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EDLD 554.01: School Law

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EDLD 554: School Law
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The University of Montana
Department of Educational Leadership & Counseling

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Textbook: Alexander, K., & Alexander, M.D. (2001). *American Public School Law*, 6th ed. Belmont, CA: West/Wadsworth Publishing.

Course Purpose: School Law provides a comprehensive overview of the laws that govern primary and secondary education in America. The purpose of this course is to familiarize students with general administrative and constitutional law principles affecting education, thereby enabling students to apply these principles to future conflicts they encounter in school settings. A secondary purpose is to integrate, apply, and reinforce knowledge acquired in other graduate courses in education through the study of school law.

Course Objectives: Upon successful completion of this course, students will be able to:

1. Identify basic constitutional principles which come into play in a particular school conflict;
2. Analyze the politics of school governance and operations [OPI 10.58.704;bii];
3. Use legal concepts, regulations, and codes for school operation to evaluate possible courses of action in educational settings [OPI 10.58.704;fv];
4. Understand the decision-making process in schools and the proper allocation of decision-making power among those who compete for it;
5. See the evolving nature of the law by tracing changes in the Court's approach to a particular area of school conflicts;
6. Understand special education programs, Section 504 of the Rehabilitation Act, and the processes necessary for the management of such programs [OPI 10.58.704;h] and
7. Integrate legal theory with applied professional educational experience via a fieldwork project opportunity.

Grading: Portfolio of Legal Briefs (counts 1/3 of grade), Fieldwork/Benchmark Project (1/3), and Class Presentation (1/3).

ISLLC Standards: The knowledge, dispositions and performances articulated in the standards are included in this course in the following areas:

Standard 1

A school administrator is an educational leader who promotes the success of all students by facilitating the development, articulation, implementation, and stewardship of a vision of learning that is shared and supported by the school community.
[1K1,1K5,1D1,1D2,1D4,1D5,1D6,1P1,1P2,1P8,1P11]

Standard 2
A school administrator is an educational leader who promotes the success of all students by advocating, nurturing, and sustaining a school culture and instructional program conducive to student learning and staff professional growth.
[2D1,2D2,2D5,2D6,2D7,2P1,2P10,2P13,2P14]
Standard 3
A school administrator is an educational leader who promotes the success of all students by ensuring management of the organization, operations, and resources for a safe, efficient, and effective learning environment.
[3K2,3K3,3K7,3D7,3P3,3P5,3P6,3P9,3P21,3P23]
Standard 4
A school administrator is an educational leader who promotes the success of all students by collaborating with families and community members, responding to diverse community interests and needs, and mobilizing community resources.
[4K1,4D1,4D4,4D7,4P2,4P13]
Standard 5
A school administrator is an educational leader who promotes the success of all students by acting with integrity, fairness, and in an ethical manner.
[5K2,5K5,5D1,5D2,5D3,5D4,5D5,5D6,5D7,5P5,5P7,5P8,5P9,5P15,5P16]
Standard 6
A school administrator is an educational leader who promotes the success of all students by understanding, responding to, and influencing the larger political, social, economic, legal, and cultural context.
[6K1,6K2,6K3,6K7,6K8,6D5,6P4,6P5]
Standard 7
The internship (fieldwork project0 provides significant opportunities for candidates to synthesize and apply the knowledge and practice and develop the skills identified in Standards 1-6 through substantial, sustained, standards-based work in real settings, planned and guided cooperatively by the institution and school district personnel.
[7.3a,7.3b,7.4a]
Students anticipating the M.Ed. culminating portfolio for Educational Leadership will be required to reference specific ISLLC standards in their presentations..

Course Context: The study of education law is consistent with the following mission statements guiding this graduate program:
School of Education Mission Statement
The School of Education shapes professional practices that contribute to the development of human potential. We are individuals in a community of lifelong learners, guided by respect for knowledge, human dignity and ethical behavior. To advance the physical, emotional, and intellectual health of a diverse society, we work together producing and disseminating knowledge as we educate learners.
Educational Leadership Mission Statement
The mission of Educational Leadership at The University of Montana is to develop leaders for learning organizations who are guided by respect for knowledge, human dignity, and ethical behavior. This is accomplished by providing high quality academic and professional opportunities. We subscribe to a definition of leadership wherein

individuals assume evolving roles within influence relationships requiring their contributions in order to achieve mutual purposes.

Professional Standards for Student Performance: Graduate students in the Department of Educational Leadership at The University of Montana are expected to:

- Demonstrate professional vision in the practice of educational administration
- Accept responsibility and accountability for class assignments in their role as members of the class
- Demonstrate growth during the period of their graduate career
- Demonstrate good decision making and an awareness of organizational issues from a variety of perspectives
- Demonstrate imagination and originality in the discussion of educational leadership issues
- Understand the relationship between theory and practice and the value of reflective leadership
- Demonstrate a moral, humanistic, ethical and caring attitude toward others
- Demonstrate an ability to build trust and positive relationships with others
- Demonstrate a tolerance for diversity and a warm acceptance of others regardless of their backgrounds or opinions
- Demonstrate emotional stability and an ability to work well with other members of the class, including the instructor
- Demonstrate an ability to express himself/herself well in speech and writing, and
- Demonstrate mastery of fundamental knowledge of course content and an understanding of its application

It is the belief of the faculty that those entering educational administration should represent the most capable in our profession and that those who do not demonstrate the ability to perform the above list of qualities, should not be educational leaders. These standards have been adopted by the Educational Leadership faculty and are used both for admission to the program and to judge student progress. Failure to demonstrate the aforementioned qualities, on a consistent basis, may result in removal from classes and/or the educational leadership program.

Course Outline:

Date	*Topic*	*Assignment*
Wednesday, Sept. 1	Legal Analysis & Foundational Issues Course Overview & Expectations	
September 15	The Legal System Marbury v. Madison	Chapter 1
September 22	Historical Perspective of Public Schools Role of Federal Government; Governance	Chapter 2 Chpts. 3 & 4
Sept. 29	Torts School District Liability • Practice Brief Due: *Brown v. Tesack, pp. 560+*	Chapter 11 Chapter 13
October 6	Church & State	Chapter 5
October 13	School Attendance	Chapter 6
October 20	No Class Held – State Conferences	
October 27	The Instructional Program	Chapter 7
November 3	Student Rights: Speech, Expression, & Privacy	Chapter 8
November 10	Student Rights: Common Law, Due Process, & Statutory Protections	Chapter 9
November 17	Rights of Students with Disabilities • Legal & Philosophical Issues • Administrative Procedures	Chapter 10
November 24	Thanksgiving Holiday	
December 1	Defamation & Student Records	Chapter 12
December 8	Teacher Rights & Freedoms Due Process Rights of Teachers	Chapter 15 Chapter 16
December 15	Desegregation of Public Schools • Benchmark Assignment Projects Due • Brief Portfolios Due	Chapter 19

Assignments:

Fieldwork/Benchmark Project (Due December 15): The fieldwork component is a designed specifically to foster applied learning in concert with best-practices in the field. This project requires students to select a contemporary legal issue facing a school district with which they are familiar. The topic may emerge from a fact (e.g., District A currently has seven teachers working on provisional/temporary/uncertified licensure.), a question (What are the ramifications for our district regarding a multitude of requests to transfer students in/out?), a pending legal threat (Zero tolerance notwithstanding, we can't expel Student A.), or an intriguing case (Jane Doe v. District A). The fieldwork project will evolve from that topic and will ultimately be represented by a paper that includes:

a. An overview of the topic;
b. A transcribed interview of one stakeholder in the legal matter studied;
c. Related legal research of existing case law;
d. The student's assessment/critique of the decisions made relative to the matter studied; and
e. Other relevant documents/artifacts/analyses of each student's choosing.

Legal Briefs (presented @ time of chapter lesson; portfolio due Dec. 15) : Each student will submit legal briefs as assigned by the instructor modeled after an exemplar. The first one will not be graded and will constitute a "practice" activity; it will undergo editing by the professor and class peers. Students will provide overviews of briefs due at the time the particular chapter is discussed and must submit a complete portfolio (just a folder) of their briefs at the conclusion of the course.

Class Presentation (due as assigned): Students will be divided into teams charged with presenting a legal topic (consistent with the chapter of study) to their classmates. The instructor will provide students with the necessary materials, and groups will deliver the presentation in a manner that covers the elements identified by the instructor. As cases emerge chronologically, groups will invite classmates to share the briefs they've completed on the cases of study.

APPENDIX I
Briefing Form

Your Name
EDLD 554: School Law
Fall Semester, 2004
Case Page Number in Textbook

Citation: Case Name, citation (year). Use parallel cites if given.

Facts: State who the parties are and what brought them to court. State those facts relevant to the issues decided by the court and the relevant background material, as well. (In effect, you tell the story of the case here.)

Issue(s): The question that the court must decide to resolve the dispute between the parties. This is short and concise, incorporates the facts of the case, and is framed as a question. There may be more than one issue decided. Often the court will clearly state the issue.

Decision: How did the court decide the issue? (Literally begin with "yes" or "no" in answer to the questions/issues cited above.) What is the rule of law that is often noted in the decision?

Reasoning: The court's explanation and support for its decision. The court may cite other cases or general rules of law on the specific issue. The court will then apply the rule of law to the undisputed facts of the case.

NOTE: Keep the brief to one page (i.e., "brief").

Parties to Litigation

Plaintiff: The party who brings/files the lawsuit.
Defendant: The party who has to defend.
Appellant: The party who appeals a judgment; also known as Petitioner.
Appellee: The party against whom an appeal is taken; also known as Respondent.

APPENDIX II
Fieldwork Project Exemplar

by
Arnie Polanchek
EDLD 554: School Law
Fieldwork Project

Overview

For my topic I chose to review Stevensville School District (SSD) Policy 3310. This is a student disciplinary policy concerning drugs, controlled substances, drug paraphernalia, alcohol, and weapons at school or school sponsored events. The policy provides for the expulsion of students "… using, possessing, distributing, purchasing, or selling illegal drugs or controlled substances, *look alike* (emphasis added) drugs and drug paraphernalia. Students who are under the influence are not permitted to attend school functions and are treated as though they had drugs in their possession."

In years past, students have been expelled from SSD for the remainder of the school year for on campus sale of a look alike drug. In 2002, a student was expelled for the remainder of the school year for off campus use of a look alike drug and returning to campus for a voluntary after hours class.

While both incidents involved look alike drugs, the circumstances are markedly different. One incident was a student to student sale of a look alike substance on school grounds. The other incident was off campus purchase and use of a look alike substance by a student who then returned to school for a voluntary after hours class and was assumed to be under the influence of an illegal drug, marijuana. Policy 3310 considers being under the influence the same as possessing drugs.

In both instances the look alike drugs were non-toxic organic matter. In the under the influence incident, the student voluntarily submitted to a urinalysis test, properly administered, which was negative.

The question I sought to answer has two components: 1. on campus, or school

sponsored activity, sale of a look alike substance and 2. being under the influence of a look alike drug. Are expulsions for look alike drug incidents as outlined in Policy 3310 legally sustainable?

Preliminary Legal Assessment

My initial assessment is no, students cannot be expelled from school for look alike incidents. It would seem improbable that the on campus sale of anything other than an illegal drug or controlled substance would not violate drug laws. It would seem to more likely be a fraud or swindle of minor value and conduct that would not warrant expulsion for the remaining school term.

It is difficult to conclude that a student can be under the influence if a drug or controlled substance has not been used. If you don't use it, how can you be under its influence? The student may have intended to be under the influence but cannot be if an actual drug wasn't used. It would be unreasonable to expel a student for intending to be under the influence.

My initial reaction is that there is (or should be) a vast difference in handling actual illegal drug or controlled substances and look alike incidents.

Methodology

To answer these questions, I conducted interviews with SSD's School Board Chairman, Superintendent, High Scool and Junior High School Principals, and the Montana School Board Association (MSBA) attorney for policy issues. I researched Montana codes, administrative rule, judicial decisions, federal codes, regulations and

judicial decisions. I also researched law review articles and other school district policies.

The results of my research were surprising. Montana law addresses look alike drugs while federal regulations are not as specific. The Montana criminal code term for look alike drugs is "imitation dangerous drugs" and governs incidents involving them.

Interviews

Prior to interviewing administrators and others who I believe are "stakeholders" in the application of Policy 3310, I prepared a questionnaire shown below.

Fieldwork Project Questionnaire

The Stevensville School District (SSD) has, in most instances, adopted a zero tolerance approach to drug incidents governed by Policy 3310 and expels students from school for policy violations. Agree or disagree?

1.Why do you think the term "look alike" is included in the policy?

2. Do you personally believe "look alike" drugs should be treated in the same manner as actual drugs?

3. Should there be a differentiation in discipline between the sale or distribution of drugs vs. use or being under the influence of actual drugs? "Look alike" drugs?

4. In a "look alike" incident, are students disciplined for *intent* rather than actually being "under the influence" or for "fraud" or "scamming" when selling or distributing "look alikes?" How can you be under the influence of say alfalfa or powdered sugar?

5. Do you believe the policy is an effective deterrent to drug incidents at the school? Have disciplinary actions for drug incidents gone up or down in recent years?

6. Do you believe a zero tolerance policy such as SDS' is a reasonable method to curtail drug incidents among students? Is it reasonable for "look alike" incidents?

7. Do you believe expulsion is the best method to deal with student drug issues

outlined
in Policy 3310 or would other options (counseling, probationary status, etc.) be more
effective? For "look alike" incidents?

8. Do you believe a zero tolerance policy is an educationally effective method to address
student drug issues or is it more of a punitive approach?

9. Do you believe the "look alike" provisions of Policy 3310 would withstand a legal
challenge to its applicability as an illegal substance?

Although responses and opinions of the interviewees may not reflect applicable law, I was interested in their views from a policy standpoint. As we have learned in class from our readings, majority of opinion does not govern, the statute does. Surprisingly, responses to the questions were quite similar and there was no chance for prior discussion of the questions among interviewees prior to the interview. Except for the MSBA attorney, everyone was asked the same questions. Because the attorney is not a SSD employee, some questions were deleted during the interview.

Summary of Responses

All respondents agreed that SSD has a zero tolerance policy and in most instances expels students for violating Policy 3310.

1. All respondents, except the MSBA attorney, stated they believed look alike drugs were included to discourage the sale of illegal or controlled substances and to prevent "the intent to do something illegal." The attorney explained that the Montana criminal code makes the sale or intent to sell or distribute a look alike substance a criminal act and that is why look alikes are included in the policy.

2. Responses were varied. Several said they should not be treated the same; two

said if the substance was represented as an actual drug it should be treated as an actual drug incident; and others said it should be handled on a case by case basis but not treated the same as an actual drug.

3. All respondents indicated sale or distribution of drugs or controlled substances should be treated differently than use or possession. The same approach should be taken for look alike incidents.

4. All respondents stated they believed the students were disciplined for intent, "the spirit of the transaction," when sale or distribution was involved. All but one agreed it was not fair or didn't make sense to expel a student for being "under the influence" of a look alike substance. The MSBA attorney stated that if the student was able to prove that he/she was not under the influence of the alleged prohibited substance there are no grounds for discipline.

5. All agreed the policy was not a deterrent. The administrators said disciplinary activity for drug usage was cyclical and seemed to depend on the student body mix. (That seemed to me a statistic that needs further research to see if the rise or fall of incidents is caused by transitory trends of the student population, the town's population, or other developmental activity in the local area. What corollaries can be drawn?)

6. All agreed zero tolerance is not a reasonable method to curb drug incidents at school, actual or look alike. One responded zero tolerance "doesn't scare the students one bit," and another stated that "kids have become more sophisticated" if they are involved with drugs, controlled substances or alcohol.

7. Respondents agreed that the sale of, or intent to sell actual drugs or controlled substances warranted expulsion. However, except for one response, distribution, use, or

possession need to be reviewed on a case by case basis and handled in the context of the incident and discipline other than expulsion should be considered and should have an educational component. With two exceptions, all agreed look alike incidents warranted discipline other than expulsion and should also have an educational component.

8. All agreed zero tolerance is a punitive approach and not educationally effective.

9. The board chairman and one administrator believed the policy would withstand a legal challenge, the others did not think it would. The MSBA attorney stated that it would because of the Montana criminal code and a similar policy was upheld in Wilson v. Collinsville Community Unit School District No.10, 451 N.E. 2d. 939 (Ill., 1983). However, after further discussion concerning the current Stevensville Student Handbook provisions for drugs or controlled substances, SSD would have difficulty enforcing the look alike provisions of Policy 3310 because look alikes are not mentioned in the student handbooks. As the attorney stated, "what you give notice of is what you enforce." Look alike incidents are addressed in the SSD's board policy manual that is provided to students or parents upon request while the handbook is provided to every student for parental review.

The prevalent common thread among those interviewed was that incidents arising under provisions of Policy 3310 need to be reviewed on an individual basis and handled in a manner appropriate and consistent with the specific circumstances of the incident. Expulsion may not be the best solution and alternatives that include an educational component should be explored and available.

In the current school year, an alcohol related incident occurred at school that was brought before the school board. Administrators recommended against expulsion of the

offending student and suggested alternate discipline. However, the majority of the school board voted to expel the student and now, in retrospect, the board questions if they "did the right thing." The board may revisit their views on zero tolerance in the near future.

It is significant to note that Policy 3310 does not mandate expulsion, it is an available disciplinary option the board may exercise. Zero tolerance is merely a "mindset" that a majority of the board embraces as their own particular philosophy regardless of its validity.

As stated earlier, the interviews reflect the opinions of various "stakeholders" concerning Policy 3310 and may not reflect how legal standards affect the policy.

Relevant Legal Research

Montana Guidelines

The Montana criminal code specifically addresses imitation dangerous drugs, or for SSD's purposes, look alike drugs. As defined in 45-9-111, "… imitation dangerous drug means a substance that is not a dangerous drug but that is expressly or impliedly represented to be a dangerous drug or to simulate the effects of a dangerous drug and the appearance of which, including the color, shape, size, and markings, would lead a reasonable person to believe that the substance is a dangerous drug."

45-9-112 makes it a criminal act if "… the person knowingly or purposely sells, barters, exchanges, gives away, or offers to sell, barter, exchange, or give away any imitation dangerous drug." This section also addresses maximum penalties for criminal distribution of imitation dangerous drugs.

45-9-113 makes possession of an imitation dangerous drug a criminal act if the

person intends to distribute the drug. This section also addresses penalties for this criminal act.

These statutes address sale, distribution, or intent to distribute imitation or look alike drugs but is silent with respect to the use, possession without intent to distribute, or being under the influence of an imitation, or look alike drug.

Although not in a school setting, there have been convictions for violating these statutes. One case decided in 1999 by the Montana Supreme Court is noteworthy. In *Preston v. State of Montana,*[i] the appellant, Ernest L. Preston, protested his conviction for selling imitation dangerous drugs to an undercover police officer. Preston raised four issues in his appeal, primarily violation of due process allegations, but did not contest the basic reason for his conviction by a jury, violation of 45-9-112 MCA. The validity of the statute was not challenged.

The Montana statutes and *Preston* make it clear that selling, distributing, or possessing imitation dangerous drugs with intent to distribute is a felonious criminal act.

Federal Guidelines

There are numerous federal statutes and regulations governing the sale of actual drugs, legal and illegal, and controlled substances, but few addressing imitation drugs. The main thrust of imitation drug regulations concerns the counterfeiting and marketing of prescription drugs or medications. Numerous regulations are in place to prevent the manufacture and distribution of imitation medications.

The purpose of the Drug Free Schools and Communities Act of 1986 (Amendments of 1986), is to establish programs of drug abuse education and prevention

by providing federal financial assistance. The Act does not mention imitation or look alike drugs.

20 USC 3221, Section 5141, definitions, states in part "(1)... use and abuse of controlled, illegal, addictive or harmful substances. (2) the term 'illicit drug use' means the use of illegal drugs and the abuse of other drugs and alcohol." There is no mention of imitation or look alike drugs.

21 USC 812, The Controlled Substances Act, has five schedules to classify drugs, legal and illegal, and controlled substances. It establishes a hierarchy from highly addictive/high impact drugs to not very addictive/low impact drugs. Imitation or look alike drugs are not mentioned.

Title 34 of the Code of Federal Regulations pertains to education. 34 CFR Parts 85, 85.635, and 86 refer to drug use but do not address imitation or look alike drugs.

I did not find any federal regulations specifically addressing imitation or like alike drugs in a context relevant to the question I sought to answer. Apparently the issue has been left to the individual states for their disposition. Numerous court cases have addressed the sale or distribution of imitation or look alike drugs, almost all involve criminal cases not related to a school setting.

As an aside, during my research I found an interesting bill that has been introduced in the U. S. House of Representatives. HR 8631H, The Classroom Safety Act of 2003, was introduced on February 13, 2003. This bill would amend the Individuals With Disabilities Education Act (IDEA) to allow schools to expel a child with a disability for illegal drug sales. The bill is silent on use or possession of illegal drugs as well as imitation or look alike drugs.

Court Decisions

While most of the cases I reviewed concerning imitation or look alike drugs pertained to criminal acts outside of a school setting, the decisions could easily be applied to a school context.

In one school-related case, *Wilson v. Collinsville Community Unit School District No.10*,[ii] a student was expelled from school for the remainder of the school year for possessing 80 to 100 pills. Subsequent testing of the pills indicated they were 80% caffeine and 20% ephedrine, or over the counter "diet" pills. They were not illegal drugs or a controlled substance, but were a "look alike" drug. The student handbook prohibited "unauthorized drugs," which might include aspirin, Tylenol, or vitamin pills according to the school's assistant superintendent.

In the course of the investigation of the incident by school officials and during the expulsion hearing before the school board, it was determined the student intended to "give away" the pills to other students and not sell them. The high school principal testified that "… the presence of "look alike" drugs in school has a disruptive effect on the educational process" and recommended the student be expelled.

The school board expelled the student and the expulsion was upheld by the Appellate Court of Illinois, 5th Circuit. The Appellant Court stated "… the board's expulsion was not arbitrary, unreasonable, capricious, nor repressive…" The court agreed

that the presence of "look alike" drugs disrupted the educational process.

In *State of Ohio v. Mughni*,[iii] the Supreme Court of Ohio upheld the conviction of Mughni for offering to sell an undercover police officer a controlled substance, Percodan, but in fact delivered a non-toxic substance. The court ruled "... in that he offered to sell Percodan which is a controlled substance. The fact that the substance he was offering was not actually controlled is immaterial for purposes of a conviction under ..."

In *People v. Haines,*[iv] a California Court of Appeals decision, Reed H. Haines appealed his conviction for selling an uncontrolled substance to an undercover police officer. The court ruled that "... the offense is complete if there has been an offer of a restricted dangerous drug and there is subsequent delivery of a substance in lieu therof."

A similar ruling was set forth in another California Court of Appeals decision, *People v. Medina,*[v] Alan Medina appealed his conviction for representing the sale of a controlled substance to an undercover police officer but delivering a non-toxic substance. In its ruling the court noted the applicable Code "... was to prohibit anyone from appearing to engage in narcotics traffic, the offense is complete at the time of delivery of the nonnarcotic, regardless of the intent to which it is done."

The Supreme Court of Iowa in *State v. Henderson*[vi] upheld the conviction of Robert Henderson for possession of a simulated substance with the intent to deliver. Henderson while approaching a vehicle occupied by two undercover police officers offered to sell them "crack" cocaine. However, when he reached the vehicle Hendrson recognized one of the officers and fled. While the officers were pursuing Henderson he dropped what he had offered to sell. Henderson was captured and the substance that was recovered was not a controlled substance. In its ruling the court stated "There was ample

evidence the defendant possessed a substance and intended to distribute it. The conversation between defendant and the officers, including defendant's words and gestures, made out a case of both an expressed and implied representation that it was a controlled substance under the statutory definition."

A California Court of Appeals, Second Appellate Division decision in *People v. Siu*,[vii] has far reaching implications in defining intent. Siu was a deputy sheriff assigned as a baliff in one of Los Angles' criminal courts. He asked a fellow deputy sheriff in the narcotics division to provide him with a large quantity of narcotics that he could sell to a willing buyer. The narcotics deputy reported the conversation to his superiors and it was decided that the deputy would supply Siu with a nonnarcotic substance, talcum powder. After several more conversations with Siu, the narcotics deputy delivered a package to Siu's home and when Siu put the package in his pocket the narcotics deputy arrested him. The court ruled "… Mr. Siu intended to commit the crime of possession of narcotics. Delivery to him of what he thought was heroin was a direct, unequivocal act toward commission of the crime of possession. There was, therefore, no error in the court's finding that he was guilty of the crime of attempt."

The Court of Appeals of Florida, First District, upheld the dismissal of a charge of possession of an imitation controlled substance with intent to sell. In *State of Florida v. Jones*,[viii] a police officer observed Jones engaged in an ostensible drug sale. When the officer made contact with Jones he observed two rocks of suspected "crack" cocaine at Jones' feet and found another in his pocket. Subsequent lab analysis determined the rocks were not "crack" or any other controlled substance but were indeed rocks.

The State of Florida has statutes governing "imitation controlled substances" and

the wording of the statutes was challenged. The court ruled "… these arguments at least demonstrate sufficient ambiguity in the enactment to call for application of lenity to foreclose prosecution…" Montana statutes are not ambiguous.

The preceding cases establish that there are penalties for the sale, distribution, or possession with intent to distribute an imitation dangerous drug or controlled substance. While California, Florida, Iowa, and Ohio, have regulations similar to Montana's concerning imitation dangerous drugs, other states may not.

In *People v. Rosenthal,*[ix] the Supreme Court of New York dismissed the conviction of David Rosenthal for delivering an uncontrolled substance to undercover police officers rather than an illegal drug. The court stated "It is well settled that knowledge of the harmful character of the material transferred even when a narcotic drug has in fact been delivered or possessed is an absolute requirement to a finding of guilt. It therefore follows that where there is nothing more than the transfer of an innocuous substance the People have failed in proving their case." "The court has combed through numerous decisions in this State involving the sale of drugs and not a single case of record appears where a defendant has been found guilty of the sale of a narcotic drug when in fact the substance was nonnarcotic."

A Kentucky Court of Appeals case concerning the sale of an imitation dangerous drug has an interesting aspect. In *Shanks v. Commonwealth,*[x] the conviction of Donald Shanks for knowingly selling an imitation drug to an undercover police officer was reversed. The court stated that if Shanks had thought he was selling a narcotic but it was later discovered not to be a narcotic he would be guilty of criminal intent. The court further stated "… for the reason that Shanks knew the material sold was sugar and not a

narcotic. We do not believe this will support a conviction ..."

One interesting case decided in United States District Court for the Eastern District of Louisiana illustrates the reluctance of federal courts to overrule state statutes unless they offend the federal constitution.

The issue in *United States v. Rosenson*[xi] concerned specific wording and location of narcotics statutes in Louisiana's code. Randolph Rosenson was convicted of attempted possession of narcotics under a Louisiana statute that was an adaptation of the Uniform Narcotic Drug Act. Rosenson argued that this Act does not make attempted possession of narcotics a criminal act and therefore he was not convicted under this Act but a general Louisiana statute that makes it a crime to attempt to commit a crime but he was not charged under that statute. (confused yet?)

In its decision the court stated "Though the defendant's argument is truly ingenious, it must fail for it would require us to engraft subtle distinctions upon the law unwarranted by the clear language of 18 U.S.C. §1407. That section refers to persons convicted of a violation of *any* of the narcotics or marihuana *laws* of any State." "Therefore, the fact that the attempt provision is found in a different part of the statute books has no relevance. The relevant inquiry is not to determine where the crime is found in the books but rather to determine what the crime is." "...an attempt is but a lesser grade of the intended crime."

There are many court decisions concerning the sale, distribution, or possession with intent to distribute imitation dangerous drugs, but I was unable to find any that pertained to use, possession without intent to distribute, or being under the influence of an imitation dangerous drug. The lack of case law in this area leads me to believe these

types of incidents are not of sufficient import to be considered criminal acts and do not warrant the expenditure of time or resources on their behalf.

However, I did find one Mississippi Supreme Court decision that should be mandatory reading for all school boards and school administrators. Although the decision in *Warren County Board of Education v. Wilkinson*[xii] concerned due process, the text of the decision touches on many other issues relevant to the Stevensville school board actions enforcing Policy 3310 and how many administrators deal with student issues. The main, clear message is "don't overreact."

In *Wilkinson* a student lost credit for an entire semester because she and a classmate drank a few sips of her father's beer at her home in the morning before going to school on the last day of the school year. During the school day she did not cause any disruptions or behave erratically. Some time after 1:00 p.m. of the school day (school was over at 1:30 p.m.), after her classmate was confronted by teachers and confessed that she and Wilkinson had sipped beer before school, Wilkinson was removed from her classroom by the principal and subsequently admitted drinking the beer. The school board denied her the credits she had earned during the semester for violating school rules. The student handbook had a rule prohibiting consumption of alcohol on campus, at school activities or on school trips, and to and from school. The rule specified that students violating this rule would be expelled for the remainder of the semester in which the violation had occurred. Since Wilkinson's alleged violation was on the last day of the semester she was denied the credits she had earned. This decision was reversed and many of the components of the decision that do not address due process are noteworthy.

The opinion itself immediately grasps your attention. It states "But we know that

the law is good, if a man use it lawfully." A quote from *Timothy* 1:8, Paul's letter to Timothy after release from Roman prison. It is not often a verse from Scriptures is used as an opinion. At the onset of the text of the decision the court stated "The conduct of the school officials epitomizes the misuse of good law. What we have to say in this case shall not be interpreted as condemnation of any individual, but is supplied as a guide in future disciplinary actions taken by school boards."

Even the lower court was appalled at the school board's behavior as it stated in its decision "...apparently concluded that a few sips of beer in the privacy of her own home before leaving for school was as heinous as assaulting a teacher or student with a gun in school, and exacted the maximum penalty..." The Mississippi Supreme Court said the lower court's opinion could have gone much further and the Supreme Court did.

The Mississippi Supreme Court addressed the subject of bias by the school superintendent who, prior to the board hearing, advised the student's father that his "daughter broke the rules and she was going to be punished." Bias was also shown by the school board when the student's father said "after about 30 minutes and after a member of the board advised me that the school board could interpret the law any way they wanted to, I felt it was fruitless to produce any witnesses..." The court then advised "...the school board and others that might entertain such an erroneous view" where their power comes from and it isn't from themselves.

The court went even further by referring to the Eighth Amendment of the U.S. Constitution prohibiting cruel and unusual punishment. The court said "The punishment inflicted here appears to us to be unreasonable when considered along with other offenses..." The court was also critical of the school board's failure to exercise discretion

when considering disciplinary actions even though their rules allow them to do so. The court quoted another judge's opinion that said "The school board may choose not to exercise its powers of leniency. In doing so, however, it may not hide behind the notion that the law prohibits leniency for there is no such law. Individualized punishment by reference to all relevant facts and circumstances regarding the offense and the offender is a hallmark of our criminal justice system."

To further reinforce this point the court quoted more Scriptures when it said "Wise men through the centuries have exercised discretion. Solomon stated ' The discretion of a man deferreth his anger; and it is his glory to pass over a transgression.'"

Clearly the Mississippi Supreme Court admonishes school boards and administrators to consider all the relevant facts and circumstances before making disciplinary decisions, use their discretion and not hide behind a rule, and to remember from where their power is derived. A thoughtful decision affecting students who all too often are overlooked as being children in the zeal to enact and enforce rules to control student behavior. (Hey, lets put some Ritalin in the school's drinking water, that'll do it.)

Post Hoc Legal Assessment

With respect to the provisions of SSD's Policy 3310 that provides for the expulsion of students "…using, possessing, distributing, purchasing, or selling illegal drugs or controlled substances, look alike drugs and drug paraphernalia. Students who are under the influence are not permitted to attend school functions and are treated as though they had drugs in their possession." I have concluded that if SSD were to expel a student under rules and policies currently in place, such expulsion would not withstand a legal challenge. However, if SSD were to correct student and parent notification deficiencies in the student handbooks, such expulsions of students would be legal and withstand such a challenge.

This conclusion is a reversal of my preliminary legal assessment. To say that I was surprised by what I learned through my legal research would be an understatement. But then, I had never considered junior high school and high school students to be criminals and never bothered to look in the criminal codes, guess I must be out of step. I will first address the sale, distribution, possession, or possession with intent to distribute look alike drugs and then later the use of, or being under the influence of a look alike drug later.

Montana statutes 45-9-111, 45-9-112, and 45-9-113 are very clear that the sale, distribution, or possession with intent to distribute an imitation dangerous drug is a criminal act. The Montana Supreme Court in *Murphy* further substantiates that violation of these statutes is a criminal act.

There have been many criminal court cases upholding convictions for offering to sell or distribute imitation dangerous drugs. In *State of Ohio v. Mughni* the court ruled

"The fact that the substance he was offering was not actually a controlled substance is immaterial for purposes of a conviction under..." Similar conclusions have been stated in California Court of Appeals decisions. In *People v. Haines* and *People v. Medina*, convictions were upheld for offering to sell an illegal drug or controlled substance and delivering an imitation substance in lieu thereof.

It is clear from numerous court cases that the sale or distribution of an imitation dangerous drug is a criminal act. The possession of a look alike drug with intent to distribute is also a criminal act and is also grounds for expulsion from school.

In *State v. Henderson* the court upheld a conviction for possession of an imitation drug with intent to deliver. An Illinois court upheld the expulsion of a student for having 80 to 100 over the counter "diet" pills in *Wilson v. Collinsville*. The court agreed that the presence of look alike drugs in schools disrupted the educational process.

These decisions, among others, reinforce the validity of SSD's policy prohibiting the sale of, distribution of, or possession with intent to distribute look alike drugs.

However, the validity of the policy's inclusion of the use of or being under the influence of a look alike drug is less clear. Several cases would undermine this theory. The decision in *Florida v. Jones* brings the application of lenity into play when there isn't a specific statute or regulation governing an alleged illegal act. Also in *People v. Rosenthal* the court held that an actual drug must be present to uphold a conviction.

But it may be possible to stretch the decision in *People v. Siu,* wherein the court held that even though Siu did not purchase an actual drug he was "guilty of the crime of attempt," to apply to the provisions of the policy. This California Court of Appeals decision is buttressed by the decision in *United States v, Rosenthal* when the court stated

"…an attempt is but a lesser grade of the intended crime."

I would consider these applications tenuous at best as students would be guilty of the attempt to use or be under the influence of a look alike drug. The question of whether the use of a look alike drug or being under its influence is a criminal act was not answered in my research. What was answered though, was the ability of school boards to enact and enforce reasonable rules to conduct school operations. Courts are reluctant to overturn the decisions of school authorities unless the decision is unconstitutional or the applicable rules are unreasonable or arbitrary or lead to the abuse of authority.

In *Donaldson v. Board of Education,*[xiii] the court stated "School discipline is an area which courts enter with great hesitation and reluctance -- and rightly so. School officials are trained and paid to determine what form of punishment best addresses a particular student's transgressions. They are in a far better position than is a black-robed judge to decide what to do with a disobedient child at school."

This position is also expressed in U. S. Supreme Court decisions. In *Board of Education v. McClusky,*[xiv] the court stated "…the District Court and the Court of Appeals plainly erred in replacing the Board's construction … with their own notion under the facts of the case." In *Wood v. Strickland,*[xv] the U. S. Supreme Court also said "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." "The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, … was not intended to be a vehicle for federal court corrections of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees."

When considering the decisions in *Donaldson, McClusky,* and *Wood,* unless a student is able to prove they are not under the influence of a look alike drug, (as was the case in one SSD incident), an expulsion for use of, or being under the influence of a look alike drug as provided in policy 3310 would most likely be upheld.

Responses to interview questions indicated the look alike provisions of Policy 3310 are meant to discourage students from becoming involved with drug or alcohol usage. As one respondent said, it is meant to prevent "the intent to do something illegal." Another response was that Policy 3310 discipline was assessed for "the spirit of the transaction." The attempt to deter drug or alcohol usage by students at school or school sponsored activities is of critical importance to school officials.

The disruption of drug use in schools and the need for school officials to have flexibility to deter the impact of drugs at school was expressed by a U. S. Seventh Circuit Court of Appeals decision. In *Schaill v. Tippecanoe*,[xvi] the court said "… we recognize that, if students are to educated at all, an environment conducive to learning must be maintained. The plague of illicit drug use which currently threatens our nation's schools adds a major dimension to the difficulties the schools face in fulfilling their purpose -- the education of our children. If the schools are to survive and prosper, school administrators must have reasonable means at their disposal to deter conduct which substantially disrupts the school environment. … has chosen a reasonable and limited response to a serious evil."

Enacting reasonable rules to achieve an environment that is conducive to student learning is a primary duty of school officials. The question then becomes "Is Policy 3310, as it pertains to look alike drugs, a reasonable rule?"

Considering the legal research I completed, I would conclude that the look alike provisions of 3310 are reasonable and are intended to prevent disruptions at school and school sponsored activities and to deter drug and alcohol use by students. If a student receives proper due process in school disciplinary proceedings, courts are reluctant to reverse the discipline unless a rule is vague, arbitrary, or leads to abuse of authority. I do not believe this is the case with Policy 3310.

One can only hope that the school board revisits its zero tolerance philosophy as the board chairman indicated they might and that they and school administrators heed the advice of the Mississippi Supreme Court's *Wilkinson* decision and also remember *"For he shall have judgment without mercy, that hath showed no mercy; ..."* (James 2:13).

Endnotes: Cases Cited

[i] State of Montana (Respondent) v. Ernest Loree Preston (Appellant), 1999 MT 340N. (1999)
[ii] John Wilson, father, on Behalf of Lynn Wilson, a minor (Appellee) v. Collinsville Community Unit School District No. 10 (Appellant), 116 Ill. App.3d 557, 451 N.E.2d 939, 71 Ill.Dec. 785. (1983).
[iii] The State of Ohio (Appelle) v. Mughni (Appellant), 33 Ohio St.3d 65; 514 N.E.2d 870. (1987)
[iv] The People (Respondent) v. Reed Hadley Haines (Appellant), 53 Cal. App.3d 496; 125 Cal. Rptr. 735. (1975)
[v] The People (Respondent) v. Alan Ralph Medina (Appellant), 27 Cal. App.3d 473; 103 Cal. Rptr 721. (1972)
[vi] State of Iowa (Appelle) v. Robert E. Henderson (Appellant), 478 N.W.2d 626. (1991)
[vii] The People (Respondent) v. Jacob E. Siu (Appellant), 126 Cal. App.2d 41; 271 P.2d 575. (1954)
[viii] State of Florida (Appellant) v. Darius Jones (Appellee), 565 So.2d 788. (1990)
[ix] The People of the State of New York (Plaintiff) v. David Rosenthal (Defendant), 91 Misc.2d 750; 398 N.Y.S.2d 639. (1977)
[x] Donald Shanks (Appellant) v. Commonwealth of Kentucky (Appellee), 463 S.W.2d 312. (1971)
[xi] United States of America (Appellee) v. Randolph Erwin Rosenson (Appellant), 291 F. Supp. 874. (1968)
[xii] Warren County Board of Education (Appellant) v. Alexandra Rennee Wilkinson (Appellee), 500 So.2d 455. (1986)
[xiii] Donaldson (Appellant) v. The Board of Education for Danville School District No. 118 (Appellee), 98 Ill.App.3d 438, 439, 53 Ill.Dec. 946, 948, 424 N.E.2d 737, 739. (1981)
[xiv] Board of Education of Rogers, Arkansas (Appellee) v. McCluskey (Appellant), 458 U.S. 966; 102 S.Ct. 3469; 73 L.Ed.2d 1273. (1982)
[xv] Wood ET AL. v. Strickland ET AL., 420 U.S. 308; 95 S.Ct. 992; 43 L.Ed.2d 214. (1975)
[xvi] Schail v. Tippecanoe County School Corp., 864 F2d 1309 (1988)

Other References
Stevensville School District School Board Policy 3310
Stevensville High School 2003-2004 Student Handbook
Stevensville Junior High School 2003-2004 Student Handbook
Montana Code Annotated

Drug Free Schools and Communities Act of 1986 (Amendments of 1986)
The Classroom Safety Act of 2003, HR 8631H
20 USC 3221, Sec. 5141
21 USC 812
U.S. Government Code of Federal Regulations Title 34