

No. 26904 - J. M., L. M., his natural mother and guardian, and P. M., his natural Father and Guardian v. The Webster County Board of Education

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Starcher, concurring in part, and dissenting in part:

The majority opinion sets forth equitably compelling facts, and does a good job in crafting excellent syllabus points. Then it applies the good facts to the good law, and ends up with a bad result. There is only one explanation for such a result -- the wish of the majority not to “undermine” a local school board that is bent on “zero-tolerance,” regardless of the equities and the law.

Last year, I had the honor to attend a community forum on school violence sponsored by Senator Robert Byrd at West Virginia University. At that forum, we learned from expert after expert -- and from our own state’s teachers -- that an inflexible zero-tolerance policy is counter-productive.

What we heard is well summarized in a recent article from the *ABA Journal* that I include as an appendix. I am glad to have the law that the majority has propounded. I wish that the majority had applied the law of this case to the facts of this case. And I am sorry that J. M. must suffer because this Court was unwilling to right the wrong of the Webster County Board of Education.

Accordingly, I concur in the syllabus of the majority opinion, but I dissent to the opinion’s conclusion.

APPENDIX

ZERO TOLERANCE, ZERO SENSE

School violence is a hot-button issue, but are strict, inflexible policies the answer? Some say yes, while others insist that all-or-nothing punishments merely alienate students.

BY MARGARET GRAHAM TEBO

Six-year-olds carrying weapons, seventh-graders trafficking in drugs, high schoolers making terrorist threats.

A quick glance at the headlines these days might lead one to think that American public schools have become dangerous, violent places. In reality, the stories behind those headlines sometimes yield less-than-disturbing facts.

The "weapon" brought by the six-year-old was a plastic knife in his lunch sack, put there by a grandmother who wanted him to be able to spread his peanut butter. The "drugs" traded by the seventh-graders were Midol tablets. The "terrorist threat" by the high schooler was an ill-conceived campaign poster for a student council candidate that attempted to parody the movie *Speed*.

Nationwide, statistics gathered by the Justice Policy Institute and the U.S. Department of Education show that crime of all sorts is down at public schools since 1990--some studies say by as much as 30 percent. Less than 1 percent of all violent incidents involving adolescents occur on school grounds. Indeed, a child is three times more likely to be struck by lightning than to be killed violently at school.

Still, fueled by media hype, fear of the unthinkable and perhaps even a bit of guilt, more parents are demanding that school boards implement strict policies to deal with kids who step out of line.

So-called zero-tolerance policies being implemented across the country are snaring large numbers of regular kids in broad nets designed to fish for troublemakers.

No current statistics are available on the number of public school students who are formally disciplined or prosecuted for wrongdoing. But an informal discussion recently during a seminar for attorneys who represent children showed a sharp increase in the number of clients seeking counsel over perceived injustices in school discipline.

The seminar, sponsored by the ABA Juvenile Justice Center, included a program on school officials' extreme and even bizarre reactions to student misbehavior in the wake of the Columbine shootings. Examples cited included the plastic knife and Midol cases.

"I was overwhelmed by the response from attorneys from across the country who were experiencing a new wave of these cases," said Kim Brooks, executive director of the Children's Law Center of Kentucky, who

spoke at the seminar. "Our office has been inundated with these, too. It's gone in cycles, after a major incident that gets significant media coverage."

Deepening Chasm

Kids whose misbehaviors in the past would have occasioned oral reprimands from a teacher or perhaps a trip to the principal's office are now being labeled a threat to school safety. And, those very same kids-will-be-kids incidents are now prompting punishments ranging from suspension to expulsion to referral to the juvenile court system for behaviors that even the schools agree do not actually compromise safety.

The result is a growing alienation between the administrators who implement the policies and the kids they are trying to protect.

"Zero tolerance does away with the entire concept of innocent until proven guilty," says Catherine Krebs, an attorney with the Children's Law Center in Boston. "Our job as adults is to help kids learn from their mistakes, not to throw them out of school and say, 'That's the end of it.' " Krebs notes that in Massachusetts, students expelled from public school lose their right to a public education permanently.

What becomes of kids of whom the system washes its hands? Many turn to gangs and crime, since without a high school diploma, legitimate jobs are nearly impossible to get. And even kids who have rarely been in trouble before their run-in with zero tolerance seem to be getting a message that mistakes of youth will not be tolerated and second chances are rare.

"The message that kids are getting is, 'Our main enemy is among us and it is our children,' " says Bernardine Dohrn, director of the Children and Family Justice Center at Northwestern University School of Law. "Our whole goal should be to hold onto them until they grow out of it, not look for more and more ways to get rid of kids."

But helping kids to learn from mistakes often takes a back seat to law-and-order concerns. And, say some lawyers, psychologists and parents, the harshness of the penalties for seemingly innocuous offenses is often fueled less by genuine safety concerns and more by fear of lawsuits from those who might allege unequal treatment.

"Schools are confusing equal treatment with equitable treatment," says Dohrn. "Kids in middle school and high school care most about fairness. When they see two students whose 'offenses' are vastly different being treated exactly the same, that sense of fairness is obliterated and replaced with fear and alienation."

We expect kids to learn to make differentiations of degree on various types of matters in their school work, points out Diane Fener, a private lawyer in Virginia who represents children. And children are able to understand that there is a difference between being treated equally and being treated fairly.

"Kids are not going to respect teachers and administrators who cannot appreciate the difference between a plastic knife and a switchblade," says Fener.

And the idea that treating everyone the same will protect the school from lawsuits may prove to be misguided as well. Some parents who believe that their children were treated too harshly as a result of all-or-nothing policies have considered lawsuits to attempt to restore their children's reputations.

Still, in the few cases across the country in which parents have tried to challenge a school board's decisions regarding expulsion, courts have consistently found that such decisions are a matter for the board's discretion.

The only requirement appears to be minimal due process, which the courts have found can be satisfied by merely holding a hearing at which the student and parents are given an opportunity to speak.

Except in cases where the student has been shown to be covered by the Americans With Disabilities Act, courts have appeared extremely reluctant to invade the territory of school authorities to make disciplinary decisions.

Board Oversteps Bounds

One exception is a 1999 Pennsylvania case in which the court found that the school board exceeded its authority in adopting a zero-tolerance policy that resulted in the expulsion of a seventh-grader for possession of a Swiss Army knife. The court said that under Pennsylvania law, the superintendent of each school district is vested with discretionary power to overturn expulsion decisions based on the individual facts of the case.

By adopting a zero-tolerance policy that denied the superintendent the ability to review the expulsion decision, the school board exceeded its authority, the court said in overturning the expulsion. *Lyons v. Penn Hills School District*, 723 A.2d 1073 (Commonwealth Court of Pennsylvania).

One family that considered a lawsuit, but rejected the notion because their attorney said it was unwinnable, is the Heitners of suburban Cincinnati. Eighteen-year-old Dana Heitner was the leading candidate to be valedictorian of his class at Madeira High School last fall. Then the straight-A student decided to make some campaign posters for his girlfriend's run for student council.

One of the posters was intended to be a spoof of the movie *Speed*, in which a bus is rigged so that once driven above 50 mph, the bus will explode if the speed drops below that threshold. The bomber demands a ransom to deactivate the bomb, to be delivered to a certain doctored receptacle near a subway station. Heitner made a hand-lettered black and white campaign sign and hung it in a stall in the boys' washroom at the school. The sign read:

"There is a bomb in this receptacle. If the weight on the seat goes over 50 pounds, the bomb will be activated. Once activated, this receptacle will blow up if the weight put upon it ever goes below 50 pounds. The only way to get off the seat safely is to scream as loud as you can that you will vote for Robin Cox in the coming election and then deposit one billion dollars in the nearest mail container with a hole in the bottom that connects the container to a not yet completed underground subway."

When school officials learned that the poster was made by Heitner, they knew that no genuine threat was intended, according to Michele Hummel, superintendent of the Madeira City Schools. Officials quickly decided that no evacuation of the school was necessary, and the majority of students were never even aware of the incident.

However, Heitner and Cox were both charged by the school board with making terroristic threats--a finding that carries a mandatory suspension penalty under the school's zero-tolerance policy.

"Under state law, every district in Ohio is required to have a zero-tolerance policy and to employ it without exception," says Hummel. "Dana knew or should have realized that this was not a smart thing to do."

Heitner and Cox were both suspended from school for 10 days. Neither was allowed to receive credit for any schoolwork assigned during their suspension. As a result, Heitner's grades for the first quarter dropped significantly. In calculus, normally one of his best classes, he received a D because he missed an exam during the suspension.

As a result of the grade drop, he now expects that he will lose his valedictory status come graduation in June. In addition, he was required to disclose on some of his college applications whether he had ever been suspended from school. He is uncertain whether his truthful answer will prevent his admission to some colleges.

Heitner and his parents say they don't understand why a disciplinary incident should be allowed to have an impact on his grades.

"I still don't think it was any big deal," Heitner says. "But if I had to be punished, make me write an essay or do some community service. Why change the grades I earned to reflect something other than reality? I am not a D student in calculus. I aced every assignment."

But Hummel says the policies are only effective when things that are highly valued--such as grades--are at stake, and that anything less would not be a deterrent. In addition, she says, Heitner was not denied any learning opportunities because he was required to complete the assignments that he missed, and was allowed to consult with his teachers about class lectures he did not attend.

"I would personally be happy to write a letter of recommendation on behalf of Dana's admission to any college or university," says Hummel. "But rules are rules, and he knew better."

Heitner counters that he did not consider his sign to be a threat, and had no idea at the time that others would see it as a violation of the rules.

The superintendent's acknowledgment that Heitner's poster was never considered a bona fide threat raises the question of just what zero tolerance is designed to protect, or promote.

Underlying Problems Overlooked

Parents tend to think of zero tolerance as keeping guns and drugs out of their schools and away from their kids. But that assumption fails to acknowledge the obvious: Kids such as the shooters in Littleton, Colo., Paducah, Ky., and Springfield, Ore., would not have been deterred from their shooting sprees by the existence of a zero-tolerance policy. Indeed, even before the term was coined, virtually every school already had a strict policy that prohibited weapons on school property.

Rather than safeguarding the good kids from the bad, zero tolerance seems to be a convenient catchphrase for schools unable or unwilling to prevent school violence by identifying and counseling at-risk students before they turn violent. All of the recent school shooters showed some signs of either repeated violent fantasies or of detectable mental illness months before their crimes, and yet they scarcely received even rudimentary evaluation or counseling.

And, under zero-tolerance initiatives, some students are less inclined to confide in teachers or school counselors for themselves or friends who may need intervention, out of fear that they will be punished rather than helped, says Irwin Hyman, a professor of school psychology and director of the National Center for Corporal Punishment and Alternatives at Temple University.

Such was apparently the case with a middle-school student in Virginia recently, who talked a suicidal classmate into relinquishing a knife that she planned to use to kill herself. Rather than turning the knife over to school officials, the boy kept it in his locker, planning, he said later, to give it to his mother or to the girl's family.

Instead, when the knife was found in his locker, he was suspended for possessing a weapon on school grounds. The boy later told a television reporter that he was afraid his friend would be in trouble if he turned in the knife, and he wanted her to get counseling, not punishment.

And there are dozens of similar stories played out on the nightly news across the country. A second-grader who accidentally grabbed her mother's lunch bag containing a steak knife was disciplined despite turning the bag over to her teacher as soon as she realized her mistake. A middle-schooler who shared her asthma inhaler on the school bus with a classmate experiencing a wheezing attack was suspended for drug trafficking. An eighth-grader was handed over to juvenile authorities for allegedly making an off-color joke about the Columbine incident to a classmate. The student spent 26 days on home confinement.

But when employed with common sense, zero-tolerance programs can improve school systems, says Celia Lose, assistant director of public affairs for the American Federation of Teachers, the largest teachers' union in the country.

"We are very supportive of zero tolerance for violent offenses--guns, drugs and the like," says Lose. "But when schools start trying to use zero tolerance to enforce all sorts of discipline issues, such as tardiness or possession of baby aspirin, the message gets lost."

Zero tolerance has had a positive effect, though, in that it has spurred school districts to clarify and communicate their policies for weapon and illegal-drug offenses. Before, the punishments were not always

clear, according to Lose. Many school districts either had no written policy or had policies that simply said certain items were banned, but failed to put students on notice of the punishment. Consequently, enforcement was spotty and inconsistent.

Now, says Lose, a student has a very clear message that items such as Boy Scout knives are not to be brought to school, even if needed for a Scout meeting later in the day. Still, schools need to take motives into consideration when determining punishments. In court, judges generally consider whether a legal violation is inadvertent or intentional when determining the severity of the sentence to be meted out. A solid zero-tolerance policy must also make the severity of the punishment fit the offense, Lose says.

"School is really the safest place a kid can be," she says. "We have a responsibility to make it as safe as it can be. But zero tolerance can't mean zero common sense."

Three-tiered Approach

Texas is one state with an innovative approach to zero tolerance. There, legislation sets out three levels of violations and the appropriate responses, says John Cole, president of the Texas Federation of Teachers. At the most serious level are four offenses that merit expulsion: bringing a gun, bringing a knife with a blade long enough to reach the heart, bringing drugs the nature and amount of which would constitute a felony, and aggravated assault. Students expelled for these reasons are required to attend a county alternative school.

At the second level, offenses including simple assault, misdemeanor drug possession, use of alcohol and a few other violations net the student a temporary removal from school. Students are required by state law to attend an alternative education setting in their own school district and are required to complete their normal school work.

At the lowest level are offenses for which school officials have discretion to determine the severity of the offense and the punishment.

But some educators say they are already overburdened with the social problems that students bring to school, and to charge them with determining which incidents pose genuine threats and which do not is beyond the realm of their capabilities. At least some juvenile law experts agree.

Krebs, of the Children's Law Center, advocates referrals of questionable student incidents to independent decision-makers, generally psychologists or others trained to deal with adolescent behavior. Hyman agrees that more psychological services are needed. But where would the money come from?

"We're turning our schools into a police state. Use some of the funds that are going for police officers, cameras and all of that," says Hyman.

And, get students themselves involved, says Dohrn of Northwestern University. Peer-review panels are particularly effective for transgressions such as technical violations of school policy, she says. That way, the students themselves can investigate the complexities of the situation and devise solutions.

Dohrn cites two basic principles that she believes are key to stemming violence and reversing the trend toward overzealous punishment in schools: No child should be deprived of an education, and all school disciplinary measures must be fair, equitable and individualized.

Among her recommendations:

- * Create high-quality alternative schools to accommodate students who must be expelled.
- * Keep schools open until 6 p.m. for extracurricular programming.
- * Use peer juries to hear disciplinary cases.
- * Set up smaller schools where all students are known to adults in charge. (This has been accomplished even in some large urban areas simply by breaking large high schools into smaller units.)
- * Remove guns from children's environments.

In Florida, a pilot program guarantees confidentiality to any student who approaches a counselor with concerns about safety or a potential violation of school policy. Students are promised that investigations will seek to provide help to those in need first, with discipline used as a last resort.

"Insurance companies do seminars for employers about how to identify and avoid problems at work. We should be doing the same for people who deal with kids," says children's lawyer Fener. "We know what works. Let's put the emphasis--and the money--there."

Margaret Graham Tebo is a legal affairs reporter for the ABA Journal.