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Legal Issues in K-12 and Higher Education Institutions: Understanding Search and Seizure Law (Fourteenth Amendment) and Free Exercise Rights (First Amendment) in American Schooling

Case Study III

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Case Study A: Of Course You Have Rights in School...Psych!!

In the wake of several high profile bullying stories in the press, the Harbortown School District adopted a "zero tolerance" policy on bullying and abusive language. In relevant part, the policy reads as follows:

...The Harbortown School District is committed to providing all students with a safe learning environment that is free from bullying. This policy is part of our effort to promote learning, and to prevent and eliminate all forms of bullying and other harmful and disruptive behavior that can impede the learning process.

...The District will not tolerate any unlawful or disruptive behavior, including any form of bullying in our school buildings, on school grounds, or in school-related activities. Such behavior may include abusive language, sexually explicit language, behavior that is physically intimidating or aggressive, or behavior that disrupts the learning environment. We will investigate promptly all reports of bullying, whether brought by the target of the bullying or a third party, and we will take prompt action to end that behavior and restore the target's sense of safety. Such investigations may include, as necessary, searches of lockers, bags, cars, and other personal belongings, as well as the immediate physical removal of the accused bully from school grounds...

The Principal of each building will be given sole authority to suspend or expel students determined guilty of bullying and, as bullying has no place in our District, all decisions are final.

Shawn and Gus are best friends and seniors at Harbortown Public High School in Harbortown, Massachusetts. Shawn has a crush on fellow senior, Juliet, and they flirt over their shared love of old Saturday Night Live sketches. Their favorites are the "Point/Counterpoint" sketches with Dan Akroyd and Jane Curtin. *See, e.g.,* <http://www.youtube.com/watch?v=ttqgw1CsXZM>.

As they were walking between classes, Shawn saw Juliet and called across the hall: "Juliet, you ignorant slut," to which she replied, "Shawn, you pompous ass" without missing a beat. Gus, who is forced to watch Shawn and Juliet's dated SNL-themed flirting every day, jokingly says, "Keep it up, you two, and I will shoot one or both of you!!" All three laughed and continued on to class.

Unbeknownst to them, Henry, a sophomore with great powers of observation, but little social grace or understanding, overheard their exchange and became genuinely worried about Juliet, who he also had a crush on after she came to his defense when other students teased him earlier in the year. Henry went to Principal Lassiter's office and told him that he heard Shawn call Juliet a slut and then heard Gus threaten to shoot her. Principal Lassiter immediately ordered Shawn and Gus to his office. Then he called the School Resource Officer and told him to search the boys' lockers and cars to ensure they did not have any firearms.

The School Resource Officer is relatively new to the job and barely passed his training at the Harbortown Police Academy. He informed Principal Lassiter that he could not search the cars, because they are personal property of the boys; but he could definitely search the lockers because they are school-owned. He then conducted a search of the lockers, and found the cell phones of both boys stowed in their jackets (since they cannot have them in class). The SRO did not find

anything related to the threat of firearms on the phones, but he did find evidence that the boys were involved in recent vandalism at the school, including pictures of the boys standing in front of the vandalized area giving the thumbs up and taken just around the time the police suspect the vandalism occurred.

After reporting this to Principal Lassiter, the Principal immediately expelled both Shawn and Gus for bullying Juliet, despite their protests and explanations to the contrary. (Notably, he never asked Juliet for her side of the story.) He also referred them to the Harbortown Police Department for their involvement in the vandalism. The boys were provided no right to appeal their expulsion.

Issues to Address:

- **What are the most important ethical and public policy issues at stake? [No more than 250 words.]**
- **On its face, do you see any problems with the Harbortown School District's bullying policy? How could you resolve them?**
- **Turning to the fact pattern, what legal issues did the Principal face in this fact pattern? Did he address these issues appropriately? Why or why not?**
- **What legal issues did the SRO face in this fact pattern? Did he address these issues appropriately? Why or why not?**
- **How would the legal issues differ in a private institution?**
- **What defenses or legal claims might Shawn and Gus have in this scenario?**

Essay Response #1

At Harbortown School District (HSD), Principal Lassiter faces several ethical and public policy issues after expelling both Shawn and Gus for bullying Juliet at Harbortown High School. One of the ethical issues at stake is whether or not the Principal had notified Shawn and Gus of their legal rights and of an appeal process prior to the search. According to the *Statement of Ethics for Educational Leaders*, the educational leader must "support the principle of due process and protect the civil and human rights of all individuals" (AASA, 2007). If the Principal did not use substantive and procedural due process, then the educational leader may have violated Shawn and Gus's Fourteenth Amendment rights. Typically, Principals are confronted with a wide number of "ethical dilemmas and moral decisions that have a direct impact on the lives of student" (Bowen, Bessette, & Chan, 2006, p. 7). Since HSD adopted a "zero-tolerance" policy on school bullying, the Principal must uphold to the highest ethical standards that does "not intentionally expose the student to embarrassment or disparagement" (NEA, 1975). In other words, was the Principal decision to search Shawn and Gus lockers and cell phones based on "probable cause?" Did the Principal have "reasonable cause" for conducting the search at its inception? If the Principal did not have "reasonable cause" or "probable cause," then the Principal would run into several ethical and public policy issues of whether the student's Fourth Amendment right was violated by the School Resource Officers at Harbortown High School.

To clarify, one of the main problems with HSD bullying's policy is the 'reasonableness of the search.' According to their school's "zero-tolerance" policy, it states "we will investigate promptly all reports of bullying, whether brought by the target of the bullying or a third party." Although schools must hold an ethical obligation to provide all "students with a safe learning environment that is free from bullying," the school's anti-bullying policies to "search lockers,

bags, cars, and other personal belongings" to any suspicious student would violate the student's Fourth Amendment right to privacy and personal security. Unless the Principal have "reasonable" suspicion to claim that the student had violated either the law or the rules of the school, then a warrantless search may be performed if the student "voluntary consent" to the search. Because all students are fully protected by the Fourth Amendment, the school must ask for "voluntariness of consent" prior to any search (*Commonwealth v. Carey*, p. 3). If the school does not receive a "voluntary consent," then the school cannot perform the search on the student unless exigent circumstances (e.g., emergency situation, health and safety) justify the warrantless search. In other words, the 'reasonableness of the search' plays a large factor of whether the school's policy on "searches of lockers, bags, cars, and other personal belonging" is legally acceptable. The school could improve this policy statement by expanding upon their legal procedures and process that would follow should the Principal have "reasonable cause" of acquiring evidence of wrongdoing. Furthermore, the school could outline how they define "reasonable" in the context of their school setting and who exactly may perform unwarranted searches should the Principal have reasonable suspicion of the student. Additionally, the school may add that any searches conducted by the SRO will remain strictly confidential and that all students have the right to ask for their legal guardian prior to any search. By providing more details of the school's legal procedures of their "zero-tolerance" policies, both the school and the student would benefit from the rules and regulations that are embedded within the school district.

The Principal face several legal issues and challenges. Notably, the Principal had failed to provide Shawn and Gus with "reasonable cause" of why the School Resource Officers (SRO) must search their lockers and cell phones at Harbortown Public High School. In the case of *New Jersey v. T.L.O.*, Justice White argued that schools must meet a minimum "reasonableness"

standard to conduct any unwarranted searches on school property. Because Principal Lassiter did not inform Shawn and Gus of his "reasonable" suspicion, the Principal had violated the student's constitution right to privacy by asking the SRO's to perform an otherwise "illegitimate" and "involuntary" search for firearms in their lockers and cell phones. Generally, the standard of reasonableness for any search and seizure requires "balancing the need to search against the invasion which the search entails" (*Camara v. Municipal Court*, p. 526). Specifically, any search of a student's belonging requires "some modification of the level of suspicion of illicit activity needed to justify a search" and be based on "probable cause" (*New Jersey v. T.L.O.*, p. 4). For instance, in the case of *G.C. v. Owensboro Public Schools*, Circuit Judge Moore argued that school leaders must provide "probable cause" at the time of the search before determining if Gabriel had intended to hurt others with her cell phone. Similarly, in *Safford United School District v. Redding*, Justice Souter emphasized that any intrusive unwarranted searches, such as, a strip search, requires both "evidence at its inception" and is "reasonable related in scope to the circumstances in the first place" (p. 7). In other words, the Principal must have "exceedingly persuasive justification" that is based on "some level of individualized suspicion" (*Board of Education v. Earls*, p. 2) to perform any unconstitutional search unless the object, property, or item happens to be in "plain view." Because the Principal neither had "reasonable cause" nor "probable cause" of Shawn and Gus wrongdoing, the school's leader decision to request a search had violated their expectations of privacy and therefore, any evidence obtained from the search cannot be used in trial. The Principal could have simply avoided this legal issue if he had told the SRO what "reasonable suspicion" and/or "probable cause" he had against Shawn and Gus prior to the search of their lockers and cell phones. Furthermore, the Principal could have explained that under Mass General Law c. 71, 37 ½, he has the right to suspend any student if he believe

that Shawn and Gus presence in the school would directly affect the general welfare in the school community. Additionally, the Principal could have explained his reason to not ask Juliet for her side of the story and how he came to the conclusion of Shawn and Gus expulsions at HSD.

It is important to note that there were some instances in which the SRO had addressed Shawn and Gus appropriately; however, one of the primary legal issues the SRO would face was failing to provide the student's with their legal due process prior to the unwarranted search. Though the SRO was relatively new to the job, all SRO's are required to read students their legal rights and appeal process regardless of the individual's training experience. For example, in the case of *Goss v. Lopez*, Justice White argued that students "must be given some kind of notice and afforded some kind of hearing" prior to the removal from the school (p. 5). Though education is not a fundamental right under the U.S. Constitution as presented in *Doe v. Worchester*, all students must be given the right to an appeal process to prevent any violation of the individual's substantive and procedural due process rights. The Fourteenth Amendment forbids the State to deprive "any person of life, liberty, or property without due process of law." Because HSD is a public institution in the state of Massachusetts, the SRO should have provided Shawn and Gus with their due process rights prior to the search and expulsion of the students. The SRO could have avoided this legal issue if the SRO had asked the Principal whether or not he had "probable cause" or "reasonable cause" to justify the search in the first place. Furthermore, because the SRO was affiliated with the Harbortown Police Academy, the SRO could have read Shawn and Gus their *Miranda* warnings prior to the search requested by the Principal. Although it was unclear if Shawn and Gus were free to leave at the time of the unwarranted search, the rights of any students – adolescents and young adults - must be balanced against the needs of the schools.

The outcomes of this case would have been a different if Harbortown High School was a private institution. Notably, students attending private schools would not have the right to make legal claims under the Constitution because their actions are not state action. For example, if Harbortown High School was a private school, then Shawn and Gus cannot file a lawsuit against the Principal for violating their Fourth Amendment rights; instead, the student's will need to sue the school based upon conduct codes and standards should a contractual relationship exists between the student's and Harbortown High School. For example, in the case of *Schaer v. Brandeis*, David A. Schaer filed a breach of contract against Brandeis University for violating one of his contractual process rights. Specifically, Schaer claims that Brandeis University had improperly complied to follow legal procedures and protocols outlined in their "Rights and Responsibilities" student handbook contract. Although Justice Abrams concluded that Schaer had failed to provide a claim "for which a relief can be granted" (p. 4), the case is an example of how students from private institution may bring about legal claims on contractual process rights. It is important to note that just like students', public law enforcement officers may also violate due process by conducting unwarranted search at a private school because such involvement may be sufficient to consider the search state action and thereby violate the Fourth Amendment.

One defense Shawn and Gus could pitch is that K-12 education is a fundamental right and is required under U.S. state law. Historically, the duty to educate all students equally was established in *Brown v. Board of Education*. Thereby, Shawn and Gus could explain that the state has the legal and moral responsibility to educate all students, to prepare them for society, and to become engaged and informed global citizens. Alternatively, Shawn and Gus could make claims that the Principal had failed to offer them fair legal procedures in *certain* interactions and were not afforded procedural due process rights to secure counsel, to confront and cross-examine

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witnesses, and to identify any witnesses prior to their expulsion at HSD. Similarly, as outlined above, the students could make legal claims against the Principal for violating their Fourth and/or Fourteenth Amendment rights as well as their student conduct codes and standards at HSD. All of these are a few areas in which Shawn and Gus may do to move forward in this case.

Case Study B: Townie Trouble

Pine Valley is an old mill town, comprised largely of blue-collar workers, most of whom are Protestant or Catholic. The community had recently fallen on hard times, with most young adults being forced to leave Pine Valley for work. The University of Manatopia is a large, public university system with designs to build a new campus in Pine Valley.

Years of strategic planning went into choosing Pine Valley as a site for a campus, and the University spent considerable effort ensuring the local Pine Valley community would be part of the process. For example, the University offered to admit and provide free tuition for the top 25% of the Pine Valley High School for the next five years, as well as take other steps to reinvigorate business in the community. This reinvigoration included the hiring of new staff from Pine Valley. The University also placed an advertisement in the local newspaper informing the Pine Valley community that they could utilize some of the University's resources as their own, including a cafeteria that offered reduced rate meals and the library, since Pine Valley was forced to shutter its own library three years ago amid budget shortfalls. The community applauded these gestures and welcomed the University.

In its first year of operation, the University began to receive reports of anti-Semitism on campus, with several of the Jewish students complaining of the proliferation of anti-Semitic humor and anti-Semitic graffiti showing up on campus. The University staff was alerted to some of these incidents and ordered investigations into the behavior. In each instance, the behavior could be traced back to one of the 150 or so students admitted to the University under the agreement with the Pine Valley community, and in each case appropriate punishment was doled out.

Alarmed by this trend of anti-Semitism with some of the Pine Valley students, the Dean of the University spoke with a member of the student council who grew up in Pine Valley. When the Dean told the student what University staff found on campus, the student seemed unsurprised and responded: "That sounds pretty tame to what high school was like. It is not a very diverse area, either in terms of demographics or tolerance of other religions. We're mostly Protestants or Catholics and those religions are pretty much hard-wired in most of the kids from the community. Many of them feel their religious beliefs have taken a back seat to political correctness in recent years."

With Christmas break quickly approaching, the Dean noticed that a group of students was planning a holiday party in the University cafeteria. The student group was made up primarily of Pine Valley students and they had applied for and received all the appropriate permissions from the University. The flyers for the party made the Dean stop in her tracks. It read: "Tired of the commercialism that certain people – ahem, the Jews – have injected into Christmas? Come celebrate the birth and life of our Lord, Jesus Christ. All are welcome."

Upon returning to her office, the Dean learned that several students had already complained about the flyers, and a local reporter had been tipped off to the story and was asking for comment. Trying to avoid scandal in the Pine Valley campus' first year, the Dean quickly called the reporter and told him that the University would not allow the Christmas party to go forward. When pressed by the reporter over why a Muslim group was able to sponsor a small celebration at the beginning of the school year to mark the end of Ramadan, the Dean stated that each

group's application was considered on a case-by-case basis and, in this case, the religious tenor of the party, coupled with the anti-Semitic flyers on campus as well as the prior anti-Semitic behavior justified her decision.

News trickled out about the Dean's decision on campus, and the next day the local reporter wrote an article in which he explained the cancellation of the Christmas party despite the University's acceptance of the Ramadan celebration, but also provided the Dean's rationale. Still, tensions rose on campus.

Three days after the local reporter's story ran, a member of the University's event planning department wrote a letter that was published in the local newspaper. In her letter, she stated that she was a newly hired member of the University staff (in thanks to the University agreement with the community), but she was also a lifelong citizen of Pine Valley and a practicing Catholic. In her view, this was just another instance of a large institution succumbing to the political correctness of the time. She stated that she had reviewed the applications for the Christmas party and nothing anti-Semitic was apparent. Likewise, she said that she had never observed anything anti-Semitic in her day-to-day work at the University. She continued, stating that she also approved the Ramadan celebration in the fall and, in her view, both should have been allowed given that the cafeteria had been offered for community use. This article upset the Dean and, after providing the teacher with appropriate due process, fired her within days of the publication of the article.

Issues to Address:

- **What are the most important ethical and public policy issues at stake? [No more than 250 words.]**
- **What legal issues does the Dean face in this fact pattern?**
- **How would the legal issues differ in a private institution?**
- **What defenses or legal claims could the fired University staff member put forward? The student group throwing the Christmas party?**

Essay Response #2

At the University of Manatopia (UOM), the Dean faces several ethical and public policy issues after canceling a student's group Christmas party in the school's cafeteria and firing a University staff for a letter published in the local newspaper. Historically, the purpose of the First Amendment is to "promote tolerance/diversity of views and perspectives, and prepares people for active, effective participation in our pluralistic, often contentious, society" (Catanzano, 2013). Thereby, one of the main public policy issues at stake is whether or not the Dean had violated the student group freedom of religion. The *AAUP Joint Statement on Rights and Freedoms of Students* states that "students and student organizations should be free to examine and discuss all questions of interest to them and to express opinions publicly and privately" (p. 3). Similarly, the National Association Education (1975) *Code of Ethics* outlines that educational leaders should not discriminate against "the basis of race, color, creed, sex, national origin, marital status, political or religious beliefs, family, social or cultural background, or sexual orientation, unfairly" (p. 1). In other words, was the Dean's justification to cancel the Christmas party motivated by religion? Did the Dean prefer one religion over another religion at UOM? Was the cancelation of the Christmas party "reasonably related to legitimate concerns" of safety at the University? Did the religious content of the flyers disrupted student's learning in the classroom? All of these are a few ethical and public policy questions the Dean may face at UOM.

The Dean faces several legal issues in the Pine Valley community. Notably, one of the main legal issues the University will face is whether the Dean had violated the free speech, free exercise, or Establishment Clause of the First Amendment. Generally, the purpose of the 'Establishment Clause' is to prevent any governmental endorsement of religion. Specifically, the Establishment Clause prohibits the establishment of religion via government-created law, statute,

and practice (Catanzano, 2013). For example, if a public school decides to favor one religion over another, then it violates the Establishment Clause. For instance, in the case of *Ahlquist v. Cranston*, Justice Lagueux argued that a Christian prayer Mural at Cranston High School West (CHSW) was deemed unconstitutional because the banner had a 'religious speech' that stated "Our Heavenly Father." Notably, Jessica Ahlquist claimed that the religious quote in the school's auditorium was offensive to non-Christians and had violated her civil rights. Though the school was not supportive with the student's decision to file a lawsuit on behalf of ACLU, the case of *Ahlquist v. Cranston* is a fine example of the very neutrality the Establishment Clause requires and the institutions expectation to not engage in viewpoint discrimination (Catanzano, 2013).

So the question arises: did the Dean of UOM violate the Establishment Clause principle of government neutrality in religion? To answer such question, I first examine if this case is a traditional public forum, limited public forum, or non-public forum. Because the Christmas party was open to the general public in the University cafeteria, the case would fall under as 'public forum'. The question whether the Dean had violated the Establishment Clause principle by favoring one religion over another requires a full analyze of the three-part test: 1) *Lemon*, 2) endorsement, and 3) coercion. Firstly, in the *Lemon* test, the Courts must determine if the flyer's approved by the Dean had: "(1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid "excessive government entanglement" with religion" (*Ahlquist v. Cranston*, p. 6). Because the flyer was approved by the University does not have a clear secular purpose, the Dean would violate the Establishment Clause for advancing one religion at UOM. Additionally, because the flyer was created by students who wanted non-Christians to become Catholics at UOM, the student group would also violate the Establishment Clause for disseminating flyers for the purpose of advancing religion. Secondly, when applying

the endorsement test, the Court must determine if the student and the Dean had any intention of favoring one religion over another religion at UOM. Since the student group wanted to promote Catholicism over Judaism, the student group flyer did violate the Establishment Clause.

Likewise, since the Dean had canceled the Christmas party because he wanted to endorse one religious group over the other, he also violated the Establishment Clause principle of government neutrality in religion. Thirdly, when applying the coercion test, the Court must determine if the student had "subtle coercive message" on the flyer that would force students to become Catholics or Protestants at UOM. Because the flyer had a religious message that threatened non-Christians to become Catholics or Protestant, the flyer fails to meet the coercion analysis test and thereby violates the Establishment Clause. Generally, public institutions must not coerce anyone to participate in any religious exercise (*Santa Fe v. Doe*). Any public institution that favors one religion over another religion would violate the neutrality the Establishment Clause requires.

The legal issue would have been significantly different if UOM was a private institution. Specifically, because private institutions are supported by student tuition and large endowments from alumni, the Dean would have the right to limit certain free speech on-campus. For example, if UOM was a private institution, the Dean would have the right to cancel the Christmas party regardless of the purpose. Furthermore, the Dean would also have the ability to prohibit student protests as well as to expel students at the institution. Additionally, student groups at private universities would also have statutory protection that prohibits them to organize religious activity on-campus. For instance, a group may be denied access to campus facilities or university funds should the activity infringe upon the doctrine or mission statement of the University. In other words, students attending private universities are limited to certain freedom of expression as well as freedom of press. Because the constitution does not apply to private actors, students will not

have the ability to make legal claims against the University; rather, the students will need to make claims on specific codes of conduct and standards that are approved by the institution.

Unlike private universities, some public institutions do have the authority to limit free speech that can either be offensive or illegal to the public. For example, in *Tinker v. Des Moines*, Justice Fortas argued that schools may restrict certain free speech if it causes a "substantial disruption" of school activities. Similarly, in cases like *Hazelwood v. Kuhlmeier* and *Hosty v. Carter*, the Courts concluded that educational leaders have the right to remove sensitive topics on school's newspaper as long as the decision were "reasonably related to legitimate pedagogical concerns" (p. 4). Likewise, in *Morse v. Frederick*, Justice Roberts concluded that public schools have the right to prohibit student from displaying messages that endorse illegal use of drugs. It is important to note, however, that public institutions may not limit free speech if the speech is "neutral toward religion." For example, in the case *Rosenberger v. University of Virginia*, Justice Kennedy concluded that UOV's decision to not provide funding to a Christian group because of their "neutral and objective" viewpoint had violated their First Amendment rights. Generally, the whole purpose of "viewpoint neutrality" is that minority views are treated with the same respect as majority views (Catanzano, 2013). Thus, the Dean's decision to cancel the Christmas party in the University cafeteria did not violate the neutrality of students' free speech because educational leaders have a duty to treat all religious groups with the same viewpoint respect on-campus.

One legal claim that the fired University staff member may put forward is that the Dean had violated her Free Exercise Clause. Because UOM is a public institution, the University staff could make claims that the Dean had fired her based on "private speech" (e.g., not affiliated with the University). Because the letter was published outside the University, the University staff member could argue that the institution had discriminated her viewpoint regarding the Dean's

action of the Christmas party. Moreover, the University staff could argue that she was unaware of the anti-Semitic hostility at UOM because the Dean had not communicated with the planning department regarding the tension that occurred on-campus. Generally, the right to freedom of the press gives all people to express themselves through publication and dissemination. Hence, the Dean's decision to fire the staff based on the article would violate her Free Exercise Clause.

On the other hand, one legal claim that the student group may put forward is that the Dean had violated their Establishment Clause rights. As outlined earlier, students attending public institutions are afforded free exercise rights to their own religions on-campus. Because students have Amendment rights at public universities, the student group could argue that the flyer's statement was in no way endorsing or supporting one religion over another because the flyer ended with the statement: "All are welcome." Because everyone was welcomed to attend, the student group could argue that the Christmas party was inclusive to build dialogue between Catholics and Jews in Pine Valley, and to encourage non-Christians to explore the purpose and meaning in life. Additionally, the student group could put forward that the University had approved the event in the first place and that canceling the Christmas party would violate their freedom of association and expression. Moreover, the student group could argue that the institution had failed to provide "strong factual assessment" to claim that UOM had met its burden of demonstrating that the Christmas party was supportive towards a religious group. In addition, the student group could add that the University lacked evidence to provide "reasonable certainty" that the student group would create a disruption on-campus, and that the Dean's decision to cancel the Christmas party was based on "pure speculation." Nevertheless, there are many arguments the student group could put forward to win the case at University of Manatopia.

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