Perhaps the most powerful incentive to maintain safe schools is the desire to avoid legal liability. It is no surprise that educators and school resource officers have been attentive to legal reform in judicial cases, especially in recent times as public attention to school policies grows more intense.

While public laws (legislation) represent the most straightforward type of reform to put into practice, court decisions are a mysteriously difficult tool of reform. This is due to the variety of courts and the mixture of state and federal rules that may be relevant to a case. Therefore, despite the good intentions of school officials, court decisions appear to vary in a way not easily explained, making the question of when school policies cross the line difficult to understand.

Fortunately, there are two big stories from the student rights decisions of 2014-2015. First, on the subjects of excessive force, bullying, student searches, and the duty of school officials to protect students, the courts are no longer divided on the relevant law. The courts appear to be speaking the same language with rules that can easily be put into practice by school officials. The second big story reflects the truth of the first: eight of the eleven court decisions come out in favor of the school policies.

When one combines the results of both the federal decisions and the state court rulings, it is clear that the audience to whom these decisions are written is beginning to understand what the law permits and what it requires. Only on the subject of bullying are all of the courts uncertain about where the law draws the line for purposes of the liability of school officials. And for the present time, the courts are resolving doubts in favor of school attempts to regulate bullying in the absence of evidence of improper training, complacency, or abuse of authority.

As is often the case, the Fourth Amendment produces the most consistent rulings with two noteworthy conclusions. First, in the area of student searches, educators win every case. School officials appear to have mastered the ins and outs of their authority to search students based upon reasonable suspicion that "the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." New Jersey v. TLO, (469 U.S. 325, at 341 (1985)). The decision in State v. Lindsey, holding that a student athlete has a lowered expectation of privacy using a school-issued equipment bag, is sure to affect day-to-day school searches involving extracurricular activities. Indeed, the current focus on campuses on weapons and drugs makes Lindsey and People v. T.S. (holding that a search of a student backpack for weapons is valid even with the assistance of two school resource officers) especially important decisions for schools that inherit these risk factors.

Perhaps the most impressive decision in this area is the Jackson v. Ladner case where the court rules in favor of proactive school officials aggressively enforcing a cyber-bullying policy by searching a student's social-networking account upon receiving information that the student sent threatening online messages concerning school activities.

The second important outcome in the area of the Fourth Amendment has to do with two very interesting excessive force
cases. J.W. v. Carrier suggests that all courts are moving quickly to flatly adopting a three-part rule to resolve excessive force lawsuits (1) as the age of the student decreases the amount of force used should be reduced accordingly; (2) when the offense involves non-violent minor incidents the amount of force should be reduced accordingly; and (3) increased use of force is justified when the conduct of the student escalates a tense situation – the responses of school officials (and school resource officers) are then seen as a reasonable attempt to deescalate the situation, protecting the safety of others as well as the safety of the official. This is the best explanation of the outcome in the case of J.W. v. Birmingham Board of Education. The lesson of the Birmingham case is that school officials would do well to exercise wise discretion in the use of pepper spray.

Meanwhile, the duty of school officials to protect students benefits from the clarity of the reasoning provided by the courts in Beward v. Wittaker and Estate of Massey v. City of Philadelphia. Both the federal and the state court agree that educators have an affirmative duty to take all reasonable steps to prevent foreseeable harm to its students, such that educators are not entitled to qualified official immunity for negligent performance of this duty. This language is used rarely because it often creates confusion between liability in statutory and common-law cases and liability involving constitutional law, where the Due Process Clause does not make such a demand. Nevertheless, the rule that emerges is that school liability follows the negligence.

Only the bullying cases take us down the rabbit hole into the judicial reluctance to control this area of school safety law reform, apparently in the hope that lawmakers will devise a workable standard that assists educators in distinguishing kids-play from chronic predatory acts. In Hankey v. Town of Concord-Carlisle, the court holds that a school district is not liable for student injuries sustained by bullying even though educators should have done more to protect the victim and take the incidents seriously. In Maldaire v. Mount Pleasant Central School District and Emmanuel B. v. City of New York, the court ruled that school officials are not liable for injuries to a student sustained by bullying unless they had actual or constructive notice of prior conduct to place them on notice. And in Gauthier v. Manchester School District, the court held that failure by school officials to comply with school bullying policy does not create a private right of action to sue the school district for injuries to a student. Judicial restraint of this magnitude is rare except in constitutional cases and is best explained as a form of deference to law makers, who only now are beginning to address the gap between legislation that prohibits bullying and the rules for holding educators accountable for eliminating its harmful effects from the school climate.

"When one combines the results of both the federal decisions and the state court rulings, it is clear that the audience to whom these decisions are written is beginning to understand what the law permits and what it requires."

I. THE DUTY OF SCHOOL OFFICIALS TO PROTECT STUDENTS

Beward v. Whitaker --- S.W.3d ----; 2015 WL 293461 (Court of Appeals of Kentucky 2015)

Educators have a "special relationship" with their students by virtue of state law and an affirmative duty to take all reasonable steps to prevent foreseeable harm to their students.

Facts: A fellow student injured Whitaker in the school hallway just prior to the beginning of his first class. The attacker put Whitaker into a chokehold until he passed out. He let go of Whitaker, and he fell to the ground, hitting his head on the floor and causing severe head trauma. No teachers or administrators were in the hallway at that time to supervise the students. State and school policy required school officials to provide a "safe environment for students," and to not tolerate "[b]ehavior that materially or substantially disrupts the educational process." Whitaker filed a complaint alleging that school officials failed to meet their duty to keep the students safe, monitor the hallways, and maintain control of the students at the time he was attacked and therefore breached their duty of care to him. The school official argued that they were entitled to immunity from suit in student injury cases.

Holding: Educators are not entitled to qualified official immunity for negligent performance of the duty to keep students safe. "Official immunity" is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions. It rests not on the status or title of the officer or employee, but on the function performed. Immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions, i.e., those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment, (2) in good faith; and (3) within the scope of the employee's authority. There is no immunity from tort liability for the negligent performance of a ministerial act, i.e., one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts. The "special relationship" formed between a school district and its students imposes a ministerial and an affirmative duty on the district, its faculty, and its administrators to take all reasonable steps to prevent foreseeable harm to its students.

NOTE: On September 16, 2015, the Kentucky Supreme Court agreed to review the case and issue a new ruling on whether the duty to protect students is a ministerial or a discretionary function.


Educators can be held liable for preventing a student from seeking medical attention or by forbidding the taking medication that is necessary to function, thereby creating a danger to the student.

Facts: Massey was a sixth grade student in the Philadelphia Public Schools. She suffered from chronic asthma and used medication to treat her asthma. School officials knew of Massey's medical condition, particularly that an asthma attack would require immediate intervention such that any delay could lead to death. Nevertheless, school official followed a policy that students could not possess or use prescribed medication at the school without the supervision of a nurse. On
day in school, Massey had an asthma attack. Her teacher informed her that no nurse was on duty, but did nothing else to provide medical treatment to Massey. Although Massey’s condition worsened, school officials did not contact emergency medical aid or take her to the hospital, despite her having told the educators that she could not breathe. Later in the day, school officials drove Massey home where her family took her to the hospital. She died soon thereafter of acute exacerbation of asthma. Massey’s family argued that educators and the school district were liable for her death by preventing her from obtaining medical treatment.

**Holding:** The court ruled that under federal law school districts can be liable under the “state-created danger rule,” when they take action that creates a danger to a student or that renders a student more vulnerable to danger than had educators not acted at all. The policy of not having a nurse on duty while also not permitting Massey to use prescription medication without a nurse on duty is a basis for liability under the state-created danger rule. This is particularly true because school officials were said to know of the risk to Massey if an asthma attack was not immediately treated. The court ruled that under Pennsylvania law school officials have no immunity from liability when their conduct is shown to be unreasonable, reckless, willful, and deliberately indifferent to the health, safety, and well-being of a student. This sort of misconduct is synonymous with an intentional tort and is not protected by state tort immunity laws.

**II. EXCESSIVE FORCE**

**J.W. v. Corporal Carrier**

2015 WL 2085438 (United States District Court, D. Maryland 2015)

A school resource officer does not use excessive force when handcuffing and lifting the arm of an unruly student.

**Facts:** J.W. was a special education student at a public middle school. He was on medications for his disabilities. J.W. was having an outburst at school during which he told school officials he was going to harm himself, resisted all attempts to calm him down, and lifted up a desk and tipped it over. The assistant principal and the school resource officer informed J.W. that they were going to place handcuffs on J.W. and take him to the hospital for an emergency psychiatric evaluation. J.W. physically resisted the school resource officer, kicking him and pulling away. Eventually, the SRO handcuffed J.W., took him out of the classroom to a police car and transported him to the hospital. At the hospital, J.W. complained of pain in his left wrist. His left wrist was put in a splint. J.W. sued for “excessive force.”

**Holding:** The court ruled that an “excessive force” claim should be judged under Fourth Amendment rules and focuses on the objective reasonableness of the officer’s conduct.

The court ruled that the SRO acted reasonably when he lifted J.W.’s arm in an attempt to gain control of J.W. to transport. Excessive Forceovert him to the hospital. Assuming that Corporal Carrier could have gained control of J.W. by grabbing his shoulders and escorting him from behind, the Court ruled that “reasonableness is evaluated from the perspective of the officer on the scene, not through the more leisurely lens of hindsight.” Moreover, the court ruled that the fact that an arguably less “forceful” alternative to gaining control of J.W. might have existed does not render the force that Corporal Carrier used unreasonable.

**J.W. v. Birmingham Board of Education**


The guiding principle in excessive force cases is that unwarranted use of force when a student is not resisting constitutes excessive force.

**Facts:** Several former students of the Birmingham City School District sued for excessive force, representing a class action of all current and future Birmingham City Schools high school students. The parties all agree that Birmingham Police Department School Resource Officers sprayed students with a chemical spray. The SROs were required to carry duty belts that contain canisters of chemical spray. All parties agree that deploying the chemical spray was the standard response for school disruptions — even for the non-threatening, non-violent incidents — including backtalking and challenging authority. Between 2006 and 2014, SROs sprayed 19,930 Birmingham City School students with chemical spray in 110 incidents. With one exception, none of these incidents involved any students who had weapons in their possession. The SROs also failed to decontaminate the students, and instead left them to suffer the effects of the chemical spray until they dissipated over time. The class action seeks injunctive relief to cease the unconstitutional use of the chemical spray.

**Holding:** This case boils down to four issues. The first is whether the SROs inflicted excessive force on the students when they sprayed them. The second is whether the SROs adequately decontaminated the students after spraying them, and if not, whether their failure to do so constituted excessive force. The third is whether, if the SROs’ behavior was pursuant to a Birmingham Police Department policy or custom. The fourth is whether
the students have demonstrated that they are entitled to injunctive relief.

The guiding principle in excessive force cases is that unwarranted use of force when a person is not resisting constitutes excessive force. The SROs assigned to Birmingham City Schools can lawfully spray students who are actively engaged in a physical fight or other violent behavior with chemical spray. But, two of the plaintiffs succeed on the merits of their individual excessive force claims against the SROs who sprayed them. Although these two students were creating noisy disturbances when SROs sprayed them, neither posed a danger to anyone. The claims of the other students fail; these persons resisted, fled, or tried to assault someone, all grounds for the lawful use of chemical spray.

Six students who the SROs directly sprayed succeed on the merits of their excessive force claim against the SROs for failing to adequately decontaminate them. By and large, the SROs did nothing to decontaminate students. Absent exigent circumstances, failing to decontaminate an individual after exposing him to chemical spray shocks the conscience and is a violation of the Fourteenth Amendment.

These two constitutional violations occurred pursuant to Birmingham Police Department policy or custom. Birmingham police officers were instructed that they could respond to resistance with a degree of force one to two levels greater than the resistance itself. These plaintiffs have met their burden and are entitled to injunctive relief – the termination of the unconstitutional use of the chemical spray. The court temporarily enjoined the use of chemical spray in Birmingham City high schools until the Birmingham Police Department, the plaintiffs, and the court can craft policy changes aimed at addressing the constitutional violations.

III. STUDENT SEARCHES

People in Interest of T.S. 2015 WL 4505955 (Superior Court of the Virgin Islands, Division State v. Lindsey of St. Thomas and St. John 2015)

A school official’s search, State v. Lindsey of student backpacks for weapons is valid on mere reasonable suspicion. The assistance of two school resource officers did not raise the standard to probable cause. In light of reasonableness standard, the minor’s consent was not necessary to conduct the warrantless search.

Facts: T.S. sought to suppress all evidence seized from his backpack during a search outside a fence at his high school, asserting that the search was unlawful and in violation of the Fourth Amendment. On the day of the search a school staff member and an SRO went behind the school campus where several students were reported to be hanging out. T.S. and two other students were found. The staff member asked why they were not in school. She then asked for their backpacks to search for weapons. T.S. gave the staff member his backpack where several small plastic bags filled with marijuana were found. T.S. was arrested and charged with possession of a controlled substance.

T.S. argued that (1) the search required probable cause because it occurred off campus and was conducted with police involvement; (2) even if a “reasonable suspicion” standard was applicable, it is not met by the facts; (3) an off campus search by a school monitor is an act exceeding her authority; and (4) T.S. did not voluntarily consent to the search.

Holding: In 1985, the Supreme Court addressed the issue of warrantless searches by school officials, on school grounds, in N.J. v. T.L.O., 469 U.S. 325 (1985). The Court held “that school officials need not obtain a warrant before searching a student who is under their authority.” N.J. v. T.L.O., at 340. The Supreme Court determined that the school settings require a modified level of suspicion, a “standard of reasonableness – reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”

The location where T.S. was found is within the boundary line of the school’s property. The staff member had reasonable suspicion to conduct the searches. She has worked as a school monitor for five years. She knows the students and utilizes the same practices for all students found in unauthorized areas and limited her search to the students’ backpacks.

When school officials initiate the search or police involvement is minimal, the reasonableness standard applies. In this instance, the school staff member questioned the students, initiated the investigation, and searched T.S. The SRO’s involvement in the search of T.S. was minimal – he was merely present. Therefore, the reasonableness standard applies. In light of reasonableness standard, the minor’s consent was not necessary to conduct the warrantless search.

State v. Lindsey
868 N.W.2d 881; 2015 WL 3884175 (Court of Appeals of Iowa 2015)

A school administrator’s search of school property (a school-issued athletic equipment bag) is reasonable and does not violate the Fourth Amendment.

Facts: Lindsey sought to suppress all evidence seized from his bag during a search by a school official, asserting that the search was unlawful and in violation of the Fourth Amendment. On the day of the search Lindsey sustained a serious injury during a football game. On learning he
"As to the Due Process claim, the court ruled that school officials did undertake some measures to address Hankey’s harassment. Therefore, although school officials’ response to the bullying and threats may have been unreasonable and ineffective in some respects, it did not create or enhance the bullying and cannot be characterized as ‘so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.’"

would have to be hospitalized, Lindsey expressed concern about his school-issued equipment bag several times leading school officials to wonder what was in it. The school Superintendent searched the bag and found a loaded firearm and drug paraphernalia. Lindsey was arrested, charged, and sentenced for possession of a firearm as a felon, carrying weapons on school grounds, going armed with a dangerous weapon, and possession of a controlled substance. Lindsey appealed his judgment and sentence arguing that the school officials seized and searched his backpack without a warrant and without consent in violation of federal and state law.

**Holding:** Students who participate in competitive extracurricular activities voluntarily subject themselves to many intrusions on their privacy. Students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy. The T.L.O. "reasonable grounds" standard was met on these facts. As a student athlete using a school-issued equipment bag, Lindsey had a lowered expectation of privacy. Lindsey’s preoccupation with his bag in the face of his hospitalization for a serious injury would have led a reasonable person to suspect the bag contained something illicit.

**Jackson v. Ladner**
2015 WL 5332664 (United States Court of Appeals, Fifth Circuit 2015)

School officials have qualified immunity when accessing a student’s social-networking account upon receiving information that the student sent threatening online messages to another student, where those remarks concerned school activities and where the quarrel began at a school-related function.

**Facts:** A high school student sought to reverse school disciplinary action (suspension from sponsored extracurricular events — cheerleading and community service to the school) taken in response to her sending threatening and offensive remarks on the social networking platform Facebook that related to school activities. The incident occurred after a bus ride returning from a cheer squad event, when the teacher who supervised the squad was told that the student had cursed at and threatened the captain of the cheer squad. The reports stated that the student had continued to send threatening and swearing Facebook messages. The teacher coercedly requested the student’s Facebook login information and accessed the Facebook messages. This confirmed that the Facebook correspondence contained threatening and offensive language and concerned cheer squad activities. The student was not invited to join the cheer squad for the following school year. The student sued for violations of her constitutional rights to privacy and freedom of speech.

**Holding:** School officials have qualified immunity from federal constitutional lawsuits on the novel facts of this case. The court took “as given” that the student did not consent to the search of her Facebook profile. While it appeared that school officials had authority to seize and search the Facebook page of the student under the “reasonable grounds” standard of New Jersey v. T.L.O., 469 U.S. 325 (1985), and the “disruption” standard of Tinker v. Des Moines School District, 393 U.S. 503 (1969), the court expressed no opinion regarding whether the school officials’ conduct violated the Fourth Amendment or the First Amendment. The rule in constitutional cases is that if no prior ruling of the U.S. Supreme Court clearly applies the First and Fourth Amendments to the facts of a current case, then school officials did not have fair warning. The “fair warning” doctrine means that the unlawfulness of the actions of school officials must be apparent in light of pre-existing law. Therefore, these school officials did not have fair warning that they could not, consistent with the First and Fourth Amendments, access a student’s social-networking account upon receiving information that the student had sent threatening online messages to another student, where those remarks concerned school activities and where the quarrel began at a school-related function.

**IV. BULLYING**


A school district is not liable for student trauma and property damage caused by bullying even though educators should have done more to protect the victim and take the incidents seriously.

**Facts:** Hankey, a student of the Concord-Carlisle School District sued under Title IX and Due Process Clause alleging that educators were liable for failing to adequately respond to a pattern of bullying and threats she suffered at the hands of other students at the High School. The facts were not in dispute that the high school had an antibullying policy that required school officials to (1) fully investigate allegations of bullying or retaliation, (2) take steps to assess the need to restore a sense of safety to victims, (3) protect the victims from further incidents, and (4) document any incident of bullying that is reported. It was also not disputed that school officials were promptly advised of nearly all of the incidents of bullying focused on Hankey, but the policy was not followed. The court concluded that, “the record shows meager efforts to root out the cause and stop the bullying of [Hankey] prior to actual threats being made.”

**Holding:** A school receiving federal funds may be liable for sex-based discrimi-
nation under Title IX if the school is deliberately indifferent to student-on-student harassment that is sufficiently severe and pervasive to deprive the student of educational opportunities or benefits. The standard is a high one to satisfy and does not easily lend itself to an application to bullying incidents. To prevail on a Title IX claim, a student must establish that: (1) the school had actual knowledge of the harassment, (2) the harasser was under the school’s control, (3) the harassment was based upon the victim’s sex, (4) the harassment was “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit,” and (5) the school was deliberately indifferent to the harassment. The court ruled that there was insufficient evidence to establish that Hankey was harassed by others students because she was female. As to the Due Process claim, the court ruled that school officials did undertake some measures to address Hankey’s harassment. Therefore, although school officials’ response to the bullying and threats may have been unreasonable and ineffective in some respects, it did not create or enhance the bullying and cannot be characterized as “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.”

Gauthier v. Manchester School District
--- A.3d --- 2015 WL 5174775
(Supreme Court of New Hampshire 2015)

A failure by school officials to comply with state law on school bullying prevention does not create a private right of action that allows a parent to sue the school district.

Facts: Student’s mother filed suit against the Manchester School District to recover for injuries sustained in incidents at school, based in part on the fact that the school principal breached a statutory duty to inform the mother of the bullying within 48 hours. State law requires that, “[t]he Principal or administrative designee shall report to the parents of a student who has been reported as a victim of bullying and to the parents of a student who has been reported as a perpetrator of bullying within 48 hours of receiving the report.” The school principal did finally notify the parent after one week, during which time the student received threatening Facebook messages and was victimized in two fights. The student’s parent argued that the school principal had a common law duty to protect and supervise her child and that he breached this duty by failing to notify her in a timely manner. The trial court dismissed the case, ruling that the educator was protected by statutory immunity.

Holding: On appeal, the appellate judges affirmed the dismissal of the lawsuit. The 48-hour reporting statute explicitly states that it does not create a private right of action. The creation by the courts of a common law right of action would undermine the policy of immunity expressed by the legislature.

Maldari v. Mount Pleasant Central School District
131 A.D.3d 1019; 17 N.Y.S.3d 48
(Supreme Court, Appellate Division, New York 2015)

Emmanuel B. v. City of New York
131 A.D.3d 831; 15 N.Y.S.3d 790
(Supreme Court, Appellate Division, New York 2015)

School officials are not liable for injuries to a student sustained by bullying unless they had actual or constructive notice of prior conduct to place them on notice.

Facts: The students in both cases sued the school districts based on a theory of negligent supervision. Maldari claimed that school officials negligently failed to prevent him from being bullied by fellow students at his high school. The bullying included verbal taunts, pushing and bumping, being grabbed by another student who simulated a lewd act. Emmanuel B. claimed that he had informed his teacher that a specific student was picking on him and calling him names only to suffer serious physical injuries later the same day as a result of a fight in which the same bully caused him to strike his head against a bookcase. The trial courts dismissed the cases, ruling that the students’ lawsuits could not be based on injuries resulting from the sudden and unforeseeable act of another student.

Holding: On appeal, the appellate judges affirmed the dismissals of the lawsuits. A school district is not required to provide constant supervision of its students. Nevertheless, schools are under a duty to adequately supervise the students under their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision. To prevail, a victim must show that, school officials had actual or constructive notice of prior similar conduct, which caused injury, such that the third-party acts could reasonably be anticipated. Injuries caused by the impulsive, unanticipated conduct of a fellow student will not give rise to a finding of negligent supervision. Under New York law, even a physical attack by a student having a record of disciplinary problems, but no history of violence, is foreseeable.

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