FALL 2018 NEWSLETTER

SCHOOL LAW UPDATE

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UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

***Littell v. Houston Independent School District*, __ F.3d __, 2018 WL 3149148 (5th Cir. June 27, 2018)**

A school district can be held liable for a mass, suspicionless strip search of twenty-two female middle school students for a violation of the girls' Fourth Amendment rights if the violation resulted from a failure to train its employees on the constitutional parameters of such searches.

After $50 went missing during a sixth-grade choir class, the assistant principal took all twenty-two girls in the class to the female school nurse, who stripped searched them, taking them one at a time to the bathroom, where she made the girls lift their shirts, and checked around the girls' underwear. No parents were notified and no money was found.

Two of the girls' mothers sued the Houston ISD asserting claims under 42 U.S.C. § 1983 and the Texas Constitution. The district court granted Houston ISD's motion to dismiss the complaint for failure to state a claim, and the parents appealed.

For the case against the school district to survive dismissal, the plaintiffs must allege sufficient factual content to permit the reasonable inference that a constitutional violation occurred and that the official policy attributable to the school district's policymakers was the moving force behind it.

The search is of a student's underwear is impermissibly intrusive unless the school officials reasonably suspect either that the object of the search is dangerous, or that it is actually likely to be hidden in the student's underwear. The court held, and the parties did not dispute, that the search of the twenty-two students in this case was unconstitutional. The parties did dispute, however, whether the plaintiffs adequately alleged an official policy on which liability may rest. In this case, the plaintiffs allege a failure to train claim: that the violation was caused by the school district's alleged policy of providing no training whatsoever regarding its employees' legal duties to not conduct unreasonable searches. When a municipal entity enacts a facially valid policy but fails to train its employees to implement it in a constitutional way, that failure constitutes an official policy that can support municipal liability if it amounts to deliberate indifference.

The court found that the plaintiffs pled facts sufficient to support a claim that the risk of officials conducting unconstitutional searches was or should have been a highly predictable consequence of the school district's alleged decision to provide its staff no training regarding the constitutional constraints on searches. The court further found that given the "relatively

egregious nature of the alleged constitutional violation in this case," it was plausible that even a modicum of Fourth Amendment training would have alerted the assistant principal that the search was unconstitutional, and that she would not have undertaken the search if she understood it to be illegal. As such, the court reversed the district court's decision to dismiss, and remanded the case for further proceedings.

***Greene v. Greenwood Public School District*, 890 F.3d 240 (5th Cir. May 14, 2018)**

A superintendent with contractual employment has a Fourteenth Amendment right to notice and an opportunity to be heard pre-termination even when state code provisions provide a post-termination right to appeal the decision.

The School District's Board of Trustees terminated Greene's contractual employment as superintendent of schools without informing him of the basis of his termination nor giving an opportunity to address the Board. Greene brought suit in federal district court alleging various claims against the School District, including a claim that the District violated the Due Process Clause of the Fourteenth Amendment by depriving him of his property interest in his job as superintendent without first providing him with a hearing or the opportunity to present a defense.

The School District's Rule 12(b)(6) motion to dismiss was granted by the district court, and Greene appealed, the sole issue being whether Greene adequately alleged that he was terminated without receiving the process to which he was entitled under the Fourteenth Amendment. The district court dismissed Greene's claim because he did not appeal his termination under a Mississippi code provision stating that any employee aggrieved by a decision of the school board is entitled to judicial review by filing an appeal in Mississippi chancery court. The Fifth Circuit distinguished that remedy, noting that it would have only provided Greene with a *post*-termination hearing; whereas, the Fourteenth Amendment entitled him to a hearing *before* he was terminated.

SUPREME COURT OF TEXAS

***Neighborhood Centers v. Walker*, 544 S.W.3d 744 (Tex. April 13, 2018)**

The Texas Whistleblower Act ("TWA") does not apply to open-enrollment charter schools.

After Walker reported to the Texas Education Agency that the Neighborhood Centers charter school had submitted falsified test scores and committed other wrong-doing, Walker's employment was terminated. Walker sued alleging a violation of the TWA. The school filed a plea to the jurisdiction, which the trial court denied. The court of appeals held that the TWA's waiver of governmental immunity covers open-enrollment charter schools and also that the CSA waives immunity from suit for TWA violations. Neighborhood Centers appealed.

The TWA prohibits a local governmental entity, including a public school district, from retaliating against an employee for reporting a violation of law by the employer.

Since the Texas Charter Schools Act states, in part, that "an open-enrollment charter school operated by a tax exempt entity … is not considered to be a … local governmental entity unless the applicable statute specifically states that the statute applies to an open-enrollment charter school." Because the TWA contains no such specific statement, the Texas Supreme Court held that it does not apply to open-enrollment charter schools, and reversed the judgment of the court of appeals interpreting otherwise.