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The Right to Search Students

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Student search can be a tool for maintaining safe schools, but school administrators must balance students' individual rights with the school community's need for a safe learning environment.

Littleton, Jonesboro, Springfield, West Paducah, and Pearl. The school tragedies in these communities brought the threat to school safety into the public conscience and moved school safety onto the U.S. public agenda. Safety threats, once thought to be only an urban problem, are a concern for urban, rural, and suburban areas alike. Although schools are among the safest places for children to be, education policymakers and administrators continue to look for ways to protect students and staff. One tool for keeping schools safe is the use of student searches.

Students in U.S. public schools have the Fourth Amendment right to be free from unreasonable searches. This right is diminished in the school environment, however, because of the unique need to maintain a safe atmosphere where learning and teaching can occur. Schools must strike a balance between the student's right to privacy and the need to maintain school safety.

The courts have recently expanded the right of school officials to conduct student searches, resulting in part from recent acts of school violence and heightened public scrutiny. A search that was illegal 20 years ago now may be a legal search. Unfortunately, no definitive test exists for determining what constitutes a legal search. Moreover, what may be legal in one jurisdiction could be illegal in another locality because search law is so fact- and context-specific. This vagueness leaves teachers, administrators, policymakers, and school security and law enforcement personnel wondering what constitutes a legal search of a student in a public school.

Reasonable Suspicion

The Fourth Amendment to the U.S. Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Before 1985, doubt existed about whether this right applied to students in the public schools. Schools argued that administrators acted *in loco parentis*—in the place of the parent—while students were at school. In 1985, the U.S. Supreme Court determined that the Fourth Amendment applies to students in the public schools (*New Jersey v. T.L.O.*, 1985). The Court concluded, however, that the school environment requires an easing of the restriction to which searches by public authorities are normally subject. School officials, therefore, do not need probable cause or a warrant to search students.

The Court articulated a standard for student searches: reasonable suspicion. Reasonable suspicion is satisfied when two conditions exist: (1) the search is justified at its inception, meaning that there are reasonable grounds for suspecting that the search will reveal evidence that the student has violated or is violating the law or school rules, and (2) the search is reasonably related in scope to the circumstances that justified the search, meaning that the measures used to conduct the search are reasonably related to the objectives of the search and that the search is not excessively intrusive in light of the student's age and sex and the nature of the offense.

In *New Jersey v. T.L.O.*, a teacher's report of a student smoking in the bathroom justified a search of the student's purse. Since this landmark decision, several cases have debated what constitutes reasonable suspicion:

- Four students huddled together, one with money in his hand and another with his hand in his pocket, does not provide reasonable suspicion (*A.S. v. State of Florida*, 1997).
- An anonymous phone call advising an administrator that a student will be bringing drugs to school, coupled with the student's reputation as a drug dealer, creates reasonable suspicion to search the student's pockets and book bag (*State of New Hampshire v. Drake*, 1995).
- A report made by two students to a school official that another student possesses a gun at school constitutes reasonable suspicion to search the student and his locker (*In re Commonwealth v. Carey,*1990).

- An experienced drug counselor's observation of a student who appears distracted and has bloodshot eyes and dilated pupils justifies taking the student's blood pressure and pulse (*Bridgman v. New Trier High School District No. 203,* 1997).
- The fact that the search of all but one student in a class fails to reveal allegedly stolen property gives school officials reasonable suspicion to search that student (*DesRoches v. Caprio,* 1998).
- The odor of marijuana in the hall does not provide reasonable suspicion to search all students' book bags, purses, and pockets (*Burnham v. West*, 1987).

Although the legal standard for reasonable suspicion is clear, the application of it in different contexts is not always as clear. The Court has even noted that

articulating precisely what reasonable suspicion means . . . is not possible. Reasonable suspicion is a commonsense, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. (*Ornelas v. United States*, 1996, at 695)

Probable Cause and Student Consent

School officials need only reasonable suspicion to search students in public schools, but sworn law enforcement officials normally must have probable cause to search students. Probable cause to search exists when "known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband . . . will be found" (*Ornelas v. United States*, 1996, at 696). But are law enforcement officials assigned to schools to maintain safety subject to the reasonable suspicion standard or the higher probable cause standard? The answer depends on whether the court views law enforcement personnel assigned to the school as school officials or law enforcement officials.

When the police or school administrators act at one another's request, they run the risk of becoming one another's agents. Such a relationship could change the standard necessary to conduct a student search. Some courts treat police officers as school officials subject to the lower standard of reasonable suspicion when they search students at the request of school administrators (*In the Interest of Angelia D.B.*, 1997). Other courts hold that school officials conducting a search on the basis of information from the school resource officer are acting as agents of the police and are, therefore, subject to the higher standard of probable cause (*State of New Hampshire v. Heirtzler*, 2000). The mere presence of a sworn law enforcement officer during a search by a school administrator does not trigger the need for probable cause (*Florida v. D.S.*, 1996).

School officials and sworn law enforcement officers may conduct a search without reasonable suspicion or probable cause if the student voluntarily consents to the search. Voluntariness is determined on the basis of the circumstances—including the student's age, education level, and mental capacity—and the context of the search. When consent is granted, officials may conduct the search only within the boundaries of the consent. If a student consents to the search of her purse, for example, an administrator may not search her locker unless the search of the purse provides probable cause or reasonable suspicion to search the locker. School officials and law enforcement officers are not required to advise students that they have a right to refuse to give consent to search. Some school policies or state regulations, however, may require that they advise students of their rights.

Some school policies require students to provide consent to a search or risk discipline. In at least one federal circuit, the court has upheld this policy (*DesRoches v. Caprio*, 1998). In this case, all but one student consented to a search of their personal belongings. The search of the consenting students revealed nothing. Pursuant to school board policy, DesRoches was suspended for 10 days for failure to consent to the search. The student claimed that his Fourth Amendment rights were violated because the administrator did not have reasonable suspicion to search him. The court held that when the search of all other students in the class failed to reveal the stolen item, the administrator had reasonable, individualized suspicion to search DesRoches. Therefore, his discipline for failing to consent to a legal search was upheld.

Individual Versus Random Searches

School officials conduct individual searches when they suspect that a student or a small group of students possesses evidence of a violation of the law or school rules. Such searches are subject to the reasonable suspicion standard. Officials conduct random or blanket searches not because of individualized suspicion, but as a preventive measure. Examples of random searches include the use of metal detectors in school entrances and sweeps of parking lots and lockers. The legality of a random search depends on whether the school has a compelling interest or special need that warrants the use of a search without suspicion. The most common need articulated by schools is the prevention of drug abuse.

Perhaps the most controversial random search is the use of drug-sniffing dogs in schools. The right of school officials or police to use dogs to detect drugs in students' belongings is well established. In fact, most courts conclude that such detection is not a search because the dogs merely sniff the air around the property and that students do not have an expectation of privacy in the air around their belongings.

One federal court has recently held that the use of drug-sniffing dogs on a student's person requires individualized, reasonable suspicion. Prevention of drug abuse, according to this court, does not justify the dog sniffing the person because it intrudes on the expectation of privacy and security (*B.C. v. Plumas Unified School District*, 1999). This case changed practices in many school districts—those schools no longer use the dogs to sniff around students.

Drug-testing programs are another form of a random search. In 1995, the Supreme Court upheld a drug-testing program for student athletes because the school had a documented drug epidemic; participation in athletics was optional; the athletes had a lessened expectation of privacy because they participated in communal showering; the athletes had a heightened risk of injury; the athletes were the leaders of the drug culture; the testing procedure was minimally intrusive; and the consequence of a positive test was not discipline but treatment (*Vernonia School District 47J v. Acton*, 1995).

As schools try to expand drug-testing programs beyond the facts in *Vernonia*, courts have struggled in a number of cases to determine what is constitutional:

- *Todd v. Rush* (1998) and *Miller v. Wilkes* (1999) upheld drug testing for students participating in any extracurricular activity.
- *Willis v. Anderson* (1998) struck down drug testing for students suspended for certain disciplinary infractions such as fighting.
- *Joy et al. v. Penn-Harris Madison School Corporation* (2000) upheld a drug testing program for students who drive to school or engage in extracurricular activities.
- *Earls v. Board of Education of Tecumseh Public School District* (2001) struck down a drug-testing policy for students participating in extracurricular activities because no special need existed other than for athletes. The opinion notes, however, that schools need not wait until drug use is epidemic before implementing a testing program.
- *Tannahill v. Lockney Independent School District* (2001) struck down a drug-testing policy for all middle and high school students for lack of a compelling state interest (there was no documented drug abuse program for students in this locality).

Until the Court provides guidance on drug-testing programs beyond the facts of *Vernonia*, schools should consider the following questions before instituting a drug-testing program: How serious is the drug problem in the tested population? Have less intrusive means to combat the problem been exhausted? Did parents give consent to the search? Is the testing procedure reliable and minimally intrusive? Are the consequences of a positive search result discipline, denial of privileges, or treatment?

The primary purpose of student searches is to maintain a safe learning environment. Discipline and conviction are two secondary purposes. Usually, law enforcement personnel conduct searches to reveal evidence of a violation of the law. The seized evidence then can be used in a criminal trial to convict the student of a crime. School administrators conduct a search to gather evidence for school discipline. At times law enforcement and school administrators may, therefore, have different purposes for a potential search. One crucial difference in their purposes is the ability to use the results of an illegal search in a disciplinary hearing but not in a criminal proceeding.

School administrators face severe threats to school safety and are simultaneously held increasingly accountable to the public and policymakers to keep students safe. To keep schools safe, most administrators err on the side of

searching rather than not searching. Administrators' judgments are protected by governmental immunity as long as the search is not knowingly or willfully illegal. In fact, an administrator will not incur civil liability unless his or her conduct violates clearly established statutory or constitutional rights (*Harlow v. Fitzgerald*, 1982). Immunity is not dependent on whether the actual search violated the law but rather on the objective reasonableness of the search. Immunity protects administrators acting in good faith in a gray area of the law.

Preventive Search

As school practitioners navigate the murky waters of school searches, two practices may help successfully avoid legal challenge: debriefing and policy.

Debriefing. After a search, administrators should meet with those individuals who are involved. Record and reflect on the crucial areas of the search and learn from the reflection. This exercise may be invaluable if the search is subsequently challenged. Document the names of the people who conducted the search; the background of the student who was searched; the alleged infraction; the way the school learned of the infraction; the basis for the search (for example, how reasonable suspicion, probable cause, or consent was obtained); the time and location of the search; the names of the people who were present at the search; and the school policies that were implicated and followed. School officials should also note whether the police were involved or present during the search.

Policy. The best search policies are developed by school boards who work collaboratively with local law enforcement officials, local judges and attorneys, school staff, and community members. A sound policy can make the difference between a legal or illegal search. Sound school search policies should have a mission statement: to maintain a safe learning environment. They should outline techniques for searching students, from the least intrusive to the most intrusive means (metal detectors, canines, breath tests, urine tests, pat downs, strip searches), and they should describe the types of searches students may be subjected to while on school property or at a school function (locker searches, automobile searches, personal belongings, and personal searches). The policies should explain what happens to seized possessions; define consent searches and note how consent may be obtained and the consequences for failing to provide it; state that lockers and other school property are provided for students' use, are under the school's control, and are subject to search at all times; and require that students and parents acknowledge that they have read and understood the school search policy.

Good policies can guide educators' actions, but school staff members need to remember that what constitutes a legal student search depends upon the context. Despite the lack of clarity about whether to apply reasonable suspicion or probable cause in different situations, courts are more willing now than ever to find student searches legal to preserve safety. In the final analysis, school personnel should balance the student's expectation of privacy with the school's unique need to create and preserve a safe learning and working environment.

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