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Search Resulting From Police Tip Must Only be Reasonable

***In the Matter of: K.K.*, 2011-Ohio-192 (January 18, 2011).**

The Fifth District Court of Appeals for Ohio recently decided that a student search resulting from a police tip to school administrators was only subject to the reasonable suspicion standard.

In early 2009, Andrew Dreyer, was the resource officer at Lancaster High School. He worked for the Fairfield County Sheriff's Department. Dreyer received information from Commander Brown that K.K., a student at Lancaster High School, might be dealing heroin.

Dreyer informed assistant principal Nathan Conrad of the suspicion, but did not suggest or insinuate that a search should result. In fact, in his testimony, Dreyer stated that he stayed in his office after he relayed the tip to Conrad. He believed it was his responsibility to pass on the tip, but then he left the rest up to school officials hoping they would act on it.

Lancaster High School has a zero tolerance policy so they follow up on all tips from the resource officer. Conrad did decide to search K.K. based on Dreyer's tip. He got K.K. from class and escorted him to his office. K.K. was asked to bring his book bag and books. Conrad found a white plastic wrapper containing some substances inside K.K.'s book bag.

At trial, K.K. submitted a motion to suppress the evidence used in the search which was denied. He was subsequently convicted of delinquency and sentenced to six months of commitment with the Department of Youth Services. K.K. then appealed the decision. He argued that the search was done at the specific request and direction of law enforcement and therefore was an illegal warrantless search.

First, the Court discussed the three methods of challenging a motion to suppress on appeal. First, an appellant could challenge the trial court's findings of fact. To overturn a trial decision an appellate court must decide that the findings of fact are against the manifest weight of the evidence. Second, the appellant could claim that the trial court did not apply the appropriate test or law. Last, if the above are not at issue, the party could argue the trial court incorrectly decided the final issue.

The Fifth District then reviewed relevant law. It found that *New Jersey v. T.L.O.*, a 1985 United States Supreme Court case, governed. In *T.L.O.* the Supreme Court determined that school administrators only need reasonable suspicion, not the usual probable cause, to search a student.

The Supreme Court found that the Fourth Amendment against unreasonable search and seizure applied to searches conducted by school officials. However, requiring probable cause and a warrant would interfere with school disciplinary procedures. Therefore, before a school official can search a student, he or she must have reasonable suspicion that there is a reason for the intrusion.

The Supreme Court next outlined a two-part analysis for the searches. Administrators must first consider whether the action was justified at its in-

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Search Resulting From Police Tip Must Only be Reasonable, Cont.

ception, and second whether the search was conducted in a way that was reasonably related in scope to the circumstances that justified the interference in the first place.

A search is justified at its inception if there were reasonable grounds for believing the search would provide evidence that the student was breaking the law or school policy. A search is permissible when it is not excessive taking into consideration the students age and sex. It must be reasonably related to the objectives of the search.

The Court then proceeded to determine whether the evidence resulting from the search should have been suppressed. The motion to suppress did not challenge the reliability of the tip, only that the evidence should be suppressed because law enforcement started the chain of events. Despite this, the Court found that the search was by a school official and it met the reasonableness standard.

No case law suggested to the Court that school officials should have begun their own investigation because the tip was from law enforcement. The zero tolerance policy led them to act upon it, and that decision was made independently. It was not "state action." The zero tolerance policy also made the search justified at its inception.

The scope of the search was also permissible. Conrad only searched K.K.'s pockets and his book bag. It was minimally intrusive and related to the tip.

How This Affects Your District:

This case is important because it addresses student searches when resource officers are also involved. Although this case is only controlling in the Fifth District Court of Appeals, it is likely to influences other Ohio courts.

A tip from police does not necessarily mean that probable cause was required for a student search. Law enforcement may not ask school administrators to conduct searches so they can obtain evidence and avoid the probable cause requirement. However, if the police are not trying to evade warrant requirements, then the fact that the tip came from law enforcement will not undermine the district's reasonable suspicion standard.

As a result of this case, many Ohio schools know exactly what standard they must meet to search a student when a police tip is involved. The search must be reasonable just like other administrator searches. To meet this standard, administrators must ensure that the search is reasonable from its inception, which is met here when the police provide the tip. However, schools that do not operate with zero tolerance policies should take extra care to determine if the search is justified at its inception. It remains to be seen if the same standard applies to them.

Second, administrators need to think about what they can search. While a book bag and a student's person might be permissible, searching a car or a cell phone may not.

U.S. Supreme Court to Decide Case Regarding Public Officials' Speech

***Nevada Commission on Ethics v. Carrigan*, 10-568 (certiorari granted January 11, 2007).**

The United States Supreme Court granted certiorari in *Carrigan*, a case on appeal from the Nevada Supreme Court. The issue decided was whether public officials' votes constitute protected speech and if so, what is the standard of review courts should apply in such cases.

The Nevada Commission on Ethics appealed the case after the Nevada Supreme Court struck down part of a Nevada statute governing recusal. Nevada City Council member Michael A. Carrigan refused to excuse himself from voting on a hotel and casino project. Carrigan's close friend had been retained by the developer.

In striking down a portion of the law, the Nevada Supreme Court reversed the trial court decision upholding it. It stated that the trial court had incorrectly applied the test laid out by the U.S. Supreme Court in *Pickering v. Board of Education*. The Nevada Supreme Court applied strict scrutiny and held that a vote by an elected officer on a public issue is protected speech. The law was not narrowly tailored to notify officials which close relationships required recusal.

How This Affects Your District:

This issue may directly affect members of Ohio's school boards. In Ohio, there are certain situations where board members are required to excuse themselves from voting. It remains to be seen whether the United States Supreme Court's decision will impact these laws

As always, Ennis Roberts & Fischer will keep you updated on the Supreme Court's decision regarding this case.

Judge Dismisses Title IX and § 1983 Claims in Bullying Case

***J.B. ex rel Bell v. Mead School District*, CV-08-223-EFS (E.D.Wash 2010).**

The Eastern District of Washington recently addressed a case resulting from student-to-student sexual harassment. The parents of the victim sued the school district after their son graduated. The Court granted summary judgment dismissing the plaintiffs' Title IX and section 1983 claims against the school district.

J.B. attended Mead High School (MHS) in Mead School District (Mead) during the 2005-2006 school year when the abuse took place. MHS had block scheduling which provided for 'access time' where students could choose to come to school and ask teachers questions and get help with school work. If students were at school during this time but not meeting with a teacher, they were to stay in a teacher's classroom, the library, or the mall area.

J.B. was physically and sexually abused as a result of a game of truth or dare he played with his special education classmates during access time. The students would gather in the field house, the "back room" (a hallway connecting the gym with the field house), the wrestling gym, or the regular gym. A lookout would tell the students to run or get out if someone was coming.

Two other high school students, M.L.U. and D.R.D., orchestrated the game. Over the course of the school year they ordered J.B. to hug them, kiss their bare buttocks, hug the principal, and touch another student's backpack. They also kicked J.B.'s buttocks and made him kick other students' and expose himself. The girls spit into J.B.'s mouth, kicked him in the genitals, struck his genitals with a skateboard, and made him perform and receive various sexual acts with them and another student.

In May 2006, a teacher, Wesley Graham, went to the field house during lunch. When he got there, he found M.L.U. sitting on top of J.B. Both were clothed. J.B. later stated that M.L.U. was 'humping' or 'pretending to rape' him. Wesley Graham, however, perceived M.L.U. sitting on J.B. and holding him down or wrestling. He did not see any sexual or abusive behavior and did not notify anyone of the incident.

On June 1, 2006 D.R.D. and M.L.U. forced J.B. to take his pants off and chase another student, M.E.F., around the room. J.B. did until he realized he should not do that. He then stopped. M.E.F. told school staff about the incident which triggered an investigation where J.B. finally revealed his own abuse.

Mr. Chadwick, MHS's Assistant Principal, suspended both girls for the rest of the school year, forbid J.B. from taking classes with the girls, assigned a supervisor to walk J.B. to class, and requested that D.R.D. transfer to another high school.

As a result of his abuse, J.B. was diagnosed with post traumatic stress disorder, depression, anxiety regarding eating, and difficulty sleeping. J.B.'s troubles also manifested themselves so he was distracted at school and he considered killing himself. After J.B. graduated, his parents brought state claims in addition to a Title IX and § 1983 claim.

The Eastern District of Washington addressed J.B.'s Title IX claim first and granted summary judgment. The Court first found that to establish liability under § 1983, a plaintiff must show: "1) he suffered sexual harassment that was so severe, pervasive, and objectively offensive that it could be said to deprive him of access to the educational opportunities or benefits provided by the school; 2) the funding recipient had actual knowledge of the sexual harassment; and 3) the funding recipient was deliberately indifferent to the harassment."

The Court easily determined that J.B. had met the first prong of the test. Mead conceded that the abuse was severe, pervasive, and objectively offensive. The Court also found that J.B.'s education was undermined and he was denied equal access because of the abuse. J.B. suffered stomach problems, sleeplessness, anxiety, and depression severe enough to warrant counseling. These ailments, combined with his suicidal thoughts, created an issue of fact as to whether the abuse negatively affected his education.

However, the Court then found that J.B. could not show that Mead had actual knowledge of the abuse. The legal standard states that the school must have had actual knowledge of the abusive incident or actual knowledge of at least a significant risk of sexual abuse; the often used 'should have known' standard is not enough.

The Court then stated that there was no evidence that district administration had notice of any sexual behavior or harassing conduct by M.L.U. or D.R.D. toward J.B. The district knew that J.B. kissed

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Judge Dismisses Title IX and § 1983 Claims in Bullying Case, Cont.

D.R.D., hugged the principal, and touched another student's backpack. However that does not constitute notice.

In addition, it was reasonable for Graham to believe that M.L.U. and J.B. were only wrestling when he found M.L.U. on top of J.B in the gym. Even if he had thought the situation was sexual, there was no reason for him to believe J.B. did not consent or welcome it. Additional caselaw substantiated that conclusion. Finally, the Court found that the abusers' disciplinary history did not suggest either would sexually abuse another student.

Next, the Court granted summary judgment for the section 1983 claim. To prevail on the claim, J.B. had to show: 1) that a government employee violated his constitutional rights; 2) that the government entity has customs or policies that rise to deliberate indifference; and 3) that these customs or policies were the moving force behind the employee's violation of constitutional rights.

The Court found that Mead was not directly responsible for depriving J.B. of his right to bodily security. The Court pointed out that usually lack of due care does not rise to deprivation of due process. It stated that there is no right to affirmative government aid. As a result, to prevail, J.B. had to show that Mead met either of the two exceptions: 1) there was a "special relationship" between the state and the individual; or 2) the state affirmatively placed J.B. in a dangerous situation.

The Court found that neither of these exceptions applied. J.B. was not in custody or held against his will to create a special relationship and there is no evidence Mead subjected or placed J.B. in a dangerous situation.

How This Affects Your District:

This case is an example, and warning, of how school districts can react to sexual harassment or abuse between students and avoid liability. Actual knowledge is important to a Title IX claim. It is a high standard and it protects school districts. However, schools still need to be very careful to investigate claims of sexual harassment at school. Although actual knowledge was not present in this case, this determination will largely rest on the facts of each specific situation. It may be helpful for districts to be proactive.

If a school does have actual knowledge of sexual harassment, it should act swiftly and firmly to protect the victim and discipline harassers. Although a recommendation that the harasser leave school is not always necessary, a thorough effort to solve the problem must result.

Change in Statute Could Eliminate Some Bidding Processes

H.B. 330, Representative Patton (December 23, 2010).

The Ohio State Legislature recently passed House Bill 330 which will allow the State's Director of Transportation to include school districts in purchase contracts for machinery, materials, supplies, and other articles. Governor Ted Strickland signed the bill into law on December 23, 2010 and it will become effective on March 24, 2011.

The law simply adds school districts to the definition of 'political subdivisions' under the statute. The Act changes the law so that school districts do not have to go through a competitive bidding process when they need to buy machinery, materials, supplies, and other articles. Instead, school districts can simply attach onto an existing contract with the Director of Transportation to buy the supplies they need.

To attach onto an existing contract to obtain machinery, materials, supplies, and other articles, the school district must submit a certified copy of either the bylaws or rules of the turnpike commission, or alternatively, the school board's ordinance or resolution that requests authorization to participate in the contract. These documents must show that the school board agrees to be bound by the terms and conditions the director prescribes in the contract.

How This Affects Your District:

This change in the law creates an alternate method for school districts to purchase supplies, materials, and machinery. School districts should be aware that they have the option to 'piggy back' onto contracts the Director of Transportation makes with vendors.

For many school districts this may prove to be a better method of buying materials than going through their own bidding process. Certain situations may also lend themselves to this purchase method and relieve work from school districts.

Education Law Speeches/Seminars

Ennis, Roberts & Fischer regularly conducts seminars concerning education law topics of interest to school administrators and staff.
Popular topics covered include:

Cyber law
School sports law
IDEA and Special Education Issues
HB 190 and Professional Misconduct

Bill Deters
At Brown County ESC on February 14, 2011
Special Education Update

Bill Deters and Jeremy Neff
At Princeton City School District on February 22, 2011
Special Education Update

Bill Deters and Erin Wessendorf-Wortman
At Warren County ESC on February 23, 2011
Negotiations

Bill Deters
At OSBA on March 11, 2011
Private Placement and Special Education

Administrator's Academy Dates at Great Oaks Instructional Resource Center

February 16th, 2011– *Gear Up for Negotiations (RESCHEDULED DATE!)*

April 7th, 2011 – *Media and Public Relations*

June 21st, 2011 – *Student Education and Discipline*

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