



SLS HANDBOOK

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CHILD CUSTODY/CONTROL DISPUTES AND PARENTAL RIGHTS

From time to time, school site administrators are called upon to deal with custody and control issues that may arise between a child's parents when one parent is making decisions and acting without due consideration for the other's rights. This sort of circumstance seems to be occurring with greater regularity, perhaps suggesting an increasing number of families experiencing instability or dysfunction.

Absent a custody order specifying otherwise, school districts are obligated to honor the rights of both parents. However, compliance with this obligation can be tricky when one parent is exercising educational rights in derogation of, or directly at odds with, the rights of the other.

The type of disputed custody/control issues which school personnel typically deal with include:

- Which parent or who else can enroll the child in school and in what district may the child be enrolled;
- Which parent can petition to revise the content of the child's records and the nature of that revision;
- Who may contact the child during school hours or share a lunch period with the child while at school and when;
- Who besides a parent can access the child's records;
- Which parent can make the necessary educational decisions regarding program selection and after school activities;
- Which parent can volunteer at the school or participate in off campus school events and when;
- Which parent or who else may pick up the child from school at the end of the school day;
- Which parent or who else may pick up the child early from school for a medical appointment or another reason;

- Which parent or who else may pick up the child at the school bus drop-off point; and
- Which parent can specify who may or may not contact their child.

A. The Singularly Most Important Parental Right and Corresponding Obligation of School Personnel

The singularly most important parental right is to get physical custody of their child back, safe, sound and unharmed at the end of the school day; or specify to whom school personnel may relinquish physical custody of the child at the end of or during the school day. This right is sometimes referred to as the right to family integrity or familial association.¹

B. How are Parent Custody Rights Modified or Terminated?

1. Court Orders: Courts decide custody disputes between parents or others claiming custody rights, i.e. grandparents. Court orders vary concerning the amount of detail they include about each parent's rights and responsibilities.

2. "Best Interest of the Child": Courts base child custody decisions on this standard. The courts consider such factors as:

- The child's age;
- The child's emotional and physical health and development; and
- Evidence of neglect, abuse or domestic violence.

3. Separation/Custody Agreements: An agreement that resolves issues between the parties, and may be incorporated into a court order. Custody agreements also vary concerning the amount of detail they include about each parent's rights and responsibilities.

4. Operation of Law: Any registered sex offender who comes onto school grounds without lawful business and written permission from the chief administrative official of the school may be subject to arrest.²

C. Custody Orders – Terminology

1. Legal Custody: Legal custody is the right to make decisions regarding the child's health, education, medical treatment, religion, and discipline.

2. Joint Legal Custody: Joint legal custody means parents are to make major decisions together about the child's education, health, religion, and welfare. It generally does not require the parents to agree on all decisions - either parent acting alone may exercise legal control of the child.

¹ *Ramirez v. Escondido USD* (2013 U.S. Dist. LEXIS 201885 (S.D. Cal. April 8, 2013)

² Penal Code section 626.81

However, communication between the parents is encouraged to foster collaborative co-parenting and avoid disputes.

3. Sole Legal Custody: Sole legal custody gives one parent the exclusive right to make decisions concerning a child's health, education, and welfare. It does not mean the parent who obtained sole legal custody gets to make all decisions at all times. The parent who has visitation (but not custody) still has supervisory responsibilities while the child is in his or her control.

Sole legal custody orders are rare and not favored by the courts unless the non-custodial parent has committed certain acts of misconduct or has otherwise abandoned the child to such an extent that he or she should not be involved in important decision-making concerning the child.

4. Physical Access: Physical access to a child is not necessarily given to an adult with legal custody. A parent with legal custody may have limited visitation privileges which may be contingent on permission of the other parent.

5. Physical Custody: Physical custody means the right to have physical charge, control, access to, and responsibility for supervising and caring for a child.

6. Joint Physical Custody: Joint physical custody means that each parent has significant periods of physical custody, but not necessarily an equal amount of time with the child. Joint physical custody rarely means that both parents have equal access to the child - equal access is difficult to arrange due to the child's schedule.

7. Sole Physical Custody: Sole physical custody gives a parent the right to be the primary custodial parent and caretaker. Sole physical custody orders do not necessarily take away all parenting time from the non-custodial parent. It is common for a sole physical custody order to be granted to one parent while visitation (parenting time) is ordered for the other.

8. Primary Physical Custody: Primary physical custody is the jargon used when the term "sole physical custody" becomes uncomfortable or offensive to a parent and the custodial parent is willing not to attach "sole" to the custodial arrangement.

9. Visitation: Visitation is the right to have control of a child for a limited period of time.

10. Supervised Visitation: Supervised visitation is typically part of the custody order when:

- There are allegations of drug abuse, alcoholism, domestic violence, child abuse, or molestation;
- Parent has been absent from the child's life for a long period of time or there has been no existing relationship between the parent and child to help re-introduce that parent;
- There is a concern about mental illness; or
- There is a threat that a parent may abduct or kidnap the child.

11. Joint Physical and Legal Custody: California law favors joint physical and legal custody particularly if not objected to by either parent. Courts have broad discretion in fashioning a joint custody arrangement so that it is in the best interest of the child.

12. The Uniform Child Custody Jurisdiction Act (UCCJEA): The Uniform Child Custody Jurisdiction Act (UCCJEA) deals with the specific question of where an action for custody should be heard. The general functions of the UCCJEA are to:

- Avoid conflicting orders in different states;
- Promote cooperation between states to determine which is the more appropriate state to make decisions affecting a child or children;
- Make sure that custody litigation takes place in the state where the child has the closest connection and where the more significant evidence regarding the child's care, education, etc., exists;
- Discourage continuing litigation over custody issues;
- Deter abductions or removal of children in order to obtain custody awards;
- Avoid the re-litigation of custody decisions of other states;
- Facilitate enforcement of custody orders of other states; and
- Promote and expand the exchange of information and other forms of mutual assistance between the courts.

Please contact Schools Legal Service should you have any questions regarding the meaning of an order.

D. Subpoenas to Testify in Custody Matters

From time to time, school staff, generally teachers, may be served with a subpoena requiring that they appear and testify during a custody-related evidentiary hearing. Generally, witnesses sit outside a courtroom until it is their turn to testify.

Teachers may be directed to testify on the issue of the best interest of the child. The best interest of the child includes connectedness to school, such as attendance, homework, grades, behavior, emotional wellbeing, and participation in extracurricular activities.

If parents of a special needs child are not in agreement regarding the severity of the child's needs or the proper special educational services, a special education-related specialist might be subpoenaed to testify about the child's specific needs. Such persons may include a school district physical therapist, speech therapist, or occupational therapist, as well as a special education teacher or any other professional, such as a school psychologist, who works with the child.

When subpoenaed school staff testify regarding a student, the district is required to pay witness/district employees for their time and the subpoenaing party (usually a parent) is obligated

to reimburse the district for this expense. For this purpose, advance payment of a witness fee in the amount of \$275 to the district is required.³

Generally, a true-up and an additional bill or reimbursement follow completion of the testimony. More often than not, the time necessary to address a true-up is not worth to amount of money at stake. Therefore, it makes business sense to allow the matter of a true-up to lapse.

E. Subpoenas for Copies of Student Records

Section 99.31 of Title 34 of the Federal Code of Regulations and section 49077 of the California Education Code require the district to make a reasonable effort to notify a student and/or a parent of a lawfully issued subpoena for student records.

Note that a student records subpoena served by a party to a case that is unrelated to the student must include proof of service of a Consumer Notification. However the district's obligation to, itself, notify the student's parents is separate and independent of the Consumer Notification requirement.

F. Contact by Minor's Counsel

Minor's counsel is an attorney appointed by the court to represent the child. They act as factfinders and will gather information from interviews with the child, parents, therapists, and doctors. They will evaluate school and medical records, psychological evaluations, and any other record that provides relevant information pertaining to the child's needs. The idea is to use a neutral person to learn about the child's health, safety, and welfare who will then make recommendations for the court to consider. In most counties, including Kern, the Superior Court has issued a standing order that allows minor's counsel to have access to a copy of their client's pupil records. Teachers may discuss their firsthand observations and knowledge regarding a child with minor's counsel as well.

G. Addressing the Problem of Parents Who Create a Disturbance at School

1. Stay Away Directive: The chief administrative officer of a school or his/her designee may withdraw any express or implied consent to be physically present at a school site, for a maximum of 14 calendar days, whenever there is reasonable cause to believe that such person has willfully disrupted the orderly operation of a school.⁴

2. Breach of the Peace: Any person on school grounds who unlawfully fights or challenges another to fight, maliciously disturbs another by loud and unreasonable noise, or uses offensive words likely to provoke an immediate violent reaction may be arrested.⁵

³ Government Code section 68096.1

⁴ Penal Code section 626.4

⁵ Penal Code section 415.5

3. Planned Disruption: Any person not a student, officer, or employee, and not required by his/her employment to be on campus, and if it reasonably appears to the chief administrative officer of the school or his/her designee that the person is not a student, officer, or employee, is committing an act likely to interfere with the peaceful conduct of the activities of the school, or has entered the campus for the purpose of committing any such act, that person may be directed to leave the campus or facility. If that person reenters without first contacting the chief administrative officer of the school, he or she may be arrested.⁶

4. Workplace Temporary Restraining Order: An employer may seek a temporary restraining order and a more permanent order following an evidentiary hearing in order to protect an employee from violence and threats connected to the workplace. To obtain a court order, the employer must demonstrate that an employee has suffered unlawful violence, or a credible threat of violence, that can reasonably be construed to be carried out or to have been carried out at the workplace.⁷

A “credible threat of violence” is a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and serves no legitimate purpose.

A “course of conduct” is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an employee to or from the place of work, entering the workplace, following an employee during hours of employment, making telephone calls to an employee, or sending correspondence to an employee by any means including but not limited to the use of public or private mail, interoffice mail, facsimile, or email.

5. General Harassment-Related Temporary Restraining Order: A person who has suffered harassment may seek a temporary restraining order and a permanent order following an evidentiary hearing that prohibits future harassment.

“Harassment” is unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person and serves no legitimate purpose. The course of conduct must cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner.

“Course of conduct” is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an individual, making harassing telephone calls, or sending harassing correspondence by any means including but not limited to the use of public or private mail, interoffice mail, facsimile, or email. Constitutionally protected activity is not included within the meaning of “course of conduct.”

⁶ Penal Code section 626.7

⁷ Code Civ. Proc. section 527.8

“Credible threat of violence” is a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and serves no legitimate purpose.

HYPOTHETICAL NO. 1

Facts: Mother and father have been living in Escondido for the past 10 to 12 years. Mother is an undocumented immigrant; father is a documented immigrant. Both parents emigrated from Mexico. They never married, but had been a couple and subsequently, separated and were living apart. They have a son, Enrique, born in the United State and attending first grade at Farr Avenue Elementary School in the Escondido Unified School District.

Mother has primary physical custody, most likely by informal agreement with father. Mother is the primary parent with whom the child lives and who almost exclusively interacts with the school. Legally, however, the parents share joint legal custody as there is no court order providing otherwise. Mother is well known to school officials, father much less so.

Enrique has experienced an excessive number of absences during the school year causing father to ask the school to advise him whenever Enrique is absent. The school agreed to do so.

At the end of November 2010, mother was deported to Mexico. From Mexico, she immediately called the school and advised that she was deported and that Enrique was now living with his father. Father also advised the school of the new circumstances and did so in person. For the next two weeks, father brought Enrique to school every morning and picked him up at the end of the day. During this period, it is apparent that father was exercising primary physical custody.

On December 6, 2010, however, mother called the school and advised that Enrique had a non-emergency medical appointment in 15 minutes, that his father could not pick him up for the appointment, but that her boyfriend would pick him up. When the boyfriend arrived, he presented identification and it was obvious that Enrique knew and liked him. A school clerk staffing the front desk allowed Enrique to leave school with mother’s boyfriend. Enrique left his backpack at school because everyone anticipated he would return before the end of the day when his father would pick him up.

The school did not contact father. In retrospect, school staff should have contacted father prior to releasing Enrique in order to seek his consent.

Boyfriend was not on the child’s emergency card as someone authorized to pick up Enrique. In retrospect, mother should have been required to place the boyfriend on her child’s emergency card if she intended to use him to pick up the child from school.

Enrique was not returned to school that day and instead was taken to his mother in Mexico. His father was unaware Enrique had been taken until he presented at the end of the school day to pick him up. Father never regained physical custody of Enrique, although there has been some minimum level of contact. An extended period passed before father saw his son again.

Father filed a lawsuit against the district. The jury awarded both father and Enrique a total \$2.8 million in damages, plus attorney fees and punitive damages against the school principal, school secretary, and front office clerk.

Discussion Points: Most school districts have BP/AR 5113 regarding absences. The policy provides that students shall not be absent from school without their parents/guardians' knowledge or consent except for confidential (usually STD, HIV, or pregnancy-related) medical appointments. However, this circumstance did not involve a confidential medical appointment.

Despite having been aware that Enrique was living with his father and not his mother, it did not occur to school staff to at least verify verbally that he agreed with mother allowing her boyfriend to take Enrique out of school early, ostensibly for a medical appointment. Consequently, the school staff violated the district's BP/AR 5113,

Education Code section 49408 provides that schools obtain emergency contact information from parents including the name, address, and telephone number of a relative or friend who is authorized to care for the pupil in an emergency situation if the parent or legal guardian cannot be reached. Mother's boyfriend was not on this list, nor did the circumstance present an emergency situation.

A district should always be reluctant to release a child to an adult who is not the child's parent or guardian and is not otherwise listed on an emergency contact card.

In this situation, upon mother's deportation, father became the primary point of contact for the school. The school should not have left him out of the information loop and decision-making process.

HYPOTHETICAL NO. 2

Facts: Parents of a fifth-grade boy are divorced. Pursuant to the family court order, both mother and father have joint legal and physical custody. The child resides with mother Monday through Friday. Father has visitation and custody on the weekends, beginning at the end of the school day each Friday.

Father wishes to pick up the child early from school on Friday in order to get an early start on a fishing trip with the child, and so advised the school earlier in the week. In turn, the school advises mother. Mother instructs the district that her child is not to leave school early.

Father's attorney calls the school and explains that early pickup from school on Friday is within father's physical custody rights. Mother's attorney calls and advises that if the school intends to release the child to his father early on Friday, mother will promptly seek a restraining order and attorney fees. Neither of the communications with counsel were very pleasant.

Despite controversy and the fluid nature of the circumstances, instead of keeping the child at home Friday, mother nevertheless sends him to school.

Discussion Points: Dealing with divorced parents can often be tricky and emotionally taxing when one or both parents attempt to use the public school as a battleground in their ongoing marital dispute.

District administrators should approach this difficult situation with sensitivity and a recognition of the legal rights of both sides. However, when in doubt, select the course of action which maintains the status quo and is most consistent with California compulsory education law, which requires the child to attend school for the full school day.

A public school is not law enforcement nor is it the family court. Consequently, schools are not in a position to nor should they be responsible for enforcing an order of the court. Nor are schools a party to the underlying case. Nevertheless, the school should try its best to act consistently with family court orders or they risk being made a party to such orders in the future.

Unfortunately, in many cases, family court orders are less than specific about what rights either parent has until a conflict arises between the parents and the conflict is adjudicated.

In the past, family court orders were often silent on the subject of educational rights and simply deferred to the default position that both parents share equally in the educational decisions of their child.

More recently, it seems that family courts have acknowledged that two people who cannot agree on child custody, visitation, care, and medical decisions do not have the inclination to agree on their children's education either. More and more courts are addressing educational rights in court orders. Therefore, when approaching such disputes, the first step is to contact both parents and request the most current and up-to-date family court orders.

When representing a parent, counsel may contact school staff to attempt to persuade them to implement their preferred course of action. School officials are required to communicate with their students' parents in most circumstances, but school officials are not required to communicate with the parents' attorneys. Instead, the school may insist that all of its communications with parents' attorneys be directed to the district's attorneys.

Possible courses of action in these circumstances include:

- Advising both parents to seek clarification from the family court concerning the educational rights of both parents and the ability of either parent to withdraw the child

- from school early on a visitation day;
- The district should counsel the parent who is seeking to withdraw the child early that it is important that the child be in school during regular school hours and to minimize disruption to the educational program in which the child is participating; and
 - When father comes to school to take his son fishing, contact mother and inform her that father has arrived at school to pick up the child.

HYPOTHETICAL NO. 3

Facts: Father of a 6-year-old student requests evaluation for special education under the Individuals with Disabilities Education Act (IDEA). Mother and father are divorced. District proceeds with the evaluation and finds that the student is eligible. Mother learns that the district has deemed the child eligible and immediately writes to the district revoking consent for the child to participate in special education. What should the district do?

Discussion Points: The first step is to request from both parents a copy of the most current family court orders concerning educational rights. It is not unheard of for a parent to misrepresent the provisions of a family court order in an attempt to convince a district to take a certain course of action that may be inconsistent with the order.

In a typical case, both parents will have the right to make educational decisions concerning the child. The Office of Administrative Hearings (OAH) is the administrative court that hears and decides cases brought under the IDEA. OAH has issued decisions holding that a district is permitted to proceed with the consent of only one parent, where the parents are divorced and where the parents hold equal educational rights. If an initial evaluation was consented to and completed by one of the two parents, the district may proceed. The district may likewise proceed with the permission of one parent in order to place the child in special education and begin providing services.

As to whether or not to honor mother's revocation of consent over father's grant of consent, until the matter is adjudicated, it may make sense that the district lean toward providing a free appropriate public education as required by the student's Individualized Education Program (IEP) instead of not providing services which an IEP team has recommended. This course of action seems to have relatively smaller risk.

HYPOTHETICAL NO. 4

Facts: The district office receives a letter and an attached subpoena filled out by the Department of Child and Family Services (DCFS) or the Office of Child Protective Services (CPS) requesting copies of educational records of a student. What steps must the district follow in order to comply with its responsibilities?

Discussion Points: Compliance with subpoenas from DCFS or CPS is routine and is invariably the correct course of action. The Family Educational Rights and Privacy Act (FERPA) and California law allow the release of educational records to DCFS or CPS pursuant to subpoena

and without parental consent. However, FERPA requires that the district follow up by notifying the parent that the records will be released. This final step is often times overlooked by districts.

Sometimes DCFS or CPS merely requests pupil information without a court order or subpoena. Education Code section 48976(a)(1)(N) permits the school to allow an agency caseworker of a local child welfare agency with legal responsibility for the care and protection of a child to have a copy of the child's pupil records without first obtaining parental consent.

HYPOTHETICAL NO. 5

Facts: Parents of a child are divorced and have been engaged in a highly emotional family court proceeding for several months. Child is a third grade general education student. Child primarily resides with father, but father and mother both live within the district's jurisdictional boundaries and child spends approximately equal amounts of time in father and mother homes. District has a good working relationship with both parents who are both very involved in child's education. One day, both parents come to the district and begin fighting with one another at the front office. Parents are screaming obscenities and racial epithets at one another over some issue that has arisen between them. What should the district do?

Discussion Points: Any person on school grounds who unlawfully fights or challenges another to fight, maliciously disturbs another by loud and unreasonable noise, or uses offensive words likely to provoke an immediate violent reaction may be arrested. An appropriate course of action is to contact law enforcement.⁸

Additionally, the chief administrative officer of a school, or his/her designee, may withdraw any express or implied consent to be physically present at a school site, for a maximum of 14 calendar days, whenever there is reasonable cause to believe that such person has willfully disrupted the orderly operation of the school.⁹

HYPOTHETICAL NO. 6

Facts: A parent who is a Penal Code section 290 sex offender has requested written permission to enter school grounds ostensibly to watch his son play high school football. The offense underlying the parent's conviction resulted while he was a district employee. He perpetrated a sexual battery and the crime of false imprisonment against one or more 14 to 15-year old female high school students.

Penal Code section 626.81 prevents section 290 sex offenders from entering school grounds without both lawful business and written permission from the chief administrative officer of the school. This legislation is designed to facilitate control and containment of local sex offenders thereby minimizing the likelihood of future victimization.

⁸ Penal Code section 415.5

⁹ Penal Code section 626.4

Discussion Points: Usually, a carnival-like atmosphere pervades high school football games. Students of all ages, including young women, wander around the general area socializing and engaging in other innocent activities largely outside the direct observation of parents and school officials. It is paramount that school officials maintain an environment for this activity which minimizes every known risk of victimization. Parents will demand vigilance by school officials.

Permitting a sex offender on school grounds for any purpose, and particularly in the atmosphere of a high school football game, creates an unacceptably elevated risk of exposure to liability under the California Tort Claims Act. Allowing this individual on campus for a football game without direct supervision may be tantamount to negligent conduct by the district.

The nature of this individual's crime objectively and unambiguously indicates that his presence creates a risk that a high school female student will be victimized. Indeed, his desire to be present at a location where female students congregate with minimal supervision may be construed to be nefarious. Should this individual victimize another student, as he has done before, a civil jury will likely conclude the district knowingly elevated the risk and the result was easily predictable. The associated liability could be enormous.

Even if it appears that this individual is fully rehabilitated, which is unlikely, should a young female student simply accuse him of reoffending, a reasonably competent plaintiff's attorney representing the purported victim may be able to present enough evidence to a jury in a way that will engender their sympathy and create a real probability of a large award against the district.

Additionally, favorable consideration of the request, right or wrong, will likely be perceived by the community as exposing children to an unacceptably elevated risk of criminal assault. If favorable consideration is granted as a matter of community relations, the district should warn parents prior to each football game that a section 290 sex offender will be present. Parents who are alarmed may then elect to keep their children home.

Note that there are rules associated with advising the public of the presence of a section 290 sex offender and there could be liability associated with this action should the notification result in assaultive behavior directed against the sex offender.

Should a school wish to allow a sex offender on school grounds, the district should first develop a policy that sets forth safety requirements and the criteria applicable to sex offenders. Hallmarks of such a policy may include: (1) a careful background investigation and knowledgeable evaluation of the offender's criminal record, including his conduct while confined and any subsequent criminal or even irresponsible conduct in the community; (2) a psychological evaluation in the nature of a risk assessment; (3) strictly controlled ingress and egress; (4) direct and immediate supervision at all times; and (5) no contact with a minor other than the offender's own children.