

Hirsch v New York City Dept. of Educ.

2011 NY Slip Op 30003(U)

January 3, 2011

Supreme Court, New York County

Docket Number: 103504/10

Judge: Barbara Jaffe

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE J.S.C.
Justice

PART 5

YITZCHAK HIRSCH
- v -
NYC DEPT OF EDUCATION

INDEX NO. 103504/10
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 2 were read on this motion to/for motion for adj

Notice of Motion / Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

JAN 05 2011

NEW YORK COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Dated: 1/3/10 JAN 03 2010

BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
YITZCHAK M. HIRSCH, a/k/a JUSTIN HIRSCH, by
DEVORAH HIRSCH, Mother and Guardian ad Litem
of YITZCHAK M. HIRSCH, a/k/a JUSTIN HIRSCH,
and DEVORAH HIRSCH

Plaintiffs,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,
THE BOARD OF EDUCATION OF THE CITY OF NEW
YORK, CITY OF NEW YORK, POLICE COMMISSIONER
RAYMOND W. KELLY, in his official capacity, JAMES
SECRETO, ASSISTANT CHIEF and COMMANDING
OFFICER OF THE NYPD SCHOOL SAFETY DIVISION
or his SUCCESSOR, in his official capacity, NEW
EXPLORATIONS IN SCIENCE TECHNOLOGY AND
MATH (a/k/a NEST + m), DR. OLGA LIVANIS, in her
individual and official capacity, BRENDAN ALFIERI,
in his individual and official capacity, JOSE-MARTINEZ-
ELIAS, in his individual and official capacity and
SCHOOL SAFETY AGENTS "JANE DOE 1," "JANE
DOE 2," in their individual and official capacities,

Defendants.

-----X
BARBARA JAFFE, JSC:

For plaintiffs, self-represented:

Devorah Hirsch
40 Exchange Place, Suite 1800
New York, NY 10005
646-464-2059

Index No. 103504/10
Motion Date: 11/16/10
Motion Seq. No.: 001

DECISION & ORDER

FILED

JAN 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

For defendants:

Suzanne K. Colt, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-788-0611

By order to show cause dated October 6, 2010, plaintiffs move pursuant to CPLR 6301
for an order preliminarily enjoining defendants from (a) detaining, questioning, or searching
plaintiff Yitzchak Hirsch or his belongings, unless his mother is present, and from making any

utterances or statements to any person that expressly injure Yitzchak's personal reputation, are defamatory in nature or calculated to injure his character and which imply that they are true, or inadvertently infer that he has committed a crime or make statements that negatively reflect on his good name, reputation and credibility or statements that infer that association with him should be avoided or that association with plaintiff will result in negative consequences.

Defendants oppose.

I. BACKGROUND

In an action filed on March 17, 2010, plaintiffs assert 14 causes of action against defendants, including malicious prosecution, intentional and negligent infliction of emotional distress, defamation, violation of due process, and unlawful search, all arising from an incident at his high school, New Explorations in Science, Technology and Math (NEST + m), where in March 2009, Yitzchak was accused of, but not disciplined for, smoking marijuana on school premises. (Affidavit of Devorah Hirsch, dated Oct. 6, 2010 [Hirsch Affid.], Exh. A).

According to defendants, Yitzchak was suspended following an incident on March 17, 2009, when identified students reported that he and another student were smoking marijuana in the school gymnasium locker room. (Affirmation of Suzanne K. Colt, Esq., dated Nov. 16, 2010 [Colt Aff.], Exh. A). Yitzchak was called into the office of principal Olga Livanis, and at her direction, a school safety agent searched Yitzchak's backpack and found tobacco, lighters, remnants of a rolled joint, and items Livanis took to be drug paraphernalia, including empty plastic "dime bags," cigarette rolling papers, Blunt wrappers, a plastic film container and metal container that smelled like marijuana. (*Id.*, Exh. A). Livanis claims that Yitzchak was visibly high when he appeared in her office, as his eyes were red and glassy, he smelled of marijuana,

and he spoke incoherently. (*Id.*).

Upon being notified by school, plaintiff Devorah Hirsch arrived at the school. (*Id.*).

Yitzchak was suspended for a day; the principal did not call the police. (*Id.*).

Two days later, two of the students who saw plaintiff on March 17 signed statements accusing Yitzchak of having offered to sell them marijuana on the school premises. (*Id.*, Exh. A).

Yitzchak was called into the principal's office again and his mother was notified. (*Id.*). This incident triggered a mandatory suspension hearing, which was held on March 27, 2009. (*Id.*). However, as neither student appeared at the hearing, the charges against Yitzchak were dismissed. (*Id.*).

On October 1, 2010, after plaintiffs commenced their case against defendants, one of Yitzchak's teachers reported both orally and in writing that he had witnessed Yitzchak in what appeared to be a suspicious transaction with another student at the intersection of Houston Street and Avenue C. (*Id.*). Both students were called to the principal's office and asked to empty their pockets. (*Id.*). Yitzchak complied and nothing incriminating was found on him. (*Id.*). No charges of any kind were brought. His mother had not been called. (*Id.*).

Yitzchak told his mother that another student had told him that defendant Jose Martinez-Elias, apparently referring to Yitzchak, had warned him to "watch out who he makes friends with and who he hangs out with because certain negative assumptions and conclusions will be made about him. . . as a result of those associations." (*Id.*). She also alleges that on or about October 3, 2010, the other student involved in the October 1 incident told Yitzchak that a school employee told his parents that he "should not associate or remain friends with Yitzchak "because negative inferences and conclusions will be made about" him "if he continues to associate with" him.

(*Id.*).

II. CONTENTIONS

Plaintiffs contend that Yitzchak will be irreparably harmed by the school's "constant harassment, slander and interference" with his "ability to be part of the School Community," which affects his education and ability to obtain the necessary credits to graduate, that they have established a likelihood of success on the merits because the school's actions violated Yitzchak's rights, and that the balance of equities lies in their favor because the school will not be harmed by an injunction. (*Hirsch Affid.*). They also allege that there was no justification for the October 1 search, because the earlier searches were fruitless and plaintiff was exonerated of the previous charges against him. (*Id.*). In support, they rely on Devorah Hirsch's affidavit, the amended complaint verified by her, and a letter she sent to the school following the October 1 incident. (*Id.*, Exhs. A, B).

Defendants argue that plaintiffs are not entitled to injunctive relief given the existence of probable cause for the searches and the absence of any likelihood of success on the merits, that plaintiff will not suffer irreparable harm because he had been neglecting his schoolwork before the 2009 search and he continues to neglect his school work and attend classes, and that the balance of equities is in defendants' favor because the school's important interest in keeping the students free of illegal drug transactions supersedes Yitzchak's interest in being free from scrutiny and suspicion. (*Colt Aff.*). Defendants also maintain that plaintiffs are unable to establish a likelihood of success on the merits on their defamation claims because the alleged statements attributed to them constitute vague opinions that do not specifically refer to plaintiff. (*Id.*). They also claim that plaintiffs mischaracterize the dismissal of the charges against him

after the hearing, as the charges were dropped only because the witnesses had declined to testify. (*Id.*). In support, defendants rely on Livanis's affidavit; school records reflecting Yitzchak's failing grades, his lack of interest in school, frequent absences and failure to complete required assignments; a notarized statement from the teacher who reported Yitzchak's conduct which led to the October 1 search, and signed statements from students alleging that he had offered to sell them drugs. (*Id.*, Exh. A).

III. ANALYSIS

A preliminary injunction may be granted where the moving party can show (1) a likelihood of success on the merits, (2) irreparable injury in the absence of the relief requested; and (3) a balance of equities in the moving party's favor. (CPLR 6301; *Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 [2005]).

In order to show a likelihood of success on the merits, plaintiffs here must demonstrate a likelihood that they will prevail in the action against defendants, that defendants' conduct toward Yitzchak has irreparably injured his education and ability to obtain the necessary credits to graduate, and that his interest in obtaining an education and the necessary credits to graduate outweighs defendants' interest in keeping the school drug-free.

It is firmly established that students on school property are entitled to Fourth Amendment protection against unreasonable searches and seizures. (*Matter of Gregory M.*, 82 NY2d 588, [1993]; *People v Scott D.*, 34 NY2d 483, 487 [1974]). However, school safety agents are held to the standard of "reasonable suspicion, not probable cause, in determining the reasonableness of a search. (*Gregory M.*, 82 NY2d 588, *citing New Jersey v T.L.O.*, 469 US 325[1985]; *In re Steven A.*, 308 AD2d 359 [1st Dept 2003]). Consequently, a student's expectation of privacy is balanced

against the school's interest in keeping the school and its students free of illegal activity.

(*Gregory M.*, 82 NY2d at 593-594; *In the Matter of Haseen N.*, 251 AD2d 505, 506 [2d Dept 1998]).

The school's March 2009 search, which was based on the report of identified individuals that Yitzchak was smoking marijuana in the gym locker room, was amply supported by reasonable suspicion that he had committed a crime. (*Gregory M.*, 82 NY2d at 590; *see eg In the Matter of William P.*, 57 AD3d 1509, 1510 [4th Dept 2008 [search of student reasonable, based on information from another student that respondent possessed a gun in his book bag]). The principal also relied on her own observations of Yitzchak's appearance and behavior to justify her decision to ask a safety agent to search his backpack. That the search yielded only circumstantial evidence of drug use, or that the school was compelled to drop the charges when the witnesses refused to testify does not diminish the basis for the search. Likewise, given the principal's awareness of Yitzchak's previous activity on the school premises, the October 1 search was, under the totality of the circumstances, reasonable. (*Scott D.*, 34 NY2d 483, 489 [factors to be considered are in determining sufficiency of cause for search are child's age, history and record, prevalence and seriousness of problem to which search directed, and exigency to conduct search without delay]). As the searches conducted here are supported by reasonable suspicion, plaintiffs have not shown a likelihood of success on the merits.

Nor have plaintiffs shown irreparable harm, absent any demonstration that baseless searches are imminent. That one subsequent search was supported by minimal suspicion does not constitute harassment. Moreover, defendants' evidence indicates that Yitzchak's scholastic shortcomings and the possibility that he will not graduate are in large part the result of his pre-

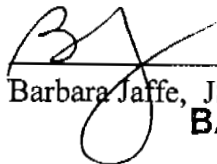
March 2009 conduct. In any event, plaintiffs submit no evidence that defendants are preventing Yitzchak from attending class or completing his assignments. Hearsay statements attributed to miscellaneous school personnel, allegedly told to anonymous students and repeated to Yitzchak, who submits no affidavit, are inadmissible. (*See People v Alvarez*, 44 AD3d 562 [1st Dept 2007] [evidence relying on multiple levels of hearsay inadmissible, even where original statement has non-hearsay purpose]).

IV. CONCLUSION

Given defendants' important interest in keeping its schools free of drugs by imposing the relatively minimal intrusion in issue here, plaintiffs have not shown that the balance of equities tips in their favor. (*See Gregory M.*, 82 NY2d at 593 [minimal privacy interests outweighed by governmental interest in school safety]). Accordingly, it is hereby

ORDERED, that plaintiff's motion for a preliminary injunction is denied.

This constitutes the decision and order of the court.


 Barbara Jaffe, JSC
BARBARA JAFFE
 J.S.C.

DATED: January 3, 2011
 New York, New York

FILED

JAN 05 2011

NEW YORK
 COUNTY CLERK'S OFFICE