



POINT OF LAW TIP SHEET: WHAT'S NEW IN 2011?

Are You Following the Rules When it Comes to – Release of children to unauthorized individuals?

Preview: Institute these best practices

- Policies and procedures regarding release of children from your day care facility during the day or in any instances when they are in your care evenings must be reasonable.
 - Require parents to complete a list of those individuals whom they authorize to check their children out of your day care facility
 - Require staff members to verify that:
 - A person who seeks to check out a child is on that list
 - The person is who s/he says s/he is
 - A statement by the person that he is the child's father, or relative, cannot be taken at face value; the "authorized persons" list, and an official picture ID must still be checked.
 - Review such policies regularly with all of your day care center staff and administrators, and make compliance a "zero tolerance" issue. All staff members should regard such policies as mandatory.
 - Review and revise policies as needed in light of expressions of concern about content or implementation.
- Staff members must take all actions specified by policy in determining to whom to release children during the day or in any instances when they are in your care evenings.
- A student's apparent recognition of, comfort, and willingness to leave, with the unauthorized person do not give staff members license to overlook the mandates of policy.

What the issue looks like given recent cases involving school districts. While the cases cited below reference school district situations there are lessons for day care centers as well.

Doe v. Covington County School District, 2011 WL 3375531, 5th Circuit, 8/5/11

The facts:

- Jane Doe, a 9-year old student, was removed from school on 6 occasions by an unauthorized, unrelated individual who sexually abused and assaulted her on each occasion.
- The man – Tommy Keyes – identified himself as the girl's father, and on at least one occasion, signed her out as the girl's mother.
- The district's check-out policy did not require that staff verify the identity of an adult seeking to check out a student, but it did have a list of authorized individuals on a "Permission to Check Out Form" provided by the student's parents."
- Keyes was not on the list of authorized individuals on the Permission form filled out by Jane Doe's parents

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- The school had received complaints and had internal safety meetings about its express check-out policy, so the school was aware that 9-year old Jane's safety was threatened by its checking her out to Keyes without verifying his identity.

The allegations:

- The Does alleged that Jane's school violated her substantive due-process rights by being deliberately indifferent to 9-year-old Jane's safety by affirmatively depriving Jane of her liberty to care for herself.
- The school acted to force her into the sole custody of an unauthorized adult, Defendant Tommy Keyes, by knowingly facilitating his taking her off the school's grounds.
- The constitutional right at issue is the "right to personal security," a form of liberty interest protected by the Due Process Clause.
- The completion of the school-provided Permission form by Jane's parents amounted to an affirmative request by them that only specified individuals be allowed to check her out.

The failures:

- The school failed in its duty of protection that existed because
 - Of Jane's very young age
 - Her inability to protect herself, particularly when separated not only from her legal guardians, but also from her regular teachers and classmates
 - The school took *affirmative action* by adhering to its express check-out policy so as to give up the school's custody of the young girl, and to place her in the absolute custody and control of Keyes off campus.
- Although the school gave Jane's parents an opportunity to specify those individuals who were authorized to take her out to school, and although they took advantage of that opportunity by completing the form, the school still checked her out to Keyes six times.
- The complaints, inquiries, discussions, and/or meetings show that school and its staff *had actual knowledge* of the dangers created by their policies, customs and regulations, but they failed to take corrective action to reduce or prevent the danger.

Another look at the issue

Cotton v. Smith, 2011 WL 2586002, Ga. App., July 1, 2011

The facts:

- A front office employee of a high school ("Smith") allowed a 14-year old student ("N.F.") to leave school with a middle-aged man ("Hardy") who claimed to be the girl's uncle.
- Hardy was, in fact, a convicted felon who had given the employee a fake name and was not related to N.F.
- He took her to a house and molested her.
- The school's "master file" contained, among other things, a list of people who were authorized to check the student out of school during regular schools hours.
- Policies included in the school's Student Planner specified that "A parent note, doctor appointment note, court appearance summons, or other certified documentation must be presented to the attendance clerk at the time of check out. . . The note must have a phone number whereby the present can be reached by an administrator for verification. Students without a note will not be granted permission to leave. Students will not be granted permission to leave based on telephone requests. Students without notes must be signed out by a parent or guardian.
- The district's "Emergency Preparedness Plan" also included sections pertaining to identification of visitors to the school and "Student Sign-In and Out" provisions.
- Board of Education administrative regulations echoed these provisions.
- Smith was familiar with these "rules," and considered the provision to be a "requirement" that had to be met before a student would be allowed to leave school early.

Asserted defenses, and trial court findings:

- The school and Smith contended that Smith's duties in determining whether to release a student from school were discretionary in nature, not ministerial, and that, as a result, Smith was entitled to official immunity from liability under state law.

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- o The trial court concluded that Hardy’s criminal act “was not a reasonably foreseeable consequence of Smith’s conduct since N.F. testified that she voluntarily left school with Hardy.” The appellate court disagreed.

The failures:

- o The school failed in its duty of protection that existed because
 - Even though the student was 14-years old, such students still need protection “because they are sometimes ‘foolish’.”
 - Smith failed to take affirmative actions specifically directed in the applicable rules in order to ensure the man was authorized to check the student out of school.
- o Smith failed to carry out mandatory steps that “could have prevented N.F. from leaving with Hardy—and, in fact, would have been *required* to prevent N.F. from leaving until she could consult with an administrator—if she had fulfilled even one of her ministerial duties.”

Lessons from the cases:

- o While *passively allowing* harm to a student is a serious offense, courts generally hold that it is *affirmative action* that places a student in harm’s way, and gives rise to constitutional implications.
- o The failure to take required affirmative action is a basis for liability when the required actions permit no discretion or use of judgment, but, instead, specific adherence to each step mandated.
- o The Covington Court points to the fact that the school had to be aware of the threat to young students that exists today from sexual offenders. “A nationwide program employing an electronic tracking system to identify whether visitors to primary and secondary schools were registered sex offenders or otherwise presented threats to young students. . .[had been designed] with the *express purpose* of combating the threat posed by pedophiles to very young children like Jane. By 2006 (the school year immediately preceding the one at issue here), this program had been endorsed by the U.S. Department of Justice, had received federal grant money, and had already been activated in at least 1,400 schools in some 100 school districts across 10 states. Today’s ubiquitous awareness by schools and school boards (and even the Department of Justice) of the omnipresent threat posed by deviant adults preying on very young schoolchildren—and the progressive policies that were already being adopted and implemented around the country to deal with that threat well before the incidents alleged in this case—dispel any conceivable doubt that, if the School’s policy was deficient as alleged, the School’s indifference to Jane personal safety had to have been *deliberate*.”
- o The Cotton Court notes that the rules at issue were specifically intended, at least in part, to avoid the harm that occurred. Communication and training about “release of students policies” should reflect the purpose of those policies – to prevent student harm. A school or district should take every opportunity to reinforce the non-discretionary nature of obligations included in these policies.
- o When a threat is, or certainly should be, known to school officials, and there are reasonable steps that could be taken to minimize or eliminate that threat, the failure to take such steps is unreasonable.
- o Training tip: Identify other **actions** that various staff members might take that would place a student in harm’s way. By way of example only:
 - Discharging a young or disabled student at a location known not to be his or her designated bus stop
 - Assignment of athletic equipment to a student when the equipment is known to be unsafe for that student for any reason
 - Taking action to allow students known to be hostile to one another to be unsupervised in what would otherwise be a supervised situation.

The items listed below may be adapted to your day care center’s operations as well.

- In the context of overall “Safety and Security Practices,” discussed in *Education Week* (August 31, 2011), the article lists, among necessary steps to take,
 - o A review of criteria for allowing access to students (includes staff members, substitute teachers, student teachers and volunteers).
 - o Here is a cumulative list of criteria reflected in school and district policies and provisions that have been reviewed for reasonableness:
 - Students will be released only to the parent/guardian or those family members or adults who are designated on the student’s [registration record] [emergency release form] [any form used by the school for the purpose of release a child].

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- If an individual other than the child's parent or legal guardian (listed on the registration record) seeks to pick up a child from school prior to the end of the school day, the individual must present a parent note, doctor's appointment note, court appearance summons or other certified check out, in addition to the fact that the individual must be listed on the list of those persons authorized to pick up the child. In addition, the note must have a phone number whereby the [student's] parent can be reached by an administrator for verification.
- Children cannot leave school grounds until the authorized person has signed them out at the school office.
- Staff members assigned to release students to pick up by an authorized person are required to request and review valid (i.e., still current) picture identification.
- Students are to be released early only upon approval of the principal or his/ her designee.
- The principal shall not honor a telephone request for a student's early dismissal to someone not listed on the emergency card
- Parents/guardians of all students will be reminded no later than the end of the first week of school to update registration information.
- Parents/guardians of all students are notified at least twice during each grading period that they must inform the school immediately if there is any change of emergency information, or, in particular, those individuals authorized to pick up their child(ren)
- In all cases, the person picking up a child from school must sign a log indicating that they have picked up the child, noting the date and time
- Parents/ guardians shall be notified that, if a student will be picked up by an individual not listed on the student's registration form, the parent should notify school officials in person or writing along with the date, pick-up time and relationship of the person to the family (i.e., uncle, cousin, neighbor, etc.). The person should be prepared to show a driver's license or other form of photo I.D. If the person will be picking up the child occasionally, the parent should add the name of the person to the registration form.
- Parents/ guardians shall be notified that it is their responsibility to provide legal documents, when applicable, restricting access to a student by an individual. If a person who checks into the office to pick up a child is not on the list of persons authorized to do so, staff members must check the student's file to determine if there is any document restricting release. Staff members are charged with the knowledge that a student must not be released to an unauthorized individual if the school has on file any document restricting release. Under no circumstances shall staff knowingly release students to individuals who have been prohibited from having contact with children or a parent who has been legally denied access to the student or access to a school site.
- All requests to pick up a child from school shall be kept on file.

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