

Strip-searches at school enter murky legal area

Incidents like the one in Winslow must be decided on a case-by-case basis, a district attorney says.

By COLIN HICKEY, Blethen Maine News Service October 8, 2007

WINSLOW — District Attorney Evert N. Fowle said in his 22 years in the legal profession, he had never heard of a school employee strip-searching a student -- until last month.

Fowle said the strip-search of a Winslow High School girl, revealed by the Maine Civil Liberties Union on Sept. 27, never came across his desk. Sally Sutton, executive director of the Maine Civil Liberties Union from 1984 to 2001, said she never dealt with such a case during her tenure.

A school official strip-searching a student is an act that deals with fundamental rights -- specifically, the Fourth Amendment, aimed at protecting citizens from unreasonable search and seizure.

Did Winslow High School officials violate the rights of the then 16-year-old girl they strip-searched from the waist up? The settlement reached between the Maine Civil Liberties Union and Winslow High does not answer the question. Nowhere in the agreement does the high school admit to violating the civil rights of the student.

The fact that the school paid a settlement of \$15,000 -- \$6,500 in attorney fees, \$8,500 in damages to the girl -- and agreed to apologize for the incident in writing are proof of regret, but not an admittance of guilt.

Winslow High School Vice Principal Terry Atwood said in court filings that the search was reasonable under the circumstances and, thus, constitutionally valid.

At the same time, the school system has agreed to alter its policies to prohibit strip-searches of students by school employees.

All of which points to the murky nature of the Fourth Amendment, particularly as it applies to the relationship between school officials and children in a school building.

"Every case as far as its legality would have to be determined on a case-by-case basis," Fowle said. "There is not a cookie-cutter way that it can be judged."

CONSTITUTIONAL IMPLICATIONS

The Fourth Amendment to the Constitution offers protection against a government that threatens rights of privacy through search or seizure.

A public school employee is considered a government official, according to Cabanne Howard, a professor at the University of

Maine School of Law. "Schools are clearly the government," he said. "There is no issue about that at all."

That means a public school official can be held accountable for violating the rights of a student by strip-searching that student.

A private school, in contrast, would be exempt from the law. "If parents don't like it," Cabanne said, "they can take their child out of the school."

That said, a strip-search of a student is a highly invasive action regardless of the constitutional implications and could bring legal action on other grounds, said Michael J. Steinberg, legal director of the American Civil Liberties Union of Michigan.

Michael Kaplan, a lawyer with the Portland law firm of Preti, Flaherty, Beliveau & Pachios, put it in more blunt terms: "Strip-searches are particularly intrusive. And regardless of what one case or another says, you better damn well have good justification for it."

PROBABLE CAUSE

That gets to the issue of probable cause versus reasonable suspicion. In the legal world, there is great distinction between the two.

"Suffice it to say," the ACLU's Steinberg said, "that (probable cause) is a higher standard than reasonable suspicion."

Police are obligated to have probable cause, he said, before they consider strip-searching a suspect. And before they do so, they must go to court to obtain a search warrant.

Public school officials, Steinberg said, do not need a search warrant, and they do not need the same level of evidence.

Fowle said the first concern of school officials is the health and safety of all students and faculty in the school, a charge that, given certain circumstances, can override the civil rights of an individual.

The rub is the nature of those circumstances, Steinberg said. The reasonable suspicion must first not be of a general nature, he said. For example, school officials cannot act simply on a rumor that somebody in the school is in illegal possession of prescription drugs.

The magnitude of the possible violation also must be considered. To strip-search a student for stealing money, he said, would not be appropriate because the offense would not threaten the safety of other students.

If the concern is a weapon, however, such an intrusive measure might be justified, he said.

CASES BECOMING MORE COMMON

Given the subjective nature of reasonable suspicion, as well as

the intrusiveness of a strip search, Fowle argues that school officials should be extremely wary of taking such measures.

"Police are probably better equipped and better trained to conduct the investigation than school officials are," he said. "I think it is probably wise for the school and local police agency to work in concert. The most important thing is to ensure the safety of everybody in the school."

The ACLU's Steinberg, though, said that across the country the number of strip-searches by school officials is increasing.

"I think it is more common," he said, "and it is part of a disturbing trend around the country of school officials turning schoolhouses into jailhouses. It is just one of many policies or practices of that nature that are becoming more common."

"Strip-searches," he said, "just should not be conducted by school officials."

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