

Protecting Student Health

Public schools have certain responsibilities for the health of their students. Approximately half of the states require schools to implement health standards, including physical exams, as a prerequisite to attendance. All 50 states require public school students to be vaccinated against diseases such as diphtheria, measles, and rubella. And, according to the American Academy of Pediatrics, most public schools also provide vision and hearing screening as well as dental and dermatological checks.

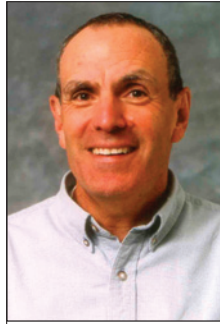
Yet, in implementing these responsibilities for children's health, principals tread a fuzzy line. In our diverse society, what is prevention to some is intrusion to others. The following case and the accompanying questions and answers illustrate relevant litigation.

The Case¹

At the start of the 1995–96 academic year, school personnel in Stroudsburg, Pennsylvania, sent a notice home to parents of fifth-grade students, informing them that their children were required to take state-mandated medical checkups. The notice explained that those fifth graders who were not examined by their family physician would be examined by the school doctor in March. The district contracted with a local female physician to examine female fifth graders whose parents did not submit examination results from their family doctors by the specified deadline. The district did not stipulate, to the parents or the physician, the specific elements of the exam.

In March, with the help of two school nurses, the contracted physician performed exams on nearly 60 girls for whom the school did not have results. Claiming to be within guidelines set by the American Academy of Pediatrics, the physician included genital exams to determine whether the girls were “developing normally, as they were at the beginning of puberty, ... [and to see if] they had any abnormal lesions” or sexually transmitted diseases. Three girls declined the genital exams, and they were not performed in their checkups.

When they heard about the genital exams, some parents were very upset. One parent told the principal that she had her daughter examined by the family physician, and the daughter insisted she had given the form to her homeroom teacher early in the year. But the nurse told her daughter she would have to participate because she had no record of the form. Another parent claimed her daughter had



informed one of the assisting nurses that her mother had requested to be present during her exam, and that the nurse had not called home.

After the administration investigated the complaints and found no improprieties, the parents of the two girls joined with six others to file suit in federal court against the district, the school nurses, and the contracted physician, alleging that the exams violated the Fourth Amendment's prohibition of unreasonable governmental searches. They also included state common law claims of assault, battery, and negligence.

“...In implementing [their] responsibilities for children's health, principals tread a fuzzy line. In our diverse society, what is prevention to some is intrusion to others.”

Questions and Answers

What do you think was the outcome of the parents' suit?

At the first stage, the federal judge ruled that the Fourth Amendment claim against the district would proceed to trial because genital exams constituted searches, and there were genuine issues about their constitutionality. For example, the judge explained that a jury would have to determine, after hearing the relevant evidence, whether these exams should be part of a school medical exam, and, if so, whether the doctor and nurses conducted them properly. Similarly, the jury would have to decide whether such exams fit into the “special needs” exception, illustrated by drug testing for school sports and other extracurricular activities. If not, they would have to decide whether the parents had consented to them.

However, the judge dismissed Fourth Amendment claims against individual school board members, because they had not been personally involved. He also dismissed claims against the doctor and nurses, because the constitutional issue was not clearly settled and thus they were entitled to qualified immunity. Finally, the judge dismissed some of the state common law claims against the school district and its personnel, based on the boundaries of Pennsylvania's governmental and official immunity legislation.²

At the second stage, after hearing the evidence at trial, the judge directed a verdict for the two school nurses, concluding that the families did not prove that they acted improperly.³ Hours before the jury verdict, the physician settled her part of the case, based on the remaining common law claims that included battery and negligence, for \$25,000 for each of the eight girls.⁴ The jury held that the exams violated the Fourth Amendment and that the district was liable for an additional \$7,500 per girl. The judge upheld the jury's verdict and awarded the parents \$250,000 in attorneys' fees.⁵

Have there been other such cases in recent years? If so, how do the results compare with those of this case?

In the only other published decision in recent years, the Tenth Circuit Court of Appeals recently provided similar legal guidance⁶, although the facts were not identical. In this case, the students were preschool children enrolled in a Head Start program. The medical checkups included blood tests as well as genital exams, and the parents had signed general consent forms. However, the forms did not specify these two elements of the exam. The appeals court analysis was similar to the Pennsylvania case in concluding that the medical exams were searches under the Fourth Amendment and that, despite the signed forms, there was a question whether the parents had consented to intrusive checkups.

What other preventive health services, not associated with the curriculum or students with disabilities,⁷ have proven to be fertile fields for litigation?

For elementary school principals, who do not typically have to worry about drug testing of students in sports⁸ or other extracurricular activities⁹, much less condom distribution¹⁰, the major cause of such litigation is immunization. In a long line of case law, courts have consistently upheld the constitutionality of immunization, or vaccination, as a condition of attending public school.¹¹ However, some states grant exemptions based on religious or other grounds.¹² Principals should check with their district's legal counsel to see whether their state has such exemptions.¹³

The only other area of concern is the use of student surveys as a means of preventive health care. The courts have not been of one mind on this issue. In one older case, a federal district court ruled that a drug prevention survey violated the students' right to privacy.¹⁴ Yet, more recently, a federal district court in California ruled that distribution of a survey questionnaire to first-, third-, and fifth-grade children

that contained sexually explicit items did not violate the parents' substantive due process rights.¹⁵

Conclusion

In taking preventive health measures for the benefit of their students, elementary school principals need also to practice preventive law. The Tenth Circuit's analysis is illustrative:

"The defendants' argument seems to be...that medical examinations...are for the good of children and should not be hamstrung by legalistic requirements like...consent. We do not doubt that [the program administrators] were acting in the interest of the children, as it understood them. But the requirement of...parental consent ...serves important practical as well as dignitary concerns...."

Parental consent is the starting point. If accomplishing this safeguard appears impractical, think twice; the judge and jury, not you or your peers, are the ultimate test of reasonableness.

However, in cases where parental consent is clearly not feasible or forthcoming, as in cases of parental objection to immunization, determine the specific scope of the applicable law and proceed ahead with due diligence. Health, education, and law are not without ambiguities and risks. ■

Notes

1. The facts are approximations based on the limited sources cited in footnotes 2-5.
2. Danielle Rodier, "Parents Go After School District for Physical Exams," *Pennsylvania Law Weekly* (Aug. 31, 1998), 5.
3. "Judge Releases Nurses in Genital Exam Case," *Pennsylvania Law Weekly* (July 26, 1999), 2.
4. "Father of Girl in Genital Exam Case Complains about Settlement," *Pennsylvania Law Weekly* (Aug. 9, 1999), 2.
5. "Female Students' Civil Rights Awards Upheld," *Pennsylvania Law Weekly* (Feb. 7, 2000), 2.
6. *Dubbs v. Head Start, Inc.*, 336 F.3d 1194 (10th Cir. 2003).
7. Separable issues, which will be treated in future issues, are sex education within the regular curriculum and administration of medication to students with disabilities, as a related service under Section 504.

8. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (permissible under the Fourth Amendment).
9. *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002) (permissible under the Fourth Amendment).
10. Compare *Parents United for Better Sch., Inc v. Sch. Dist. of Philadelphia*, 148 F.3d 260 (3d Cir. 1998); *Curtis v. Sch. Comm. of Falmouth*, 652 N.E.2d 580 (Mass. 1995) (permissible) with *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (App. Div. 1993) (impermissible).
11. See, e.g., *Zucht v. King*, 260 U.S. 174 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Maricopa County Health Dep't v. Harmon*, 750 P.2d 1364 (Ariz. Ct. App. 1987); *Syska v. Montgomery Bd. of Educ.*, 415 A.2d 301 (1980); cf. *Calanda v. State College Area Sch. Dist.*, 512 A.2d 809 (Pa. Commw. Ct. 1986) (tetanus shot as condition for participation in interscholastic athletics).
12. But cf. *Boone v. Boozman*, 217 F. Supp. 2d 938 (E.D. Ark. 2002); *McCarthy v. Boozman*, 212 F. Supp. 2d 945 (W.D. Ark. 2002) (religious exemption violates First Amendment religion clauses if limited to recognized denominations); *Brown v. Stone*, 378 So.2d 218 (Miss. 1979) (religious exemption constituted unequal protection of the laws).
13. See, e.g., *Friedman v. Clarkstown Cent. Sch. Dist.*, 75 Fed. Appx. 81 (2d Cir. 2003) (upheld superintendent's denial of New York religious exemption); *Mason v. Gen. Brown Cent. Sch. Dist.*, 851 F.2d 47 (2d Cir. 1988); *Hanzel v. Arter*, 625 F. Supp. 1259 (S.D. Ohio 1995) (secular chiropractic ethic did not qualify for religious exemption); *Farina v. Bd. of Educ.*, 116 F. Supp. 2d 503 (S.D.N.Y. 2001); *Sherr v. Northport-East Northport Union Free School Dist.*, 672 F. Supp. 81 (E.D.N.Y. 1987) (similarly not qualified under New York's exemption where reasons are personal, medical, or purely moral). But cf. *In re LePage*, 18 P.3d 1177 (Wyo. 2001) (health department exceeded its authority by denying religious exemption under Wyoming law). A related practical concern is obtaining immunization records upon a student's transfer into the district. See, e.g., *White v. Linkinogger*, 344 S.E.2d 633 (W. Va. 1986).
14. *Merriken v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973).
15. *Fields v. Palmdale Sch. Dist.*, 271 F. Supp. 1217 (C.D. Cal. 2003).

Perry A. Zirkel is University Professor of Education and Law at Lehigh University in Bethlehem, Pennsylvania.