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STRIP SEARCH OF STUDENTS AND 42 U.S.C 1983 LIABILITY

Overview

As my late research partner H.C. Hudgins, Jr., and I observed more than two decades ago, “[b]efore the 1960s, the Civil Rights Act of 1871 was largely ignored; but, almost a century later, in 1961, the *Monroe v. Pape* decision initiated what has resulted in two decades of increasing litigation against governmental officials and governmental agencies.....It was in 1961 that the provisions of the Act were made applicable to local public school board members and administrators; and, in 1975, the Act was subsequently interpreted by the U.S. Supreme Court as a protection of students.” (Vacca and Hudgins, 1982) In recent years, court actions where students sought remedy under 42 U.S.C. 1983 have involved the First, Fourth, and Fourteenth Amendments to the United States Constitution. For an excellent discussion of the elements and prerequisites for recovery of damages by students and the issue of procedural due process the reader is directed to Justice Powell’s opinion in *Carey v. Phipus* (1978).

Section 1983: The Civil Rights Tort. Intended to implement the language of the Fourteenth Amendment and designed as a broad and flexible source of remedy, the Civil Rights Act of 1871, Section 1983, applies to “state actors” and provides *concurrent jurisdiction*—jurisdiction exercised by more than one court. Section 1983 also has been available as a source of *supplemental jurisdiction* in a state claim. As a general rule, remedy is available in a federal court where state remedies are either non-existent or ineffective. (Vacca and Hudgins, 1982) To put it another way, both federal and state courts function as alternative sources of remedy for the same wrongful act.

As a general rule, Section 1983 court actions are filed against school officials and not school employees. The language of the Act is directed at misconduct and abuse by officials acting under color of state law whose actions in carrying out official policies, or customs, or practices deprive a person of his or her constitutional rights and/or deny their civil rights. As the United States Supreme Court opined, in a public school student discipline case, school officials “are not protected when their actions violate a student’s constitutional rights, when they act in ignorance or disregard settled law, when their decisions are based on malice or intent to injure, or when their actions are not based on good faith. *Wood v. Strickland* (1975). Three years later, in a case involving a local government agency, the Court clarified that a governmental body itself may not be held liable

under 42 U.S.C. 1983 based on a theory of *respondeat superior*. However, government is responsible under 42 U.S.C. 1983 “when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts injury....” Monell v. Department of Social Services of New York (1978)

Student Search and Seizure

When the United States Supreme Court handed down its landmark decision in New Jersey v. T.L.O. (1985), three things were made clear. First, the Fourth Amendment’s protection from “unreasonable searches and seizures” applies to public school students. Second, while public school officials are government actors, the legality of a student search rests not on application of *probable cause* (*i.e.*, applicable in a police search) but on a standard of *reasonable suspicion*. Third, to pass judicial muster a student search must remain reasonably related in *scope* to the circumstances and purpose that spawned the search. A decade later the United States Supreme Court, in a student drug-testing case, balanced student privacy protections with the “intrusive nature” of the school system’s drug testing procedures. As the Court admonished, the actions of school officials should not be *excessively intrusive*. Vernonia School District 47J v. Acton (1995) See also, Board of Education v. Earls (2002) In other words, the disciplinary actions of school officials must remain within and not exceed the bounds of reason and necessity.

Currently not all courts are in agreement regarding the search of a student’s person—especially when it involves searching a student’s clothing (including underwear) or his/her personal belongings. In other words the “strip search” of a student still produces mixed judicial opinions—case-by-case. Therefore, the researcher must examine the totality of the circumstances (*e.g.*, seriousness of the suspected offense; age, gender, and grade level of the student; individualized suspicion; level of intrusiveness; status and gender of the person conducting the search; involvement of parent) to determine the outcome of each case. As Justice White emphasized in T.L.O. (1985), “what is reasonable depends on the context within which the search takes place.”

Marino v. Chester Union Free School District (S.D.N.Y. 2012)

Recently I came across a “strip search” case in which parents of two middle school students sought remedy under 42 U.S.C 1983. In my view, the federal district court’s rationale: (1) demonstrates the technicalities associated with successfully seeking remedy through a civil rights tort action, and (2) presents policy implications for local public school system officials and administrators.

Facts: At the time of the events that spawned this case one of the students involved was a thirteen-years-old male (hereafter referred to as A.M.) and the other student was a fourteen-years-old female (hereafter referred to as E.J.). A.M. had received thirteen disciplinary infractions during the 2007-2008 school year and E.J. had received twelve infractions—most of the infractions involved disruptive behavior and tardiness. Neither student had been cited for possession of illegal substances.

On April 7, 2008, the middle school principal learned from a hall monitor that A.M. and E.J. may have been smoking cigarettes in the hallway of the school—which was against school rules. Both students were separately summoned to school nurse’s office where the principal and nurse conducted an investigation.

A.M. was the first student to arrive at the nurse’s office where he was escorted into an examination room. According to the principal he only instructed A.M. to empty his pockets and take off his shoes; and, that after he

removed his shoes A.M. voluntarily lifted his shirt. However, A.M.'s mother stated that her son was directed to empty his pockets, remove his pants, shirt, undershirt, socks, shoes, and to shake out his underwear.

Next, E.J. reported to the nurse's office where the principal instructed the nurse (a female) to model the search of E.J. after his search of A.M. According to the nurse, the principal chose not to be present for the search of E.J. because he believed it was more appropriate for a woman to conduct the search. Subsequently, the nurse asked E.J. to empty her pockets and remove her shoes. However, E.J.'s mother stated that her daughter was directed to remove her shoes, lift each pant leg, lift her shirt, and shake out her bra while the nurse looked up E.J.'s shirt.

Court Action: Parents filed suit in federal district court where they claimed that the school district, through its agents and employees, improperly strip searched their children. As a result, parents alleged that their children suffered humiliation and embarrassment, emotional distress, violation of their bodies, as well as "violation of their civil liberties." Parents also brought suit under Section 1983 as individuals, based on their children's emotional distress."

District Court Rationale: The district court first had to decide whether or not a "genuine issue of material fact" existed to determine whether summary judgment requested by the defendants was warranted. In this case, said the court, the parties' allegations demonstrate that there were strong disputes over the material facts, especially whether or not the students were strip searched. First, defendant argues that plaintiff parents cannot assert claims as individuals. Second, defendant argues plaintiffs' Section 1983 claims on behalf of their children are improper because the school district cannot be held liable for the acts of the principal and school nurse. Third, defendant states that the court should decline to exercise supplemental jurisdiction over plaintiffs' state claim, or, in the alternative, grant summary judgment because the plaintiff did not satisfy the state's notice requirement.

Regarding plaintiffs in their individual capacities the court first made it clear that standing under Section 1983 "is not conferred solely on the basis of harm to plaintiff's family member." Then, citing case law on point, the court held that "plaintiff's individual claims, which are based solely on the alleged strip search of their children, warrant summary judgment, leaving only the claims they bring in their representative capacities."

Citing Monell (1978) and focusing on the issue of liability, the court district reiterated that "[a] municipality and its agencies may not be held liable for the actions of its employees under a broad respondeat superior theory; rather, they can be held liable only 'when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts injury'." Thus, said the court, the school district will not be liable for the principal's alleged strip search of the students unless he was following a custom or policy of the school district.

To determine whether a municipal actor (in this case the school principal) can "trigger a municipality's liability" the court relied on the United States Supreme Court's decision in Pembaur v. City of Cincinnati (1986) where it was held that only actions of an official who is vested with "final policymaking authority" (a question of state law) may subject the municipality to Section 1983 liability. Also, the challenged action must have been taken pursuant to a policy adopted by the official responsible under state law for making policy in that area of the school's operation. As such, in this case was the school principal vested with policymaking authority and was the alleged strip search a reflection of a policy and custom adopted by that principal?

The defendants argued that because (1) under New York State law only the school district has policymaking authority and (2) the school district did not have a policy on strip search, it cannot be held liable under Section 1983. In the district court's view, however, while school boards are vested with broad rulemaking authority "policymaking authority may not be so strictly limited." "As a practical matter," said the court, "principals are the highest ranking officials in the school and thus have policymaking authority in the day-to-day operations of the school." Citing and quoting from federal case law on point, the district court opined that a school principal has final policymaking authority in the management of the school and need not be a policy maker for all purposes.

The district court next focused on the question raised regarding established procedure for student searches in the school district. Quoting directly from the school principal's deposition in which he said that "[e]verything inside that school okay, is under the control of the school and the leaders in there," the district court concluded that his statement "supports the conclusion that the School Board delegated disciplinary matters" to the school principal's discretion. And, as such, he may be deemed "a policymaker" under Monell (1978) for purposes of Section 1983. Thus, the court had to determine whether the searches of A.M. and E.J. were school policy created by the principal in his capacity as a policy maker—*i.e.*, did the searches, in whatever manner they were carried out, "represent school policy."

Citing depositions taken from the principal, school nurse, and former school district superintendent the district court concluded that the school board did not adopt a policy on student searches but decided to leave such policy determinations in the principal's discretion and that he "fashioned his own policy, which he instructed his subordinates to follow." Accordingly, said the court, "it is plausible that the searches of A.M. and E.J., whether or not they were strip searches, as Plaintiff has alleged, represent school policy."

Lastly, the district court considered defendant's motion for summary judgment on plaintiff's state law claims. In this case the court held that the state constitutional claims are analogous to claims under the United States Constitution. Because the notice of claim sufficiently asserted "civil liberties violations that the School District could adequately investigate," the notice of plaintiff's state law claims were adequate.

Decision. The district court granted defendant's motion for summary judgment with respect to claims asserted by the parents as individuals. However, the court denied summary judgment to defendants with respect to the Section 1983 and state law claims.

Policy Implications

As the district court's rationale in Marino v. Chester Union Free School District (S.D.N.Y. 2012) demonstrates, 42 U.S.C. 1983 represents a viable avenue of remedy available to parents on behalf of their children involved in school disciplinary situations—in this case a strip search. At the same time, however, the court's analysis of the elements and prerequisites for recovery of damages, coupled and associated with the technicalities of parallel federal and state law issues, demonstrates plaintiff's burden to successfully move forward in court to establish the liability of school officials for alleged civil rights violations. Who is or is not a "state actor," what is or is not "official school district policy," who is or is not an "official policy maker," what is or is not an "official custom or practice" are crucial questions to ask in determining the outcome of such cases.

While Marino (2012) is one case in one jurisdiction and narrow in scope, the court's rationale regarding student discipline, the disciplinary prerogatives of school principals, and potential liability under *Section 1983* has

implications for local school board policy. What follow are implications for policy gleaned from the district court's rationale.

School system policies must make it clear that:

- The school board is vested by state law with the final policymaking authority for the school district.
- All overall governing policies in effect in the school district are those formally enacted by and through official action of the school board.
- All official school district policies are, as a matter of record, made available to the community, school system personnel, parents and students.
- The day-to-day management of each school in the school district is the official responsibility of the principal in his/her role as the instructional leader of the school.
- School principals are expected to respect and protect the civil rights of all students.
- School principals are granted discretionary authority to structure and implement procedures necessary to deal with student disciplinary situations arising in the day-to-day operation of their individual school.
- The school board will immediately investigate all reports of alleged improprieties (legal or otherwise) by school principals in carrying out their authority in student disciplinary matters.
- Appropriate disciplinary action will be taken where the results of an investigation lead in that direction.

Final Comment: While some local school districts have moved away from granting student disciplinary discretion to school principals and have instead enacted “zero-tolerance” policies, not all experts in education law agree that this is the best policy. In my view the impact on potential liability of local school officials under *42 U.S.C. 1983* may be enhanced rather than reduced by such policies. When does something become the “custom and practice” in a school district?

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Note: The views expressed in this commentary are those of the author.