline.

With these factors in mind, the reach of the Fourth Amendment is limited in the typical excessive force case. Its concern is with long-term detentions and prolonged physical restraints that courts consider to be a sustained deprivation of liberty. Therefore, a brief use of physical force by a teacher in reaction to a disruptive or unruly student does not affect a 'seizure' of the student under the Fourth Amendment and therefore cannot be considered excessive for purposes of liability. However, it is important that the force must be capable of being construed as an attempt to serve pedagogical objectives.

FOURTEENTH AMENDMENT EXCESSIVE FORCE CLAIMS

The Due Process Clause of the Fourteenth Amendment has its own rules for evaluating unreasonable use of force. The test looks for physical restraint by the educator that "shocks the conscience." In Sandin v. Conner, 515 U.S. 472 (1995), the Supreme Court ruled that arbitrary corporal punishment of students represents an invasion of personal security
which parents do not consent to when sending their children to public school.

The most important aspect of the test focuses on whether the use of force is related to the student's misconduct at school and whether it is a legitimate use of discipline. Doubts are resolved in favor of educators unless the student can show that (1) the use of force was obviously excessive, and (2) that the educator intended to use that obviously excessive amount of force.

The substantive due process inquiry in school safety cases is whether the force applied is so severe and disproportionate to the need presented, and was so inspired by malice and intent rather than a merely careless or unwise zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience. When courts examine a specific case they consider the following factors:

- The need for the application of corporal punishment;
- The relationship between the need and amount of punishment administered;
- The extent of the injury inflicted; and
- Whether physical force was applied in a good faith effort to maintain or restore discipline or maliciously and intentionally for the very purpose of causing harm.

Application of the "shocks the conscience" standard is not as complex as it may seem at first. For example, when an educator's need to use force against a student is minimal or nonexistent, any physical force will be considered an abuse of authority that satisfies the test. In one case, the court held that a principal's unnecessary and repeated striking of a student, causing a large knot on the student's head and continuing migraine headaches, satisfied the test for a substantive due process claim. See Kirkland v. Greene County Bd. of Ed., 347 F.3d 903 (11th Cir. 2003).

At the other extreme, courts easily find a violation of student rights when the educator goes too far with discipline that may at first have been justified. A good example for this is an early case in which a court ruled that a student who was repeatedly paddled so forcefully that she required ten days of hospitalization for bodily injuries satisfied the test. See Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980). Similarly, it is not a violation of substantive due process if the educator did not intend to use any force against a student or cause an injury, and therefore the contact was accidental. And finally, there is no liability if an educator intended to use force against a student, but not to cause an injury, and therefore the injury was accidental.

As in the Fourth Amendment cases, any force used by an educator or an SRO must be capable of being construed as an attempt to serve pedagogical objectives. Where members of the safe schools team grab a student to break up a fight or restrain a student when hearing him curse or paddle a student for misbehaving, the reason for the use of force by the school official is obvious. Corporal punishment rises to the level of a substantive due process violation when it is unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning.

"EXCESSIVE FORCE IQ" ANSWERS

In Question One, the court found that the use of force did not rise to the level required for a constitutional violation under the Fourth Amendment because momentary use of physical force by a teacher in reaction to a disruptive or unruly student is not a seizure. The court did state that there was little or no need for the teacher's application of force and it was very possible that the teacher hit the student out of anger. The court noted that one hit with a plastic bat did not have the potential to cause serious harm to the student, and in fact did not cause such harm, it therefore, did not meet the excessive force standard under the "shock the conscience" standard. See Gonzales v. Passino, 222 F. Supp. 2d 1277 (D. N.M. 2002).

In Question Two, the court held that the principal's conduct did not rise to the level of excessive force. The principal was acting quickly and decisively to a serious incident of misbehavior, applying a "shocks the conscience" standard, the court found that the principal did not maliciously and sadistically injure the student, and thus there was no excessive force. Golden v. Anders, 324 F.3d 650 (8th Cir. 2003).

In Question Three, the court held that the push did not give the student a constitutional excessive force claim. The push was so minor that even if the injuries the student alleged occurred, it could not be inferred from the act itself that the principal intended to act maliciously and sadistically. Also, the student explicitly stated that she believed that the principal did not intend to injure her. Thus, the principal's conduct, although possibly tortious, did not give the student a constitutional cause of action. See Gottlieb v Laurel Highlands School District, 272 F.3d 168 (3d Cir. 2001).

In Question Four, the court ruled that the force was excessive and violated the student's Fourth Amendment rights. The SROs handcuffing of the student was not reasonably related to the scope of school safety. At best, it was an attempt to create a teachable moment in hopes of changing her behavior in the future. It was excessively intrusive given the student's young age and the fact that it was not done to protect anyone's safety. See Gray ex rel. Alexander v. Bostic, 458 F.3d 1295 (11th Cir. 2006), cert. denied, 550 U.S. 956 (2007).

In Question Five, the court held that the act of the vice-principal did constitute excessive force. It ruled that the eight-year-old student was "seized" and that the Fourth Amendment governed a teacher's seizure of a student. The act was excessive because the student's misconduct was for "horsing around" and refusing to stand still. The student did not pose a danger to other students. Taping his head to a tree for five minutes was so objectively unreasonable that a fifth grader observed it was inappropriate. See Doe v. Haw. Dep't of Educ., 334 F.3d 906 (9th Cir. 2003).

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