School Law for Administrators

Constitutional Violations

Parents allege state and school district violated their and their son's constitutional rights based on discriminatory actions

Citation: *Williams v. Lenape Board of Education, 2018 WL 916364 (D.N.J. 2018)*

A federal district court in New Jersey has granted the state and a school district's request in part to dismiss claims against them in a discrimination complaint brought by the family of an African American high school student who the family claimed was subjected to discrimination on the school's football team. The court dismissed the claims in their entirety for the state and dismissed the claims brought by the parents against the school district. However, the court declined to dismiss the discrimination complaint of the student against the district.

K.W. was a high school student in the Lenape School District. In 2015, K.W. and another African American student went to pick up their uniforms. Traditionally, upperclassman like K.W. and his friend were permitted to pick their uniforms before underclassmen. However, when K.W. and his friend made it to the front of the line, they were told to go back to the back of the line behind white upperclassmen. K.W.'s friend quit the team because of this treatment. K.W. experienced other discriminatory treatment throughout that football season. For example, at some point, white players began calling him the n-word and also called him other African American players "grease monkeys." When K.W.'s parents and a group of other player parents complained of this treatment and the racial composition of the team, white teammates began calling K.W. a snitch.

K.W.'s parents also complained to the NAACP and the board of education. At that point, the district began providing K.W. with a "shadow" and promised an investigation. The investigation found evidence of harassment, intimidation, and bullying and remediation measures were ordered, including that K.W. would be given a "shadow" on a continuing basis and students accused of misbehavior were to receive counseling. Additionally, two administrators were to address the football team about the issues and a coach was to be in the locker room at all times.

Despite this, the harassment continued and in November, K.W. found that his cleats were missing from the locker room and that his belongings had been removed from his locker and put in the trash. When he asked other players what had happened to his stuff, a white player said that his locker has been given to a white underclassman. K.W. and the student were about to engage in an altercation when a coach stepped in to find out what was happening. Days later, KW.'s cleats were returned to his locker.

In November, after receiving an in-school suspension, the team bus left without K.W. When his parents complained about this and other actions they believed were discriminatory, an administrator called the police, believing that he was being threatened by the parents. Later that month, K.W. was not permitted to dress for his last game of the season.

The family alleged that such mistreatment continued in the 2016 season, condoned by school officials, coaches, and teachers. For example, K.W.'s teammate failed to block for him in a game, causing him injury. He was not put in the game at his "Senior Night" game and he was not given a varsity letter at the awards banquet though he had played on the varsity team. Through this, the family has alleged they made numerous complaints which were ignored and that nothing was done to address the discriminatory treatment K.W. was enduring.

The family later filed a suit against the state and school board, alleging discrimination and various other complaints. The complaint included claims both for the parents and for K.W., alleging violations of their rights. The family sought $6 million in damages. The state and school board asked the court to dismiss all claims.

The court agreed with the state and the school board that most of the claims should be dismissed, finding with respect to the state defendants that the claims lacked any factual allegations relating to them. The family did not allege any personal involvement from state defendants. Therefore, the court dismissed the complaint against the state for failure to state a claim upon which relief could be granted. Relating to the school board, the court found that it would dismiss the parents' claims against the board because all claims were really just K.W.'s. More specifically, the court wrote that the parents did not "allege facts giving rise to a colorable claim on their own."

However, the court found that K.W.'s complaint brought under Section 1983 against the school board was a viable claim at this point in the proceedings. Under Section 1983, a viable claim requires that a person acting under the color of state law must have "deprived [Plaintiff] of rights, privileges, or immunities secured by the Constitution or laws of the United States." The court noted that while poorly drafted, K.W.'s complaint alleged facts meeting this bar. He alleged that he was subject to ongoing discrimination and retaliation based on his race and his complaints against mistreatment and that the school district did nothing to address the discriminatory treatment he endured.

—School Law Bulletin,
Vol. 45, No. 9, May 10, 2018, pp. 5-6.

Around the Nation ~ Arkansas

Student claims First Amendment violation for expulsion in wake of picture of himself with assault weapon

Jessica McKinney and her son, identified as K.P. have filed a lawsuit against Huntsville School District (HSD) alleging that the district violated his first amendment rights when they expelled him for posting a photograph of himself on Instagram wearing a trench coat and holding an assault rifle. The suit contends that: "For this exercise of protected expression, K.P. has been expelled from the school district for an entire year." In addition to the violation of his first amendment rights, the suit asserts that Principal Roxanne Enix defamed K.P. when she "falsely" accused him of "criminal and terroristic conduct toward a school community."

According to the lawsuit, on February 24, K.P. was at his father's house in Rogers when he decided to post the photo on Instagram. This decision was in poor taste as it was only 10 days after the school shooting at Marjory Stoneman Douglas High School in Parkland, Florida that left 17 people dead. In the suit, K.P. claims that he was not thinking of the school shooting when he posted the picture, he claims that he was trying to emulate a 1920's mobster holding a machine gun because he liked the "aesthetic." There were no words posted with the picture.

The lawsuit asserts that K.P. didn't anticipate the responses that the post would garner, and as soon as he saw some of the inappropriate comments under the photo the next morning, he deleted the post. One student had written: "When I drop my pencil, start shooting," according to the lawsuit. Another wrote "school shooter meme." Despite K.P.'s claims that he didn't intend for this post to allude to a school shooting, the school board met on March 5 to discuss consequences, and elected to expel him for the year.

Throughout the course of the expulsion he will be allowed to take core courses online, according to a letter that Enix sent to McKinney on April 22. A transcript from the expulsion hearing documents McKinney's plea to the school board. In it she told the School Board that her son is a "model student" who has "almost perfect grades," has no discipline issues, has a perfect attendance record, and is getting scholarship offers to run track in college. She contends that the post was thoughtless, but she is adamant that he meant no harm and that expelling him was too extreme for the circumstances.

After seeing some of the comments on his original photo, K.P. deleted the post and replaced it with a different picture in which he was wearing the trench coat but not holding a gun. In the caption under the new photo, K.P. wrote that "nothing bad was intended" with his previous post. "I'm an ambitious, young enterprising individual, who wouldn't throw my future away for something as pointless as a school shooting," he wrote under the photo. "If I wanted to make an impact, I would choose a much more high-profile crowd than a bunch of hicks and jocks who are never going to be anything of particular value." He claims that his original post was taken out of context and misunderstood.

Later that evening when K.P. returned to his mother's house, police officers came to the residence to question him about the post. According to a plaintiff's brief, "The officers concluded that no crime had been committed and that K.P. posed no threat to his school community or to anyone else." Without being asked, "K.P. offered the officers his three personal firearms as a gesture of good faith and demonstration of peaceful motives. The officers took the firearms and returned them in less than a week." The police were convinced that he meant no harm.

Following the police investigation, on February 26, a police officer went to Huntsville High School to share their findings with Enix. He contended that their department had determined that no crime had been committed. Despite these claims, Enix said she was recommending expulsion because K.P. engaged in "terroristic threatening related to school shooting posts on social media," according to the brief. Enix claimed that her decision stemmed from the extreme reaction that the community had to the post, and because of this an extreme consequence was necessary.

According to a statement, Enix claimed that she had received several calls over the weekend after the post. There were calls from concerned teachers, crying parents, and students. Enix claimed that K.P. had disrupted the learning environment by creating a situation where students and teachers were afraid to go to school, and parents were afraid to send their children to school that day. To justify the expulsion, Enix referred the board to a section in the student handbook concerning expulsion, the lawsuit asserts. That section states that students can't use threats, intimidation, or fear (among other things) to disrupt any school mission, process, or function.

Additionally, the handbook states: "The district's administrators may also take disciplinary action against a student for off-campus conduct occurring at any time that would have a detrimental impact on school discipline, the educational environment, or the welfare of the students and/or staff." McKinney's attorneys argue that those sections of the student handbook are "unconstitutionally vague and overboard."

Still, many people believe that K.P. intentionally sent a message of fear, not only by holding a gun, but by wearing a trench coat. Staff attorney for the Arkansas School Boards Association, Kristen Craig Garner explains that trench coats were worn by the shooters at Columbine High School in Colorado in 1999. "That image communicates a whole package of information with it," she said. A picture of you holding an assault rifle while wearing a polo shirt sends a different message. "The gun by itself, if he's wearing ordinary street clothes, that's not communicating a clear message that people would associate as a threat. But when you couple that with iconic garments associated with school shootings, to me that's different."

Still, not everyone agrees that K.P.'s post was meant as a threat. Holly Dickson, legal director for the American Civil Liberties Union of Arkansas, didn't attach a similar significance

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Reasonable Suspicion

Mother files lawsuit against school district, officials for search of son's cell phone without reasonable suspicion

Citation: *Simpson v. Tri Valley Community Unit School District No. 3, 2018 WL 3354878 (C.D. Ill. 2018)*

A federal district court in Illinois has granted in part and denied in part a school district's request to dismiss a lawsuit brought against the district by a student's mother who claimed that the district violated her son's Fourth Amendment rights when a principal searched her son's cell phone in a way that was unconstitutional and without reasonable suspicion. The court found that the principal did not have a reasonable suspicion to justify the search, declining to dismiss the claim against him, but noted that the allegation that the superintendent condoned the search and had a policy condoning such searches was not supported, thus dismissing the claims against him.

J.S. was a freshman at Tri-Valley High School in 2017. Principal Ben Derges pulled J.S. out of lunch on April 18, 2017, and took him to the office where he told J.S. to unlock his cell phone. J.S. did so and gave the cell phone to Derges to search through. Derges searched through his files on the cell phone including SnapChat and Instagram accounts that J.S. admitted he and other students maintained. In one account, Derges found negative memes of a student reported to have been bullied. Derges gave J.S. a two-day suspension.

J.S.'s mother, Jodi Simpson spoke to Superintendent David Mouser the next day. She said that Mouser told her Derges should not have searched J.S.'s cell phone without permission and that it would not happen again. According to Simpson, Mouser said that Derges wanted to look at the cell phone because a teacher had overheard J.S. tell another student to "send him that picture."

Simpson filed a lawsuit in July 2017 against Derges, Mouser, and the Tri-Valley Community Unit School District No. 3 (defendants). She claimed that Derges had "custom of searching and seizing student cellphones . . . " ". . . without reasonable suspicion the student committed a crime or violated [a] school rule." She also claimed that Mouser acquiesced in the custom, either intentionally or with deliberate indifference, and did not order Derges to limit his searches and seizures to "circumstances where there is reasonable suspicion." According to her complaint, Simpson alleged that Mouser and Derges were policy-makers in the district. In her complaint she also referred to the high school handbook and a letter from Mouser to J.S.'s father, Jason Simpson, explaining why J.S. had been disciplined.

The defendants asked the court to dismiss the complaint, and the court granted in part and denied part of this motion.

The defendants asked the court to dismiss the complaint, arguing that: 1) Derges had the required reasonable suspicion to search J.S.'s phone; 2) Mouser should be dismissed from the complaint because he had not participated in the search; and 3) the claims against the school district should be dismissed because neither Mouser nor Derges had policy-making authority and Simpson did not plead facts sufficient to support a custom or policy of unconstitutional searches.

The court found that it disagreed with the defendants on the first argument, because the record did not confirm that Derges had reasonable suspicion to search J.S.'s cell phone.

Clearly, if Derges suspected J.S. of cyberbullying, his search of the cell phone confirmed those suspicions along with J.S.'s admission of maintaining the Instagram account. However, the court was not sure exactly what Derges knew when he ordered J.S. to unlock his phone and allow him to search it. Under *New Jersey v. T.L.O.,* Derges needed reasonable suspicion to search J.S. The court noted the first step was to determine whether the search was justified at its inception. According to the alleged facts, Derges wanted to search J.S.'s phone when he heard that J.S. told another student to "send him that picture."

In Mouser's letter to J.S.'s father, he stated that "several other students indicated to the administration that [J.S.] had participated in or sent pictures/memes of the [bullied] student to them at various times that were unflattering or mean in nature." The court did not find these facts provided a basis for Derges to have reasonable suspicion to search the cell phone without permission. According to the alleged facts, the only thing Derges had to go on was that a teacher overheard J.S. asking another student to send a picture. The statement by Mouser in the letter did not specify when the administration heard from other students that J.S. was cyberbullying. The court noted it was "not at liberty to speculate as to when Derges knew of the other students' allega-

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to the trench coat. "If the facts are limited to what you said—a picture of the student holding an assault rifle—photo taken and posted not on school time and devices, then yes, he has a right to post the photo," she said in an email. "If there are other posts or facts and circumstances surrounding the post that would indicate this was a threat of some sort, then that would be a different animal."

The freedom of speech is a right that is taken very seriously in our country, but, Garner contends that although the First Amendment argument is an interesting theory, but school administrators are hypersensitive about school shooting threats because there have been so many recently. "This is not a really good time to do First Amendment experiments," she said. "It could end badly."

—School Law Bulletin,
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Around the Nation ~ Missouri

Gender neutral bathrooms have been installed at two new elementary schools in Missouri

Many schools around the country are turning to gender neutral bathrooms in response to all of the controversy about bathroom use. Following suit, the North Kansas City School District (NKCSD) elected to install gender neutral restrooms at two new elementary schools and some other existing school buildings. The restrooms are enclosed with floor-to-ceiling walls and lockable doors. There is an open alcove area with a common trough sink. Both male and female symbols adorn the same sign on the wall outside the bathrooms.

Additionally, the school district used a gender-neutral design in renovated bathrooms at two sixth-grade centers and at North Kansas City High School. NKCSD first used the design at its Northland Innovation Center for gifted students in 2016. "We had such positive feedback from students, teachers, and parents," said Rochel Daniels, the district's executive director of organizational development. "Since then we have decided to replicate the concept in any new construction."

Even though NKCSD doesn't officially have a policy governing gender-neutral restroom, "we do have a policy about non-discrimination," Daniels said. "The restrooms become a point where we can provide for all students. The design was a decision based on privacy, safety, and security for all students."

Source: *Time*

—School Law Bulletin,
Vol. 45, No. 19, October 10, 2018, p. 7.

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tions." Therefore, it was sufficiently alleged that the search was not justified at its inception *(Conley v. Gibson)*, and the court denied in part the defendants' motion to dismiss.

Next, the defendants argued that Mouser should be dismissed from the case because he was not alleged to have participated in the search. Since Simpson was suing Mouser in his individual capacity, she had to prove that Mouser knew about the unlawful custom, facilitated it, approved it, or was deliberately indifferent to it *(Jones v. City of Chicago)*. However, Simpson claimed that Mouser condemned the search and said it would never happen again, so he hardly condoned it. Therefore, the court granted in part the defendants' request to dismiss the claim that Mouser was individually liable for the search of J.S.'s cell phone.

However, Simpson also alleged that Mouser had actual knowledge of Derges' custom of regularly searching students' cell phones without reasonable suspicion. Simpson claimed that Mouser had acquiesced in the custom by intentionally or with deliberate indifference failing to order Derges only to seize and search cell phones where there was reasonable suspicion. The court found that she sufficiently pleaded enough facts to hold Mouser individually liable for Derges' custom of searching student cell phones without reasonable suspicion, and therefore, the defendants' motion to dismiss was denied in part.

The defendants argued that Simpson's claims against the school district should be dismissed because neither Mouser nor Derges had the authority to make policy. The court noted that in Illinois, superintendents, and principals do not have final policy-making authority. Therefore, Simpson could not succeed on a claim that the school district was liable under Section 1983 for the actions of Mouser and Derges *(Duda v. Bd. Of Educ. Of Franklin Park Pub. Schl. Dist. No. 84)*. The court granted in part this portion of the defendants' motion to dismiss.

In conclusion: 1) the claims against the school district were entirely dismissed; 2) Mouser could not be held liable for the specific search of J.S.'s phone but could be held liable for Derges' ongoing custom of regularly searching student cell phones; 3) and all of the claims against Derges survived the motion to dismiss. Therefore, the defendants' request to dismiss Simpson's claims was granted in part and denied in part.

—School Law Bulletin,
Vol. 45, No. 16, August 25, 2018, pp. 5-6.