SAFE SCHOOL POLICIES, LIABILITY AND THE SCHOOL RESOURCE OFFICER

By Bernard James, Professor of Constitutional Law, Pepperdine University

The U.S. Supreme Court has redefined the fabric of school safety law in the past 4 years, weighing in on both Fourth Amendment and Fifth Amendment student rights issues. In Safford Unified School Dist. #1 v. Redding, 557 U.S. 364, 370, 371, 129 S. Ct. 2633, 174 L. Ed. 2d 354 (2009), the Court refined the TLO standard of reasonable suspicion when student searches involve the removal of clothing. The rules for “strip searching” require that the school officials have reasons to suspect the contraband sought presents a danger or a reason to believe that the contraband is concealed in the student’s underwear.

In J.D.B. v. North Carolina, U.S. 09-11121, 131 S. Ct. 2394, 2406, 180 L. Ed. 2d 310, 326 (2011), the Court added the factor of age to the Miranda custody analysis when a child is interrogated by police. In light of J.D.B., the SRO who interrogates a child must take the age of the child into consideration because of the pressure a child feels to submit to the questioning by a law enforcement officer.

The lower courts have the task of applying the new rules to the vast number of lawsuits filed by students who challenge the validity of school policies. It is these lower court case decisions that deserve the most attention by educators and their school safety partners. The details of these cases clarify how the new rules will affect the obligations of educators to provide a safe learning environment. The fact patterns out of which the disputes arise also provide school officials and school resource officers with an accurate view of which policies are likely to be challenged.

In review, the 2011-2012 cases provide important insight on how safe school policies can stay on the constitutional side of the line. The cases presented below send the message that personnel who are given the responsibility of providing campus safety must be wisely selected, well-trained and adequately supervised in order to avoid the liability that comes from violating student rights.

LIABILITY FOR FAILURE TO TRAIN, SUPERVISE, AND CORRECT


The federal lower court in D.H. had the task of applying the new Safford rules to a lawsuit challenging the constitutionality of a strip search conducted by school officials on a seventh grade boy in the presence of students as well as adults. The search arose out of a suspicion by school officials that several students possessed marijuana on campus. After searching the first three students and finding nothing, these students lied and told the SRO that D.H. had the marijuana.

D.H. was called into the vice principal’s office, where the SRO, Vice Principal, and the three original suspected students were present. In their presence, D.H. was searched - first his pockets and book bag, and finally the strip search, which rendered D.H. completely nude in front of the persons in the office.

The court applied the Safford rules and held that the strip searches of D.H. and the other students were unconstitutional. Then the case took a turn for the worse for the school district. The court noted that although the school officials and the SRO were aware that strip searches under the old policies would violate students’ constitutional rights, they had neither changed the written policies nor trained personnel in the new Safford policies or procedures. The court noted that so-called “failure to train” cases are usually very difficult for students to win, because the plaintiff must prove that (1) the government inadequately trained or supervised its employees; (2) the failure to train was an official policy; and (3) the policy caused the employees to violate the student’s rights. However, the court ruled that D.H. did, in fact, bring a proper “failure to train” case that met the requirements by showing that the school district knew...
that a need to train or supervise its employees existed but made a deliberate choice not to take any action. The court noted that:

"The primary evidence in favor of [D.H.] was the fact that in light of the need to search students in these kinds of situations, [the school district] issued a policy to guide school officials on when to search students. However, this policy appears virtually the same in its material elements as the policy that was in place before."

The lesson to be learned from D.H. are both obvious and significant. "Failure to train" cases take on a special emphasis on the subject of student searches. The focus of the courts is on the adequacy of the school safety program in relation to the routine and forseeable tasks to be performed by the SRO and other staff members. Liability becomes a matter of fact:

- Does the deficiency in training cause the violation of student rights?
- Would the violation have been avoided had the employee(s) been trained properly?
- Does the school district's failure to train reflect deliberate indifference to the constitutional rights of students?

When the failure to provide proper training is declared by the courts, this failure is always held to be the policy of the school district. As a result, the entire school district is made liable when the failure to train causes the violation of a student's rights.

GUNS, SPECIAL SEARCH RULES AND VICTIMS RIGHTS


In M.D., the state appellate court was asked to apply the student search rules to an incident involving weapons rather than drugs. In doing so, the lower court applied the judicial deference to school safety policies that the Supreme court announced in Safford:

"When the object of a school search is the enforcement of a school rule, a valid search assumes, of course, the rule's legitimacy. But the legitimacy of the rule usually goes without saying as it does here. The Court said plainly in New Jersey v. T.L.O., 469 U.S. 325, 342, n. 9, (1985), that standards of conduct for schools are for school administrators to determine without second-guessing by courts lacking the experience to appreciate what may be needed. Except in patently arbitrary instances, Fourth Amendment analysis takes the rule as a given, as it obviously should do in this case. There is no need here either to explain the imperative of keeping drugs out of schools."

Safford, 557 U.S. at 372.

An anonymous tipster called the school on the day before the search and informed school officials that M.D. had carried a gun onto campus three months earlier. As a result, the school resource officer asked a school security guard to escort the student to the office. It was the policy of the school that all students who were brought to the office be searched as they entered. When M.D. was asked by the SRO to empty his pockets, the gun was discovered.

The court in M.D. does apply judicial deference to the policy, when it says; "[w]e should also not second-guess the school officials concerning the reasonableness of the administrative policy of searching students upon entry into the security office." 65 So. 3d at 567. Then the court goes on to apply a special deference to school policies that apply protective searches in incidents involving guns. The court held that; "In light of the serious nature of the threat and the location in which it took place, the actions of school authorities were reasonable." 65 So. 3d at 564. In its rationale, the court elaborates on why "[a]llegations of gun possession on school campuses are different from traditional Fourth Amendment cases." 65 So. 3d at 565.

- Allegations of possession of a gun on a school campus should be treated differently than similar allegations in other settings;
- Students in school do not possess the same breadth of constitutional rights as parties in other settings;
- School resource officers should be treated as part of the school administrative team and not as outside police officers entering school grounds to conduct an investigation;
- Courts should not second-guess the reasonable administrative decision of school officials to segregate a student from the general population prior to questioning a student about possible weapons possession.

A motivating factor in the M.D. decision is the growing awareness of the duty of educators to protect potential victims of violence. The growth of the Safe Schools Movement coincides with the Crime Victims' Rights Movement in both time and urgency. Both are deeply rooted in human rights. The M.D. case makes prevention of victimization in schools a legitimate basis for applying the deferential standard of the Safford and T.L.O. cases. The National Center for Education Statistics and Bureau of Justice Statistics made these findings in 2011:

"For both students and teachers, victimization at school can have lasting effects. In addition to experiencing loneliness, depression, and adjustment difficulties, victimized children are more prone to truancy, poor academic performance, dropping out of school, and violent behaviors. For teachers, incidents of victimization may lead to professional disenchantment and even departure from the profession altogether."

The growing awareness of the courts to protect victims in schools is grounded in these statistics. The lower courts are simply following the lead of the U.S. Supreme Court on the authority of educators to protect the rights of others to be free from victimization at school. The standard has been consistently rigorous since its announcement in the 1985 decision of New Jersey v. T.L.O.:

"Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers from violence by the few students whose conduct in recent years has prompted national concern."

The Victims Rights Movement has surpassed its education reform twin in prominence and this urgency goes all the way to the public school campus; 33 states have enacted constitutional amendments codifying the right. Although each states' victims' rights amendments ("VRAs") differ in scope, substance, and length, the constitutional changes made by these states evidence the importance of the right. There
is no federal VRA, but Congress has passed a number of legislative acts aimed at protecting victims' rights, including: the Victims of Crime Act of 1984, the Victim's Rights and Restitution Act of 1990, the Victims Rights Clarification Act of 1997, and the Crime Victims' Rights Act of 2004. As for students, victims' rights law simply formalize what already exists – a human right to be free from abuse on campus. This right extends to children because they are compelled by state law to attend public schools. Some state constitutions specifically include students - victims of harassment or violence on school property through both VRAs and other legislation. For example, victims of harassment, intimidation, violence or threats of violence on school property in Alabama may file a complaint on an authorized form and submit the form to the official of the designated local board. Further, states like Arkansas and California have expanded these rights to protect victims from cyber bullying, in response to technological changes and the growth of social networking. Although these states are careful not to impede on students' constitutional right to free speech, policy makers recognize the importance of protecting the rights of minors and student victims.

Therefore, the idea that a gun on campus triggers special duties which the law recognizes and accommodates has become a firm basis for a more aggressive search policy – even when the information received by the SRO and educator is from an anonymous source. Going forward, allegations of possession of a gun on a school campus should be treated differently than similar allegations in other settings. The large body of victims' rights laws make it clear that school liability occurs when students are not protected from routine and foreseeable risks of harm.

INTERROGATIONS, FAIRNESS, AND ELEMENTARY STUDENTS


In J.D.B. the U.S. Supreme Court required that the age of the child be factored into the voluntariness assessment when a child is interrogated by police and makes incriminating statements. The justices express the hope that the lower courts will have no problem producing outcomes that make sense when younger students face interrogations by school resource officers. The logic that is built into the J.D.B. case is that as the age of a student decreases that doubts about the validity of any incriminating statements will be resolved in favor of the youth. It now appears that this is a hope that will not be realized in the short term. If the Hunt case is any indicator, lower courts will have trouble with the challenge to make more realistic assessments of what it is that younger students are thinking when confronted with police questioning.

In J.D.B., a 13-year-old middle school student, was suspected of two home break-ins in which various items were stolen. On the day of the incidents, J.D.B. was found in the neighborhood of the homes and was questioned by an outside police investigator who visited the school for this purpose. The investigator, assistant principal, and an administrative intern questioned J.D.B. in the room for 30-45 minutes with the door closed. He was not presented with Miranda warnings, told that he was free to leave the room, nor given an opportunity to speak with his parents. J.D.B. confessed to breaking into the homes with a friend. The North Carolina courts refused to include the age of a juvenile as an element in the custody analysis and held that J.D.B. was not in custody during the questioning, so that his statements should be used against him. The Supreme Court ruling reversed the lower courts.

In Hunt, the Delaware state courts applied the J.D.B. rules to a case involving an eight-year-old student who was being questioned about a theft that took place during the morning bus ride to school. The school administrator was told about the bullying incident in which an autistic student had money taken from him on the school bus. After a brief investigation, two students sitting behind the autistic student were suspected as the perpetrators. An SRO questioned both students – the eight-year-old and a ten-year-old student. The school administrator told the SRO to "act mad." In doing so, the SRO told the younger student 11 or 12 times that he had the authority to arrest him and put him in jail if he was not truthful, described where bad children were sent when convicted, and spoke about how a child committing a crime upsets their family. The eight-year-old became upset and he cried. His parents brought a civil rights lawsuit for false imprisonment and false arrest in which the question of whether the student was "in custody" during the interrogation would control the outcome of the case. If Plaintiff was not in custody, then he was not being held against his will. The lower court held that the eight-year-old was not in custody:

With regard to the circumstances surrounding the interview, [the eight-year-old] admitted that [the SRO] told him before he entered the room that he was not in trouble. While [the other youth] was also present, [the SRO] tapped the back of each of the boy's hand to indicate that there were no consequences to the discussion they were having. The [eight-year-old] stated, however, that [the SRO] said he was going to put [him] in jail if he lied, and he had the authority to arrest. If the officer did not know [the eight-year-old] exact age, it would have been objectively apparent to a reasonable officer that [he] was an elementary school-aged child. The [eight-year-old] was not in handcuffs. He was not at a police station. He was not told that he was restricted in his movements. [He] freely walked from one part of the school to another part of the school. [He], however, was eight years old at the time of questioning, was intimidated, justifiably so or not, by [the SRO], and ultimately began to cry. The other student questioned, who was also an elementary-aged student, (although a year to two older) did not have the adverse reaction that [the eight-year-old] did. .... the Court finds that Plaintiff was not in custody, and therefore, was not restrained. Hunt v. Cape Henlopen Sch. Dist., at pages 13-14.

It appears that the state lower court in Hunt misses nearly every admonition of the Supreme Court in J.D.B.

- The vulnerability and susceptibility of children to submit to pressure as a commonsense conclusion.

- The uniqueness of a student interrogation being carried out in an elementary school setting, which by its nature limits the freedom of children.