Don't Touch!

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Legal Brief

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By Perry A. Zirkel

During the past decade, charges of sexual abuse and harassment of children by teachers have been widely publicized in the news media. First there were reports of purported child abuse in day care centers, which portrayed caregivers as sexual predators, even though in many cases the charges were later shown to be baseless. More recently, harassment charges by students in elementary and middle level schools have left teachers and principals ambivalent about touching students. Some schools and districts have gone so far as to adopt a draconian policy of "Don't touch any student for any reason."

Such a policy conflicts with the caring nature of schools, where it is not uncommon for teachers to congratulate and console young children with hugs. A more balanced approach to physical contact with students should consider such factors as the purpose, frequency, and degree of the contact; the age and gender of the students; and the interests of both students and teachers.

The following case and the accompanying question-and-answer discussion illustrate the difficulty of determining when touching students is the basis for teacher termination, even when the touching does not constitute outright sexual molestation.[1]

The Case

William H. has been a mathematics teacher in Kanawha County, W.Va., for 22 years. During that time, his evaluations have consistently been "exceeds expectations" or "excellent."

During the 1994–95 school year, while working at Sissonville Middle School, Mr. H. had the responsibility, which rotated annually among members of Sissonville's teaching staff, of collecting money from students for lunch and snacks. He had two student volunteers who assisted him by collecting lunch money in the morning and operating the "break room," where students were permitted to purchase snacks during their afternoon free periods.

On November 14, volunteer assistants Brittany B. and Nicky V. were in the break room with approximately six other students when Mr. H called them over to thank them for

1. For cases of outright sexual molestation, see, e.g., Perry Zirkel and Ivan Gluckman, "Administrator Liability for Immoral Conduct of Employees," *NASSP Bulletin*, January 1992, pp. 103–06.

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their help with the lunch money collection. While thanking them, he patted Brittany.

Three periods later, Brittany, tearful and shaking, reported to the school counselor that Mr. H had patted her buttocks. The counselor reported the incident to the principal, who in turn reported it to the superintendent. The next day, the principal separately interviewed Brittany and Rachel, another student who had been in the break room at the same time. Brittany repeated her allegation and Rachel confirmed that she had seen Mr. H. touch her "on the behind."

After a hearing, the school board terminated Mr. H. for immoral behavior. Mr. H. then requested and received a hearing before an administrative law judge (ALJ). At the hearing, Rachel testified and demonstrated where she saw Mr. H. touch Brittany—on her side at waist level. Another student, Tracy, testified that on another occasion Mr. H. had put his arm around her and put his hand under her jacket, rubbing her side. A classmate said she had seen Mr. H. do this and that Tracy was upset afterward. Other female students testified that Mr. H. had initiated personal discussions with them about their dating practices. The principal testified that he had warned Mr. H. two years earlier, as the result of a parent complaint, to refrain from inappropriate contact with students. The ALJ ruled that the school board had failed to meet its burden of proof for immoral behavior and ordered Mr. H. reinstated with back pay.

The board appealed this decision to the state's circuit court.

Questions

1. What do you think was the ultimate judicial outcome in this case?

Both the circuit court and the state supreme court affirmed the administrative law judge's decision, based on the appellate standard that the ALJ should not be reversed unless clearly wrong.[2] The state supreme court's decision was a close one, however, the vote being three to two. The majority concluded that the ALJ's decision was plausible and not clearly wrong. The spirited dissent charged that "[i]n their zeal to protect the teacher's job...the majority...departs from all common sense and...[provides] the wrong doer...with a nice fat reward of back pay."

Commenting that "[no] school teacher...has any business touching the bodies of these children," and characterizing this case along with a previous decision that had reversed the termination of a janitor charged with fondling an elementary school student, the dissenting judges concluded: "Frankly, these decisions create open season on children."

2. Would the outcome have been different if the teacher taught fifth-grade coed physical education classes, habitually nudged students as a motivational technique, snapped female students' bra straps,

2. Kanawha County Bd. of Educ. v Hayes, 500 S.E.2d 547 (W. Va. 1997).

or poked them in the vicinity of their bras during PE class, despite repeated warnings from the principal, and received an adverse judgment from an ALJ or hearing panel?

In a New York case, the appellate court upheld the termination of a teacher in such circumstances.[3] The key, again, may have been the decision of an impartial fact finder, the administrative law judge, to terminate. Similarly, in a Colorado case, the intermediate appeals court upheld the termination of a tenured middle school teacher who, the hearing officer found, continued to inappropriately touch and talk to students. The most serious offense was snapping the bra strap of a sixth grader.[4]

3. Are there many such reported court decisions, and what is the usual outcome?

There have been a number of such published court decisions in the 1990s, ranging from a single incident of inappropriate touching that was more in the nature of corporal punishment[5] to repeated inappropriate touching and language that was ruled to be sexual harassment[6] or aggravated sexual battery.[7] The teachers have lost in the majority of these decisions,[8] but the districts in these cases typically had accumulated substantial credible evidence, complied with procedural due process requirements, and avoided a knee-jerk overreaction. Occasionally, based on the failure to provide such substantive and procedural fairness, the school districts have lost. [9]

4. What if the person accused by students of inappropriate touching was an administrator?

Again, the results would depend upon specific and admissible evidence, as assessed by the impartial individual or panel responsible for reviewing the school board's termination decision. In *Douglas* v *Cincinnati Board of Education,*[10] a case that was the focus of this column in March 1994, the appellate court decided in the administrator's favor. The impartial fact finder (here,

3. Forte v Mills, 672 N.Y.S.2d 497 (App. Div. 1998).

4. Knowles v Board of Educ., 857 P.2d 553 (Colo. Ct. App. 1993).

5. Board of Educ. v Flaming, 938 P.2d 151 (Colo. 1997) (upheld termination of teacher for hitting or tapping elementary school female on the head with a pointer, contrary to school policy). For earlier articles in this column that focused on corporal punishment, see the March 1988, November 1991, and January 1996 issues of *NASSP Bulletin.*

6. Governing Bd. v Haar, 33 Cal. Rptr., 744 (Ct. App. 1994) (upheld termination of teacher for repeated incidents of sexual rubbing as well as related sexual language and contact in interacting with middle school female students).

7. Enochs v Nerren, 949 S.W.2d 686 (Tenn. Ct. App. 1996) (upheld termination of teacher for rubbing breasts and related sexual touching of female middle school students).

8. In addition to the decisions cited in notes 3–7, see, e.g., Hinkle v Garrett-Keyser-Butler Sch. Dist., 567 N.W.2d 1173 (Ind. Ct. App. 1991); *cf.*, Tweedall v Fritz, 987 F. Supp. 1126 (N.D. Ind. 1997) (suspension).

9. In addition to the decision cited in note 2, *see, e.g.,* Youngman v Doerhoff, 890 S.W.2d 330 (Mo. Ct. App. 1994).

10. 608 N.E.2d 1128 (Ohio App. Ct. 1992).

a trial judge) found that the evidence supported the administrator and that he had not received any warning of previous inappropriate verbal or physical conduct.

5. Could the accused teacher or administrator sue the school district for harassment or some similar legal claim if the students' accusations are shown to be without sufficient factual foundation?

Yes, but as long as the district officials were prudent in their investigation and fair in their prosecution, the wrongfully accused individual is unlikely to succeed. For example, in a Missouri case, several students reported that a teacher had made sexual comments and inappropriately touched them. The administration suspended him without pay pending an investigation. The school board held a hearing, decided in his favor, and restored his lost salary. He then sued the administrators and board for malicious prosecution, tortious interference with contract, and loss of consortium. The court rejected each of his claims in deciding for the defendants.[11]

Conclusion

As observed in our March 1994 column,[12] which extended to cases of alleged sexual relations between educators and students, "[t]he challenge for principals is to provide an environment that is not only safe for students but also secure for staff members." This challenge is all the more acute today, particularly when the charges focus on limited but arguably inappropriate touching of students. Although court decisions generally favor school districts, they reveal the appropriateness of a case-by-case approach. They also reveal the importance of a documented warning (or other progressive discipline), a prudent investigation, and an ultimate board decision that will stand up under the direct, trial-based scrutiny of an impartial finder of facts. These factors reinforce the meaning of a "balanced" approach in this sensitive area.~***B***

11. Davis v Board. of Educ., 963 S.W.2d 679 (Mo. Ct. App. 1998).

12. Perry Zirkel and Ivan Gluckman, "Sexual Misconduct by Staff Members," *NASSP Bulletin,* March 1994, pp. 101–04.