THE COURTS AND SAFE SCHOOLS REFORM:
Emerging Guidance on Student Rights

By Bernard James, Professor of Constitutional Law, Pepperdine University
"An anonymous tip that a named student has a gun in school is not something that school administrators may lightly ignore. It is not a matter that warrants no response. . . . [T]he conclusion appears inescapable that a reasonable guardian and tutor of a group of school children might well conduct a search of the student's book bag to address such a substantial threat to the children assembled at school." K.P. v. State of Florida.

"Here, the speech had no connection to HCMS whatever other than the fact that both the speaker and the target of the speech studied there. The speech was not made at school, directed at the school, or involved the use of school time or equipment. No disruption of school activities or impact on the school environment has been shown. Thus, it is the finding of the Court that the [school officials] have fallen short." Nixon v. Hardin County Bd. of Education.

"A reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. However, a child's age is not determinative, and may not even be a significant factor." State v. Oligney

The above statements in three recent court decisions increase the volume of opinion by judges whose commitment to student rights is quickly shaping the implementation of safe schools plans. It is important to take notice of the increased judicial curiosity. Courts rarely rule against educators in local policy disputes. The standard approach is to defer because; "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . [b]y and large, public education in our Nation is committed to the control of state and local authorities." Epperson v. Arkansas, 393 U.S. 97, 104 (1968). This judicial deference has become so engrained among all courts that it is generally held that; "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).

While the task of making safe schools policy is purely a state and local matter to which courts keep a respectful distance, an increasing number of cases reflect the growing belief by federal judges that educators need more judicial supervision on the emerging structure of the legal reform quickly taking place in education, particularly in the area of student discipline. This article summarizes the recent spate of cases arising out of Florida, that are shaping the thinking of school officials and school resource officers about the rule of law, student rights, and school safety. Three cases arising out of California, Wisconsin, and Tennessee illustrate this trend of greater judicial supervision in school safety law reform.

Anonymous Tips, Reliability, and Student Searches

An assistant principal of a public high school took possession of a student's book bag after receiving information from other local officials who, while running a gun bounty program, received an anonymous tip of a student carrying a firearm. The student's arrest and subsequent adjudication followed the discovery of a loaded, semi-automatic handgun.

As a means to this end, the U.S. Supreme Court has rested the law, empowering educators to leap over constitutional limitations on searches and seizures to insure that all is well on campus. In New Jersey v. T.L.O., 469 U.S. 325 (1985), the Court announced that the efforts of the safe schools team would be valid if "reasonable," even when no warrant has been obtained and probable cause not found to exist. "Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are 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." T.L.O., 469 U.S. at 341-42.

The reliability of the information on which educators and SROs rely is an essential element to avoid liability for violating the constitutional rights of students. In over 90% of the instances, there is no dispute or liability over the quality of information that leads to a student search under the T.L.O. standard. Direct observation by a teacher; administrator; or SRO is sufficient without more to justify a search. Discussions among school officials over observations of a student or incident will support a decision to search. Similarly, a pattern of incidents documented over time may, after an assessment of the facts, lead to reasonable suspicion that a search of a student is necessary.

However, in a small, but growing number of cases, the issue of liability is harder to determine because of concerns about the reliability of the information from informants. The word "informant" is used in this article to identify unknown students, parents, or other individuals who provide tips on school safety. In the informant cases, the courts are taking a harder look at tips that come from questionable sources or have no corroboration. This issue has moved closer to center stage because of the popularity of "Crime Stoppers" and "Silent Observer" hotlines that solicit information on school safety while keeping the identity of the informer and their motives private. A related issue arises when the source of the information is the SRO. Both scenarios may compromise school safety by depriving the educator of reasonable suspicion, because of either the unreliability of the tip or because the educator is deemed to be the agent of law enforcement, triggering the probable cause standard.

The reasonableness analysis that courts conduct in cases that involve public schools and anonymous tips can be confusing. Most
of the confusion results because the U.S. Supreme Court, while agreeing that the anonymous tip rules of criminal procedure in the school setting do not apply to educators, has not clarified when, or how, the lower standard of T.L.O. is to operate. (See Florida v. J.L., 529 U.S. 266 (2000)). In J.L. the Court merely implies that where the expectation of privacy is diminished, such as in airports or schools, an anonymous tip about a dangerous event might be so great as to justify a search without corroborating the reliability of the tip. (See 529 U.S. at 275).

However, any doubt about the correctness of applying the more forgiving standard for using informants in the school setting is easily cleared up by taking into account the Court’s school safety cases on suspicionless searches. The U.S. Supreme Court has stated, on two occasions, that the reasonable expectation of privacy is reduced in public schools because the interest in maintaining safe schools is “compelling.” (See Vermonia Sch. Dist. 47 v. Acton, 515 U.S. 646 (1995)). (See also, Board of Education v. Earls, 536 U.S. 822, 843 (2002)).

Therefore, the court in K.P. gets it right when it concludes that,

“An anonymous tip like the one at issue may not constitute a sufficiently reliable indicator that a crime was occurring to justify a search of K.P. by police officers on a public street. However, the level of reliability required to justify a search is lower when the tip concerns possession by a student of a firearm in a public school classroom. The Fourth and Fourteenth Amendments require that searches be reasonable in light of all the circumstances. Here, the lower level of reliability reflected in such an anonymous tip is more than offset because (1) a student's expectation of privacy in the school setting is reduced, and (2) the government's interest (protecting the vulnerable population of children assembled within the confines of the school from a firearm) is heightened.”

Cyberbullying and Student Speech


The cyberbullying issue in Nixon arises out of a dispute between two female students who, while attending the middle school, began competing for the attention of the same male student. A series of tweets were sent by Nixon to her peers, all targeting the other student for death:

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-- "[I will help you] shoot [her] in the face.
-- "Good Luck. Shoot her in the face.
-- "I hate her. That was my whole point. ... I'll kill her."

After receiving notice of the tweets, the mother of the other student called the assistant principal at home to advise him of her concerns about sending her daughter to school the next day. The next day at school a conversation between Nixon with the principal and the assistant principal resulted in a decision to discipline Nixon with a forty-five-day suspension and a transfer to the alternative school for the duration of the suspension period. Nixon's mother appealed the discipline to the Hardin County Discipline Hearing Authority, which required her to participate in counseling but reduced the number of days Nixon would attend the alternative school to ten. Nixon's mother filed a lawsuit asserting the constitutional rights of her daughter.

The United States District Court found itself in new territory on the cyberbullying issue, but after a careful review of the growing number of judicial decisions on the topic, ruled in favor of Nixon. Beginning with the landmark cases of Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503 (1969), Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988), Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986), and Morse v. Frederick, 551 U.S. 393 (2007), the legal landscape on student discipline produced by these cases force judges to navigate along a thin line that separates protected student speech from that which is unprotected because of (1) where it originates, (2) where it is directed, and (3) the likelihood that the speech will disrupt the work and discipline of the school. The courts are unanimous on the rules:

- Student speech crosses the boundary of protected speech and may be punished when it originates on campus, or uses school equipment off campus or originates off campus but is directed at the school in such a way as to pose a reasonable foreseeable risk that it will disrupt the work and discipline of the school.

In the school context, threats of violence and harassment are not protected speech. But there must be a connection between the cyberbullying and the school to justify school discipline. The speech must have something to do with the school to justify school discipline.

Unfortunately, the application of the rules from case-to-case has not been consistent. The majority of courts follow the geographic rule. For example, in Wynar v. Douglas County School District, 728 F3rd 1062 (9th Cir. 2013), the court upheld the discipline of a high school student who sent several threatening instant messages from home via MySpace to his friends bragging about his guns and promising to shoot persons at the school on a certain date. The court concluded that the threat of a school shooting was not protected because school officials could reasonably foresee substantial disruptions on campus. Following this trend, the court in Nixon denied the attempt by the school to dismiss the student's lawsuit, concluding:

"Here, the speech had no connection to [the school] whatever other than the fact that both the speaker and the target of the speech studied there. The speech was not made at school, directed at the school, or involved the use of school time or equipment. No disruption of school activities or impact on the school environment has been shown. Thus, it is the finding of the Court that the [school officials] have fallen short of establishing that summary judgment should be granted in their favor."
view was conducted in the school administrative office with the doors closed. The school resource officer, also not in uniform, was present for the interview as well. The detective told Oligney that he was not under arrest, that he could leave at any time, and was not required to talk to him. The interrogation lasted nearly two hours during which the warnings were repeated that Oligney was free to leave. During the interview, Oligney admitted to the assault. In Court, Oligney asserted his rights, arguing that the incriminating statements he made to police officers during an in-school interview should be suppressed because he was not given Miranda warnings and the statements were involuntary.

The court summarized the law on student interrogation:

- Law enforcement officers must administer Miranda warnings at the first moment an individual is subjected to 'custodial interrogation'.
- A person is 'in custody' when a reasonable person in the person's position would have considered himself or herself to be free to terminate the interview and leave.
- The mere presence of two officers in a voluntary interview is insufficient to establish a custodial situation.
- The lack of parental notification does not render a juvenile's statements involuntary when a juvenile is present for a voluntary interview and is told he could leave at any time.

The court rejected Oligney's arguments and affirmed his conviction with the following comment:

Here, virtually all the relevant circumstances militate against a determination that Oligney was in custody. Perhaps the most important factor is the "defendant's freedom to leave." Oligney was informed on two occasions that he did not need to be at the interview, was not under arrest, and was free to go whenever he wanted. The doors were kept unlocked and there is nothing to suggest Oligney would have been prevented from declining to answer any more questions and leaving. When the officers concluded the interview, Oligney walked out of the room. ... The interview was held in a relatively neutral location, a school resource office. (An interview that takes place in a law enforcement facility, such as a sheriff’s department, police station, or jail, may weigh toward the encounter being custodial.) ... The officers were not in uniform and did not draw or show Oligney their weapons, nor did they perform a frisk, handcuff Oligney, or otherwise restrain him.

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