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6th Circuit Denies High School Officials Immunity in Strip Search Case

Knisley v. Pike County Joint Vocational School District, 2010 WL 1924498 (2010)

In a decision handed down on May 14, 2010, the United States Court of Appeals for the Sixth Circuit held that high school officials who had participated in a strip-search of students were not entitled to qualified immunity. This decision is a result of the United States Supreme Court's instructions that the Sixth Circuit should decide the case in light of, *Safford Unified School District No. 1 v. Redding*, 129 S.Ct. 2633 (2009).

Ohio's Pike County Joint Vocational School District ("District"), appealed a district court order denying its motion for summary judgment. In the case, the school Director went through purses and books looking for a stolen credit card. Officials only knew someone in the class had to have taken the card. Female staff checked shoes socks, and pockets. The girls' lockers were then searched. After one student said the culprit was hiding the item in her bra, everyone in the class was made to shake their unhooked bras beneath their shirts and lower their pants halfway down their thighs.

The Sixth Circuit first addressed the reasonableness of the search. To determine reasonableness of a Fourth Amendment search of a student, the search must be 1) justified at its inception, and 2) reasonably related in scope to the circumstances justifying the search. The Court compared this to a previous Sixth Circuit case, *Beard v. Whitmore Lake School District,* 402 F.3d 598 (2005), where the Court found some sort of search cold be reasonable even if officials had no individual suspicion and searched everyone.

Searches performed without individual suspicion are evaluated in light of 1) the student's legitimate expectation of privacy, 2) the intrusiveness of the search, and 3) the severity of the schools system's needs that were met by the search. In *Beard*, the searches were unreasonable because they were intrusive, carried out to find money, performed on too many students, without individual suspicion, without consent, and some were in the presence of other students.

The Court decided the Pike County search was intrusive and the students had a significant privacy interest in their unclothed bodies. The Court further held that the handbook policy on searches did not constitute mutual consent, as some students were not aware of the policy or did not understand its terms.

The Sixth Circuit concluded that the students' Fourth Amendment rights had been violated. It then moved on to qualified immunity.

Qualified immunity is allowable only where the officials' actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." A constitutional right is clearly established when the boundaries of the right are sufficiently clear that an official would know if he or she was violating the right. Because previous Sixth Circuit cases, such as *Beard*, put officials on notice, they were not subject to qualified immunity.

Finally, the Sixth Circuit compared the present case to *Redding*. The Court concluded that the Supreme Court's decision in *Redding* was distinguishable because there was no case-law to put the officials on

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notice as there was in this case. Therefore, the Sixth Circuit denied the officials' claim for immunity.

How this affects your District:

This case is persuasive for Federal Courts in Michigan, Ohio, Kentucky, and Tennessee. It carries less weight in state courts. However, it should be considered before any strip-searches take place at school. *Beard* and *Knisley* put school officials on notice that students have a constitutional right of privacy. This notice means school officials must consider those cases in decisions to strip-search students. Officials should:

1) Make sure a search is reasonable by asking whether the search was reasonable at inception and whether the scope of the search is reasonable under the circumstances.

2) Try to establish individualized suspicion. Officials should avoid searching a large group of students. Officials should identify a very small group, or better, one student, they suspect of the indiscretion, and reserve a search to that student or small group. Always attempt to limit intrusion, respect students' privacy, and make sure the search is in the interest of the school.

3) When a situation is questionable, contact your attorney before taking action.

The bottom line is that if a case is similar to *Beard* and *Knisley*, school officials are unlikely to receive qualified immunity and be immune to subsequent law-suits.

House Bill 48 Changes Levy Resolution Deadlines

The Ohio House of Representatives recently passed House Bill 48 which goes into effect July 2, 2010. The Bill changes the dates resolutions must be certified by.

In most situations, the deadlines gave schools 75 days before election to certify their levy resolutions. House Bill 48 moves that deadline up to 90 days before election. Statutes that specify this change include:

- Levies to raise more funds where a District decides authorized levies, along with government funds, are insufficient for necessary requirements of the district. This law allows a new levy to replace specifically provided levies. ORC 5705.199.
- Levies for general improvements, including cultural centers or education technology. ORC 5705.21.
- Levies to raise money for district operating expenses. ORC 5705.211(B).
- Levies as a result of the School Board's opinion that the amount of taxes that can be raised within the 10mill limitation will not be sufficient to provide for present and future needs of the district. The school may levy up to five taxes in excess of the limitation. ORC 5705.212.
- A levy voted for by 2/3 of the Board of Education to levy in excess of the 10-mil limitation because the amount of taxes allowable within the limitation are insufficient to provide for present and future requirements of the School District. (This resolution now must be to the county auditor 95 days before election.) ORC 5705.213(A)(1).
- A levy voted for by 2/3 of the School Board to raise funds for current operating expenses, acquisition, enlargement, construction, renovation, and financing of permanent improvements where funds within the 10-mil limitation will be insufficient. The new 90 day deadline applies to the resolution certification by the Board of Elections. ORC 5705.217.
- Levies to raised funds for a Regional Student Education District, proposed by the Board of Directors of the Regional District to all the districts it is made up of. ORC 5705.2111.

Other statutes have alternate deadline changes.

- A resolution to issue general obligation bonds for permanent improvements. The time limit was changed from 75 to 90 days. ORC 5705.218.
- Resolutions converting existing levies for current expenses into a levy raising a specific amount of money by repealing all or part of the existing levies and imposing a levy that will be in excess of the 10-mill limitation for a specified amount of money for current expenses. The certification deadline was changed from 90 days to 180 days before election. ORC 5705.219.
- Resolutions from 5705.2111 shall be certified by the tax commissioner 90 days before election. ORC 5705.25.
- Resolutions for levies guided by 5705.212 and 5705.213 shall be

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certified 90 days before election. ORC 5705.251.

- Resolution by a District (except a Joint Vocational School District), stating it is necessary to raise a specified amount annually for the School District. The resolution will be certified by the tax commissioner 100 days before election, rather than 85. ORC 5748.02(A).

- After the tax commissioner certifies the above resolution in 5748.02(A), a resolution by the majority of the Board of Education proposing a annual income tax for School District purposes must be certified to the Board of Elections 90 days before election. ORC 5748.02(B).

- Resolution to repeal income tax levied for more than 5 years may be initiated not more than once in any 5-year period. This must be certified 90 days before the appropriate election. ORC 5748.04.

- The following should be certified to tax commissioner 105 days before election: levies for an annual tax a certain amount of money for school district purposes, general obligation bonds for permanent improvements, levies outside the t10-mill limitation to pay debt on bonds and anticipatory securities, and to submit the question to the electors at a special election. A subsequent, specific, resolution must be certified to the board of elections 90 days before election. ORC 5748.08.

In the case of emergency tax levies, certification by the board of elections is 90 days, but the resolution must be to the county auditor 80 days before election. The latter was not changed in HB 48. Ennis, Roberts and Fischer suggests school districts plan to have resolutions to the county auditor 95 days before election, 15 days before the legal deadline. This will ensure the resolution is returned in the mandatory 5 days to be certified by the Board of Elections in a timely manner.

How this Affects your District:

Districts should be aware of the change in deadlines or contact an attorney for specific dates. Some of these levies are also applicable to special elections. Levies should be planned for and begun before they would have been in previous years. This means budgetary concerns may need to be identified earlier.

Law Enforcement May Intervene if BIP Inadequate

Wilson County Bd. Of Educ. 53 IDELR 249 (SEA TN 2009).

A Tennessee Court of Appeals held that a Tennessee school district did not violate the Individuals with Disabilities Education Act ("IDEA"), by allowing law enforcement to intervene in an incident where a child with emotional disturbance was a harm to others.

The fifteen year old boy who started the incident had bipolar disorder, attachment disorder, and PTSD. His Behavioral Intervention Plan ("BIP") called for physical interventions when the student became a danger to himself or others. However, it did not address what to do if these physical interventions were unsuccessful.

In the situation at issue, the boy became violent turning over a desk, spitting, throwing writing utensils, kicking and flailing. He hit an assistant and kicked his teacher. A school resource officer, employed by the Sherriff's department and posted at the school, arrived and tried to calm the boy. Finally, the officer had to physically restrain the child when he hit and kicked staff. The student was then taken to jail since the officer was afraid for others' safety.

The student's parents sued, arguing that the BIP was not appropriately applied. However, the court decided that the IDEA does not prohibit school personnel from involving law enforcement when a crime is committed. Every effort was made to comply with the BIP, but it did not outline what should happen when the situation went beyond the BIP. The Court held that the officer acted in the most reasonable manner consistent with the intent of the BIP, even though what he did was not specifically provided for in the plan.

How this Affects your District:

As usual, every effort should be taken to comply with a student's BIP when applicable. However, this case recognizes there are situations the BIP cannot anticipate. If the BIP does not cover a situation, or the BIP did not resolve a situation, law enforcement may intervene.

Use caution when applying this case to situations with different facts. This case may be limited to scenarios where the student is harmful to him/herself or others. The Court did not extend its holding to situations where the child is not being harmful.

It is significant that the Court stated the officer's actions were in the spirit of the BIP. If actions stray from the intent of the student's BIP, they may not be allowable under this case.

Extracurricular Participation and Students with Disabilities

Kittery (ME) Sch. Dist., 53 IDELR 271 (OCRI, Boston (ME) 2009).

The Office of Civil Rights (OCR) recently determined that a local school district did not discriminate against a high school student with a disability when it did not select her to join the cheerleading squad because the school's decision was based on legitimate, nondiscriminatory factors unrelated to the student's disability.

OCR's decision was in response to a complaint filed by the student's parent which alleged that the district violated Title II of the ADA or section 504 when it decided not to ask the student to join the cheerleading squad. The student received special education services, though, according to the complaint, her disability did not affect her athletic ability. Significantly, the student did not request any accommodations in the selection process.

OCR closely examined the manner in which the school selected cheerleaders in order to determine whether there was any evidence of discrimination. Each candidate for the squad was evaluated by the coach and two independent judges. The evaluators then assigned a score for each candidate in six skill categories. In order to receive an invitation to the squad, a candidate had to score at least 225 out of a possible 450 points. However, the student at issue in this case received only 180 points.

OCR determined that this evaluation process used objective criteria that assessed skills related to competitive cheerleading. The investigation further determined that the coach had applied the scoring criteria evenhandedly to each candidate who participated in the tryout. OCR thus concluded that the decision to exclude the student from the team was based on "legitimate, nondiscriminatory criteria that were rationally related to the purposes and goals of the cheerleading program."

How this impacts your district:

This case should serve as a valuable reminder of the interplay between extracurricular activities and federal laws which prevent discrimination based on disabilities. Pursuant to Section 504 and Title II of the ADA, school districts are permitted to establish and implement skill-based eligibility standards for participation in extracurricular activities, so long as these standards are rationally related to the purposes or goals of the activity.

However, school districts, however, are also required to provide nonacademic and extracurricular services in a manner that will allow students with disabilities an equal opportunity to participate in the activity. School districts may use the same skill criteria to assess students with disabilities trying out for extracurricular activities, though the district may be required to modify certain nonessential requirements of the program to accommodate these students.

Connecticut School Cannot Hold Graduation at Church

Does 1, 2, 3, 4, and 5 v. Enfield Public Schools, Conn. Dist. Ct (May 31, 2010).

Connecticut's Federal District Court recently decided that a local public school could not hold graduation at a local church. The Court held that the school violated the separation of church and state.

The American Civil Liberties Union (ACLU) asked the federal court to grant an injunction against the graduations, to stop Enfield Public Schools (EPS) from holding two high school graduations at First Cathedral Church. The ACLU argued the graduations violated the Establishment Clause since the church had many prominent Christian decorations.

Although EPS held graduations at the church three years previously and had asked the church to cover certain displays or banners, the Court granted the injunction. It held EPS did not pass the applicable *Lemon* Test which requires that the action have a secular purpose, have a principal effect that neither advances or inhibits religion, and does not excessively entangle government in religion.

EPS admitted it failed the secular purpose prong. The Court then concluded the district had violated the entanglement prong when it asked the church to cover some displays, as this forced public officials to decide what was religious and what was not.

Finally, the Court noted that the Establishment Clause was violated even if attendance at graduation is not mandatory. Forced conformity in order to attend graduation is not Constitutional. It coerces students, their friends and/or family to support religion, specifically that of First Cathedral Church.

How this Impacts your District:

Districts should hold graduations and other ceremonies in public places. Religious buildings should be avoided.

If a district does decide to hold a school ceremony in a religious building, it should also consider that any accommodations made to avoid a threatened law suit could exacerbate religious entanglement.

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

To schedule a speech or seminar for your district, contact us today!

Upcoming Speeches

Bill Deters and Gary Stedronsky
at the 33rd Annual OCSBA Spring Seminar on June 11, 2010:
New Issues with Student Discipline

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