2018 YEAR IN REVIEW

SIGNIFICANT DECISIONS IN 2018

SCHOOL LAW

By John D. Husted

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

***Littell v. Houston Independent School District*, 894 F.3d 616 (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.

***Wilkerson v. University of North Texas*, 878 F.3d 147 (5th Cir. December 20, 2017)**

A non-tenure track lecturer did not have a clearly established property interest in continued employment with the University.

The University of North Texas declined to renew Dale Wilkerson's "Principal Lecturer" contract. The contract provided a "temporary, non-tenurable, one-year appointment with a five-year commitment to renew at the option of the University." As such, Wilkerson was not on the formal tenure track; however, the University had previously renewed the contract twice.

A former graduate student filed a sexual harassment complaint against Wilkerson. Following the completion of an investigation by the University's Office of Equal Opportunity of a former graduate student's sexual harassment complaint against Wilkerson, which found insufficient evidence of sexual harassment, his department chair recommended non-renewal of his contract. Wilkerson challenged the non-renewal, and went through the university's appeal process. Ultimately, the University upheld his department chair's decision, and Wilkerson filed suit against the chair and other administrators alleging a §1983 claim for deprivation of his property interest in his job without due process and a claim for tortious interference with his employment contract.

The district court denied the administrators' motions for summary judgment, finding that they were not entitled to immunity from the plaintiff's claims. The administrators pursued an interlocutory appeal, and the Fifth Circuit reversed, determining that the administrators were entitled to qualified immunity from the §1983 claim and governmental immunity from the interference claim against his department chair.

The administrators were entitled to qualified immunity, because Wilkerson did not have a clearly established property right, as he was not tenured. Though he had an employment contract that contemplated a five-year commitment to renew, the renewal was "at the option of the University." Likewise, the Court determined that Wilkerson's department chair was entitled to governmental immunity from his tortious interference claim, because the chair's conduct was within the general scope of her employment and the claim could have been brought against the University.

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.

COURTS OF APPEALS OF TEXAS

***University of the Incarnate Word v. Redus*, __ S.W.3d __, 2018 WL 1176652 (Tex. App. – San Antonio, March 7, 2018, no pet. h.)**

A private university is not a "governmental unit" which enjoys governmental immunity from suit resulting from the alleged actions of its state-authorized police department.

The University of the Incarnate Word (UIW) is a private university that maintains a campus police department, per Tex. Educ. Code § 51.212(a), which authorizes private higher education institutions to employ and commission peace officers and operate police departments. Redus's parents sued UIW and its officer arising from the officer's use of deadly force following a traffic stop, when the incident resulted in the student's death.

UIW raised the defense of governmental immunity, seeking dismissal of the suit in a plea to the jurisdiction. The trial court denied the plea. UIW took an interlocutory appeal under § 51.014(a)(8) of the Civil Practices and Remedies Code, which authorizes an interlocutory appeal from an order on a governmental unit's plea to the jurisdiction. The court of appeals determined that UIW was not a governmental unit, dismissed the appeal, and UIW then petitioned the Texas Supreme Court for review. The Texas Supreme Court determined that UIW was a governmental unit for purposes of being allowed to pursue an interlocutory appeal under the Civil Practices and Remedies Code, but remanded to the Court of Appeals to determine whether UIW was a governmental unit for purposes of sovereign immunity, because: "whether an entity is entitled to an interlocutory appeal and whether an entity has sovereign immunity are separate question with separate analytical frameworks."

The Court of Appeals acknowledged that police control is a governmental function; however, it found that the purposes of sovereign immunity, which include shielding the public from the costs and consequences of improvident actions of their governments, did not apply. The court was not convinced by UIW's argument that immunity for its police force would shield the public from costs, since it may have to dissolve its police force if it is not protected by immunity, thereby causing local police to have to absorb the cost of policing the university. The court determined that local law enforcement could plan and allocate resources without the risk of disrupting previously allocated taxpayer funds.

While UIW concedes that it is a private university, law enforcement is uniquely governmental. UIW's officers have the same powers, privileges, and immunities as other peace officers. Since the Legislature authorized UIW to perform the law enforcement function, the Texas Supreme Court concluded that UIW is a governmental unit for purposes of law enforcement, and that UIW is therefore entitled to pursue its interlocutory appeal.

The Court clarified that it was not making a determination of whether UIW does in fact enjoy immunity from suit and liability when sued for actions related to its law-enforcement function; rather, the court of appeals would make that determination. "[W]hether an entity is entitled to an interlocutory appeal and whether an entity has sovereign immunity are separate questions with separate analytical frameworks."