

# Teaching Sensitive

In emphasizing high scores on reading and math achievement tests, teachers may lose sight of the emotional side of impressionable youngsters. Principals need to help maintain the balance, especially because young children are sensitive to what teachers say and how they say it. With the winter religious holidays approaching, such sensitivities become acute.

The following case and the accompanying question-and-answer discussion illustrate the potential for litigation in not only the official but also the hidden curriculum. Failure to find the appropriate balance may leave the issues for judicial determination, which can be ponderous and inconclusive.

## The Case<sup>1</sup>

In 2003-2004, Nancy Doe, whose family is Muslim, was a fourth grader in the public schools of Cape Henlopen, Delaware. In September, in memoriam of 9/11, her teacher, Ms. C used a district-approved textbook that provided a brief background of Christianity, Islam, and Judaism. The book distinguished between mainstream Muslims, who are peaceful, and Islamic extremists who led the terrorist attacks on 9/11. The book described Al Qaeda members as people who bomb buildings or hijack planes and who “believe [the holy book of Islam] tells them to fight a war against countries like the United States.”

Starting in late November, Ms. C read Christmas books, which were not part of the approved curriculum, to her class every day. For example, “The Legend of the Candy Cane” centered on candy canes in which the red stripes represented the blood of Christ—the thick one for the blood he shed for the sins of the world and the thin one where the Roman soldiers whipped him—and the green one as a reminder that Jesus was a gift from God. The story also explained the mint flavor “as a reminder that Jesus was the pure Lamb of God to be a sacrifice for the sins of the world.” The story ended by prompting the students to remember “Jesus is the Christ!” every time they see a candy cane.

When Nancy told her parents about her discomfort with these two experiences, they met with the district’s curriculum supervisor, suggesting that the teacher apologize to Nancy with a positive statement to the class in terms of making her feel more welcome. Finding



nothing wrong with Ms. C’s actions and considering Nancy’s parents to be negatively “stuck in the past,” he rejected their suggestions.

In January 2004, the parents and an attorney from the ACLU met with the principal and the teacher to discuss these issues. As a result, the superintendent agreed to suspend Ms. C for two days with full pay to conduct an investigation. Ms. C also acquiesced to their request for Nancy to do a presentation to the class about Muslim culture, although she refused the alternative of a presentation on Ramadan. After the parents contacted the curriculum supervisor again, he notified Ms. C about the concerns in a memo advising her “to self-evaluate your conduct over the past few months.” About a week later, Ms. C loudly asked Nancy, in the presence of her classmates, whether

she wanted to change classrooms. Nancy responded that she wanted “to say here with my friends.” Ms. C repeated the question, and the principal made the same inquiry later that day. Nancy told her parents that she felt unwelcome and that they were forcing her to transfer. The next day, her mother brought Nancy to school and asked the principal to accompany her to Ms. C’s classroom, but he refused, offering her to transfer instead. The school counselor, who noted that Nancy was visibly upset, suggested alternatives to transfer.

Nevertheless, in February the principal transferred Nancy into another class. As a result, her friends shunned and taunted her. Nancy began treatment with a private therapist. Subsequently, based on Nancy’s continuing panic attacks, anxiety, and depression, the parents requested—and the school district granted—homebound instruction.

That summer, the family moved to another school district. On August 27, 2004, after intervention by the Civil Rights Division of the U.S. Department of Justice, the superintendent reprimanded Ms. C. Nevertheless, the parents filed suit in federal court against the district and various officials, including the principal. The parents’ claims included violations of the 14th Amendment equal protection clause and the preference clause of the Delaware Constitution, which is analogous to the federal Constitution’s establishment clause. The district defendants filed a motion for summary judgment, meaning that the court should decide in their favor without a trial because a reasonable jury would not find any of the claimed violations. The defendant school officials claimed that they were covered by qualified immunity, which applies when their liability is not clearly settled.

**What do you think was the federal trial court’s decision for their religious preference claim with regard to (a) the textbook reading as background for 9/11, and (b) the**

### teacher's Christmas stories?

In *Doe v. Cape Henlopen School District* (2011), the federal district court in Delaware granted the defendants' motion for summary judgment with regard to the textbook but denied the motion on the Christmas stories. The court concluded that "the 9/11 textbook portrays historic events in an even-handed manner, serving a secular educational purpose that neither enhances nor inhibits religion." However, the court ruled that a reasonable jury could find that the various phrases and symbolism in the candy cane story lacked a secular purpose and endorsed Christianity.

### What do you think was the court's ruling with regard to the parents' First Amendment expression claim that the defendants engaged in retaliation by taking adverse action against Nancy?

The court denied the defendants' motion for summary judgment for this claim and ruled that a reasonable jury could find that Nancy's transfer to another classroom constituted an adverse action motivated by her parents' complaints on her behalf. Specifically, the court concluded that the teacher's confrontation with Nancy and the school officials' repeated refusal to resolve the matter via other alternatives raised a First Amendment retaliation issue that reasonably could be tried in court.

### What do you think was the court's ruling with regard to the parents' 14th Amendment claims that the school officials (a) engaged in religious discrimination, and (b) responded with deliberate indifference to peer harassment based on religion?

The court agreed with the parents that they had stated a claim for religious discrimination under the 14th Amendment's equal protection clause, concluding that a reasonable jury could find that the Christmas readings subjected Nancy to differential treatment based on her religious beliefs. However, the court granted the defendants'

motion for summary judgment with regard to deliberate indifference, concluding that a reasonable jury could not find that the district's responses ending in transfer met the applicable "clearly unreasonable" test. Moreover, the teasing and name-calling following the transfer did not reach the requisite level of being "severe, pervasive, and objectively offensive."

### Did the court accept the individual defendants' claim of qualified immunity?

No. The court left this issue for trial, concluding that the parents "have alleged sufficient facts for a reasonable jury to conclude that defendants violated Nancy's well-established [i.e., clearly settled] constitutional rights."

### Have other recent court decisions reached similar conclusions concerning students' religious or ethnic discrimination challenges to school curricula?

Other recent decisions have ruled on more institutionally focused challenges with mixed outcomes. For example, in *California Parents for Equalization of Educational Materials v. Noonan* (2009), a federal district court partially denied and partially granted the defendants' summary judgment motions against a claim on behalf of Hindu students opposed to adoption of a sixth-grade social studies text. In *Griswold v. Driscoll* (2010), the First Circuit Court of Appeals rejected Turkish-Americans' challenge to Massachusetts' advisory curriculum guide that included Armenian genocide but deleted contra-genocide references. In *ACLU v. Tarek Ibn Ziyad Academy* (2011), a federal district court in Minnesota preserved for trial whether the practices of a public charter school established a pervasively Islamic atmosphere in violation of the First Amendment's establishment clause.

### If parents sued claiming that the teacher discriminated against their child in the absence of a protected category, such as religion or race,

### would they face more difficult odds in court?

Yes, although the outcome would depend on the severity of the discrimination and the jurisdiction of the court. In general, the majority of courts do not recognize class-of-one claims under the equal protection clause, and civil rights laws are typically limited to specified protected groups. In such cases, the better alternative often is for parents to seek relief at the administrative level in terms of remedial and, if necessary, disciplinary action against the offending teacher.

### Conclusion

In our culturally diverse society, recent developments, such as increased nationalism and the focus on standardized test performance, may aggravate the tender sensitivities of children, especially if they are members of a vulnerable minority. As these court decisions show, litigation is a gross and time-consuming mechanism to remedy such perceived affronts. For example, Nancy's parents challenged events that transpired during the 2003-2004 school year, and the court's decision in 2011 inconclusively resolved some of their claims.

These cases remind principals of the value and need to promote a school atmosphere of respect and sensitivity for students' feelings, especially although not at all exclusively, for those who represent vulnerable minorities. A swifter and more positive investigation and remediation of Ms. C's well-meaning but narrow-minded Christian teachings and a more proactive, sensitive school culture would have saved Nancy's family and the district defendants escalating emotional and fiscal costs. □

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<sup>1</sup> Due to the pretrial posture of the case, the parents' allegations are conditionally accepted as true, although the actual facts may well be different upon a trial.