

School Law Newsletter

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Exhaustion of Remedies Examined by Court in Student Expulsion Case

A 2009 decision issued by the South Carolina Court of Appeals in Stinney v. Sumter School District 17 could have a significant impact on the availability of relief sought in connection with student discipline cases.

In this case, two Sumter High School students (Stinneys) were recommended for expulsion as a result of being involved in a fist fight on school grounds. After separate evidentiary hearings, the school district's hearing panel accepted the school's recommendation of expulsion for both students. The students appealed to the District Superintendent and then to the School Board, who ultimately upheld their expulsion. Following this decision, the Stinneys did not appeal the School Board's action to the circuit court pursuant to S.C. Code Ann. § 59-63-240. Instead, they filed a civil action in circuit court against the District, seeking damages based on the following causes of action: Failure to Follow Disciplinary Procedures, Denial of Due Process, Negligence, and Failure to Supervise. In response, the District moved for summary judgment, seeking to have all of these claims dismissed based on the ground that the Stinneys had failed to fully exhaust their administrative remedies by appealing the expulsion directly to circuit court under § 59-63-240. The circuit court granted summary judgment on the due process claim only.

The Stinneys then appealed the circuit court's ruling to the South Carolina Court of Appeals. On appeal, the Court of Appeals reversed the lower court's decision.

Although it noted that administrative remedies must be exhausted absent circumstances that support an exception, the Court of Appeals held that an appeal from the School Board's decision would not have provided the students with an adequate remedy or immediate relief, and therefore, no appeal of the School Board's expulsion decision was required. Recognizing that the students would remain suspended by law pending a circuit court appeal – and would thereby accumulate a portion of damages during their suspension – the Court of Appeals concluded that an appeal of the expulsion would be futile since the students would be unable to seek damages in a direct appeal of the expulsion to the circuit court. Also, in issuing this ruling, the Court of Appeals found merit to the Stinneys' argument that the Administrative Procedures Act allowed them to file a civil action for damages in circuit court in lieu of a direct appeal from the School Board's expulsion.

While this ruling does not guarantee that the Stinneys' claims will prevail on the merits, this decision could arguably make court relief more accessible to students in the discipline context.

COBRA Continuation Coverage Assistance Provided Under Federal Stimulus Package

On February 17, 2009, President Barack Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA). This new legislation, an enactment of the federal stimulus package, amended in part the Consolidated Omnibus Budget Reconciliation Act (COBRA) by providing for the temporary reduction in healthcare insurance premiums for "assistance eligible individuals." In particular, the ARRA subsidizes COBRA coverage for individuals who are involuntarily terminated from employment (for reasons other than gross misconduct) on or between September 1, 2008 and December 31, 2009. As of March 1, 2009, individuals are required to pay only 35% of their COBRA premium to continue health care coverage while the remaining 65% of the premium must be paid the employer. Of significance, employers can claim a credit for this amount against their quarterly payroll taxes.

Under the ARRA, employers are responsible for determining whether an individual qualifies for the COBRA subsidy. Generally, an "assistance eligible individual" is anyone (1) whose employment was/is involuntarily terminated between September 1, 2008, and December 31, 2009; (2) who was/is eligible for COBRA continuation coverage; and (3) who elects COBRA continuation coverage either during the original COBRA elective period or within 60 days of the notice of COBRA subsidy eligibility. A separated former employee is not eligible for the COBRA subsidy if (1) the individual was terminated for gross misconduct; (2) the individual becomes eligible for other group health plan coverage; or (3) the individual is or becomes eligible for Medicare.

An employer defines what constitutes gross misconduct; however, it must ensure that its gross misconduct definition meets the standards found in existing legislative, regulatory, and legal developments. Unfortunately, COBRA, and its associated regulations, however, do not define the term. In addition, courts across the country have used varying definitions and few have provided precise definitions. Thus, an employer should be very cautious about relying on the gross-misconduct exception and is recommended to contact legal counsel with any questions regarding gross misconduct before denying the COBRA subsidy.

As part of the ARRA, the subsidy can continue for up to 9 months, or until the individual becomes eligible for coverage under Medicare or another group health plan, or until the COBRA eligibility period expires, whichever event is earliest. This new legislation also imposes several notice requirements, and model notices have been developed by the Department of Labor and are available at <http://www.dol.gov/ebsa/cobramodelnotice.html>.

Finally, the ARRA is retroactive in nature. Therefore, individuals who were paying full COBRA premiums when the law was enacted were entitled to the subsidy as of March 1, 2009. As a result, employers must refund the excess or provide these individuals with a credit towards future premium payments. Credit must be issued within 6 months of this eligibility.

Supreme Court Rules Strip Search Violated Student's Rights

In our last Newsletter edition, we reported on the United States Supreme Court's decision to hear a controversial case involving the partial strip search of a 13-year-old student by school officials. On June 25, 2009, the Supreme Court held that the partial strip search was unconstitutional, but concluded that the school administrators involved were entitled to

qualified immunity from suit because the student's rights were not clearly established at the time of the search.

As background, in Redding v. Satford Unified School District #1, after receiving reports that student Savana Redding and a friend were distributing prescription drugs on campus, and after finding the pills in the friend's wallet and pockets, Savana was pulled out of class by administrators and questioned regarding the pills. Although the pills in question were 400 mg. prescription strength Ibuprofen, the school had a zero-tolerance policy for all prescription and over-the-counter medications, without prior written permission. When confronted with the allegation that she was giving pills to fellow students, Savana denied the claim and consented to a search of her backpack, which failed to reveal any pills. She was then escorted to the nurse's office for a more thorough search. Once she arrived, she was asked to remove her outer clothing and instructed to shake out her undergarments in an effort to reveal any potentially hidden pills, at which time her breasts and pelvic area were exposed to some degree. The search, however, produced nothing.

Savana's mother filed suit against the school district and school officials involved in the search, alleging that the strip search violated Savana's Fourth Amendment rights. The district court, and subsequently, a three-judge panel of the United States Court of Appeals for the Ninth Circuit, ruled in the school district's favor. However, sitting *en banc*, the Ninth Circuit Court of Appeals vacated the three-judge panel's decision, finding that the search was not only unconstitutional, but that the school officials were not entitled to qualified immunity from the suit because their actions were so obviously illegal that no reasonable public official could have believed otherwise.

The school district and administrators appealed the decision to the United States Supreme Court, which in an 8 to 1 ruling, held that the search of Savana's undergarments violated the Fourth Amendment. The Supreme Court noted that school searches require reasonable suspicion, which is a standard lower than probable cause, which could be described as "a moderate chance of finding evidence of wrongdoing." The Supreme Court held that, based on tips from other students, the administrators did in fact have reasonable suspicion to justify searching Savana's outer clothing and backpack. However, because of the limited threat presented by the Ibuprofen and the lack of evidence that the pills were concealed in Savana's underwear, there was not sufficient reasonable suspicion to warrant

extending the search to her undergarments. The Supreme Court further stated that "the content of the suspicion failed to match the degree of intrusion."

While finding that the search violated Savana's Fourth Amendment rights, the Supreme Court held that the individual school officials were protected from liability through qualified immunity. In reaching this conclusion, the Supreme Court noted that school officials are not liable when clearly established law is not present to put the officials on notice that their search of a student is unconstitutional. Thus, as a result, the case has been remanded to the Ninth Circuit Court of Appeals to address the liability of the school district.

Although South Carolina law prohibits student strip searches, the outcome of this case provides further guidance to administrators on the standards that apply when conducting searches.

General Assembly Amends Law Regarding Concealed Weapons on School Property

Earlier this year, the General Assembly passed an Act to amend S.C. Code Ann. §§ 16-23-430 and 16-23-420, two criminal statutes, that prohibit individuals from carrying a firearm or weapon on school property.

As background, §16-23-430 made it "unlawful for any person, except state, county, or municipal law enforcement officers or personnel authorized by school officials, to carry on his person, while on any elementary or secondary school property, a knife, with a blade over two inches long, a blackjack, a metal pipe or pole, firearms, or any other type of weapon, device, or object which may be used to inflict bodily injury or death." With the passage of the Act, this statute has been amended to provide that the prohibition "does not apply to a person who is authorized to carry a concealed weapon . . . when the weapon remains inside an attended or locked motor vehicle and is secured in a closed glove compartment, closed console, closed trunk, or in a closed container secured by an integral fastener and transported in the luggage compartment of the vehicle."

In addition, §16-23-420 made it "unlawful for a person to possess a firearm of any kind on any premises or property owned, operated, or controlled by a private or public school, college, university, technical college, other post-secondary institution, or in any publicly-owned building, without the express permission of the authorities in charge of the premises or property." However, with the enactment of the new legislation, this statute was amended to provide that the prohibition does "not apply to a

person who is authorized to carry a concealed weapon . . . when the weapon remains inside an attended or locked motor vehicle and is secured in a closed glove compartment, closed console, closed trunk, or in a closed container secured by an integral fastener and transported in the luggage compartment of the vehicle."

As an implication of this amendment, if a person with a concealed weapons permit brings a weapon onto school property but keeps it secured in a vehicle, that person has not violated the two criminal laws that have been amended. The passage of this legislation, however, does not seem to abrogate S.C. Code Ann. § 23-31-220—the concealed weapons permit law that grants public employers, including school districts, the right to prohibit a person, who is licensed to carry concealed weapon, from carrying the weapon onto school premises and that further allows employers to post "No Concealed Weapons" signs on their properties.

Fourth Circuit Backs School Board's Restriction of Reporter

Earlier this year, in the case of Cole v. Buchanan County School Board, a three-judge panel of the United States Court of Appeals for the Fourth Circuit ruled that Virginia school board members were entitled to qualified immunity after voting to block a community newspaper reporter from entering public school grounds.

As background, the Buchanan County School Board (BCSB) passed a resolution to ban reporter Earl F. Cole from school property "during operational hours while school is in session and students are present, except upon express written invitation or to attend a public board meeting or to exercise his right to vote." This action was taken after parents had expressed concerns on multiple occasions about his presence on the school grounds with a camera while their children were present. Also, Cole previously had entered a school building during school hours while students were present, had taken photographs, and had interviewed one or more students in school while school was in session without permission. In addition, prior to passing this resolution, Cole had written an article that was arguably critical of a board member, as well as other critical pieces; his presence on the school grounds raised concerns among school administrators; and at least one Board member was aware of Cole's past conviction for assault and battery.

In response, the reporter sued the school board under Section 1983 for violations of federally protected rights, claiming that the board members barred him in retaliation for a recent newspaper article about a board member. The court denied a motion by the individual board members to have the case against them dismissed, holding that they

were not entitled to qualified immunity because Cole had established that the board's actions violated his First Amendment rights, and those rights were clearly established at the time.

Upon the school board's appeal, the Fourth Circuit reversed and remanded the case to the lower court. In its decision, the Fourth Circuit discussed the two-step "clearly established" test—previously used in qualified immunity cases—and considered whether a reasonable board member could have believed that banning Cole from the school grounds was lawful, in light of clearly established law and the information Board members possessed. Upon noting the broad discretion the school board had with determining access to school grounds, the court concluded that in addition to believing the act was lawful, a "reasonable board member may well have believed it was his or her duty to ban Cole from school grounds in order to protect both the safety of the students and the integrity of the educational process." Thus, because no clearly established right was violated, the Fourth Circuit found that qualified immunity for the board was appropriate.

Announcements

We are pleased to announce that Tyler R. Turner has joined the firm as an Associate. Tyler was admitted to the South Carolina bar in 2009. He received his J.D., *cum laude*, from the University of South Carolina School of Law in 2009 and his B.B.A. in economics, *magna cum laude*, from the University of Georgia in 2004.



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