Safe Schools and the Law

Roles, Duties, and Best Practices

Workshop Description

This session organizes and discusses the most frequently asked legal questions on collaboration between educators, school security officials and law enforcement. Successful strategies and model provisions implementing school-based partnerships are featured in this legal update. Each participant will be encouraged to discuss the implications of the law on his/her current policies and procedures.

Presentation Overview

Effective Collaboration and Safe Schools: What Every Cop and Educator Needs to Know

These materials present an overview of the common legal issues that arise when school resource officers are assigned to public school campuses. Its contents are addressed to both the educator and the law enforcement officer who share a common interest in making campuses safer for learning while avoiding legal pitfalls. Cases, statutes and policies are presented to highlight both typical problems and potential solutions to the SRO/educator relationship.

The theme is collaboration: detailing the implications of laws that require or authorize the educator and the law enforcement officer to combine their common interest in preserving a safe and effective learning environment. This section is not intended to provide an exhaustive legal analysis of SRO and educator collaboration or of any federal or state laws discussed herein. Each SRO and educator should also consult local policy manuals and other resource materials as a supplement to this section to complete their research of what is permitted and what is required.

When school resource officers come onto a primary or secondary school campus, they encounter a challenging legal environment. There are many reasons for this and understanding the nature of the environment will assist both the educator and the law enforcement officer in meeting their common objectives.

The challenge to the SRO is to avoid confusion when rules change and/or the objectives of each agency come into conflict. The rules are subject to change because they come from so many different sources; federal, state and local law will each affect the nature of the duties that must be performed by the SRO. Federal law primarily addresses the rights of the students through constitutional and statutory provisions that limit the power of government officials. State law also speaks to student rights, expanding or diminishing the expectation of privacy for students who attend public schools. State law may also directly define the nature of the role to be performed by the SRO and in many cases will outline the manner in which collaboration between local agencies will take place. Local law typically provides a more specific focus for campus codes of conduct and local law enforcement policies, and combine with internal agency policies to identify goals, objectives and job descriptions for all personnel.

The rules are also subject to change in order to avoid legal problems that may arise regarding the proper role of each agency when responding to campus misconduct and crime. A collaborative relationship between law enforcement and schools creates fresh challenges for the SRO, who must, in effect, navigate between two totally different worlds brought together by a specific common objective to preserve the learning environment from disruption and crime.

The SRO, as a representative of law enforcement, clearly has an independent interest in preserving the campus environment as a part of a total community policing strategy. This interest exists separate and apart from educational codes of conduct and mission statements. But while the SRO is first a trained peace officer specifically sworn to serve and protect the community, the campus environment gives rise to additional duties under unique circumstances that in some incidents will enhance and in others will be incompatible with the rules that govern ordinary law enforcement.

The same challenge applies to the educator as well. Educators have an insular interest in maintaining a safe and effective learning environment as a part of the total strategy of achieving the educational mission. This interest exists without regard to community strategies of policing or prosecutorial objectives. However, the recent increase in the range of foreseeable misconduct by students and others on campus now makes some sort of relationship with law enforcement essential. Educators who

Frequently Asked Questions

desire to avert a crisis situation and effectively deter serious and violent illegal behavior will look beyond their codes of conduct and implement new policies that reach out to other agencies that provide additional resources that will help preserve the campus.

Simply put, the effective utilization of the SRO is all about collaboration of resources and matching needs to solutions. The rules governing the conduct of the SRO should and do change to fit the circumstances and nature of the tasks required. This is not to say, however, that no standards exist for optimizing the strengths of each member. There are two broad scenarios into which all SRO/educator collaboration will fit. Each scenario describes vastly different degrees of difficulty to effective collaboration and should be used as barometers to evaluate whether, in fact, any legal problems exist to the use of school resource officers on campus.

Frequently Asked Questions on Collaboration between Schools and Law Enforcement

This section is designed to provide responses to frequently asked questions that are basic to understanding the legal nature of the relationship that develops when law enforcement collaborates with educators. It is intended to supplement a formal discussion by state and local policymakers regarding the types of interagency plans they wish to consider between educators and law enforcement.

The Appendix provides recent cases for those wishing to examine the legal issues more fully.

Most, if not all forms of interagency cooperation at schools are designed to provide an additional resource for educators seeking to maintain a safe learning environment. The case law on this partnership is not as fully developed as the law regarding the scope of authority of each agency working alone when encountering juveniles. As a result, there are at least two schools of thought regarding what the law permits and what the law requires of each agency.

The first school of thought is that the rules governing law enforcement generally should apply to school/COPS collaboration. This body of law is enormous and rather precise regarding the conduct of police when encountering citizens. It covers the range of police conduct, from the manner in which investigations are conducted, how custodial stops proceed, when searches are initiated and when persons are subject to arrest. The limitations on police action usually reflect official policies designed to avoid violating the rights of citizens. The probable cause requirement of the Fourth Amendment figures greatly into understanding the role of the police on campus and in the community generally. Police usually are well trained regarding the factual circumstances that give rise to probable cause as well as to its exceptions.

Compared to the legal guidelines that apply to the educator, the law enforcement standard is clearly more restrictive. Despite this, its application in school/COPS activities is sometimes preferred. Application of this standard shortens the training cycle of officers assigned to campus using most, if not all, of the previous training regarding proper conduct. This standard may also be preferred as a way of proceeding cautiously in the collaboration, hoping to minimize both controversy in the community and liability in the courts.

The second school of thought adapts education law for the development of rules for the school/COPS team. This body of law is less well known to law enforcement and members of other local agencies, but it is just as fully developed and stands on its own in providing guidelines for conduct in dealing with juveniles. This law is organized around the theme of the educators' authority to preserve a safe and effective learning environment in light of the education mission.

The scope of authority is more permissive than the scope that applies to law enforcement. Educators are allowed to act in response to student conduct that interferes with the education mission and activities. In addition to this power, recent decisions suggest that educators may be proactive to discourage undesirable conduct of all kinds – that which is overtly disruptive as well as that which is inconsistent with the education mission and campus rules. The primary requirement on educators is to make a measured response to juveniles, one that is not beyond the scope of the legitimate concerns to which the educator is responding. The "reasonable in inception and reasonable in scope" requirement is designed to encourage the educator to constantly assess the nature of the fit between campus rules and the reality of the campus environment.

In addition to this theme, education law also imposes a disclosure requirement on educators (to make known the rules and

The Legal Standards

the standards of conduct to students prior to enforcement) and a fairness requirement (to provide students with notice and an opportunity to be heard when discipline is meted out). Together the power to control campus life while providing due process clearly allow educators to operate from a position of strength when encountering juveniles.

When state and local jurisdictions set out to organize a school/COPS team the educational rules are immediately attractive. Law enforcement is often eager (despite the need for additional training) to determine how many of the rules governing educational conduct can be made applicable to officers assigned to local campuses. Educators prefer staying with the rules of the their trade for a variety of reasons. First, responsibility for the campus climate remains primarily on the educator and using a set of rules unsuited for that task (probable cause) seems counterproductive. Second, the application of law enforcement rules frustrate the desire of many educators for hands-on intervention with juveniles-in-need, using tools that stop short of disciplinary proceedings and the documented accusations that accompany this process. These resources include the curriculum, extra-curricular programs and school sponsored events as well as staff-on-student counseling and peer-on-peer counseling and intervention.

The question and answer narrative which follows presents the current state of the law on school/COPS collaboration. The following summarizes the rules that each jurisdiction should review and consider as they enter into a memorandum of understanding on the duties and responsibilities of each agency:

- educators do not generally become agents of law enforcement when collaborating for the purpose of maintaining a safe campus. Educators may choose to be so, but the rules of school/COPS collaboration do not require it.
- the probable cause standard does not apply to the activity of educators on campus. Courts will determine the reasonableness of campus rules on a case-by-case basis. But, a preference is clearly emerging – to allow educators to act based on their suspicions that an intervention is necessary as to a student or group of juveniles. This lower standard will permit a wider range of inquiry and involvement with students when educators feel the need to determine that "all is well" on campus.
- law enforcement officers (SROs) assigned to school campuses may become agents and resources to the educator. Law enforcement may choose not to assume this role, but the rules of school/COPS collaboration allow educators to initiate and direct the manner in which SROs provide assistance. This, in effect, allows the SRO to wear two hats – that of the peace officer when probable cause is established (and when crises occur) and that of a resource to the educator to assist in maintaining a safe and effective learning environment.
- the rules of law enforcement will apply to the activities of the school/COPS relationship when the educator is following the lead of the SRO (or peace officer) in determining the steps and policies that will apply to a juvenile on campus. The law does not permit the SRO to sidestep constitutional law by pretending to enforce the school code of conduct and other educational guidelines while really initiating ordinary law enforcement activity over which the officer has control.
- state and local law (statutes and court decisions) will clarify the nature of the school/COPS relationship and should be consulted frequently.

What is the Legal Standard that Governs the Action of Law Enforcement Officials on Campus?

Peace officers remain peace officers without regard for whether they are assigned to a school as a SRO or make frequent contact with a school on their daily beat. The collaboration with an educator does not diminish the responsibilities and duties of a peace officer. As a result, activities that are indistinguishable from law enforcement duties performed by peace officers at other sites but which happen to involve persons who are on campus and are prompted by events which take place on the campus will trigger the primary law enforcement duty. The SRO might be responding to a crisis situation that occurs on campus requiring the expertise of law enforcement in restoring the peace, conducting an investigation and determining if crimes have been committed. In this context it makes no difference whether the SRO is responding to a call from the site administrator or the district office or a 911 dispatcher. The essence of the "routine response" is that it falls within the core purpose for which law enforcement exists. The ordinary rules will affect the manner in which investigations are conducted, how custodial stops proceed, when searches are initiated and when persons are subject to arrest. The fact that a school is the forum for the police activity adds nothing to the nature of the work that must, in any event, be done.

The legal standard that applies to campus work of this sort is the probable cause standard of the Fourth Amendment and the protection against self-incrimination standard of the Fifth Amendment. As a result courts have uniformly held that acts initiated and led by law enforcement officials on campus trigger most, if not all of the same protections given other citizens who are the subject of a police investigation.

A good example of this approach is found in the so-called police questioning or interrogation cases. In these cases law enforcement officials appear on campus to pursue an investigation or the SRO requests that a student be brought in for questioning. Most courts use a total circumstances approach to determine whether the encounter between the SRO or other police official creates a custodial climate triggering constitutional protections. The elements included in this examination by the courts illustrate the strict approach applied to police-initiated and police-led activity on campus.

- juvenile's age and experience
- juvenile's background and intelligence
- capacity of juvenile to understand the implication of waiving rights.
- juvenile's experience with police
- opportunity for juvenile to have access to a parent or other supportive adult.

Ordinarily, a police-led inquiry does not receive benefit of the lower standard that applies to educators, even when the educators summon the student and remain present while the questioning takes place. Since a student would be subject to school disciplinary measures if he/she does not come to the office when told to do so, most courts will find a custodial environment is created by the encounter.

Therefore, unless the student is told that he/she is not under arrest, and can leave at any time, and does not have to answer any of the officer's questions a custodial relationship will be found by the courts. In fact, as the age of the student goes down the likelihood of even these warnings changing the legal standard becomes remote.

See the police questioning case in the Appendix.

Therefore, there is good reason for SROs and other law enforcement officials to be aware of the two hats they wear when assisting educators on campus. It will not always be easy to determine which hat is appropriate, but it will be essential for the SRO to know when to lead and when to follow the educator.

The memorandum of understanding between law enforcement and schools should give some attention to the proper roles of all parties to avoid confusion and the appearance of arbitrariness in the partnership.

515 U.S. 646,652 (1995)
Vernonia, 515 U.S. at 664.
536 U.S. 822; 122 S. Ct. 2559; 2002 U.S. LEXIS 4882 (2002),

What Is The Legal Standard That Governs The Actions Of Educators On Campus?

In New Jersey v. T.L.O., 469 U.S. 325, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985), the United States Supreme Court decided that school officials' special need for flexibility and swiftness in responding to discipline problems made the warrant and probable cause requirements inappropriate for school officials in the school setting. The Supreme Court also decided that "'strict adherence to the requirement that searches be based on probable cause' would undercut 'the substantial need of teachers and administrators for freedom to maintain order in the schools.'" T.L.O, 469 U.S. at 340,

The Justices were unwilling to give educators a total exemption from the search and seizure requirements as did previous rulings in some of the state courts. But the Supreme Court gave educators a partial exemption from the need to obtain a warrant based upon probable cause. It acknowledged that preserving an appropriate educational climate was an important, delicate, and highly discretionary function. The interests of teachers and administrators in maintaining discipline in the classroom and on campus, wrote Justice White, would be furthered by a less restrictive rule of law that would encourage school officials to maintain a balance between schoolchildren's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning could take place.

This part of the T.L.O. rule has two new components. The warrant requirement of the Fourth Amendment is replaced with the requirement that the youths subject to school discipline be under the authority of school officials. Its purpose is to limit the power of school officials' to the acts of student violators. This change also emphasizes the limited nature of new rules; school officials cannot assume authority over persons and things not part of the campus environment.

The Court then held that in-school searches need only be supported by reasonable suspicion not by probable cause. The legality of a search of a student, opined the Court, should depend simply on the reasonableness, under all the circumstances, of the search.

> "Determining the reasonableness of any search involves a determination of whether the search was justified at its inception and whether, as conducted, it was reasonably related in scope to the circumstances that justified the interference in the first place. Under ordinary circumstances the search of a student by a school official will be justified at its inception where there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."

The *T.L.O.* decision thus confirms many of the notions that school administrators had always held: that the law permits educators to respond to campus safety problems as the need dictates, provided the actions are reasonable. In addition, the decision acknowledged the need for school officials to react in a timely fashion to misconduct and authorized a shorter response time than would be applicable to ordinary law enforcement.

After TLO, the evolution of the authority of the educator is breathtaking, expanding to allow the exercise of discretion not just in response to campus disruptions but also in implementing proactive measures to prevent misconduct from occurring. The code of conduct is, for the educator, a separate disciplinary device and can be implemented with the goal of maintaining a safe and effective learning environment.

Proactive Campus Enforcement and the Suspicionless Search

Surprisingly, the U.S. Supreme Court had little difficulty extending the scope of educators authority for suspicionless, generic searches. In Vernonia School District v. Acton,[1] educators were allowed to conduct random, mandatory, suspicionless searches (by testing urine samples for drugs) of students who participated in sponsored athletic programs. Fourth Amendment standards were sufficiently flexible to allow such testing because the "relevant question", opined the Justices, "is whether the search is one that a reasonable guardian and tutor might undertake."[2]

Most recently, in Board of Education v. Earls,[3] the Court clarified and extended the Fourth Amendment rules on suspicionless searches by upholding a policy that required all students participating in interscholastic competitive activities of any kind to submit to drug testing. Justice Thomas wrote the majority opinion for a Court that declares that the power to maintain safe campuses includes the authority "to discover … latent or hidden conditions, or to prevent their development." "[The interest to keep children safe] is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion."[4] In place of an objective requirement of some nexus or precision between those tested and any actual drug problem, the Court substitutes a presumption that educators will act in good faith in the communities to which they are accountable. As a result, drug testing policies are valid if they "reasonably [serve] the School District's important interest in detecting and preventing drug use among its students."[5].

The *Acton* case has a typical student rights fact pattern: policy collides with student preferences. In the fall of 1991, James Acton enrolled to play football at one of Vernonia School District's grade schools.[6] Because he refused to consent to the drug test required by the district's policy of random, suspicionless tests on student athletes, school officials would not let Acton participate.[7] Acton and his parents filed suit alleging that the policy violated Acton's constitutional rights.[8] In an opinion written by Justice Scalia,[9] the Supreme Court held that random, suspicionless drug testing of student athletes was "reasonable" under the Fourth and Fourteenth Amendments.[10]

The Earls decision served to expand and clarify Acton. In Earls, The Tecumseh, Oklahoma, School District's student drug testing policy required students to submit urine samples for drug testing as a condition for participating in interscholastic competition. The policy was implemented in response to perceptions shared by parents, teachers, administrators, counselors, and the Board of Education that student drug use remained a persistent problem in the schools. Students who refuse cannot participate in any competitive activity. Participating students who test positive are subject to a graduating scale of requirements. After the first positive test a student may continue in an activity if he or she agrees to drug counseling and follow-up testing. Students who test positive a second time within one school year are suspended from the competitive activity for fourteen days and may return to the activity after agreeing to four hours of substance-abuse education and follow-up testing. Students who test positive three times within a school year are suspended from the competitive activity for the rest of the school year. Records of student drug tests were kept separate from the usual education records and results were shared only with the student, parent, principal, athletic director, and coach of the relevant activity. Law enforcement officials were not notified of a positive drug test by a student.
At the heart of the matter is the belief that "Fourth Amendment rights … are different in public schools than elsewhere; [thus], the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."[11]

Thereafter, the Earls majority uses the Oklahoma litigation to reach beyond the actual controversy in order to simplify the judicial resolution of future conflicts over campus search policies. The Court offers several justifications for rethinking the mod-

ern authority of educators. Educators, accountable to their communities, have a duty to provide a safe and effective learning environment.

> A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Schoolchildren are routinely required to submit to physical examinations and vaccinations against disease. Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern. [12]

Two different types of suspicionless search cases began to work though the courts prior to Earls. The first category presented Acton-like fact patterns; attempts by school officials to implement drug testing under circumstances similar in purpose, if not in scope to those of the Oregon educators. The courts invalidated all of the policies, uncertain over the precise fit of the elements present in the Acton rationale as well as being unsure of the weight to be given to the limited factual focus on athletes.[13] The decisions reflect the middle road taken by the courts on student drug testing. To these judges outcomes after the Acton decision in favor of educators would not rest on a presumption of greater authority when acting in good faith, but rather would follow a factual showing of a special need. Despite the fact that after Earls all of the decisions in this category are of questionable legal value, they are still useful as a barometer below in assessing whether or not student drug testing makes good policy.

In the second category of Pre-Earls cases the lower courts reached a different outcome in an application of Acton principles to suspicionless searches that while less intrusive were more expansive: the search for contraband. These policies did rely on the presumption of greater authority, upholding contraband searches of the entire student body even when the special needs show-

1 - 515 U.S. 646,652 (1995)

2 - Vernonia, 515 U.S. at 664.

3 - 536 U.S. 822; 122 S. Ct. 2559; 2002 U.S. LEXIS 4882 (2002),

4 - 2002 U.S. LEXIS 4882, at 14-15.

5 - 2002 U.S. LEXIS 4882, at 30

6 - See Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514, 1517 (9th Cir. 1994), vacated, 115 S. Ct. 2386 (1995) (hereinafter Acton I).

7 - See id.

8 - See id.

9 - Justice Scalia was joined by Chief Justice Rehnquist, Justice Kennedy, Justice Thomas, Justice Ginsburg and Justice Breyer. See Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2388 (1995) (hereinafter Acton II).

10 - See id. at 2396. The Supreme Court thus reversed the Ninth Circuit holding which held that because of the lack of individualized suspicion and the seriousness of the intrusion, random drug testing of student athletes was unconstitutional. See Acton I, 23 F.3d at 1527.

11 - 2002 U.S. LEXIS 4882, at 13

12 - 536 U.S. at 829.

13 - In Tinidad School Dist. No. 1 v. Lopez By and Through Lopez, 963 P.2d 1095, 129 Ed. Law Rep. 812, 98 CJ C.A.R. 3450 Colo. (1998), a member of the school band refused to consent to suspicionless drug testing implemented by the school for participants in extra-curricular activities.. The state court held that the testing policy was unconstitutional because the policy was expanded to include students involved in all extra-curricular activities without proof that band members were actually involved in drugs. In Tannahill v. Lockney Independent School Dist, 133 F.Supp.2d 919, 152 Ed. Law Rep. 549 N.D.Tex., Mar 01, 2001,, the federal dicstrint court invalidated a mandatory drug testing programs for all students and staff. A parent's refusal to consent to drug testing was construed as the equivalent of a "positive" test. The suspicionless program was too wide and too intrusive. Once again, the school district was unable to show a special need for such broad testing. The Court found that there was insufficient evidence to support the claim by educators that drug use by students and staff was increasing.
In addition, therre is the lower court ruling in Earls, 242 F.3d 1264, 151 Ed. Law Rep. 752, 2001 CJ C.A.R. 1521 10th Cir.(Okla.) Mar 21, 2001 where the court held that the

testing all participants in extracurricular activities was unconstitutional. The appellate court held that neither a concern for safety nor a concern about the degree of supervision provided a sufficient reason for testing the particular students whom defendants chose to test under the policy. Also, the immediacy of defendants' concern was greatly diminished because the evidence did not show an epidemic of illegal drug use in the school district. Defendants failed to demonstrate that there was some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students would actually redress its drug problem.. Similarly, in [PUT INDIANAN CASE HERE].

14 - See Brousseau v Westerly et al., 1998 WL. 313321 (D. Rhode Island, 6/11/98). Parents on behalf of the student brought a suit alleging Fourth Amendment violations when the school officials conducted a suspicionless search of minor and her classmates when a knife was discovered missing in the cafeteria. The students were separated by sex and patted down by an employee of the same sex. The minor asserts that the searches were unreasonable. The court in applying Acton determined the search to be reasonable. The court reasoned that the government's interest in determining the whereabouts of the knife out weighed the student's interest in their privacy. The court further reasoned that school officials reasonably suspected the knife to be taken by a student with the culprit having the intent to injure someone. The court further reasoned that the pat down of the students were the least intrusive and was consistent with the goal of finding the knife.

In Commonwealth v. Cass, 709 A.2d 350 (Supreme Ct. of Penn., 1/7/98), a student was charged with possession of marijuana on school grounds when a general search of the school lockers by drug sniffing dogs revealed the presence of the drugs. The court in citing Acton upheld the search as constitutional. The court reasoned that the interest of the government in keeping drugs out of schools outweighed the students' interest in privacy. The court further reasoned that the students had a limited expectation of privacy to their lockers since the know they are subject to search by school officials. The court further reasoned that the use of a dog, which has already been determined to not be a search, was an appropriate means for determining the presence of drugs and was minimally intrusive. Finally, the court determined the search "was a practical means to effectuate the principal's concerns over possible drug use".

In Beth Smith v. James McGlothlin, 119 F.3d 786 (U.S. Ct of Appeals, 9th Cir., 7/17/97) students brought an action against the school when a group of students were searched. The group of 20 students was off campus on a school morning when they were approached by the principal and a school security guard. The principal observed a cloud of smoke over the heads of the students and saw activity that he believed to be the discarding of cigarettes. Having no individual suspicion, the principal ordered all the students to school and conducted a mass search which revealed the defendant in possession of knives. The court found that the search was reasonable. The court reasoned, pursuant to Acton, that individual suspicion was not necessary to justify a search conducted by a school official in keeping with enforcing school policy.

In Louisiana v. Barrett, 683 So.2d 331, (La.App. 1st Cir., 11/8/96). The minor was in a classroom at school when all the students were instructed to empty the contents of their pockets onto the top of the desk and leave the room. After the students left, a drug sniffing dog was brought into the room and sniffed the items on the desk and the students book bags. The dog subsequently indicated the presence of marijuana in the minor's wallet and book bag. The searches were done randomly as too the individual students, but the administrator admitted that the classes licked were "troubled" classes. The student argued that the statute (LSA-R.S. 17:416.3(A)) that governs searches in schools only allow the use of metal detectors when searching without reasonable suspicion. The court, however, determined the searches to be reasonable. The court reasoned that the statute was created not to limit the type of searches school officials could conduct, rather, the statute serves to give a legal defense to those school officials. The court further reasoned that in the event the search did violate the statute, it does not make it unconstitutional and thus requiring the application of the exclusionary rule. Finally, in applying Acton, the court reasoned that the use of drug dogs was minimally intrusive to the student while the great interest of the government in keeping drugs out of the schools was met.

In Florida v. J.A., a juvenile, 679 So.2d 316, (Ct of Appeal of Florida, 3rd District, 10/2/96). The minor was found to be in possession of a gun when his room was subjected to a random search with the use of a hand held metal detector. The minor filed a motion to suppress in district court arguing the need for individual suspicion to justify search. The minor further argued the use of a independent search team not consisting of school officials or personnel amounted to a police search and therefore required probable cause. The trial court agreed with the minor and suppressed the evidence. The Court of Appeals of Florida, however, determined the searches to be legal and reversed the decision. The court reasoned that the Acton decision allowed for the use of suspicionless searches. The court further reasoned that the searches by use of the metal detector was minimally intrusive and only resulted in physical contact when the student possible had contraband detected by the detector. The court further reasoned that the presence of violence in schools and the government need to protect students outweighed the students right to privacy.

In In the Interest of S.S., 680 A.2d 1172, (Superior Ct. of Penn., 7/15/96). The minor upon entering the high school was immediately subjected to a search by a metal detector and a pat down. The procedure led to the discovery of a box cutter in the coat of the minor. Minor was subsequently arrested and unsuccessfully sought an order making the cutter inadmissible in court due to a illegal search. The court determined the search, in keeping with the holding in Acton, was legal. The court reasoned that the high rate of violence in Philadelphia high schools justified the use of random, suspicionless searches. The court further reasoned that the school's interest in ensuring security outweighed the students' interest in their privacy.

In People v. Pruitt, et al., 278 Ill.App.3d 194, (Appellate Ct. of Illinois, 2/26/96). Pruitt was discovered to be in possession of a gun when he went through metal detectors at school. The use of metal detectors at the school is random and assisted by police officers. The trial court suppressed the gun, the appellate court, however, reversed. The court, in applying Acton, reasoned that the searches were minimally intrusive since it did not involve any touching unless the detector went off. The court further reasoned that the government interest in protecting students in an age of school violence out weighed the student's interest in their privacy.

In Thompson v. Carthage School District, 87 F.3d 979, (U.S. Ct of Appeals, 8th Cir., 6/28/96). All of the male children from the sixth to twelfth grade were searched when a school bus driver indicated to the school principal that there might be a knife on campus. The bus driver apparently reached this conclusion when she found one of the seats on the bus with multiple slashes. The searches were conducted with in each class and involved the students emptying their pockets and being searched by a metal detector. While the minor did not have a weapon, the minor did have a matchbox that contained a white substance later determined to be crack. The minor was subsequently expelled and brought this action for wrongful expulsion. The trial court found that the search was in violation of minor's fourth amendment right and found for the minor. The U.S. Court of Appeals, however, found that the search was legal. The court, in citing Acton reasoned that the search not based on individual suspicion was not a violation of the Fourth Amendment. The court further reasoned that, while the school does not have a serious problem with violence, the principal had reason to believe there was a weapon on campus, creating a hazard to the children. The court additionally reasoned that the search was minimally intrusive and well within the guidelines of Acton.

People v. Dilworth, 169 Ill.2d 195, (Supreme Court of Illinois, 1/18/96). Dillworth was a student at n alternative high school for students with behavioral problems. The minor was searched by a liaison police officer permanently assigned to the school when a teacher reported that the student may be in possession of drugs. After searching minor and finding no drugs, the officer seized an searched a flashlight in minor's possession, thus finding the drugs. Dilworth, in his motion to suppress argued that the search was illegal because a officer conducted the search, thereby requiring probable cause, not reasonable suspicion. The trial court did not agree, but the Appellate court did and suppressed the evidence. The Supreme Court of Illinois, however, reversed the Appellate court's decision. The court reasoned that, per Acton, the students' level of expectation of privacy is lower when balanced against the school need to maintain a "proper educational environment". The court further reasoned that the need to keep students safe "not only warranted, but required, a departure from the probable cause standard. The court, therefore determined that reasonable suspicion was required and held the search to be constitutional.

A.J.Moule v. Paradise Valley Unified School District, 66 F.3d 335, (U.S. Court of Appeals, Ninth Cir., 7/10/95). The minor brought a suit through his parents challenging the school district's policy of randomly drug testing all athletes. The plaintiff won the initial petition with the district court determining that the policy violated the students Fourth Amendment rights. However, this decision was over turned when the Supreme Court decided Acton.

Desroches v Caprio et al., 974 F.Supp. 542, (Virginia, 7/31/97) reversed in DesRoches v. Caprio, 156 F.3d 571, 1998 U.S. App. LEXIS 23361 (4th Cir. Va. 1998).
Desroches filed a suit alleging that his constitutional rights were violated in connection with a search of his and other student's backpacks when a fellow student reported their shoes missing. Desroches asserts that the search was illegal due to the lack of individual suspicion. The court determined that the search was illegal. The court, in citing Acton, determined that the requirement of individual suspicion can only be overcome when there are strong government interest. The court further reasoned that an balancing test that weighed an individual rights against a intrusive search versus the schools interest in keeping order was necessary to determine if a suspicionless search would be allowed. In balancing the schools need to determine the whereabouts of the shoes versus the minor's rights, the court found the search in violation and ordered the school to remove all references of the incident from his school records. On reversal, the appellate court held that the school officials had authority to conduct the searches.

In re Latasha W..
60 Cal. App. 4th 1524 Pa. (1998 Cal. Court of Appeal)
Court upheld school district policy of random, suspicionless searches of students for weapons using hand-held metal detectors. Educators were able to show a special need. No individualized suspicion was needed in the face of evidence of the presence of guns causing an unsafe campus climate.

In re F.B.
555 Pa. 661, 726 A.2d 361, 133 Ed. Law Rep. 528
Pa. (Mar 02, 1999)
Juvenile was arrested following a search for weapons conducted as a pre-condition to entry for all students at the high school. The court upheld the search under both federal and state law. Notice of the high school's search policy had been set forth in its manual and notices were both posted in the building and mailed to students. The interest in keeping weapons out of public schools was obvious.

15 -536 U.S. 832.
16 - 536 U.S. 837.
17 - 536 U.S. 837.
18 - The policy in Tecumseh, Oklahoma, was, in fact, bases around such a combination. Justice Ginsberg's diisent notes, "the School District here has not exchanged individualized suspicion for random testing. It has installed random testing in addition to, rather than in lieu of, testing "at any time when there is reasonable suspicion." (cite to Earls).

19 - See In RE Patrick Y; 358 Md. 50; 746 A.2d 405 (2000) . It is in the Appendix.

ing fell below the standard imposed by the lower courts for validating student drug testing policies.14

These pre-Earls lower court cases highlight the path to understanding how the Fourth Amendment both expands and contracts to accommodate the new model. The role of probable cause and reasonable suspicion is clarified. The former is eliminated entirely; the latter is made optional. The TLO decision is not overruled. Rather, it is repositioned after Acton and Earls. TLO is rejected as a minimum requirement in student search cases. The Justices did not see the usefulness in micromanaging campus problem solving and ruled that; "reasonableness under the Fourth Amendment does not require employing the least intrusive means ".[15] Justice Thomas was concerned that TLO as a minimum requirement would do more harm than good on come campuses.

> "[W]e question whether testing based on individualized suspicion in fact would be less intrusive. Such a regime would place an additional burden on public school teachers who are already tasked with the difficult job of maintaining order and discipline. A program of individualized suspicion might unfairly target members of unpopular groups. The fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use."[16]

Justice Breyer agreed in concurrence:

> "[A] contrary reading of the Constitution, as requiring "individualized suspicion" in this public school context, could well lead schools to push the boundaries of "individualized suspicion" to its outer limits, using subjective criteria that may "unfairly target members of unpopular groups,"…, or leave those whose behavior is slightly abnormal stigmatized in the minds of others. … If so, direct application of the Fourth Amendment's prohibition against "unreasonable searches and seizures" will further that Amendment's liberty-protecting objectives at least to the same extent as application of the mediating "individualized suspicion" test, where, as here, the testing program is neither criminal nor disciplinary in nature."[17]

Individualized suspicion becomes simply another tool in the kit of safe school policies for educators. Notwithstanding the fears of the Court, its use in managing campus life should not diminish. Educators, parents and students have acquired a comfort zone with its use and it works well in response to most campus discipline scenarios. The warning of the Court as to the litmus of reasonable suspicion does serve to suggest to educators when a shift to suspicionless policies should take place. As such, suspicionless searches will increasingly become legitimate options for educators seeking to maintain a safe campus environment-especially after Earls. The comprehensive safe school plan would combine both suspicion-based and suspicionless policies; especially the suspicionless searches for contraband as a way of discouraging both drugs and weapons on campus.[18] If the more intrusive, invasive search of drug testing can be implemented after Earls, then the contraband searches will be even easier to validate and implement.

In addition to these strategies, another suspicionless search policy is gaining in popularity at about the same time: the proprietary interest search of the physical plant. This search which relies on the absence of a student expectation of privacy as to public property, allows educators to monitor student use of lockers and other school resources.[19] These three components: the search based on individualized suspicion, the suspicionless search for contraband and the proprietary interest provide the benchmark for an effective use of the array of powers now available to the educator.

What is the Legal Standard that Governs the Action of Educators and SROs When they Collaborate?

Courts have described the standard that applies when schools and SROs collaborate as one which diminishes Fourth Amendment and Fifth Amendment requirements when the educator initiates and leads the participation of the police officer:

> The special relationship between teacher and student also distinguishes the setting within which school children operate. Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws and facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between school authorities and pupils. Instead there is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education.
>
> A police investigation that includes the search of a public school student, when the search is initiated by and conducted by police, usually lacks the "commonality of interests" existing between teachers and students. But when school officials, who are responsible for the welfare and education of all of the students within the campus, initiate an investigation and conduct it on school grounds in conjunction with police, the school has brought the police into the school-student relationship. (emphasis added).
>
> State of Wisconsin v. Angelia D.B., 211 Wis. 2d 140, 155; 564 N.W.2d 682 (1997). (Citations in the original quote to T.L.O., 469 U.S. at 349 (Powell, J., concurring) have been omitted).

The discussions and analysis by the courts appear to fall into four categories.

First, the T.L.O. standard has been applied in cases in which a school official initiates the search or in which the police involvement is minimal. See, e.g., Cason v. Cook, 810 F.2d 188, 191-92 (8th Cir. 1987); J.A.R. v. State, 689 So. 2d 1242, 1243 (Fla. Dist. Ct. App. 1997); In re Interest of Angelia D.B., 211 Wis. 2d 140, 564 N.W.2d 682, 688 (Wis. 1997).

Second, the "reasonable under the circumstances" standard established in T.L.O. also has been applied where a school resource officer, on his or her own initiative and authority, searches a student during school hours on school grounds, in furtherance of the school's education-related goals and in keeping with authority granted by the educator. See, e.g., People v. Dilworth, 169 Ill. 2d 195, 661 N.E.2d 310, 317, 214 Ill. Dec. 456 (Ill. 1996); In re S.F., 414 Pa. Super. 529, 607 A.2d 793, 794 (Pa. Super. Ct. 1992).

Third, courts have applied the more forgiving reasonableness standard when educators request the assistance of law enforcement that is otherwise controlled and led by the educator. See, e.g., In the matter of Josue., a Child, 128 N.M. 56; 989 P.2d 431 (1999).

Fourth, some courts have not allowed the reasonableness standard and have held that probable cause applies in cases in which "outside" police officers initiate a student search as part of their own investigation, or in which school officials act at the behest of "outside" police officers. See, e.g., Tywayne H., 1997 NMCA 15, P10, 123 N.M. 42, 933 P.2d 251; F.P. v. State, 528 So. 2d

1253, 1254-55 (Fla. Dist. Ct. App. 1988).

Under proper school-initiated, school-led collaboration the educator may ask the SRO to

- perform an act;
- be present as a witness when the educator acts;
- generally lend support and provide assistance in maintaining a proper learning environment.

Please see the Appendix for cases in each category.

What Rules Govern Responses to the Misconduct of Special Education Students?

Implementing policies on student misconduct becomes more complicated when the student is receiving special education. The laws that govern the treatment of special education students creates special duties and unique responsibilities. Often this law can create problems for interagency collaboration if the rules are not fully understood. The following brief summary of the law will help remind educators and introduce SROs to the different set of options that should be considered in their collaborative efforts.

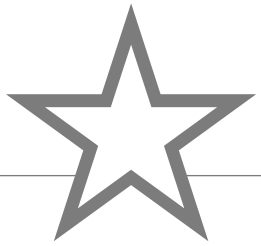
While each state has provisions governing the rights of special education students, these rules are based upon, and look to the federal laws. Occupying most of the field is the Individuals with Disabilities Education Act, (IDEA), 20 USCS § 1401 and its accompanying regulations. This law bring together rules which began under the Education for All Handicapped Children Act of 1975 (20 USCS §§1401 et seq.) later changing to IDEA in 1990 (Act Oct. 30, 1990. P.L. 101-476, Title IX, § 901(a)(2), (3), 104 Stat. 1142, effective 10/1/90). Of some relevance as well are the provisions of § 504 of Rehabilitation Act of 1974 (29 USCS § 794). Together the laws provide a framework for providing special education resources to meet the needs of emotionally handicapped children as well as physically handicapped children.

Generally, special education rules require that educators design resources to meet the unique needs of the student. The phrase used to characterize this climate is a "free appropriate public education" 20 USCS § 1401(18). An education is deemed "appropriate" if it offers a child the opportunity to achieve his/her full potential commensurate with opportunities provided to other children, handicapped and nonhandicapped. The individualized education program (IEP) must also be structured to give the student a reasonable chance to acquire skills needed to function outside of institution. Programs should be designed individually to the particular needs of handicapped child, and should include related support services necessary to enable the handicapped child to benefit from special program provided. Special education programs that are detrimental to disabled child, causing him/her to stagnate or regress educationally or emotionally, are not appropriate.

More specifically, educators must educate students with disabilities in the least restrictive environment (LRE). 34 C.F.R. s 300.551. LRE refers to the legal principle that students with disabilities should be educated as close as possible to the regular education environment. Most educators, in response to this notion, attempt to "mainstream" a special education student. "Mainstreaming" is an educational term that refers to the practice of placing students with disabilities in regular education classes with appropriate instructional support. Mainstreaming is one means of meeting the LRE requirement; but the IDEA does not always require mainstreaming. It only requires that each student be educated in the environment that is the least restrictive for that student.

Four factors must be considered when determining the least restrictive environment:

- the educational benefits of placement in a regular classroom;
- the nonacademic benefits of such a placement;
- the effect the student would have on the teacher and other students in the class; and
- the costs of mainstreaming.



Removal from regular education should occur only when absolutely necessary. An educator is justified in making such a decision if the result of including the student with disabilities in regular education is detrimental to the education of other students, or when there is conclusive evidence that an inclusionary placement will not be successful. For the educator, even when a lawful decision is made to separate a disruptive special education student from regular classes, some level of appropriate instructional support may be required.

As a practical matter, when school safety problems result form the misconduct of a special education student several alternatives exist.

Misconduct that arises out of the disability
When misconduct is traceable to a special education student educators cannot apply the code of conduct in the ordinary way. Generally, if the misconduct arises out of the disability or special needs of a student, the responses to the behavior must be channeled through the IEP and related support services. Removal from regular education may be allowed, but will usually be brief and will always require continued provision of educational services.

Misconduct that is not a result of the disability
When a special education student is expelled due to serious misconduct that is properly determined in a Multidisciplinary Conference ("MDC") not to be a result of his/her handicap, then the child can be expelled and during the expulsion all educational services may cease. Virginia v. Riley, 106 F.3d 559 (4th Cir. 1997) Doe v. Maher, 793 F.2d 1470, 1482 (9th Cir. 1986), affirmed as modified sub nom., Honig v. Doe, 484 U.S. 305, 98 L. Ed. 2d 686, 108 S. Ct. 592 (1988). Doe v. Board of Educ., 115 F.3d 1273, (1997).

Misconduct that is reported and punished through the Juvenile Justice System
When a special education student commits an act that is disruptive, this act may violate both the educators code of conduct and state law. A range of acts (assaults, threats, thefts, truancy, smoking, possession and/or use of drugs, etc.) raise the option of addressing the behavior through either the IEP or the juvenile justice system or both.

If the misconduct is reported to law enforcement (or to another agency), the provisions of IDEA will not apply:

"Nothing [in IDEA] shall…prohibit an agency from reporting a crime committed by a child with a disability…or prohibit… law enforcement or [courts] from exercising their responsibilities…." (emphasis added).
20 USC § 1415(k)(9)(A)

This "interagency exception" is based on the fact that IDEA and its correlative provisions apply to educators who accept federal educational funding conditioned upon compliance with its rules. Other local agencies that share a common interest with educators in providing needed services to children and their families are not governed by this law.

For more detail on specific special education issues, the reader should look to the following:
What services must federally assisted schools provide for handicapped children under Education of the Handicapped Act (20 USCS §§ 1401 et seq.). 63 ALR Fed 856.

Requisite conditions and appropriate factors affecting educational placement of handicapped children. 23 ALR4th 740.

What are the Standards for Sharing Information Between Educators And SROs?

The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (1994). (FERPA) is the primary law that governs educational records privacy. FERPA, also known as the Buckley Amendment, has as its aim the protection of the privacy interests of students through standards for records keeping designed to discourage abusive and unwarranted disclosure. Under FERPA, the Department of Education has promulgated rules that govern privacy rights with respect to education records. Failure to comply with FERPA could result in the loss of federal education funding. The reach of FERPA is broad, covering practically every public primary and secondary school as well as public and private universities and colleges.

FERPA was enacted to further the twin goals of providing parents access to education records and limiting nonconsensual disclosure. Its sponsors announced that

> "[t]he purpose of the Act is twofold -- to assure parents of students, and students themselves if they are over the age of 18 or attending and institution of post secondary education, access to their education records and to protect such individuals rights to privacy by limited the transferability of their records without their consent.".

Significantly then, FERPA, is a "hard copy law," focusing on the uses to which information contained in the education record file is put. This characterization will become examined later when myths are discussed, but for now it is important to note that as a matter of law FERPA does not apply to oral communication between educators and others concerning information the knowledge of which does not rely on the education record.

FERPA attempts to eliminate the abuse of student records by creating a minimum standard for educational record management. School Districts are required to have a written policy that discloses its record keeping practices, 20 U.S.C. s 1232g(e) and 34 C.F.R. s 99.7(a). This policy must be disclosed periodically to students and parents. FERPA thus forces educators to announce valid guidelines and then to live by them. The minimum standard requires that students be given access to the contents in their educational record file. The access must be meaningful: schools must make location and access an easy matter by spelling out where records are kept, 34 C.F.R. s 99.6(a)(2)(iv). Students are permitted to challenge the veracity of the contents of information contained in the file, 20 U.S.C. §1232g(a)(2) and 34 C.F.R. s 99.6(a)(7). A log chronicling the use of the educational record file and its contents must be kept, in effect, forcing the educators to "log in" and "log out" of a student's file, 34 C.F.R. s 99.6(a)(5) and s 99.32.

FERPA was not intended to cut off communication between educators and government agencies. FERPA protects privacy interests of students through standards for records keeping designed to discourage abusive and unwarranted disclosure. Not surprisingly, both the enabling legislation and the regulation promulgated by the Department of Education address in great detail the concept of "disclosure". **FERPA permits in certain circumstances two-way communication** between schools and other agencies with whom they share a common interest.

Aside from the mechanical guidelines placed on educators, FERPA limits the uses to which the information contained in the educational record file can be put. Categories of information are created in order to distinguish sensitive and potentially damaging information from that which is benign. The following are the keys to proper disclosure under the provisions of FERPA.

Keys to disclosure under FERPA

The requirements of FERPA are dependent on 5 factors:

- Is the information an "education record"?
- who is talking and who is listening?
- what type of record information is disclosed?
- has the parent consented?
- are there special circumstances?

• Is the information an "education record"

The focus of FERPA is on the "education record." The "education record" is defined as "those records, files, documents, and other materials that contain information directly related to a student; **and** are maintained by an education agency or institution or by a person acting for such an agency." 20 U.S.C. § 1232g(a)(4)(A). Generally, most written information schools maintain on students (in any form, including computerized databases) will be considered an education record. Nevertheless, written information that pertains directly to a student that is not maintained by the school or by an agent of the school is not an education record. If the information is not an education record, FERPA does not apply.

For example, an important distinction for educators that wish to exchange information about violent juveniles with the juvenile justice system is the FERPA exception for **school law enforcement unit records**. These are records kept by "[a] law enforcement unit of the education agency or institution that is created by that law enforcement unit for the purpose of law enforcement.", 20 U.S.C. § 1232g(a)(4)(B)(ii). For the case that prompted this change, see Student Press Center v. Lamar Alexander, 778 F. Supp.1227 (1991). These records are not considered education records and may be disclosed to other agencies by the school's law enforcement unit (the "unit" may be a person on campuses that do not run a safety department) without prior consent of the parents.

Under this exception to FERPA, "law enforcement unit" means "any individual, office, department or division", 34 C.F.R. part 99.8. that is authorized to enforce the law or to refer violations to appropriate authorities. "Law enforcement" concerns the violation of criminal laws and does not include disciplinary action taken under the school code of conduct. However, the unit may also perform "other non-law enforcement functions" for the school without losing its exemption. These other functions may include "investigation of incidents of conduct that might lead to disciplinary action" against a student under the school code of conduct. Obviously when internal school discipline does not implicate a violation of federal, state or local law, records of disciplinary action are considered education records and cannot be disclosed without prior consent.

• The flow of information.

Schools are **not** prohibited by FERPA from **receiving** information pertaining to any child. It is a common misconception that FERPA cuts educators out of the juvenile justice and juvenile child care networks to preserve the privacy of students. Schools are entitled to receive any information another agency cares to share with them unless state law prohibits the disclosure. Therefore, even when doubts exists as to which exception under FERPA will support the sharing of education record information, schools may benefit from being on the receiving end of information about juvenile offenders, their terms of court supervised

probation as well as juveniles at-risk receiving services from other local agencies.

• Type of record information disclosed
The focus of FERPA is on the "education record." "Education record" is defined as "those records, files, documents, and other materials **that contain information** directly related to a student; and are maintained by an education agency or institution or by a person acting for such an agency.", 20 U.S.C. § 1232g(a)(4)(A). In this way, FERPA, like most state laws on juvenile records, is a hard copy law, focusing on the uses to which information contained in the education record file is put. In an early attempt to clarify the intent of FERPA law on this point Senator Pell (a co-sponsor) acknowledged that "it could be said that the act's purposes are best achieved when fewer records are kept and used.", Congressional Record-Senate; December 13, 1974; page 39859. Senator Buckley (a co-sponsor) further explained that the amendment is intended to require education agencies to conform to fair record keeping practices.

Within the education record, FERPA treats some categories of information differently from others, in effect creating a two-track scheme for record disclosure.

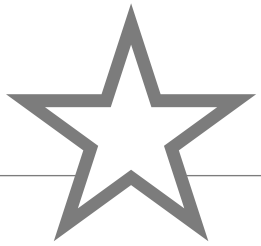
"Directory Information" from the education record may be disclosed without prior parental consent after a school gives notice of its intention to do so**.** A critical distinction exists between "directory information" and all other information present in the file. School districts are permitted to choose how much benign or "directory information" from the education record it will disclose. Directory information includes, but is not limited to the following:

Directory Information includes:

- student name
- address and telephone
- date, place of birth
- major field of study
- official activities
- dates of attendance
- height and weight for sports
- degrees and awards received
- most recent previous education institution

20 U.S.C. s 1232g(a)(5)(B) and 34 C.F.R. s 99.3, "Directory Information;" section 99.6(a)(6) and s 99.37.
The items of directory information are made up of information not generally considered by the Department of Education to be harmful or an invasion of privacy if disclosed. In most instances disclosure is helpful to both the institution and the student. Even so, school districts must establish a policy and give notice as to the type of directory information it intends to disclose. Parents who wish to retain the right to consent to disclosures of directory information must so advise the school.

• Parental Consent
Education records not considered directory information generally cannot be released without consent unless the exceptions contained in the rules apply. FERPA gives parents important rights of access and control over the education record and its contents. School Districts are required to have a written policy that sets forth how it complies with FERPA, 20 U.S.C. s



1232g(e) and 34 C.F.R. s 99.7(a). Parents rights under FERPA must be announced annually and provided to parents on request. FERPA thus forces educators to announce guidelines and to live by them. Under FERPA, parents must be given access to the contents of the education record file. The access must be meaningful: schools must make location and access an easy matter by spelling out where records are kept. Parents are permitted to challenge the veracity of the contents of information contained in the file. A log chronicling the disclosures of the education record file and its contents must be kept.

- **Special Circumstances**

FERPA provides several exceptions to its prior parental consent requirement. These exceptions clearly convey the intent of Congress that educators be allowed to exchange information with other agencies on a timely basis as specific needs arise.

- **Records Exchange with other Educators**

FERPA authorizes schools to disclose education record information concerning disciplinary action taken against a student to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student, 20 U.S.C. s 1232g(h). This type of exchange was always deemed by the Department of Education to be acceptable under FERPA, but the myth soon overtook legislative intent. The result of this misconception often placed educators within the same campus at odds over who could see the education record of a student. The transfer of records to other school districts was hardly considered. The 1994 amendments specifically clarify this matter leaving educators free to decide where, when and to whom record information concerning student conduct should be sent. This clarification is particularly timely for the school-aged offender who crosses state lines. Now under FERPA, this juvenile can no longer can assume that the record of their campus crimes will not follow them.

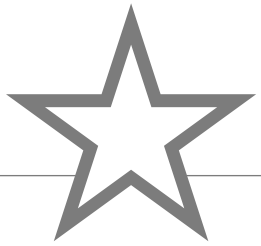
- **Court Orders**

Nonconsensual disclosures that take place **pursuant to judicial process**, through either a court order or a lawfully issued subpoena are exempt, provided an attempt is made to notify the parent prior to disclosure, 20 U.S.C. § 1232g(b)(2)(B). This court order might take on several forms. Most will be shaped by the type of authority possessed by the court in the jurisdiction. The court order may be incident driven--which is to say that as each juvenile case is decided, an appropriate order is made a part of the record and sent to the school where the juvenile is enrolled. The court order may also be more generic, essentially authorizing local educators to exchange information with other agencies.

The relationship between FERPA and court orders is also important because court orders also satisfy the laws in those states that limit the disclosure of juvenile record information kept by courts and law enforcement agencies. The court order, therefore, serves to support exchanges of information by both agencies, each of which has a different snapshot of the juvenile's conduct with the same need for a complete picture.

- **Crisis Response**

Nonconsensual disclosures of education record information **in response to an emergency** is exempt from the consent requirement, 20 U.S.C. § 1232g(b)(1)(I). The emergency exception is in some ways the most obscure of those contained in the recent series of FERPA amendments. The concept of "emergency" is strictly construed to those events in which it is necessary for the educator to " protect the health or safety of the student or other persons". The fear that this provision would provide incentive for abusive disclosure never been realized. To the contrary, most educators have failed to acknowledge the fact that most events of serious and violent crime on campus satisfy this exception to FERPA. Weapons, guns, drugs, and gangs qualify as well as those events involving the health of a student who may by his mere presence place others at risk.



• Authorization by State law

The most sweeping amendment to FERPA involves state record sharing laws. State and local legislators may now authorize the sharing of information. Schools may rely on these laws to release information on students to other agencies, 20 U.S.C. § 1232g(b)(1)(E). FERPA only requires that

- the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and
- the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.

After States have authorized information sharing, FERPA requires that schools

- maintain a record, kept with the education records of each student, which will indicate all individuals, agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information; and
- any agency that violates the disclosure limitations shall be prohibited from obtaining access to information from education records for a period of not less than five years.

This exception permits states to, in effect, waive the FERPA privacy provisions to encourage interagency collaboration regarding juveniles. Several states have juvenile records polices that require and authorize sharing of juvenile record information between agencies in the state.

In compliance with FERPA educators can:

- Participate under an interagency agreement with other agencies in their juvenile justice system and **receive** information from these agencies on juveniles with whom they share a common interest;
- Share information with other agencies verbally that reflects personal knowledge or knowledge obtained from others, PROVIDING, the information does not come from the education record.
- Share information with other agencies in their juvenile justice system after **obtaining prior consent** by the parent or guardian;
- Share information **without obtaining prior consent** under at least the following circumstances:

  1. When the disclosure is made in compliance with court orders and lawfully issued subpoenas;

  2. if the educational agency is initiating legal action against the student or the parent (and the educator has made reasonable efforts to give prior notice);

  3. when providing information to other schools that have a legitimate interest in the behavior of the student;

4. when authorized by state law (providing the agency to whom the records are disclosed certifies in writing that the information will not be disclosed to any other party, except as provided under state law without prior written consent of the parent of the student);

5. when the records disclosed are law enforcement records kept by a law enforcement records unit of the educational agency or institution for the purposes of law enforcement;

6. in connection with an emergency if the disclosure is necessary to protect the health or safety of the student or other individual.

Appendix

Reasonable Suspicion Triggered in School/COPS Relationship
SRO Present at a Search at the Request of a School Official

K.K., A CHILD, Appellant, v. STATE OF FLORIDA, Appellee.

CASE NO. 97-3322

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

717 So. 2d 629; 1998 Fla. App. LEXIS 12265; 23 Fla. Law W. D 2209

September 25, 1998, Opinion Filed

DISPOSITION: AFFIRMED.

JUDGES: ORFINGER, M., Senior Judge. HARRIS and ANTOON, J.J., concur.

OPINIONBY: M. ORFINGER

K.K. appeals from an adjudication of delinquency, following a plea of no contest to possession of less than 20 grams of cannabis wherein he reserved the right to appeal the denial of his motion to suppress.

We agree that the appropriate standard to be applied in determining the validity of a search by a school official on school property is whether the official had a reasonable suspicion of illegal activity. See New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985); State v. D.S., 685 So. 2d 41 (Fla. 3d DCA 1996); S.D. v. State, 650 So. 2d 198 (Fla. 3d DCA 1995). As was held in People v. Dilworth, 169 Ill. 2d 195, 214 Ill. Dec. 456, 661 N.E.2d 310 (1996), quoted with approval in D.S.:

"Where school officials initiate the search or police involvement is minimal, most courts have held that the reasonable suspicion test obtains. The same is true in cases involving school police or liaison officers acting on their own authority. However, where outside police officers initiate a search, or where school officials act at the behest of law enforcement agencies, the probable cause standard has been applied." Dilworth, 661 N.E.2d at 317.

Here, the school official had a reasonable suspicion, based on information from some students, that other students were smoking marijuana in the boys restroom. He entered the restroom followed by the school resource officer who stood at the door and said nothing. Heavy smoke was evident (although from cigarettes) and smoldering butts were on the floor. The school official then searched the six or eight boys who were in the room and found the marijuana in appellant's wallet. The resource officer neither initiated the

search nor participated in it, although he was in the room where the search was conducted. Under these circumstances, and based on the law as we see it, the trial judge was correct in denying the motion to suppress.

AFFIRMED.

HARRIS and ANTOON, J.J., concur.

Reasonable Suspicion Triggered in School/COPS Relationship
SRO Conducting a Search at the Request of a School Official

IN THE MATTER OF JOSUE T., a Child,

Docket No. 19,472

COURT OF APPEALS OF NEW MEXICO

128 N.M. 56; 989 P.2d 431; 1999 N.M. App. LEXIS 85; 1999 NMCA 115; 38 N.M. St. B. Bull. 36

July 2, 1999, Filed

JUDGES: RUDY S. APODACA, Judge. WE CONCUR: THOMAS A. DONNELLY, Judge, HARRIS L HARTZ, Judge.

OPINIONBY: RUDY S. APODACA

This case presents a question of first impression in New Mexico--Does the Fourth Amendment to the Federal Constitution require probable cause for a full-time, commissioned police officer assigned to a public high school as a resource officer to lawfully search a student during school hours, when the search is conducted at the request of a school official? We answer that question negatively and hold that under the facts present in this appeal, the officer only required reasonable suspicion, the same, lower standard required of school officials.

In New Jersey v. T.L.O., 469 U.S. 325, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985), the United States Supreme Court decided that school officials' special need for flexibility and swiftness in responding to discipline problems makes the warrant and probable cause requirements inappropriate for school officials in the school setting. We believe the rationale underlying the exception to the warrant and probable cause requirements for school officials applies with equal force where, as here, a school resource officer searched a student at the behest of a school official, who we determine later in our discussion had reasonable grounds for the search.

In this appeal, Defendant Josue T. (Student), a child, entered a conditional admission to the delinquent act of carrying a deadly weapon on school premises. He appeals the trial court's denial of his motion to suppress the weapon found on him, arguing that the search and seizure by the school resource officer was unreasonable. Because we conclude that the school resource officer's search of Student was reasonable under the circumstances existing in this appeal, we hold that the search did not violate Student's Fourth Amendment right to be free from unreasonable searches. We thus affirm the judgment and disposition, as well as the trial court's denial of Student's motion to suppress the weapon discovered in the search.

I. FACTUAL AND PROCEDURAL BACKGROUND

On the day in question, Student was driven to his school, Goddard High School in Roswell, New Mexico, in another student's pickup truck. During the morning, the other student was referred to the assistant principal (the school official) because he "smelled heavily of marijuana." In an effort to determine if any other students were in possession of marijuana on the school premises, the school official contacted several of the students who had ridden to school in the pickup truck. The school official went to Student's classroom with the intention of speaking with him briefly. Before speaking to Student, the school official had spoken to and searched the driver of the pickup truck, had spoken to and searched one other student who had ridden to school in the truck, and had searched the truck. No marijuana was found during those searches.

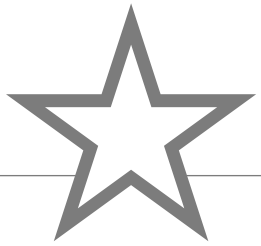
When the school official opened the door to Student's classroom and requested that he meet her in the hallway, Student immediately appeared evasive, which was not his usual manner. When Student stepped into the hallway, the school official noticed that he too smelled of burnt marijuana. At that point, the school official decided that she would take Student to her office to be searched for marijuana. Officer Reese, a school resource officer, joined the school official and Student and accompanied them to the school official's office. A school resource officer is a commissioned police officer assigned to a public school by the officer's police department. Officer Reese was employed full-time by the Roswell Police Department but had a permanent office at the high school, where he was assigned to full-time duty. In performing his duties at the school, the officer was armed and wore a police uniform.

During the time Student was being questioned by the school official outside of his classroom and as he walked with the official and Officer Reese down the hallway to be searched in the school official's office, Student kept both hands in the pockets of his baggy pants. While walking to the school official's office, both the school official and the officer noticed that Student had a large object in the right front pocket of his pants. Based on her observation of this bulging object, Student's atypically quiet demeanor, and the fact that Student kept putting his hand further and further into his pocket, the school official became concerned and wondered what Student might be hiding in his pocket.

Once in the school official's office, the school official told Student that he would be searched and that he should empty his pockets on her desk. Student emptied his left pocket, but would neither empty his right pocket nor remove his hand from the pocket, despite repeated requests to do so. Student's refusal to comply increased the school official's concern about what the Student was hiding in his pocket. She testified that she became concerned and that Student's refusal to take his hand from his pocket created a "safety issue" in her mind. For that reason, she asked Officer Reese to search Student. Based on that request, the officer directed Student to remove his hand from his right pocket, which he refused to do. Officer Reese then took Student's hand from his pocket, reached into the pocket himself, and retrieved a .38 caliber handgun.

The State filed a delinquency petition charging Student with the Unlawful Carrying of a Deadly Weapon on School Premises contrary to NMSA 1978, § 30-7-2.1 (1994). Student entered a conditional admission to this charge, but reserved the right to appeal the denial of his motion to suppress evidence of the weapon. After an evidentiary hearing on the motion to suppress, the trial court entered findings of fact, conclusions of law, and an order denying the motion. The court later entered a judgment and disposition, concluding that Student was delinquent based on his admission of carrying a deadly weapon to school. Student appeals from the judgment and the denial of his motion to suppress.

At this juncture, we observe that Student views the facts differently than we have outlined them above. He notes that, prior to his removal from the classroom, his behavior had not aroused any attention. Student emphasizes that the driver evidently



smelled of marijuana. Although the school official suspected that the students were smoking at the school, no one reported seeing Student or the driver smoking there. Student also points out that the driver did not implicate Student with possession or use of marijuana. Neither the search of the driver nor the search of another student who had been in the truck turned up evidence of marijuana.

Additionally, Student notes that Officer Reese did not testify that Student smelled of marijuana. Student states that he was cooperative as they walked down the hall. The school official testified that, at that time, she did not see anything protruding from his pockets. Student did not say anything or make threats concerning a gun. The school official testified that Student had always been respectful to her in the past. Based on this evidence, Student argues that nothing in the school official's testimony indicates her suspicion that Student was carrying a weapon. Finally, Student notes that Officer Reese did not believe he had probable cause to search Student for drugs.

Because of our standard of review, however, which we note below, Student's rendition of the facts are not determinative of the issue raised on appeal. Our review of this appeal must necessarily defer to the findings entered by the trial court, as long as those findings are supported by substantial evidence.

II. DISCUSSION

Student contends that the trial court erred in denying his motion to suppress because Officer Reese's search was unreasonable under the Fourth Amendment. This contention is based on Student's argument that the search was conducted without probable cause or a warrant and did not fall within any of the exceptions to these requirements. Because Student does not argue that he was unlawfully searched under Article II, Section 10 of the New Mexico Constitution, we limit our analysis to the Federal Constitution and do not consider whether our state constitution compels the same result. See State v. Gomez, 1997 NMSC 6, P22, 122 N.M. 777, 932 P.2d 1 (providing requirements for preserving state constitutional claim).

In particular, Student argues that the school search exception, which allows school officials to search students based on reasonable grounds without a warrant, see T.L.O., 469 U.S. at 340, 341, does not apply to the search of a student by a school resource officer. Student additionally argues that, even if this exception applies in this case, the officer here did not have reasonable grounds to support the search. Student also contends that: (1) the search cannot be justified as a search incident to a valid arrest because the officer did not have probable cause to arrest; (2) the officer did not have probable cause and exigent circumstances did not exist; and (3) the officer did not have reasonable suspicion to justify an investigatory stop, and even if an investigatory stop was permissible, a pat-down search was not. Because we determine that the school-search exception applies to the facts of this case and that reasonable grounds existed, we need not address Student's other arguments.

A. Standard of Review

When reviewing the denial of a motion to suppress, we defer to the trial court's "inferences drawn from historical facts." See State v. Tywayne H. , 1997 NMCA 15, P5, 123 N.M. 42, 933 P.2d 251. Determining the reasonableness of a search, however, is a matter of law. As such, we engage in a de novo review of the trial court's determination that the search in this case was reasonable. See id. Under our standard of review, we must consider the facts as determined by the trial court "in the light most favorable to the ruling below." <=5> In re Paul T., 1997 NMCA 71, P8, 123 N.M. 595, 943 P.2d 1048.[***10]

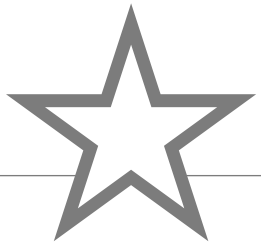
B. The T.L.O. Standard for Reasonableness Satisfies the Fourth Amendment's Reasonableness Requirement

The Fourth and Fourteenth Amendments protect individuals from unreasonable searches by state actors, including public school officials, whenever those individuals have a legitimate expectation of privacy. See T.L.O., 469 U.S. at 334, 338. The reasonableness of a particular search is usually gauged by whether the state actor had probable cause and a search warrant. See Horton v. California, 496 U.S. 128, 133, 110 L. Ed. 2d 112, 110 S. Ct. 2301 (1990). The United States Supreme Court, however, has recognized that probable cause and a warrant are not invariably required to render a search reasonable. See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653, 132 L. Ed. 2d 564, 115 S. Ct. 2386 (1995). Rather, in some cases, "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." Griffin v. Wisconsin, 483 U.S. 868, 873, 97 L. Ed. 2d 709, 107 S. Ct. 3164 (1987) (internal quotation marks omitted). For instance, school officials do not need a warrant before searching an individual student at school who is suspected of violating either the law or school policy. See T.L.O., 469 U.S. at 340. T.L.O. noted that the warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures" needed to create a safe and orderly environment for learning. Id. The Supreme Court also decided that "'strict adherence to the requirement that searches be based on probable cause' would undercut 'the substantial need of teachers and administrators for freedom to maintain order in the schools.'" Vernonia, 515 U.S. at 653 (quoting T.L.O, 469 U.S. at 340, 341). Instead, in deciding whether a student search by a school official was lawful, the Supreme Court in T.L.O. considered whether the search was reasonable under all the circumstances. See T.L.O., 469 U.S. at 341.

Here, the State argued, and the trial court agreed, that the reasonableness standard established in T.L.O. applied to student searches conducted by school resource officers at the request of school officials. Student counters that T.L.O. does not apply and that law enforcement officers should be held to the traditional and more stringent Fourth Amendment standard of reasonableness (warrant and probable cause) because they are not school officials and because they pursue different purposes when conducting a search than school officials.

Whether the T.L.O. reasonableness standard applies to searches by school resource officers conducted at the request of a school official was not answered in T.L.O. Indeed, the Court there expressly limited its holding to searches conducted by school authorities acting independently and on their own authority as custodians and educators of our youth and declined to address "the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies." 469 U.S. at 341 n.7. We thus must decide whether it is appropriate under the Federal Constitution to adopt the lower standard of reasonableness established in T.L.O., when a school resource officer searches a student at school after being requested to do so by a school official.

Courts in other jurisdictions have decided whether to apply the T.L.O. standard by considering the role of the law enforcement agent, as well as the nature and extent of the officer's participation in the investigation and search of the student. The discussions and analysis by these courts appear to fall into three categories. First, the T.L.O. standard has been applied in cases in which a school official initiates the search or in which the police involvement is minimal. See, e.g., Cason v. Cook, 810 F.2d 188, 191-92 (8th Cir. 1987); J.A.R. v. State, 689 So. 2d 1242, 1243 (Fla. Dist. Ct. App. 1997); In re Interest of Angelia D.B., 211 Wis. 2d 140, 564 N.W.2d 682, 688 (Wis. 1997). Second, the "reasonable under the circumstances" standard established in T.L.O. also has been applied where a school resource officer, on his or her own initiative and authority, searches a student during school hours on school grounds, in furtherance of the school's education-related goals. See, e.g., People v. Dilworth, 169 Ill. 2d 195, 661 N.E.2d 310, 317, 214 Ill. Dec. 456 (Ill. 1996); <=19> In re S.F., 414 Pa. Super. 529, 607



A.2d 793, 794 (Pa. Super. Ct. 1992). Third, some courts have held that probable cause applies in cases in which "outside" police officers initiate a student search as part of their own investigation, or in which school officials act at the behest of "outside" police officers. See, e.g., Tywayne H., 1997 NMCA 15, P10, 123 N.M. 42, 933 P.2d 251; F.P. v. State, 528 So. 2d 1253, 1254-55 (Fla. Dist. Ct. App. 1988).

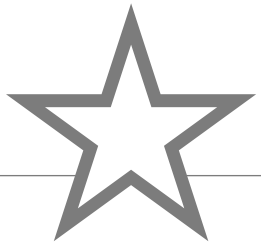
We believe the facts in this appeal fall into the first category. To begin with, we note that the circumstances here are significantly different from those in Tywayne H.. Although language in Tywayne H. might suggest that a child's expectation of privacy is lessened in school only as to school officials, but not as to police officers, this Court's analysis in Tywayne H. must be understood in its factual context. In that case, four police officers searched a student at an evening dance held at the school. The police searched the student after conducting their own investigation of the student. No school official participated in or even requested the investigation or the search. The police did not interact with, let alone cooperate with, the school administration in the search. Because the officers were collecting evidence to be used to enforce the law and were not furthering any educational goal, this Court concluded that the student's expectation of privacy was not lessened as to these police officers, even though the student was in the school building during a dance at the time of the search. See Tywayne H., 1997-NMCA-015, P 12. We thus concluded in Tywayne H. that the nature of the student's privacy interest suggested a probable cause standard rather than a reasonable-suspicion or reasonableness-under-the-circumstances standard. See id.

Here, however, Officer Reese merely assisted the school official, during the school day, at the school official's request, to protect student welfare and the educational milieu. As this court noted in Tywayne H.:

There is a sharp distinction between the purpose of a search by a school official and a search by a police officer. The nature of a T.L.O. search by a school authority is to maintain order and discipline in the school. The nature of a search by a police officer is to obtain evidence for criminal prosecutions.

Id. P 13 (citation omitted). The Wisconsin Supreme Court addressed a similar situation and concluded that, "when school officials, who are responsible for the welfare and education of all of the students within the campus, initiate an investigation and conduct it on school grounds in conjunction with police, the school has brought the police into the school-student relationship." Angelia D.B., 564 N.W.2d at 688. A school resource officer serves multiple purposes, including the prevention of crime, law enforcement, and assisting the school administration in creating and sustaining a safe environment conducive to learning. See 564 N.W.2d at 690. The school resource officer here did not initiate the investigation of Student. Rather, the school official initiated and conducted the entire investigation. Only when the school official became concerned that she was dealing with a "safety issue" did she request that the officer become actively involved--up until that point, the officer had been present but had not participated in the questioning. The officer thus searched Student only when the school official directly asked him to do so. In effect, the officer was the arm of the school official. We therefore conclude that the officer searched Student "in conjunction with school officials and in furtherance of the school's objective to maintain a safe and proper educational environment." Id. These factors lead us to conclude that the character of the search here suggests that the lower standard we have determined should apply here is appropriate.

Any other conclusion, such as requiring probable cause of school resource officers when school officials only need reasonable grounds to search, might serve to encourage teachers and school officials, who generally are untrained in proper pat down procedures or in neutralizing dangerous weapons, to conduct a search of a student suspected of carrying a dangerous weapon on school grounds without the assistance of a school liaison officer or other law enforcement official. . . . It could be hazardous to



discourage school officials from requesting the assistance of available trained police resources. . . . The proper standard for the constitutional reasonableness of searches conducted on public school grounds by school officials, or by police working at the [*63]request of and in conjunction with school officials, should not promote unreasonable risk-taking.

Id. (citations omitted). The Wisconsin Supreme Court in Angelia D.B. concluded that <=50> school officials who reasonably suspect that a student is in possession of a dangerous weapon on school grounds may request the assistance of a school resource officer to conduct a search. See id. The Wisconsin court's reasoning is both thoughtful and realistic, and we adopt it here. In doing so, we are mindful of the testimony of the school official and the school resource officer that they actually did not know what Student was hiding in his pocket. Nonetheless, both became concerned that the bulge in the pocket presented them with an unsafe situation that should be addressed in the interests of security.

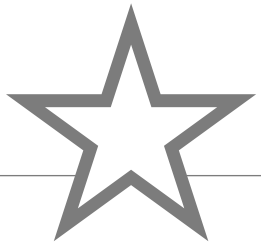
C. Reasonable Grounds Existed for the Search in This Case

Having determined that the T.L.O. standard requiring reasonableness under the circumstances applies to searches by school resource officers when undertaken at the request or direction of a school official, we now turn to whether reasonable grounds existed for the search in this case. In making such an assessment, the United States Supreme Court considered "'whether the [search] was justified at its inception,' [and] whether the search as actually conducted 'was reasonably related in scope to the circumstances [that] justified the interference in the first place.'" T.L.O., 469 U.S. at 341 (quoting Terry v. Ohio, 392 U.S. 1, 20, 88 S. Ct. 1868, 20 L. Ed. 2d 889). For the reasons that follow, we hold that reasonable grounds existed for the search in this case.

1. The Search Was Justified at Its Inception

A search is justified at its inception if the school resource officer had reasonable suspicion to believe that Student had violated a law or a school policy and that "the search would uncover evidence of the violation." Tywayne H. , 1997-NMCA-015, P 8. Here, the school official and the officer initially suspected that Student might be in possession of marijuana on school grounds, in violation of the law and school policy. For this suspicion to be reasonable, it had to be based on specific, reasonable inferences drawn from the facts and based on experience. See Terry, 392 U.S. at 27. A suspicion based on an "inchoate and unparticularized suspicion or 'hunch'" would not be reasonable. Id. In this case, the officer and the school official observed (1) Student acting in an unusually quiet and evasive manner, (2) Student refusing to empty the pocket in question, (3) Student refusing to remove his hand from the same pocket, and (4) Student's pocket bulging with an obviously heavy object. The officer testified that his professional experience informed him that Student was hiding something and that the object might be dangerous.

As noted previously, we must view the facts in the State's favor. See In re Paul T., 1997 NMCA 71, P8, 123 N.M. 595, 943 P.2d 1048. "Resolution of factual conflicts, credibility, and weight is the task of the trial court." State v. Roybal, 115 N.M. 27, 29, 846 P.2d 333, 335 (Ct. App. 1992). Under this standard of review, we hold that the school official's and the officer's suspicions that a law or school policy was being violated were reasonable. Equally important were the facts known to the school official before she decided to talk to Student. Informed that the driver of the pickup truck smelled heavily of marijuana, the school official had reason to suspect that someone in the truck had smoked marijuana on the way to school. Having such knowledge and making that inference, she could reasonably assume that one of the students possessed marijuana in the truck and still might be possessing it on school premises, not only in violation of the law but of school rules. Because a search of the truck's



driver, of another student riding in the truck, and of the truck itself did not produce the illicit drug, the school official had reason to believe that Student might have marijuana in his possession. Since Student appeared to be evasive when confronted, smelled of burnt marijuana, and kept his hands in his pockets, the school official had additional grounds to search Student.

Our holding is consistent with other states' case law providing that the odor of marijuana on or near the defendant along with other factors were "sufficient basis for a search by school officials." Alexander C. Black, Annotation, Search Conducted by School Official or Teacher as Violation of Fourth Amendment or Equivalent State Constitutional Provision, 31 A.L.R.5th 229, § 63 (1995); see also Widener v. Frye, 809 F. Supp. 35, 38 (D. Ohio 1992) (upholding search of student where he smelled of marijuana and was sluggish); In re Doe, 77 Haw. 435, 887 P.2d 645, 652-53 (Haw. 1994) (holding that search of student was reasonable where school officials detected odor of marijuana emanating from "tunnel" that student was in and which was an area where students were known to smoke marijuana); Nelson v. State, 319 So. 2d 154, 155 (Fla. Dist. Ct. App. 1975) (holding that reasonable suspicion of student existed where he was observed smoking and smelled of marijuana).

Additionally, under the second prong of the test, the search of Student's pocket was highly likely to uncover evidence of a violation because the pocket was the very location Student appeared to be hiding an unknown object. The search was therefore justified at its inception.

2. The Search Was Permissible in Scope

A search is permissible in scope when it is "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." T.L.O., 469 U.S. at 342. The search here satisfies these requirements. The search was limited to the very pocket where the school official and the officer noticed a "bulge" that Student appeared to be attempting to hide. The actual search, then, was neatly tailored to its objective--discovering what Student was trying to hide--as well as the nature of the suspected infraction. Additionally, this limited search was not excessively intrusive in light of the age and sex of the student. Student, a male, was searched by a male officer. Nothing in this search raised concerns related to Student's age. We thus determine that the scope of the search was permissible.

III. CONCLUSION We conclude that school resource officers may lawfully search a student on school grounds at the behest of a school official as long as the search is reasonable under the circumstances. We thus hold that probable cause to conduct the search was not required under the facts of this case. The search here was reasonable under the circumstances because it was justified at its inception, did not exceed the scope of its purpose, and was not overly intrusive in light of Student's age and sex. We therefore affirm the trial court's denial of Student's motion to suppress.

IT IS SO ORDERED.

Reasonable Suspicion Triggered in School/COPS Relationship
Educator Conducting a Search after Receiving Information from Police

IN RE: D.E.M., Appellee vs. APPEAL OF: COMMONWEALTH OF PENNSYLVANIA

No. 2231 Philadelphia 1997

SUPERIOR COURT OF PENNSYLVANIA

1999 PA Super 59; 727 A.2d 570; 1999 Pa. Super. LEXIS 197

September 15, 1998, Argued
March 18, 1999, Filed

JUDGES: BEFORE: KELLY, EAKIN, and OLSZEWSKI, J.J. OPINION PER KELLY.

OPINION PER KELLY, J.:

Filed March 18, 1999

In this appeal, the Commonwealth asks us to determine whether school officials act as agents of the police, where school officials conduct an investigation after being informed by police that a student may have a gun on school property. The Commonwealth also asks us to decide whether school officials must possess reasonable suspicion, supported by specific and articulable facts, before school officials can detain and question a student about an anonymous rumor that the student possesses a gun on school premises. Finally, the Commonwealth asks us to decide whether school officials must furnish a student with Miranda n1 warnings before questioning the student about conduct that violates both the law and school rules.

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n1 Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

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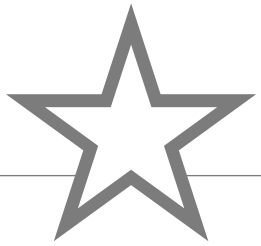
We hold that school officials do not act as agents of the police where they conduct an independent investigation based upon information the officials received from police. We also hold that school officials do not need reasonable suspicion, supported by specific and articulable facts, before merely detaining and questioning a student about a rumor concerning his possession of a gun on school property. n2 Finally, we hold that school officials [**572] need not provide Miranda warnings to a student



before questioning the student about conduct that violates the law and/or school rules. Accordingly, we reverse the order of the suppression court, which granted D.E.M.'s omnibus pre-trial motion to suppress physical evidence and remand for trial.
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n2 Our holding is limited to situations where school officials do not act at the behest of law enforcement officers.

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The relevant facts and procedural history of this appeal are as follows. On April 8, 1997, a police officer from the Shillington Borough Police Department ("officer") informed the principal and assistant principal of the Governor Mifflin Middle School of an anonymous tip that one of the students possessed a gun on school property. When the principal asked if the officer knew the name of the student, the officer identified D.E.M. The principal told the officer that he would investigate the rumor and contact him if the investigation turned anything up. n3 The officer then left the school's premises. Once the officer departed, D.E.M. was removed from class and brought to the principal's office. At this time, the principal asked D.E.M. if he had anything on his person or in his pockets which was against school rules. n4 D.E.M. said that he did not. The principal then asked D.E.M. if he would mind disclosing the contents of his book-bag. D.E.M. emptied the bag onto the principal's desk. The exposed contents of the bag did not contain any item in violation of school rules.

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n3 Governor Mifflin Middle School has an established policy to investigate all rumors concerning anything that may jeopardize the health, safety, or welfare of the students and faculty. (See N.T., 5/2/97, at 13; R.R. at R19).

n4 At the beginning of each school year, students receive a copy of Governor Mifflin Middle School's behavior code. The behavior code specifically prohibits the possession of knives and/or firearms on school property.

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Thereafter, the principal requested D.E.M.'s consent to a search of his person. D.E.M became noticeably agitated and scared. After the principal informed D.E.M. that the school was concerned about information it had received, D.E.M. agreed to empty his pockets. One pocket contained a sheathed knife, which the principal confiscated. The principal then asked D.E.M. if he had a gun in school. D.E.M. admitted that he did and stated that it was in the pocket of his jacket, which was located in the locker of another student, P.Q. The principal sent for P.Q., who was escorted to his locker. P.Q. unlocked the locker by using the correct combination on the combination dial of the lock. The principal removed D.E.M.'s jacket, which contained a loaded gun in one of the pockets. In accordance with Governor Mifflin Middle School's behavioral code, school officials contacted the Shillington Borough Police Department and turned both the gun and knife over to the police. n5
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n5 We note that state law requires school officials to report the discovery of any firearm to local law enforcement officials. See 24 P.S. § 13-1318.

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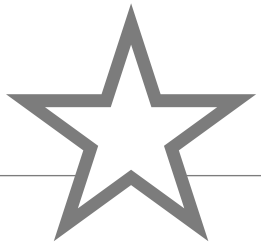

D.E.M. was arrested and charged with possession of a weapon on school property, n6 carrying a firearm without a license, n7 possession of a firearm by a minor, n8 and altering or obliterating marks of identification. n9 On April 28, 1997, D.E.M. filed an omnibus pre-trial motion to suppress the physical evidence obtained following the school officials' investigation. A suppression hearing was held on May 2, 1997. Subsequently, the suppression court found that the principal and assistant principal acted as "agents" of the police during their investigation because the police supplied information to the school officials with the intent of instigating an investigation. As such, the suppression court held that the school officials lacked the necessary reasonable suspicion to support their investigative detention of D.E.M and granted D.E.M.'s motion. The Commonwealth filed this timely appeal and certified that the suppression order in question substantially handicapped the prosecution of D.E.M. n10

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n6 18 Pa.C.S.A. § 912(a)(b).

n7 18 Pa.C.S.A. § 6106(a).

n8 18 Pa.C.S.A. § 6110.1.

n9 18 Pa.C.S.A. § 6117(a).

n10 See Commonwealth v. Dugger, 506 Pa. 537, 486 A.2d 382 (1985) (holding Commonwealth's appeal from suppression order is proper when Commonwealth certifies in good faith that suppression order substantially handicaps prosecution).

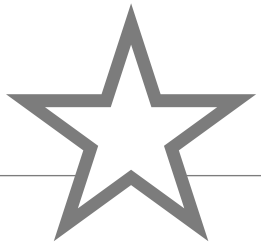
- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

On appeal, the Commonwealth raises the following issues: 1. WHETHER THE [SUPPRESSION] COURT ERRED IN RULING THAT THE JUVENILE HAD STANDING TO CHALLENGE THE SEARCH OF A LOCKER BELONGING TO A THIRD PARTY? WHETHER THE [SUPPRESSION] COURT ERRED IN CONCLUDING THAT THE SCHOOL OFFICIALS ACTED AS AGENTS OF THE POLICE? WHETHER THE [SUPPRESSION] COURT ERRED IN SUPPRESSING [***7] THE EVIDENCE PURSUANT TO COMMONWEALTH V. HAWKINS AND COMMONWEALTH V. KUE WHEN NEITHER OF THOSE CASES PRECLUDE FURTHER INVESTIGATION AFTER AN ANONYMOUS TIP? WHETHER THE [SUPPRESSION] COURT ERRED IN SUPPRESSING THE EVIDENCE WHEN THE SCHOOL OFFICIALS HAD REASONABLE SUSPICION TO CONDUCT THE SEARCH?

WHETHER THE [SUPPRESSION] COURT ERRED IN SUPPRESSING THE EVIDENCE WHEN THE SEARCH WAS CONDUCTED IN FULL COMPLIANCE WITH THE RULES WHICH WERE ESTABLISHED BY THE SCHOOL AND WHICH WERE KNOWN TO AND THEREBY AGREED TO BY THE JUVENILE AND HIS PARENTS? WHETHER THE [SUPPRESSION] COURT ERRED IN SUPPRESSING THE EVIDENCE WHEN THE JUVENILE VOLUNTARILY TURNED OVER THE KNIFE AND VOLUNTARILY CONSENTED TO THE SEARCH OF HIS JACKET WHICH PRODUCED THE GUN? (Commonwealth's Brief at 5). On appeal from the grant of a defendant's motion to suppress, this Court applies the following standard of review: When the Commonwealth appeals from

a suppression order, we follow a clearly defined standard of review and consider only the evidence from the defendant's witnesses together with the evidence of the prosecution that, when read in the context of the entire [***8] record, remains uncontradicted. The suppression court's findings of fact bind an appellate court if the record supports those findings. The suppression court's conclusions of law, however, are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts....

Commonwealth v. Nester, 551 Pa. 157, 160, 709 A.2d 879, 880-81 (1998) (citations omitted). Accord Commonwealth v. Henderson, 444 Pa. Super. 170, 663 A.2d 728 (Pa.Super. 1995) (en banc). The Commonwealth asserts that the suppression court erred in concluding that the principal and assistant principal acted as agents of the police when they detained D.E.M. and searched P.Q.'s locker. The suppression court found that the police supplied information to the school officials with the intent to instigate an investigation. The suppression court therefore treated the interrogation and search by school officials as police conduct, and held that the investigative detention of D.E.M. was not supported by reasonable suspicion. Therefore, the suppression court held that the detention and search violated the Fourth Amendment. We disagree. The resolution of whether school officials act as agents of the police is determined by an examination of the totality of the circumstances. See Coolidge v. New Hampshire, 403 U.S. 443, 487, 91 S. Ct. 2022, 2048, 29 L. Ed. 2d 564, 595 (1971); see also State v. P.E.A., 754 P.2d 382, 385 (Colo. 1988). Our analysis must include a consideration of (1) the purpose of the search; (2) the party who initiated the search; and (3) whether the police acquiesced in the search or ratified it. Commonwealth v. Ellis, 415 Pa. Super. 220, 608 A.2d 1090, 1091 (Pa.Super. 1992), appeal denied, 533 Pa. 623, 620 A.2d 489 (1993) (citing Commonwealth v. Cieri, 346 Pa. Super. 77, 499 A.2d 317, 321 (Pa.Super. 1985)). The mere fact that school [**574] officials cooperate with police, however, does not establish that the police acquiesced in or ratified the search. See Commonwealth v. Corley, 507 Pa. 540, 547, 491 A.2d 829, 832 (1985) (mere use by police and prosecutors of results of search does not serve to ratify those actions as conduct of police). The inquiry must focus on whether the police coerce, dominate or direct the actions of school officials. See United States v. Smythe, 84 F.3d 1240, 1242 (10th Cir. 1996) (citing Pleasant v. Lovell, 876 F.2d 787, 796 (10th Cir. 1989)). In the instant case, police relayed an anonymous tip to school officials that a student possessed a gun on school property. The possession of a firearm on school premises poses a serious threat not only to the school's educational environment, but also to the safety and welfare of the students and faculty. To address this kind of threat, Governor Mifflin Middle School had implemented a policy, which requires school officials to investigate all rumors about anything that jeopardizes the safety and welfare of the students and faculty. Hence, the school officials conducted the investigation principally to execute their duty to ensure the safety and welfare of the students for whom they are responsible. See Ellis, supra 608 A.2d at 1091-1092 (stating where hospital personnel take blood for their own reasons and then freely volunteer the results to police, hospital personnel do not act as agents of the police); People v. Dilworth, 169 Ill. 2d 195, 661 N.E.2d 310, 317-318, 214 Ill. Dec. 456 (Ill. 1996) (holding where school liaison police officer conducts search in furtherance of school's attempt to maintain proper educational environment, liaison officer does not act as police agent). See also United States v. Jennings, 653 F.2d 107 (4th Cir. 1981) (holding airline security do not act as agents of police where federal drug agents relayed anonymous tip and were present when drugs were discovered because airlines have own reasons for conducting search). Moreover, the police did not request or in any way participate in the school officials' investigation. In fact, the police were not even on school property when the school officials conducted their investigation. Thus, the record contains no evidence that the police coerced, dominated, or directed the actions of the school officials. Accordingly, we conclude that the principal and assistant principal did not act as agents of the police. n11 See P.E.A., supra (holding principal does not act as agent of police where police di d not request or participate in search, even though police supplied information to principal with intent to instigate search); Washington v. McKinnon, 88 Wash. 2d 75, 558 P.2d 781 (Wash. 1977) (holding school official does not act as agent of police where police relayed anonymous tip to school official with intent to instigate search if police did not direct or suggest that student be searched); Cason



v. Cook, 810 F.2d 188 (8th Cir. 1987) (holding school official is not agent of police where police were present during school official's investigation); Martens v. District No. 220, 620 F. Supp. 29 (N.D. Ill. 1985) (holding school official does not act as agent of police where police did not participate in investigation and did not direct school officials to detain and search student); Cass, supra (implicitly holding school officials do not act as agents of police where school officials initiate investigation and enlist aid of police to conduct school wide locker search).

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n11 We are mindful that school officials are agents of the state and therefore subject to the Fourth Amendment's protection against unreasonable searches and seizures. See New Jersey v. T.L.O., 469 U.S. 325, 333, 105 S. Ct. 733, 738, 83 L. Ed. 2d 720, 729 (1985). Thus, our inquiry is not whether the school officials acted as agents of the state, but whether the school officials acted as agents of the police. This inquiry is necessary because the legality of a search conducted by school officials is measured by a lower standard than a search conducted by law enforcement officers. See generally Id.; Commonwealth v. Cass, 551 Pa. 25, 709 A.2d 350 (1998); Commonwealth v. J.B., 719 A.2d 1058 (Pa.Super. 1998).

----------End Footnotes----------

We must now decide whether school officials need reasonable suspicion before they can detain and question a student about a rumor that the student possesses a gun on school property. D.E.M. asserts that Terry v. Ohio's n12 reasonable suspicion standard, which governs police "investigative stops," applies to stops conducted by school officials. D.E.M. therefore argues that the school officials did not have the reasonable suspicion necessary to detain and question him about his possession of a gun on school property because the school officials' information was based on an anonymous tip. n13 Thus, D.E.M. complains that the evidence discovered after his initial detention must be suppressed as fruit of the poisonous tree. The Commonwealth, however, claims that it makes no sense to begin a Fourth Amendment inquiry involving a search conducted by school officials with the question of whether a valid stop has occurred. The Commonwealth asserts that Terry's reasonable suspicion standard, used to examine police "investigative stops," is inapplicable to the detention and questioning of students by school officials. Instead, the Commonwealth argues that teachers must immediately address rumors concerning the possession of weapons on school premises to ensure the safety of the students for whom they are responsible. We agree.

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n12 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

n13 The reasonable suspicion standard has been interpreted to preclude a police "investigatory stop" on the basis of an uncorroborated anonymous tip. See Commonwealth v. Jackson, 548 Pa. 484, 698 A.2d 571 (1997); Commonwealth v. Hawkins, 547 Pa. 652 692 A.2d 1068 (1997); Commonwealth v. Kue, 547 Pa. 668, 692 A.2d 1076 (1997).

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The United States Supreme Court has held that the Fourth Amendment's prohibition of unreasonable searches and seizures

applies to searches of students conducted by public school officials. n14 New Jersey v. T.L.O., supra at 333, 105 S. Ct. at 738, 83 L. Ed. 2d at 729; see also Cass, supra 551 Pa. at 33, 709 A.2d at 354; J.B., supra 719 A.2d at 1061; In the Interest of S.F., 414 Pa. Super. 529, 607 A.2d 793, 794 (Pa.Super. 1992); In the Interest of Dumas, 357 Pa. Super. 294, 515 A.2d 984, 985 (Pa.Super. 1986). The T.L.O. Court recognized that a balance must be struck between the schoolchild's legitimate expectations of privacy and the school's substantial interest in maintaining a safe and educational environment on school grounds. T.L.O., supra at 339, 105 S. Ct. at 741, 83 L. Ed. 2d at 733. In balancing these competing interests, the Court concluded that school officials need neither a warrant nor probable cause to conduct a search of a student on school property. Id. 469 U.S. at 340-341, 105 S. Ct. at 742-743, 83 L. Ed. 2d at 733-734. "Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." Id. ----------Footnotes----------

n14 In so holding, the Supreme Court laid to rest the concept of in loco parentis as the justification for a school official's search of a student. The Court stated: "Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the state, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment." T.L.O., 469 U.S. at 336-337, 105 S. Ct. at 740, 83 L. Ed. 2d at 731.

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The United States Supreme Court established a two-part test to assess the reasonableness of a school search conducted by school officials: Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception," Terry v. Ohio, 392 U.S. at 20, 20 L. Ed. 2d 889, 88 S. Ct. 1868, 44 Ohio Op. 2d 383; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place," ibid. Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction. Id. 469 U.S. at 341-342, 105 S. Ct. at 742-743, 83 L. Ed. 2d at 734-735 (footnotes omitted); see also Cass, supra 551 Pa. at 34, 709 A.2d at 354; J.B., supra 719 A.2d at 1061. Applying this standard, the T.L.O. Court held that the search of a student's purse was reasonable, given that a teacher had reported seeing the student smoking in the lavatory in violation of school rules. T.L.O. supra. Unlike T.L.O., the challenge in the instant case is to the initial detention and questioning of D.E.M. n15 Thus, unlike T.L.O., our inquiry is not whether a search of D.E.M.'s person or effects was reasonable, but whether in all the circumstances of this in-school encounter, D.E.M.'s right to personal security was violated by an unreasonable seizure of his person.

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n15 Although T.L.O. held that school officials need reasonable suspicion before conducting a search of a student or his possessions, the Court did not address the standard by which to measure the more limited intrusion that occurs when school officials detain and question a student.

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The United States Supreme Court stated in Terry v. Ohio: No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251, 35 L. Ed. 734, 737, 11 S. Ct. 1000 (1891). We have recently held that "the Fourth Amendment protects people, not places," Katz v. United States, 389 U.S. 347, 351, 19 L. Ed. 2d 576, 582, 88 S. Ct. 507 (1967), and wherever an individual may harbor a reasonable "expectation of privacy," id., 389 U.S. at 361, 19 L. Ed. 2d at 588 (Mr. Justice Harlan, concurring), he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." Elkins v. United States, 364 U.S. 206, 222, 4 L. Ed. 2d 1669, 1680, 80 S. Ct. 1437 (1960). Terry, 392 U.S. at 9, 88 S. Ct. at 1873, 20 L. Ed. 2d at 898-899 (emphasis added). To assess the reasonableness of the school officials' conduct, it is necessary to first focus upon the state interest, which allegedly justifies official intrusion upon the constitutionally protected interests of the student. Terry, 392 U.S. at 20-21, 88 S. Ct. at 1879, 20 L. Ed. 2d at 905. We must then balance the need to search against the invasion which the search or seizure entails. Id. (quoting Camara v. Municipal Court, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967)). We turn now to the state interest, which allegedly justifies the detention and questioning of a student by school officials. The Supreme Court has recognized that school officials have a substantial interest in maintaining a safe and educational environment on school grounds. T.L.O. supra at 339, 105 S. Ct. at 741, 83 L. Ed. 2d at 733. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. See generally 1 NIE, U.S. Dept. of Health, Education and Welfare, Violent Schools--Safe Schools: The Safe School Study Report to Congress (1978). Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." Goss v. Lopez, 419 U.S. 565, 580, 42 L. Ed. 2d 725, 95 S. Ct. 729. Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship. See Goss, 419 U.S. at 582-583, 42 L. Ed. 2d 725, 95 S. Ct. 729; Ingraham v. Wright, 430 U.S. 651, 680-682, 51 L. Ed. 2d 711, 97 S. Ct. 1401. Id. See generally Cass, supra; J.B., supra; S.F., supra; Dumas, supra; In re Patrick Y., 124 Md. App. 604, 723 A.2d 523, 1999 Md. App. LEXIS 14, 1999 WL 41889 (Md. 1999). Swift and informal disciplinary procedures are needed in our schools to enable school officials to perform their duty to maintain a safe and educational environment. T.L.O., supra at 340, 105 S. Ct. at 742, 83 L. Ed. 2d at 733. [*P18] Against a school's substantial interest in maintaining a safe and educational environment on school grounds, we must weigh the intrusion on D.E.M.'s right to control his person, free from interference of others, while in the school environment. n16 See Terry, supra. In his concurring opinion in T.L.O., Justice Powell stated:

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n16 Although the T.L.O. Court held that a student has a limited expectation of privacy in his or her possessions while on school grounds, the Court did not address a student's right to control his or her person during school hours.

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In any realistic sense, students within the school environment have a lesser expectation of privacy than members of the population generally. They spend the school hours in close association with each other, both in the classroom and during recreation periods. The students in a particular class often know each other and their teachers quite well. Of necessity, teachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child. It is simply unrealistic to think that students have the same subjective expectation of privacy as the population generally. T.L.O., supra at 348, 105 S. Ct. at 746, 83 L. Ed. 2d at 739 (Justice Powell concurring). In Pennsylvania, a student's right to control his or her person during school hours is limited by statute. Students are compelled to attend school and to remain there during school hours. See 24 P.S. § 13-1327. Students who fail to comply with their duty to attend school are subject to discipline by school officials. n17 In fact, Pennsylvania law empowers school officials to appoint school attendance officers whose duty it is to arrest students who fail to attend school. See 24 P.S. § 13-1341. Furthermore, students are required to comply with the rules governing schools, which includes submitting to teachers' and school officials' authority. See 24 P.S. § 13-1317. Thus, unlike the ordinary citizen on the street, a student's control over his or her person during school hours is limited by the unquestionable authority of law. See Terry, supra.

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n17 Pennsylvania law also imposes penal sanctions upon every parent, guardian, or person in parental relation of a school age child who fails to secure the attendance of a child. See 24 P.S. § 13-1333.

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Balancing D.E.M.'s limited right to control his person while in school, with the need of the school to maintain order and a proper educational environment, we conclude that the mere detention and questioning of D.E.M. by school officials was reasonable. The limited scope of the intrusion on D.E.M.'s right to control his person while in school is outweighed by the school officials' substantial interest in ensuring the safety and personal security of the student body for whom they are responsible. To require teachers and school officials to have reasonable suspicion before merely questioning a student would destroy the informality of the student teacher relationship, which the United States Supreme Court has respected and preserved. n18 See T.L.O., supra at 339, 105 S. Ct. at 741, 83 L. Ed. 2d at 733. Instead, teachers and school officials would be forced to conduct surveillance, traditionally a law enforcement function, before questioning a student about conduct which poses a serious threat to the safety of the students for whom they are responsible. Thus, we hold that Terry's reasonable suspicion standard is inapplicable to the detention and questioning of a student by school officials. n19 See W.J.S. v. Florida, 409 So. 2d 1209 (Fla.Dist. Ct.App. 1982) (holding criminal law standards for "investigative stop" are inapplicable to the mere detention and questioning of a student by school officials); People v. Pruitt, 278 Ill. App. 3d 194, 662 N.E.2d 540, 214 Ill. Dec. 974 (Ill.App.Ct. 1996) (holding anonymous tip from student that defendant was carrying gun justified initial intrusion of taking defendant out of classroom for questioning by school officials); In re Alexander B., 220 Cal. App. 3d 1572, 270 Cal. Rptr. 342 (1990) (stating that school authorities search of student was reasonable even where officials did not know name of student who provided tip that defendant had gun on school property).

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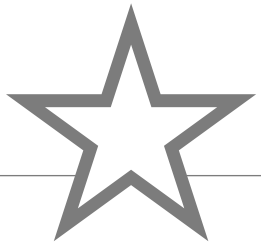
n18 The level of suspicion necessary to justify a search is directly related to the scope of the government's intrusion on an individual's rights. See Terry, supra. In the context of the school environment, school officials are only required to have reason-



able suspicion before conducting a search of a student's person or possessions. T.L.O., supra. Certainly, the mere detention and questioning of a student constitutes a more limited intrusion than a search of his person and effects. Thus, we think it makes no sense to require the same level of suspicion to justify the school officials' actions in each situation.

n19 We further note that Terry's requirement that police have reasonable suspicion, supported by specific and articulable facts, before conducting an "investigative stop" is designed to protect the citizen on the street from intrusions by police "whose judgment is necessarily colored by their primary involvement in 'the often competitive enterprise of ferreting out crime.'" Terry, 392 U.S. at 11-12, 88 S. Ct. at 1875, 20 L. Ed. 2d at 900. This concern, however, is not present in the school environment: Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between school authorities and pupils. Instead, there is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education. T.L.O., supra 469 U.S. at 349-350, 105 S. Ct. at 746, 83 L. Ed. 2d at 740 (Justice Powell concurring). Thus, the policy served by Terry's reasonable suspicion standard does not apply to the detention and questioning of a student by school officials.

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The Commonwealth also argues that the trial court erred in finding that the school officials were required to furnish Miranda warnings before questioning D.E.M. about his possession of a gun on school property. Pennsylvania law makes clear that Miranda rights do not attach, and warnings are not required, when school authorities detain and question a student about conduct that violates school rules. In re S.K., 436 Pa. Super. 370, 647 A.2d 952, 955 n.3 (Pa.Super. 1994); see also New Jersey v. Biancamano, 284 N.J. Super. 654, 666 A.2d 199 (N.J.Super. 1995) (holding Miranda rights do not apply where school officials detain and question student about unlawful conduct even if environment is coercive); In re Corey L., 203 Cal. App. 3d 1020, 250 Cal. Rptr. 359 (1988) (holding Miranda inapplicable where school officials question student about violations of law or school rules). Hence, we conclude that school officials do not need to provide a student with Miranda warnings before questioning the student about conduct that violates the law or school rules. n20

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n20 Due to our disposition of these issues, we need not address the Commonwealth's first and fifth issues raised on appeal. D.E.M.'s admission that he had a gun in P.Q.'s locker provided the school officials with reasonable suspicion to search the locker.

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Conclusion

In summary, we hold that the school officials did not act as agents of the police because (1) the purpose of the search and seizure was primarily to ensure the safety of the students for whom the school officials' are responsible; and (2) police did not coerce, dominate, or direct the school officials' actions. We also hold that the school officials' conduct was reasonable under the circumstances, and therefore did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures. Finally, we hold that the school officials were not required to provide D.E.M. Miranda warnings before questioning him. Accordingly, we reverse the order of the trial court, which granted D.E.M.'s suppression motion and remand for trial. Order reversed; case remanded for trial; jurisdiction is relinquished.

No Suspicion needed in School/COPS Relationship when lockers searched.
SRO Conducting a Search after Delgation by Educator

IN RE: PATRICK Y.

No. 27, September Term, 1999

COURT OF APPEALS OF MARYLAND

358 Md. 50; 746 A.2d 405; 2000 Md. LEXIS 50

February 18, 2000, Filed

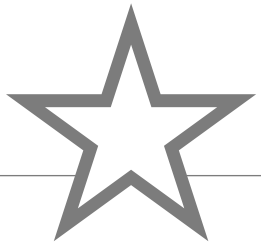
JUDGES: ARGUED BEFORE Bell, C.J.; Eldridge, Rodowsky, Raker, Wilner, Cathell andHarell, JJ. Opinion by Wilner, J. Dissenting opinion by Bell, C.J.

OPINIONBY: WILNER

OPINION:

Opinion by Wilner, J.

The District Court of Maryland, sitting as the juvenile court in Montgomery County, found petitioner to be a delinquent child by reason of his having had a deadly weapon and a pager in his possession while on public school property. He admitted possession of the two items and complains only that they were unlawfully obtained by the State and, for that reason, should



have been suppressed. The trial court rejected his contention that the seizure of the items violated his Fourth Amendment rights, and the Court of Special Appeals affirmed. In Re Patrick Y., 124 Md. App. 604, 723 A.2d 523 (1999). We agree and shall affirm the judgment of the appellate court.

BACKGROUND

Petitioner was an eighth grade student at the Mark Twain School in Montgomery County. The school is a public middle and senior high school that, at its Rockville campus, serves approximately 245 children with significant social, emotional, learning, and behavioral difficulties. The school publishes a set of "Policies Regarding Student Behavior," a copy of which was given to petitioner and his parent and was signed by them. The document states that the school is "committed to maintain a safe environment for students and staff," and advises:

"Mark Twain subscribes to Montgomery County Public Schools' Search and Seizure policy, which provides that the principal or the administration's designee may conduct a search of a student or of the student's locker if there is probable cause to believe that the student has in his/her possession an item, the possession of which constitutes a criminal offense under the laws of the State of Maryland. These items include weapons, drugs or drug paraphernalia, alcohol, beepers and electronic signalling devices."

At approximately 10:40 on the morning of May 23, 1997, the school security officer, Patrick Rooney, received information from a source he could not recall that "there were drugs and or weapons in the middle school area of the school." Mr. Rooney alerted the principal, who authorized a search of all lockers in the middle school area. The record indicates that the search was conducted by Mr. Rooney and one other person but does not reveal how the search was conducted. We do not know how many lockers were searched, other than that the search did not extend beyond the middle school area, or how the search was conducted. No evidence was produced of whether the lockers were even locked or, if locked, whether the school had a master key or a list of the combinations that would open combination locks, although a fair inference can be drawn from the apparent ease with which the search was conducted that the school had ready access to the lockers. As petitioner was not informed in advance of the intent to search his locker and was not present when his locker was opened, it is clearthat the locker was opened without his assistance or permission.

Inside petitioner's locker, Mr. Rooney found a bookbag, which he also searched. Inside the bookbag were the two contraband items -- a folding knife with a 2 1/2 inch blade and a pager -- both of which, as noted, are expressly forbidden on school property. Petitioner, it appears, was in some other, unrelated difficulty at the time of the search. He had threatened to leave the school building without permission and was being restrained on that account when he was confronted with the knife and the pager, which he admitted were his. The issue raised by petitioner is whether the Fourth Amendment was violated "by a search of Petitioner's locker, based solely upon a vague and unsubstantiated rumor, 'that there were drugs and or weapons in the middle school area.'"

Petitioner asserts that (1) he had a legitimate expectation of privacy in hislocker, (2) whatever may be the Constitutional standard for conducting locker searches, the published school policy required probable cause, which was lacking, (3) the school officials did not have even a "reasonable suspicion," that there was any contraband in his locker, and (4) by opening his bookbag, thesearch exceeded any permissible scope that might have justified opening the locker. Relying principally on Vernonia School District v. Acton, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995), the State contends that general reasonableness,

not probable cause, is the appropriate standard to applyand that, under that standard, the search of petitioner's locker and bookbag was justified. It urges that petitioner had, at best, only a limited privacy interest in his school locker, that the search of the locker was a minimal intrusion, that school safety constitutes a compelling governmental interest, that the locker search was an "efficacious" means of satisfying that interest, and that, on balance, the minimal intrusion of the locker search was outweighed by the compelling interest in school safety.

As noted, the issue raised in the petition for certiorari was limited to whether the search of petitioner's locker violated the Fourth Amendment. That statement of the issue does not include any complaint about the search of the book bag or, indeed, whether petitioner was entitled to relief solely because thelocker search violated the published Montgomery County School Policy. Because it was not raised in the petition, we shall not consider the search of the book bag. The published school policy needs to be addressed, not as an independent basis for suppression, but in the Fourth Amendment context of its effect on petitioner's reasonable expectation of privacy in the locker.

DISCUSSION

Two Supreme Court cases have come to dominate the current debate over locker searches in the public schools -- Acton, supra, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564, and New Jersey v. T.L.O, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) -- although neither of them dealt with a locker search. T.L.O., the earlier of the two cases, involved the search of a student's purse. A teacher found T.L.O. and another student smoking in a school lavatory, which constituted a violation of school rules, and took the students to the vice-principal's office. When T.L.O. not only denied smoking in the lavatory but of even being a smoker, the vice-principal opened her purse, found and removed a pack of cigarettes, noticed cigarette rolling papers, and, knowing the connection of such papers to the use of marijuana, searched the purse further. The extended search revealed a small amount of marijuana, certain paraphernalia, and other evidence implicating T.L.O. in drug dealing. The evidence was turned over to the police. After questioning, the student admitted that she had been selling marijuana at the school, and, based on that confession, she was charged with delinquency. The trial court denied her motion to suppress the evidence taken from her purse,a decision set aside by theNew Jersey Supreme Court.

The U.S. Supreme Court initially granted certiorari to determine whether the exclusionary rule enunciated in Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961) should apply in juvenile court proceedings, but it ordered reargument to consider the broader question "of what limits, if any, the Fourth Amendment places on the activities of school authorities." T.L.O., supra, 469 U.S. at 332, 105 S. Ct. at 737, 83 L. Ed. 2d at 728. The ultimate resolution in that case was that the search did not violate T.L.O.'s rights under that Amendment, but the Court warned that its disposition of the case on that basis was not to be taken as an implicit determination "that the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities." Id., 469 U.S. at 333 n.3, 105 S. Ct. at 738, 83 L. Ed. 2d at 729. The Court also made clear that its focus was on the right to search the person or personal items carried by the student, which was the circumstance before it, and that it was not addressing the question now before us of "whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies." Id., 469 U.S. at 337 n.5, 105 S. Ct. at 740, 83 L. Ed. 2d at 732. In that regard, it noted the conflict between Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981) and People v. Overton, 24 N.Y.2d 522, 249 N.E.2d 366, 301 N.Y.S.2d 479 (N.Y. 1969), holding that school administrators had the right to search or consent to the search of student lockers, and State v. Engerud, 94 N.J. 331, 463 A.2d 934 (N.J. 1983), holding that students have an expectation of privacy in their lockers.

On the merits, the Court first determined, as a threshold matter, that the Fourth Amendment does apply to searches conducted by public school officials. Largely because of the compulsory school attendance laws, public school officials, unlike their counterparts in private school, do not stand in loco parentis in their dealings with students and therefore do not have the exemption from Fourth Amendment requirements enjoyed by the parents. They do not merely exercise authority delegated to them by the students' parents, but act in furtherance of mandated educational and disciplinary policies.

Proceeding from that premise, the Court then recognized that students were entitled to bring to school "a variety of legitimate, noncontraband items," that there was "no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds," and that, as a result, the search of a child's person or of a closed purse or bag carried on the person was "a severe violationof subjective expectations of privacy." Id., 469 U.S. at 337-39, 105 S. Ct. at 740-41, 83 L. Ed. 2d at 732-33. Against that right of privacy, however, the "substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds" had to be balanced. Id. at 339, 105 S. Ct. at 740, 83 L. Ed. 2d at 733. In that regard, the Court took note that, in recent years, the maintenance of order in the schools, which had never been easy, had "often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." Id. It acknowledged that, even in schools spared the most serious problems, "the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." Id. That imperative requires "a certain degree of flexibility in school disciplinary procedures." Id. at 340, 105 S. Ct. at 733, 83 L. Ed. 2d at 742.

In striking the balance, the Court concluded that the warrantrequirement of the Fourth Amendment was unsuited to the school environment and that the generally applicable probable cause standard was unnecessary. Rather, it held, "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." Id. at 341,105 S. Ct. at 734, 83 L. Ed. 2d at 742. That, in turn, required a two-part inquiry: whether the action was justified at its inception, and whether the search, as conducted, was reasonably related in scope to the circumstances that justified the interference in the first place. As to that, the Court concluded: "Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified[***11] at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."469 U.S. at 341-42, 105 S. Ct. at 743, 83 L. Ed. 2d at 734-35.

The New Jersey Supreme Court had applied essentially the same principles in finding the search unlawful, and the disagreement between the two courts was in their application to the particular facts. The U.S. Supreme Court concluded thatthe school officials had a reasonable basis for believing that T.L.O. had been smoking in the lavatory and that her purse might contain evidence of that conduct, in the form of cigarettes. It was not unreasonable, therefore, for the vice-principal to search the purse for cigarettes. His discovery of the rolling papers while looking for the cigarettes gave rise to a reasonable suspicion that the purse also might contain marijuana, thereby justifying the extended search. Because the search was reasonable in both inception and scope, the evidence was not subject to suppression.

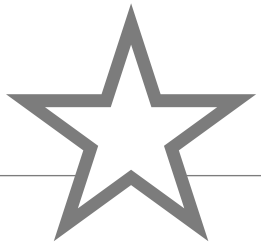
Acton, which was decided 10 years after T.L.O., involved a different kind of search -- random urinalysis for students involved in inter-scholastic athletics.The Vernonia school district, legitimately concerned over an increasing incidence of drug abuse on the part of students, which had led to a significant escalation in discipline problems, especially among student athletes, adopted

a policy of requiring all students intending to engage in inter-scholastic athletics, and the parents of those students, to sign a written consent to the random drug testing of the students through urinalysis. Special efforts were made to assure both reasonable privacy in obtaining the specimens and confidentiality and reliability of the test results. Acton and his parents refused to consent to the procedure and when, as a result, Acton was not permitted to play football for his school team, he and his parents sued for declaratory and injunctive relief, claiming that the policy violated his rights under the Fourth and Fourteenth Amendments.

The Court began by observing that the ultimate measure of the Constitutionality of a governmental search is reasonableness -- balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Although a search conducted by law enforcement persons normally requires a warrant, issuable only upon a demonstration of probable cause, neither a warrant nor the probable cause standard are required where special needs make them impracticable. In T.L.O., the Court concluded that the warrant requirement and the probable cause standard were not required in the student search setting -- that adherence to a probable cause standard would undercut the need of school officials for freedom to maintain order. The Acton Court held that, although thesearch in T.L.O. was based on individualized suspicion of wrongdoing, that too was not an "irreducible requirement" of the Fourth Amendment. Acton, supra, 515 U.S. at 653, 115 S. Ct. at 2391, 132 L. Ed.2d at 574. Suspicionless searches to conduct drug testing had been upheld for railroad personnel involved in train accidents and Federal customs officials, and random automobile checkpoints had been approved to search for drunk drivers, illegal immigrants, and contraband.

Turning then to the first aspect of the question -- the degree of intrusion on a legitimate expectation of privacy -- the Court confirmed earlier holdings that students in a public school setting, while not shedding their Constitutional rights at the schoolhouse gate, nonetheless have a lesser expectation of privacy than do adults. Simply as unemancipated minors, they lack" some of the most fundamental rights of self-determination." Id. at 654,115 S. Ct. at 2391, 132 L. Ed. 2d at 575. Although public school officials do not stand entirely in loco parentis with respect to the students, they do exercise a "custodial and tutelary" authority that permits "a degree of supervision and control that could not be exercised over free adults" and that cannot be ignored in conducting a "reasonableness" inquiry. 515 U.S. at 655-65, 115 S. Ct. at 2392, 132 L. Ed. 2d at 576. Reflecting on the target group at issue, the Court held that legitimate privacy interests were even less with regard to student athletes, who are required to dress and undress in locker rooms not noted for their privacy, and who, in other ways as well, have a reduced expectation of privacy. The degree of intrusion manifested by the drug testing program on that reduced expectation, the Court held, was not significant in light of the procedures used in its implementation.

Addressing then the "nature and immediacy of the governmental concern," the Court noted the "compelling" need to deter drug use by schoolchildren. Indeed, it recognized that the effects of a drug-infested school extend beyond those using the drugs and impact as well on the entire student body and faculty by disrupting the educational process. That general concern was heightened in the particular case both by the [*60] special vulnerability of student athletes to harm when either on drugs themselves or in contact with other athletes on drugs and by the significant increase in disciplinary problems actually experienced in the Vernonia schools that was attributed to drug use. Rejecting Acton's suggestion that a less intrusive alternative was possible -- testing only on suspicion of drug use -- the Court observed that it had "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment. Id. at 663, 115 S. Ct. at 2396, 132L. Ed. 2d at 581. The net holding was that "when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake," and in Acton, the answer was in the affirmative. Id. at 665, 115 S. Ct. at 2396-97, 132 L. Ed. 2d at 582. n1



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n1 Because Acton arose from a declaratory judgment action, the question left open in T.L.O., of whether the exclusionary rule would apply in a juvenile courtproceeding even if the search was unreasonable, was not presented. None of the lower court decisions since T.L.O. have addressed that issue, even when the casedid arise from a juvenile court proceeding. The State has not raised the issue in this case, but instead has assumed that the exclusionary rule would apply anD defends on the ground that the search was not violative of the Fourth Amendment.We too shall assume, arguendo, that the Mapp v. Ohio exclusionary rule would apply.

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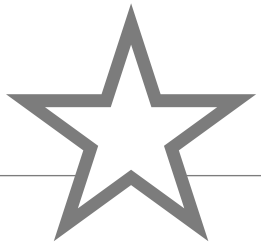
Petitioner regards T.L.O. as the more relevant case, requiring some individualized suspicion as a necessary predicate for a locker search. He seems to view Acton as limited to student athletes and their lesser expectation of privacy, noting the Court's reference to their "communal undress," the fact thatinter-scholastic athletics was a voluntary endeavor, and the further fact that, in Acton, most of the parents approved the drug-testing policy. We do not regardActon as being so limited.

Expectation Of Privacy

Both T.L.O. and Acton instruct us as to the analytical process that should be followed. First, we must determine whether, and to what extent, petitioner had a legitimate expectation of privacy in his locker. Although that is ultimately a legal issue, it depends on the facts. In In Interest of Isiah B., 176 Wis. 2d 639, 500 N.W.2d 637 (Wis. 1993), the school system adopted a written policy, communicated to the students, that school lockers were the property of the school, that the school retained exclusive control over them, and that periodic general inspections may be conducted by school authorities for any reason, at any[***18] time, without notice, and without a warrant. The school administration had pass keys to all of the lockers, and students were forbidden to put private locks on them. In light of that overall policy, the court concluded that students had no reasonable expectation of privacy in the lockers made available for their use. See also Shoemaker v. State, 971 S.W.2d 178 (Tex. App. 1998) (school had written policy, discussed with the students, that lockers remained under the jurisdiction of the school and were subject to search at any time upon reasonable cause, and school officials had pass key that opened all lockers); and cf. People v. Overton, 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (N.Y. 1967); S.A. v. State, 654 N.E.2d 791, 795 (Ind. App. 1995). In the absence of such a clear policy, and especially when there is a contrary policy purporting to limit the ability of the school authorities to conduct a search, courts have concluded that students do have some legitimate privacy interest, even if a limited one. In Com. v. Snyder, 413 Mass. 521, 597 N.E.2d 1363 (Mass. 1992), where the school published a written policy that students had the right not to have their lockers subjected to unreasonable search, the court concluded that a student had a reasonable expectation of privacy, notwithstanding that the school officials had the combinations to the locks. In Com. v. Cass, 551 Pa. 25, 709 A.2d 350, 353 (Pa. 1998), where the written policy, communicated to the students, was thatlockers were subject to search without warning when school officials "have a reasonable suspicion that the locker contains materials which pose a threat to the health, welfare and safety of students in the school" and school officials were able to open lockers by use of a master key and by having required access to any combinations on private locks used by the students, the court founda "minimal" privacy expectation. In State v. Joseph T., 175 W. Va. 598, 336 S.E.2d 728 (W. Va. 1985), the court found a right of students to security against unreasonable searches and seizures by public school officials. Although school officials had a master key that would open all lockers, the student handbook noted that the Fourth Amendment protected "all citizens" from unreasonable searches and seizures and declared that students "do have rights to privacy and may reasonably expect



that their lockers will not be searched unless appropriate school officials consider a search absolutely necessary to maintain the integrity of the school environment and to protect other students." 336 S.E.2d at 737 n.10. See also State v. Michael G., 106 N.M. 644, 748 P.2d 17 (N.M. Ct. App. 1987); In Interest of Dumas, 357 Pa. Super. 294, 515 A.2d 984 (Pa. Super. 1986); and S.C. v. State, 583 So. 2d 188 (Miss. 1991), finding a privacy interest in student lockers without discussion of published school policy or general access to lockers by school officials.

As noted, the only factual evidence in this record bearing on whether petitioner may have had a legitimate expectation of privacy was the school policy statement that he and his parent signed which, in sharp distinction to the kinds of statements evident in the above-cited cases, purports to limit the right of school officials to search lockers to situations in which the official has "probable cause" to believe that the student has in his/her possession an item that is contraband under the criminal law of the State. On its face,and without regard to the broader legal context, that document, published by thelocal school authorities, could serve as a basis for an expectation that lockerswill not otherwise be searched. That local policy cannot be considered in a vacuum, however. There is a statute enacted by the General Assembly, supplemented by a by-law adopted by the State Board of Education, that defines and controls the authority of school officials to search public school lockers, and it is that State policy that determines whether, and to what extent, petitioner had any reasonable expectation of privacy in the locker assigned to him. Maryland Code, @ 7-308 of the Education Article states:

"(a) Authority to search student. -- (1) A principal, assistant principal, or school security guard of a public school may make a reasonable search of a student on the school premises or on a school-sponsored trip if he has a reasonable belief that the student has in his possession an item, the possession of which is a criminal offense under the laws of this State or a violation of any other State law or a rule or regulation of the county board.

(2) The search shall be made in the presence of a third party.

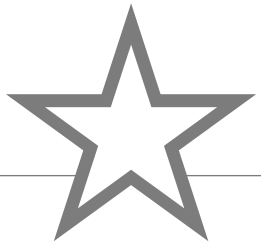
(b) Authority to search school. -- (1) A principal, assistant principal, or school security guard of a public school may make a search of the physical plan of the school and its appurtenances including the lockers of students.

(2) The right of the school official to search the locker shall be announced or published previously in the school.

(C) Rules and regulations. -- The [State] Department [of Education] shall adopt rules and regulations relating to searches permitted under this section." (Emphasis in text added).

The State Board of Education has adopted a by-law, which constitutes an agency regulation, consistent with the legislative direction. The by-law, found in COMAR 13A.08.01.14E and F., mirrors the statute.

The plain words of the statute and by-law establish a State policy distinguishing between the search of students and the search of lockers. In conformance with the requirements of T.L.O., the search of a student requires a reasonable belief on the part of the school official that thstudent has contraband in his or her possession. School lockers, on the other hand, are not regarded as the personal property of the student. They are classified as school property, part of the "plant of the school and its appurtenances," and, no doubt because of that, school officials are permitted tsearch the lockers as they could any other school property. No probable cause is required; nor is any reasonable suspicion required.



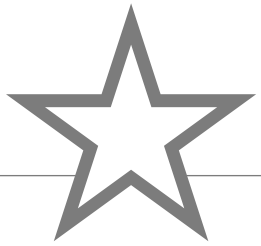
This policy is deliberate and has a long history. At least as early as 1970, before there was a statute on the subject, the State Board of Education had in effect a by-law, having the force of law, dealing with searches on public school property by both police officers and by school officials. Police officers were permitted to conduct searches, including searches of lockers, only upon a warrant. By-law 740 provided, in relevant part, that police officers, "upon the authority of a search warrant," may search that part of the school premises described in the warrant, and that "investigative searches" would be permitted only upon the authority of a search warrant "or in any case where the search is essential to prevent imminent danger to the safety or welfare of the pupil or other persons or school property." Such a search, the by-law continued, "shall not include a pupil's assigned locker unless specified in the search warrant." A more liberal policy was applied to searches by school officials, who, unless the search was "in connection with a police investigation," were permitted, at any time, to "conduct such searches as are essential to the security, discipline and sound administration of the particular school." No probable cause, or even individualized reasonable suspicion, was required when the search was conducted by school officials for their own purposes.

The first statute dealing with school searches was enacted in 1973. See 1973 Md. Laws, ch. 759, enacting a new @ 96A to former Article 77 of the Code. Like the current law, the statute drew a sharp distinction between searches of students and searches of lockers. Under @ 96A(a), principals, assistant principals, and authorized public school security officers were permitted to conduct a reasonable search of a student on school premises if the official "has probable cause to believe that the student has in his possession an item, the possession of which constitutes a criminal offense under the laws of this State." Section 96A(b), however, permitted those officials, without any determination of probable cause or reasonable suspicion, to conduct a search of "the physical plant of the school and every appurtenance thereof including students' lockers." The only complement to that authority was the [*65]direction that the right of the official to search the locker must be previously announced or published within the school. Subsection (c) required theState Department of Education to adopt regulations "relating to searches permitted under this section."

Except for style changes, @ (b), treating student lockers as school property and permitting designated school officials to search them as they could search other school property, without satisfying any minimum standard, has remained intact since 1973. In 1982, @ (a) was amended as a result of In Re Dominic W., 48 Md. App. 236, 426 A.2d 432 (1981), in which the Court of Special Appeals concluded that the search of a student suspected of breaking into another student's locker and stealing money and a watch was invalid because there was no probable cause to justify the search. The court noted, apart from any Fourth Amendment concern, that the Legislature, by statute, required probable cause for such a search. In the next session, the General

Assembly, at the urging of a county school board, amended @ (a) -- by then recodified as @ 7-307(a) of the Education Article -- to permit the search of a student upon a "reasonable belief" that the student is in possession of an item, the possession of which is a criminal offense.

The initial State Board of Education by-law, adopted prior to 1970, remained intact, and thus inconsistent with the 1982 amendment, until 1990, when it was amended to provide that the designated school official could make a reasonable search of a student on the school premises if the official had a reasonable belief that the student was in possession of an item, the possession of which was a criminal offense. See COMAR 13A.08.01.14E (Supp. 10). The by-law dropped any reference to the search of school property or lockers. In 1997, the by-law was amended in two respects. First, it was broadened to permit the search of a student on either school property or on a school-sponsored trip,if the school official has a reasonable belief that the student is in possession of an item, the possession of which constitutes a violation of any State law or a rule or regulation of



the local school board. Second, and more significant for our purposes, a new section was added to track the statutory provision dealing with searches of school property, authorizing the designated school officials to search lockers as part of the physical plant and appurtenances. Although educational matters affecting the counties are under the control of the county board of education (see @ 4-101(a) of the Education Article), the authority of the county school boards is always subject to statutes enacted by the General Assembly and to the supervening authority of the State Board of Education. A county board cannot adopt and enforce a policy affecting the operation of the public schools or the rights, privileges, or obligations of public school students that is inconsistent with public general law or with by-laws of the State Board of Education, which have the force of law. See Wilson v. Board of Education, 234 Md. 561, 200 A.2d 67 (1965); Bd. of Education of Prince George's County v. Waeldner, 298 Md. 354, 470 A.2d 332 (1984). By both statute and State Board of Education by-law, school lockers are treated as school property and are subject to search by designated school officials in the same manner as other school property. It is not within the power of a local school board or superintendent, or any subordinate official, to establish and enforce a policy that provides otherwise.

The Montgomery County policy statement upon which petitioner relies is obviously inconsistent with the governing State law. It imposes probable cause to believe that the student is in possession of an item, the possession of which constitutes a criminal offense as the standard necessary to justify a search of both students and lockers, which, under State law, is not the test for either.

Accordingly, that local policy is invalid and nugatory and cannot serve as a basis for a student to have a reasonable expectation of privacy in the locker provided by the school. To rule otherwise -- to give effect to the county policy statement as creating an expectation of privacy sufficient to create a Fourth Amendment threshold for school officials to meet -- would give that policy a precedence over the statute and State Board of Education by-law, which it clearly cannot have.

In light of the supervening State policy, this case is more akin to the situation in In Interest of Isiah B., supra, 500 N.W.2d 637, in which the Wisconsin court found no reasonable expectation of privacy, than to those cases in which a valid published policy precluding "unreasonable" searches or requiring "reasonable suspicion" to conduct a search led to a finding of some minimal expectation of privacy. As petitioner could have no reasonable expectation of privacy in the school locker, the search of it by the school security officer, upon direction of the principal, did not violate any Fourth Amendment right of petitioner.

Because we conclude that, in light of @ 7-308 and the State Board of Education by-law, petitioner had no reasonable expectation of privacy in the locker temporarily assigned to him, we need not consider, if he had such an expectation, what the nature of it would be and whether the governmental interest in conducting the search and the limited nature and extent of the intrusion manifested by the search would nonetheless suffice to justify the [**415]search. n2

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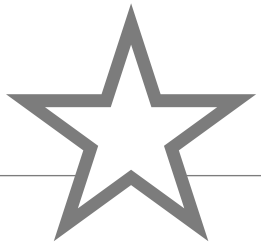
n2 Chief Judge Bell, in dissent, takes the position that the direction in @ 7-308(b)(2) (and the conforming direction in the State and Montgomery County school board regulations) that the right of a school official to search lockers be announced or published in the school effectively allows each school in the State to develop its own policy regarding locker searches, based simply on what the principal chooses to announce or publish. We did not deal specifically with the county school board regulation because it was neither mentioned nor relied upon by either party, but, as it is generally consistent with the statute and the State Board by-law, it adds little to the issue. It too treats lockers as part of the "school premises" and imposes no requirement



of probable cause or even reasonable ground in order for school officials to search the lockers. The policy statement published by the Mark Twain school is as inconsistent with the county school board regulation as it is with the State statute and State Board by-law.

Section 7-308, in our view, was intended to establish a uniform State-wide policy regarding searches of students and school property in the public schools.The direction in @ 7-308(b)(2) that the policy, as it relates to lockers, be announced or published in each school was for the obvious and salutary purpose of ensuring that students would be given actual notice of the policy, to eliminate any basis for an expectation of privacy on their part. We cannot imagine -- and there is certainly nothing in either the statute itself or in itslegislative history to support such a suggestion -- that, in directing such announcement or publication, the General Assembly could possibly have intended to allow each school to depart from that policy simply by announcing, at its whim, a different policy. Such a construction of @ 7-308(b)(2) would be wholly unreasonable; it would not only allow each school to have its own policy, but would allow each school periodically to change its policy, from year to year or day to day, just by announcing a different policy. The legal and practical consequences of such a construction would extend beyond mere confusion and uncertainty to utter chaos. The problem in this case is not with the State law or with the State Board or county board regulations but with the fact that the policy statement issued by the Mark Twain school was not in compliance with either the law or those regulations and, for that reason, is invalid and nugatory.

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JUDGMENT AFFIRMED, WITH COSTS.

Miranda and Interrogations by the SRO
In the Interest of R.H.

No. 96 M.D. Appeal Docket 2000

SUPREME COURT OF PENNSYLVANIA

568 Pa. 1; 791 A.2d 331; 2002 Pa. LEXIS 330

December 5, 2000, Argued
February 21, 2002, Decided

DISPOSITION: Order reversed. Remanded for proceedings.

JUDGES: MR. JUSTICE NIGRO. Mr. Justice Cappy files a dissenting opinion. Mr. Justice Castille files a dissenting opinion. Madame Justice Newman files a concurring opinion. Mr. Justice Saylor files a concurring opinion. Mr. Justice Eakin did not participate in the consideration or decision of this matter.

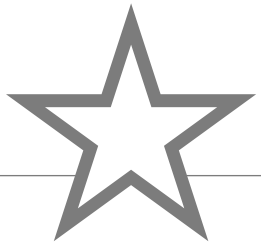
OPINION ANNOUNCING THE JUDGMENT OF THE COURT MR. JUSTICE NIGRO

In this appeal, Appellant R.H., a minor, argues that the Superior Court improperly affirmed the order of the trial court denying his motion to suppress the statements he made during questioning by a school police officer. We agree with Appellant that he was entitled to receive Miranda warnings before being questioned by the school police officer and therefore, we reverse the Superior Court's order affirming Appellant's adjudication of delinquency.

The relevant facts and procedural history of this case are as follows. On December 7, 1998, the Monroe County Sheriff notified the East Stroudsburg Area School District Police Department that someone had broken into and vandalized a classroom at East Stroudsburg High School. After entering the classroom, East Stroudsburg School police officers discovered that someone had written graffiti on the blackboards, overturned desks, and discharged the room's fire extinguisher. In addition, small sneaker footprints were observed in fire extinguisher residue on the floor and on the desktops.

The school police officers subsequently obtained a list of students with classes in the vandalized classroom and looked for a person small in stature to match the footprints found in the fire extinguisher residue. After reviewing the student list, the school police suspected that Appellant had been involved with the break-in because he had classes in the room, he was a person of small stature and because his discipline record indicated that he had exhibited unruly behavior in the past. One of the school police officers escorted Appellant to the main building of the school, where Appellant was asked to remove his shoe for comparison with the footprints found in the fire extinguisher residue. After observing the bottom of Appellant's shoe, the officer concluded that the print matched those found in the classroom. The officer then informed Appellant that he was keeping the shoe as evidence and that he was going to question Appellant about the break-in.

The school police officer did not give Appellant Miranda warnings n1 prior tothe questioning, nor was Appellant allowed to



leave the room until the questioning was completed twenty-five minutes later. During the questioning, Appellant admitted that he was involved in the break-in. The school called the municipal police department and Appellant's mother. The municipal police questioned Appellant and then permitted him to leave with his mother. Subsequently, Appellant was charged with various offenses in juvenile court.

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n1 Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) (holding that [HN1] a defendant who is subject to custodial interrogation must be advised, in clear and unequivocal language, of his constitutional right to remain silent and his right to a lawyer).

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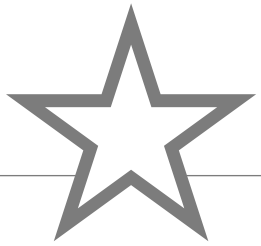
Prior to his juvenile delinquency hearing, Appellant filed a motion to suppress any statements he made during the questioning by the school police officer. Appellant's motion was denied and an adjudication hearing was held, wherein Appellant was adjudicated of burglary, criminal trespass, theft by unlawful taking, criminal mischief, institutional vandalism, and criminal conspiracy. Appellant was then sent to a residential treatment center for nine months, to be followed by one year of probation. The Superior Court affirmed.

On appeal to this Court, Appellant asserts that his Fifth Amendment rights were violated when he was compelled to give evidence against himself. Appellant argues that he should have been given Miranda warnings prior to any questioning by the school police. According to Appellant, school police are constitutionally indistinguishable from municipal police because they are permitted to exercise the same powers as the municipal police while on school property and because they wear uniforms and badges. Consequently, Appellant contends that his confession, given during custodial interrogation by a school police officer, should have been suppressed. We agree.

When reviewing a challenge to the denial of a suppression motion "we must consider only the evidence of the prosecution and so much of the evidence for the defense which remains uncontradicted when read in the context of the record as a whole. Where the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error." Commonwealth v. Hall, 549 Pa. 269, 701 A.2d 190, 197 (Pa. 1997)(citing Commonwealth v. Cortez, 507 Pa. 529, 491 A.2d 111, 112 (Pa. 1985)).

To safeguard an uncounseled individual's Fifth Amendment privilege against self-incrimination, suspects subject to custodial interrogation by law enforcement officers must be warned that they have the right to remain silent, that anything they say may be used against them in court, and that they are entitled to the presence of an attorney. See Thompson v. Keohane, 516 U.S. 99, 107, 133 L. Ed. 2d 383, 116 S. Ct. 457 (1995) (citing Miranda v. Arizona, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966)). Juveniles, as well as adults, are entitled to be apprised of their constitutional rights pursuant[***6] to Miranda. See In re Gault, 387 U.S. 1, 57, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967). If a person is not advised of his Miranda rights prior to custodial interrogation by law enforcement officers, evidence resulting from such interrogation cannot be used against him. See Miranda, 384 U.S. at 436,444, 478-79; Commonwealth v. Chacko, 500 Pa. 571, 459 A.2d 311, 314-15 (Pa. 1983). A person is deemed to be in custody for Miranda purposes when "[he] is physically denied of his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is



restricted by the interrogation." Commonwealth v. Williams, 539 Pa. 61, 650 A.2d 420, 427 (Pa. 1994) (citations omitted).

In the instant case, it is uncontested that Appellant did not receive Miranda warnings before he was taken into custody for purposes of interrogation. It is also uncontested that Appellant was in custody during the interrogation. n2 Thus, the issue becomes whether school police officers should be considered "law enforcement officers" within the purview of Miranda. - - - - -

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n2 Although Justice Castille's dissent goes through a lengthy analysis regarding its belief that Appellant was not "in custody" for purposes of Miranda, we note that the Commonwealth itself does not raise that argument and in fact, concedes in its brief that Appellant was in custody for purposes of Miranda. See Cmwlth. Br. at 6 (students are "always in custody during school hours").

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Pennsylvania common pleas courts may appoint school police officers to serve in the school districts within their jurisdiction. See 24 P.S. @ 7-778. The court may grant a school police officer the authority to exercise the same powers while on school property as the municipal police, including the power to arrest, issue summary citations, and detain individuals until local law enforcement is notified. Id. @ 7-778(a), (c)(2), & (c)(3). By an order dated July 14, 1998, the Court of Common Pleas of Monroe County granted East Stroudsburg school police officers the authority to exercise the same powers as the municipal police within the East Stroudsburg Area School District. The court also granted these school police officers the power to issue summary citations and to detain individuals until local law enforcement is notified.

In affirming the trial court's denial of Appellant's suppression motion in the instant case, the Superior Court concluded that school police officers are more akin to school officials than municipal police officers because school police officers are considered employees of the school district. See 24 P.S. @ 7-778(g). The Superior Court noted that Miranda warnings are not required when school officials detain and question a student about conduct that violates school rules. Thus, since Appellant was questioned by a school police officer, i.e. a school official, about an incident involving "a flagrant violation of school rules," the Superior Court found that Appellant was not entitled to Miranda warnings.

While it is true that the East Stroudsburg school police officers involved in the instant matter were employees of the school district, they were also judicially appointed and explicitly authorized to[***9] exercise the same powers as municipal police on school property. See 24 P.S. @ 7-778(c)(2). Furthermore, as Appellant observes, the school police officers were wearing uniforms and badges during Appellant's interrogation, and the interrogation ultimately led to charges by the municipal police, not punishment by school officials pursuant to school rules. In light of these circumstances, we agree with Appellant that the East Stroudsburg police officers were "law enforcement officers" within the purview of Miranda. Thus, Appellant was entitled to be read his Miranda rights before the school police questioned him and, given their failure to do so, we find that Appellant's Fifth Amendment privilege against self incrimination was violated. n3 Accordingly, the Superior Court's order is reversed and the matter is remanded to the trial court for [*8] proceedings consistent with this opinion. n4 Jurisdiction relinquished. - - - -

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n3 Justice Castille's dissent indicates that both this Court's plurality decision in Commonwealth v. Cass, 551 Pa. 25, 709 A.2d 350 (Pa. 1998), and our decision in In the Interest of F.B., 555 Pa. 661, 726 A.2d 361(Pa. 1999), support a conclusion that students are not entitled to Miranda warnings before being questioned by school police officers. Those cases, however, dealt with a completely different situation than the one before the Court today and did not in any way seek to address the issue at bar, i.e. whether the East Stroudsburg school police were required to give Appellant Miranda warnings before questioning him. Nothing in Cass or F.B., contrary to what the dissent infers, precludes this Court from holding that Appellant's Fifth Amendment rights were violated in the instant case.

n4 In addition to his Fifth Amendment claim, Appellant also claims that Article I, Section 9 of the Pennsylvania Constitution requires that the school police officers give Miranda warnings. Appellant does not present a separate argument based on Article I, Section 9, but merely asserts that Miranda warnings by school police officers are required under both the federal and state constitutions. However, since we find that Appellant is entitled to relief under the Fifth Amendment, there is no need to reach his Article I, Section 9 claim. See Gondelman v. Commonwealth, 520 Pa. 451, 554 A.2d 896, 898 (Pa. 1989) (if appellant prevails on federal constitutional claim, this Court does not need to address the arguments predicated upon the Pennsylvania Constitution).

Strip Search - Worst Case Scenario

JOSEPH FEWLESS, by his parents, PATRICK AND SHERRI FEWLESS, Plaintiffs, v. BOARD OF EDUCATION OF WAYLAND UNION SCHOOLS, THOMAS CUTLER, LARRY MEDENDORP, JACK DEMING, and THOMAS J. TARNUTZER, Defendants.
Case No. 1:01-CV-271
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION
208 F. Supp. 2d 806; 2002 U.S. Dist. LEXIS 12627

July 11, 2002, Decided

JUDGES: RICHARD ALAN ENSLEN, United States District Judge.

OPINION:
This matter is before the Court on Plaintiffs' and Defendants' cross motions for summary judgment. The Court will grant Plaintiffs' Motion for Summary Judgment as to the claim made against Defendants Thomas Cutler and Larry Medendorp in their personal capacities. n1 The Court will grant Defendants' Motion for Summary Judgment as to the claim made against all Defendants in their official capacities. The issue of Plaintiffs' damages remains for trial.

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n1 Plaintiffs' motion was styled as "Plaintiffs' Motion for Summary Disposition." The Court notes that "summary disposition" is the name of the procedure by which summary judgment is sought in Michigan state court, but "summary judgment" is the proper term in federal court.

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II. Facts
Plaintiffs Patrick and Sherri Fewless, on behalf of their minor son Joseph Fewless, n2 filed this action against Defendants Board of Education of Wayland Union Schools, Thomas Cutler, Larry Medendorp, Jack Deming, and Thomas Tarnutzer (collectively "Defendants"), alleging unlawful deprivation of Joseph's constitutional rights under 42 U.S.C. § 1983. Plaintiffs claim that Joseph Fewless' Fourth and Fourteenth Amendment rights were violated when Defendants Thomas Cutler and Larry Medendorp performed an allegedly illegal strip search of Joseph's person at school.

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n2 The wrong alleged was committed against only Joseph Fewless. However, cases discussing suits such as this one brought in the name of an infant plaintiff under Federal Rule of Civil Procedure 17(c) discuss the injured party and the next friend or friends collectively as "Plaintiffs." See, e.g., Helminski v. Ayerst Laboratories, 766 F.2d 208, 210 (6th Cir. 1985) (referring to the parents who brought the lawsuit on behalf of the child as "plaintiffs"). Therefore, this Court will refer to "Plaintiffs" meaning Joseph Fewless and his next friends, Patrick and Sherri Fewless.

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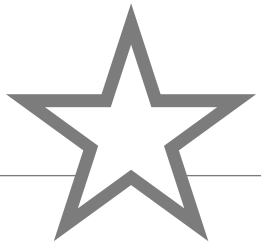
Defendant Thomas Cutler is the Assistant Principal at Wayland Union High School. (Cutler Dep. at 4.) Defendant Larry Me-



dendorp, previously a state police officer, is a security person and events coordinator for Wayland Union Schools. (Medendorp Dep. at 4, 10.) Defendants Cutler and Medendorp both testified that neither of them had performed any other strip searches while employed at Wayland Union High School. (Cutler Dep. at 51-53, Medendorp Dep. at 17.)
Defendants Jack Deming, Principal of Wayland Union High School, and Thomas Tarnutzer, Superintendent of Wayland Union Schools, were not informed of any search of Joseph Fewless until after the searches occurred. (Cutler Dep. at 5, 62-63; Tarnutzer Aff. at P 3; Deming Aff. at P 2.) No other strip searches had yet been performed in the 2000-2001 school year. (Plaintiffs' Motion for Summary Disposition, Ex. F. n3)

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n3 Plaintiffs' Exhibit F is a document which was apparently prepared by Defendant Cutler because the words "prepared by Thomas Cutler" appear at the top of the page. This document apparently lists all of the searches of students performed during the 2000-2001 school year by Defendant Cutler; the grade of the student; what was searched; and what contraband, if any, was found Considering this document as part of the record evidence would normally present evidentiary problems, but since Defendants have not objected to its consideration, the Court will accept the statement gleaned from it as true for these purposes.

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On April 20, 2001 at Wayland Union High School, two searches of Joseph Fewless occurred on suspicion that he was in possession of marijuana. (Fewless Dep. at 51 n4; Cutler Dep. at 5.) Joseph Fewless was fourteen years old at the time of the searches. (Plaintiffs' Motion for Summary Disposition, Ex. A, at 7.)

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n4 "Fewless Dep." refers to the deposition of Joseph Fewless.

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Prior to the first search, four students, Chet Kemp, Darin Stark, Ryan Terpstra, and Kirk Blaauw, reported to Defendant Cutler that Joseph Fewless had marijuana at school. (Cutler Dep. at 36; Terpstra Aff. at P 2.) The students were allegedly questioned together in Mr. Cutler's office regarding this accusation. (Cutler Dep. at 5.) Defendant Cutler testified these students said that Joseph Fewless told them he possessed marijuana in a dime roll n5 during Curd Alexander's class. (Cutler Dep. at 5.) Mr. Alexander is the teacher of a small gas engine and home improvement class. (Fewless Dep. at 43.) Several of the informants said they saw the dime roll and one student claimed to have seen the actual marijuana. (Cutler Dep. at 5-6; Lettinga Aff. at P 2; Terpstra Aff. at P 3.)

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n5 The Court assumes that the "dime roll" was a paper container for storage of coin currency of the kind typically used by banks.

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Joseph Fewless admits he removed a dime roll from his pocket and showed it to his classmates during Mr. Alexander's class. (Fewless Dep. at 56.) However, contrary to the students' accounts, Joseph claims he did not tell classmates he had marijuana, nor did he smell the dime roll or act like he was smoking it. (Fewless Dep. at 56-57.)
The day after the searches of Joseph Fewless, on April 21, 2001, Chet Kemp, Darrin Stark, Ryan Terpstra, and Justin Lettinga were all scheduled to serve a Saturday detention as punishment for an incident involving the destruction of Joseph's lawn mow-

er in Mr. Alexander's small gas engine repair class, and they did serve that detention. (Cutler Dep. at 30.) All but one of the boys had been ordered to help pay for the cost to repair the mower as well. (Cutler Dep. at 31.) Defendant Cutler was aware of this, as well as Joseph's problems involving students picking on him in the past. (Cutler Dep. at 28, 31-32, 45.) Defendant Cutler was also aware that Joseph Fewless was a special education student. (Cutler Dep. at 27.)

Defendant Cutler stated that when the group of students made their report to him, Chet Kemp seemed "upset and stated that he did not want to be around drugs." (Cutler Aff. at P 2.) Defendant Cutler asserts that a family member of Chet Kemp's reportedly has been involved with drugs in the past, and Chet's emotional state led Defendant Cutler to believe that Chet was telling the truth. (Id.)

After receiving the reports from the four students and the teacher, Defendant Cutler stopped Joseph Fewless and asked him to come with him to his office. Defendant Cutler claims Joseph Fewless voluntarily handed over a pink cigarette lighter, which is considered contraband, when the two were on their way to Defendant Cutler's office. (Cutler Dep. at 7, 21.) However, Joseph Fewless does not recall turning in a cigarette lighter on the day of the search. (Fewless Dep. at 24.) Once in Defendant Cutler's office, Defendant Cutler told Joseph about the accusation that Joseph was in possession of marijuana at school. (Cutler Dep. at 8.) Joseph denied having any marijuana. (Id.)

Defendant Cutler then searched Joseph Fewless' gym bag, pockets, and dime roll, and Joseph was cooperative in this search. (Cutler Dep. at 8.) The search turned up no marijuana, and Joseph was sent back to class. The legality of this search is not at issue. After Defendant Cutler's search of Joseph's gym bag, dime roll and pockets, Defendant Cutler reported to Justin Lettinga, another student, and Ryan Terpstra that no marijuana was found on Joseph Fewless. (Terpstra Aff. at P 2.)

After the first search and later that day, students Ryan Terpstra and Justin Lettinga reported to Defendant Cutler that Joseph Fewless said he evaded the first search because he hid the marijuana in his "butt crack." (Cutler Dep. at 12; Lettinga Aff. at P 3; Terpstra Aff. at P 4.) At about the same time, Mr. Alexander reported to Mr. Cutler that he was told by students that Joseph had drugs down "the crack of his ass." (Cutler Dep. at 10-11.) Mr. Alexander did not report that he actually saw marijuana, personally heard Joseph say this, saw Joseph acting suspiciously or smelled marijuana on Joseph. (Cf. Cutler Dep. at 11.)

Defendant Cutler then shared the additional information he received about Joseph Fewless with Defendant Medendorp. (Cutler Dep. at 12.) Defendant Cutler found Joseph in the cafeteria after concluding Joseph was attempting to evade him. (Cutler Dep. at 13, 26.) Defendant Cutler asserts that he came to this conclusion because he and Joseph made eye contact across the cafeteria, and then Joseph turned his head and left the cafeteria. (Cutler Dep. at 13.) Defendant Cutler did not make any motion to stop Joseph or call out to him because he felt there was not time since Joseph was leaving the cafeteria and because, with all of the other students present, Joseph would not have heard him call out. (Id.) When Defendant Cutler caught up to Joseph in the hallway and asked Joseph to come to his office, he did not smell marijuana on Joseph during their walk to the office. (Cutler Dep. at 23.)

Joseph Fewless claims he did not say to anyone that he hid marijuana in his "butt crack." (Fewless Dep. at 55-57.) He testified that Defendant Cutler told him Paul Kiry was the informant who made this assertion, rather than Ryan Terpstra, Justin Lettinga, and Mr. Alexander. (Fewless Dep. at 63.)

Joseph Fewless asserts that he believes that Paul Kiry made this accusation to Defendant Cutler because Paul Kiry told him that he did, and because the two classmates had trouble getting along in the past. (Fewless Dep. at 58.) Joseph Fewless stated that Paul Kiry assaulted him on numerous occasions. (Fewless Dep. at 49-51, 105.) Earlier in the year, Joseph and his mother Sherri Fewless reported to Defendant Cutler that Paul Kiry possessed drugs at school. (Cutler Dep. at 49-50; Fewless Dep. at 45-46.) The subsequent search of Paul Kiry produced marijuana. (Cutler Dep. at 50. n6) Paul Kiry also knew about the subsequent strip search of Joseph after it happened and harassed and teased Joseph about it. (Cutler Dep. at 44.)

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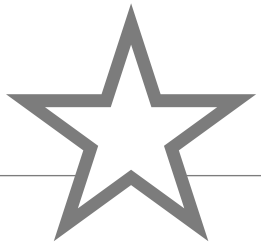

n6 Defendant Cutler's information that the search of Paul Kiry produced marijuana is hearsay, in that he testified that he was told the search produced marijuana and did not conduct the search himself. However, this information was not disputed by Defendants.

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Defendants allege that the following scenario took place next: Defendant Cutler brought Joseph into his office n7 and told Joseph that Defendant Cutler was told by students that Joseph hid marijuana in his "butt crack." (Cutler Dep. at 15.) Joseph said, "No, I don't have any. I don't have anything to hide." (Id.)

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n7 Defendant Cutler's office measures about eight feet by eight feet. (Medendorp Dep. at 9.)

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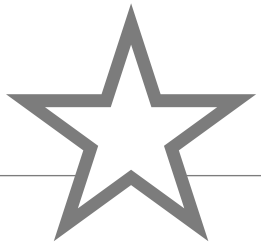
Defendant Medendorp then entered the office, and Defendant Cutler said to him that Joseph agreed to "drop his drawers." (Cutler Dep. at 15.) Defendant Medendorp then told Joseph that he did not have to consent to the search. (Cutler Dep. at 17.) Defendant Cutler asserts that Joseph then began to stand up, and Defendant Medendorp stated again: "Joe, this has to be freely and voluntary on your part." (Id.) Joseph then reportedly said that he understood and that he did not have anything to hide. (Id.) Defendant Medendorp then reportedly said, "I want you to understand this has to be freely and voluntary on your part. You don't have to do this. If you want to, we'll walk out the door." (Id.) Again, Joseph reportedly said that he did not have anything to hide. (Id.) Defendants Medendorp and Cutler testified that Joseph appeared "relaxed," "comfortable," and "anxious to show" that he was not in possession of marijuana. (Cutler Dep. at 17; Medendorp Dep. at 8.)

Thus, Defendants allege that Defendant Medendorp informed Joseph Fewless three times that Joseph did not have to consent to the search and it had to be voluntary. (Cutler Dep. at 17, 23; Medendorp Dep. at 9.) Defendants Cutler and Medendorp assert that they believed Joseph understood this and that he subsequently consented to the search. (Cutler Dep. at 17; Medendorp Dep. at 8-9.) Patrick Fewless, Joseph's stepfather, testified that Joseph told him after the search that he was asked to consent to the search, and Patrick Fewless testified that he believed Joseph said Defendant Cutler did the asking. (P. Fewless Dep. at 44.) Defendant Cutler, however, testified that he personally did not ask Joseph if he would permit a search, nor did he explain Joseph's constitutional rights to him. (Cutler Dep. at 15, 23.)

Joseph Fewless claims that Defendants Cutler and Medendorp said they were going to perform a strip search if that was okay with him. (Fewless Dep. at 66.) Joseph asserts that he then told Defendants Cutler and Medendorp that he had nothing to hide and that Defendants Cutler and Medendorp responded by saying that they could do the strip search "or the four police officers standing outside can do it." (Id.) Defendant Medendorp denied this specific allegation. (Medendorp Dep. at 14.) Joseph asserts that he was then told to go and stand by the wall and pull down his pants, which he did but that he was scared. (Fewless Dep. at 66.) Joseph denies being told the search "had to be voluntary." (Fewless Dep. at 70.)

The scope of the search is also in dispute. Defendant Cutler claims Joseph Fewless lowered his pants to about four to five inches above the knee, and Defendant Medendorp pulled the waistband of Joseph's boxer shorts back. (Cutler Dep. at 18.) Defendant Medendorp confirmed Defendant Cutler's account and stated he let go of Joseph's boxers after looking down the back of the boxers at Joseph's buttocks. (Cutler Dep. at 18; Medendorp Dep. at 9.)

However, Joseph Fewless claims he dropped his boxers as well as his pants to his ankles. (Fewless Dep. at 68-69.) Joseph also asserts that Defendant Medendorp pulled up Joseph's shirt and looked at his "front side" after Joseph dropped his pants and boxers to his ankles. (Fewless Dep. at 69.) No marijuana was found on Joseph's person as the result of the second search. (Medendorp Dep. at 9-10. n8)



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n8 The Court cannot consider as evidence a memo submitted by Plaintiffs which was purportedly written by Mr. Jamey Vermaat, a special education teacher for Wayland Public Schools. The memo does not comport with the requirements of Federal Rule of Civil Procedure 56(e), and thus was not considered by the Court.

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Defendant Medendorp acted on the basis of Defendant Cutler's information and directive. (Medendorp Dep. at 10, 21.) Defendant Medendorp was not told which students gave Defendant Cutler the tip that he received. (Medendorp Dep. at 5.) Finally, Defendant Cutler called Joseph's mother, Sherri Fewless, after the search, but not prior to it. (Cutler Dep. at 18, 26.) Joseph Fewless has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"), and is eligible for special education services under the educational definition of being a Physically or Otherwise Health Impaired ("POHI") student. n9 (Plaintiffs' Motion for Summary Disposition, Ex. A, at 7.) Joseph has a history of lying, which he is working on with his doctors. (Fewless Dep. at 9; Med. Rec. at 103, 106, 113, 115, 118, 120, 127, 137, 382). Joseph's attention deficit disorder typically involves impulsive behavior and a lack of appropriate social judgment. (See Wayland Schools Special Programs Center, Assessment of Joseph Fewless and Explanation of ADHD, at Plaintiffs' Ex. A.) Joseph has a long history of disciplinary problems at Wayland Union High School, typically involving disruptive behavior like leaving his seat in class or talking out of turn. (Cutler Dep. at 27, 64, 65.) However, Joseph Fewless has never been disciplined at school for an offense involving drugs. (Cutler Dep. at 65.) In fact, prior to the second search, Defendant Cutler knew Joseph Fewless had never been accused of possession, use, or intoxication at school in the past. (Cutler Dep. at 8, 17, 27.) While Defendants have alleged instances where Joseph tested positive for marijuana or was accused of possessing marijuana in settings outside of school, there is no indication that Defendant Cutler knew about these alleged incidents or that the alleged incidents occurred prior to the search at issue in this lawsuit.

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n9 Plaintiffs' briefing argues that Joseph has been "diagnosed ... with post traumatic stress disorder and [is] suspected to have mild dissociative episodes which prevent Joseph from recalling some events." (Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Disposition at 2 (citing Med. Rec. at 205).) However, the medical record cited by Plaintiffs contains a note apparently written by a doctor to another professional expressing suspicion of post traumatic stress disorder ("PTSD"), not a diagnosis. Moreover, the doctor apparently writing the note does not draw any conclusions about these conditions, and does not draw the conclusion that these conditions would or might prevent Joseph from recalling some events.

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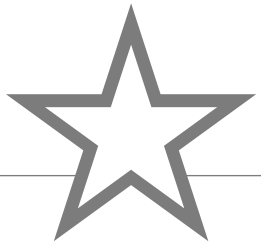
III. Analysis of Plaintiffs' Motion for Summary Judgment

To win summary judgment on their Fourth Amendment claim against Defendants Cutler and Medendorp, who were sued in their personal capacities, Plaintiffs must show that no reasonable jury could find other than that Joseph's Fourth Amendment rights were violated by Defendants Cutler and Medendorp. Plaintiffs must also demonstrate that qualified immunity does not entitle Defendants Cutler and Medendorp to summary judgment as to this claim. To win summary judgment as to the Defendants sued in their official capacities, Plaintiffs must show that Joseph's Fourth Amendment rights were violated and that school policy was the moving force behind the violation.

HN7 School officials are subject to constitutional restraints as state actors. Tarter v. Raybuck, 742 F.2d 977, 981 (6th Cir.



1984). Therefore, Defendants Cutler and Medendorp have two avenues, given the circumstances and their allegations, through which they could prove that Joseph Fewless' Fourth Amendment rights were not violated: (1) Joseph gave legally valid consent to the search, or (2) the search was "reasonable." Even examining the facts in a light most favorable to Defendants, Defendants Cutler and Medendorp cannot show either. Moreover, the Court does not find that qualified immunity shields them from liability. Therefore, this Court finds that Plaintiffs are entitled to summary judgment as to their claim against Defendants Cutler and Medendorp, as sued in their personal capacities, but not as to the claim against any of the Defendants sued in their official capacities. n10

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n10 Plaintiffs' Complaint contains one Count which alleges a violation of 42 U.S.C. § 1983. Within the description of this Count, Plaintiffs discuss the constitutional right to be free of unreasonable personal searches. Plaintiffs seem to implicate the Fourteenth Amendment as well by stating that "the Fourth and Fourteenth Amendments to the United States Constitution prohibit unreasonable searches." (See Complaint, at P 24.) However, the Fourteenth Amendment does not directly prohibit unreasonable searches except as the Due Process Clause of the Fourteenth Amendment makes the Fourth Amendment's requirements applicable to the states. See Mapp v. Ohio, 367 U.S. 643, 650, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, 16 Ohio Op. 2d 384, 86 Ohio L. Abs. 513 (1961). The Court will assume that this was the meaning intended by Plaintiffs' reference to the Fourteenth Amendment in the Complaint.

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A. Whether Joseph Fewless Consented To The Strip Search

A search authorized by consent of the searched individual is constitutionally permissible, as long as the consent was given both freely and voluntarily. Schneckloth v. Bustamonte, 412 U.S. 218, 222, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973). Defendants assert that Joseph Fewless gave constitutionally valid consent to be strip searched.

Voluntariness of a consent to a search should be determined from the totality of the circumstances, including both the characteristics of the searched party and the details of the interrogation. Schneckloth, 412 U.S. at 227. First, the Court should examine the characteristics of the searched individual, including age, intelligence, and education; whether the individual understands the right to refuse to consent; and whether the individual understands his or her constitutional rights. United States v. Jones, 846 F.2d 358, 360 (6th Cir. 1988). Second, the Court should consider the details of any detention, including length and nature of detention, and the use of coercive or punishing conduct. Schneckloth, 412 U.S. at 226. Further, the Court is to consider indications of more subtle forms of coercion that might impact an individual's judgment. See United States v. Watson, 423 U.S. 411, 424, 46 L. Ed. 2d 598, 96 S. Ct. 820 (1976).

The Sixth Circuit has held that there is a presumption against the waiver of constitutional rights. Tarter, 742 F.2d at 980. When litigating the issue of consent, the burden is on the defendants to demonstrate such a voluntary relinquishment of constitutional rights by the plaintiff. Id. at 980. Consent must be proved by clear and positive testimony and must be unequivocal, specific, and intelligently given, uncontaminated by any duress and coercion. United States v. Williams, 754 F.2d 672, 674-75 (6th Cir. 1985). Consent must not be coerced, by explicit or implicit means, by implied threat, or covert force. Schneckloth, 412 U.S. at 228. When conducting this analysis, account must also be taken for the potentially vulnerable subjective state of the searched person. Id. at 229. n11

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n11 Defendants cite United States v. Crowder for the proposition that the plaintiff must show more than a subjective belief of

coercion, but also some objectively improper action on the part of the defendants. Crowder, 62 F.3d 782, 787 (6th Cir. 1995). For this proposition, the Crowder Court apparently refers to Watson, 423 U.S. 411, 46 L. Ed. 2d 598, 96 S. Ct. 820, but does not cite to a particular page number. See id. In addition, this Court can find no location in Watson where such a proposition may be derived. Finally, this proposition of law would seem to be in direct conflict with Schneckloth, which instructed that "in examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." Schneckloth, 412 U.S. at 229. Schneckloth clearly contemplates consideration of objectively improper official action, but does not require such improper official action, since other circumstances can show a lack of voluntariness. Cf. id.

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When consent is relied upon as the basis for a warrantless search, the scope of the consent given determines the permissible scope of the search. United States v. Gant, 112 F.3d 239, 242 (6th Cir. 1997) (citing Florida v. Jimeno, 500 U.S. 248, 251-52, 114 L. Ed. 2d 297, 111 S. Ct. 1801 (1991)). The standard for measuring the scope of consent is an objective reasonableness standard, asking what the reasonable person would have understood by the exchange between the official and suspect. Gant, 112 F.3d at 242 (citing Jimeno, 500 U.S. at 251).

Because this is Plaintiffs' Motion for Summary Judgment, the Court must consider the record in a light most favorable to Defendants. Therefore, the Court will assume that Defendant Cutler asked Joseph Fewless about the accusation, he denied it, and he said that he did not have anything to hide. Defendant Cutler did not ask Joseph if he would permit a strip search. Defendant Medendorp then entered Defendant Cutler's office and was told by Defendant Cutler that Joseph agreed to "drop his drawers." Defendant Medendorp then told Joseph three times that the search had to be performed with Joseph's consent, and that the parties would "walk out the door" if Joseph did not consent. Joseph's response was again that he did not have anything to hide.

Considering the facts in a light most favorable to Defendants, Joseph was a fourteen-year-old youth at the time of this exchange, considered a special education student, and had ADHD. This information was known to Defendants Cutler and Medendorp. Joseph was escorted to a school official's office, measuring eight feet by eight feet, where he was joined by Defendants Cutler and Medendorp, the assistant principal and the school security officer, and his parents were not called. He had already been questioned that day, and a search of his pockets, gym bag, and dime roll conducted, confirming his denial of possession of marijuana at school.

Joseph's only response to whether he would permit a further search, to either Defendant Cutler or Defendant Medendorp, was that he had nothing to hide. In fact, while Joseph and Defendant Cutler were alone before Defendant Medendorp joined them, the subject of a search, much less any kind of strip search, never came up, but Defendant Cutler reported to Defendant Medendorp when he joined them that Joseph agreed to "drop his drawers." Defendant Medendorp told Joseph that he could refuse to allow the strip search and that the three would leave the office, but he did not inform Joseph what the next step would be: whether Joseph's parents would be called and informed about the accusation, whether Joseph would be allowed to go back to class and that would be the end of the inquiry, etc. n12

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n12 It seems very unlikely to the Court that Joseph's outright refusal to consent to a second search would have been the end of the inquiry. Wayland Schools' policy instructs school officials to attempt to receive consent to be searched from the student, including informing the student of his or her right to refuse consent, but instructs that "the principal shall conduct the search, however, with or without the consent." (See Plaintiffs' Motion for Summary Disposition, Wayland Schools Policy, at WS 00003.)

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Most troubling, the scope of the proposed search, a very intrusive type of strip search of the person, was not explained to Joseph. He was not told that he would have to pull down his pants, even if he may have assumed that this would be the case. Moreover, he was not told his boxer shorts would be pulled away from his body, and his bare buttocks would be examined. Joseph Fewless was a vulnerable youth in a situation akin to police custody. Defendants knew of his vulnerability, youth, and behavioral conditions impacting his impulse control and decision-making capacity. He was not provided an opportunity to speak to someone who was an advocate for him like a parent, counselor or attorney. He never gave explicit, clear consent to be searched which is required for a constitutionally valid consent; at most, his statements and actions could be described as acquiescence. See Williams, 754 F.2d at 674-75. "I have nothing to hide," without more, is not an expression of consent to be searched, particularly consent to be examined partially naked, as Joseph was. Another individual in Joseph's situation and with his personal traits would not have considered himself or herself to have other options besides "consenting" because he clearly would not be believed or left alone until he "consented" to the strip search. n13 Particularly since Defendants bear the burden of demonstrating the voluntariness of the consent, constitutionally valid consent was not present, even assuming all of Defendants' allegations are true. The "consent" was merely acquiescence and was not freely or voluntarily given.

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n13 Even if it is true that Joseph reported to his stepfather Patrick Fewless that he consented to a search, Joseph's own assessment is not legally relevant to whether the circumstances demonstrate the presence of constitutionally valid consent.

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B. Whether The Strip Search Was Reasonable Under The Fourth Amendment

Nevertheless, the search performed by Defendants Cutler and Medendorp was still within the confines of the Fourth Amendment if it was justified by "reasonable suspicion" that a law or rule of the school was being broken by Joseph Fewless. The Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials. New Jersey v. T.L.O., 469 U.S. 325, 333, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985). "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." Camara v. Municipal Court, 387 U.S. 523, 528, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967), cited in Tarter, 742 F.2d at 981.

The Sixth Circuit has stated that "it is the affirmative obligation of the school authorities to investigate any charge that a student is using or possessing narcotics and to take appropriate steps if the charge is substantiated." Tarter, 742 F.2d at 982. The accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. T.L.O., 469 U.S. at 341. Accordingly, the Supreme Court created a two-pronged test defining the boundaries of a lawful search conducted by school officials:

Determining the reasonableness of any search involves a twofold inquiry: first, one must consider whether the action was justified at its inception; second, one must determine whether the search actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place. Under ordinary circumstances, a search of a student by a

teacher or other school official will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

T.L.O. 469 U.S. at 341-342 (internal quotations and citations omitted). Thus, this Court looks for a search based on reasonable suspicion and reasonable in scope. See id.

A study of the record leads the Court to conclude that the strip search of Joseph Fewless' person was neither justified at its inception by reasonable suspicion nor was it reasonable in scope. First and most compelling, even assuming Defendants' account is true for purposes of Plaintiffs' motion, there was not enough evidence to justify the strip search which occurred. In fact, drawing all reasonable inferences from the available evidence should have led a reasonable official not to strip search Joseph without further investigation.

Defendant Cutler received a report in the morning from four students that Joseph Fewless claimed in small engine repair class to have marijuana in his dime roll and acted like he pretended to smoke the dime roll. Three of those four students were to serve a Saturday detention the next day for destroying Joseph's lawnmower in small engine repair class, and some of the students were also ordered to pay restitution. Those four students made their report to Defendant Cutler en masse and not independently. (See Cutler Dep. at 5.) Only one student claimed to have seen marijuana, although they all claimed to have seen Joseph's dime roll in addition to hearing him make incriminating statements.

Defendant Cutler then questioned Joseph Fewless, who turned over a pink cigarette lighter to Defendant Cutler, and searched Joseph's pockets, gym bag and dime roll. This search turned up no marijuana.

Two of the students who were to serve a Saturday detention the next day for destroying Joseph's lawnmower, Ryan Terpstra and Justin Lettinga, then made a report, apparently together, to Defendant Cutler that Joseph told them he evaded discovery during the first search because he was hiding marijuana in his "butt crack." The record does not disclose any additional questioning by Defendant Cutler regarding their clearly possible ulterior motives or any questioning designed to elicit information regarding the reliability of their tip. Although Defendant Cutler also received this same report from teacher Curd Alexander, Mr. Alexander's information appears from the record to have come from unidentified students, presumably the informants, rather than first-hand, personal observations. No adult, at any time during this day, smelled marijuana on Joseph or reports having observed him acting suspiciously, erratically, etc.

Defendants claim that because Chet Kemp appeared upset when he reported to Defendant Cutler, saying that he did not want to be around drugs apparently because of a family member's problems with drugs, Chet Kemp's account had additional credibility. This is one inference which can be drawn from such an observation by Defendant Cutler. However, other inferences could reasonably be drawn from an upset student in that situation. For purposes of Plaintiffs' summary judgment motion, the Court assumes that the inference Defendant Cutler drew was the most reasonable one from his personal observation.

However, Defendant Cutler never conducted any investigation to determine whether other students not associated with the informants and not tainted or less tainted by potential ill will against Joseph might be able to provide any statements or information helpful to determining whether reasonable suspicion existed. He did not speak to other teachers who had contact with Joseph. He never called Joseph's parents to attempt to collect additional information which might be helpful in deciding whether further investigation was warranted. He did not ask further questions of Joseph besides confronting him with the "butt crack" accusation which could have led to discovery of more information. He did not search Joseph's locker or in other locations to look for items which may have led a reasonable person to believe the accusations about Joseph's marijuana possession.

In another case involving a school strip search for drugs, the Sixth Circuit held that qualified immunity shielded the school officials, but the circumstances were very different. See Williams v. Ellington, 936 F.2d 881, 882 (6th Cir. 1991). There, the

Sixth Circuit specifically noted that the principal "was satisfied there was no animosity between [the accused students and the informant] to provide [the informing student] with an ulterior motive for reporting the incident" after questioning the informant if she had any problem with the accused students. Id. at 882. On a Tuesday, a student named Ginger reported to the principal after Ginger's mother called the principal that the plaintiff, a female student, and another female student named Michelle had a clear vial containing white powder in class, that the girls were smelling the powder, and that they offered some to Ginger. Id. Upon questioning, the teacher in whose class the incident happened had other, independent observations to back up Ginger's allegations, since the teacher noticed that Michelle was acting strangely, to which Michelle reported to the teacher that she had the flu. Id. The teacher also recounted a previous incident involving a note found under the plaintiff's desk, apparently typed by the plaintiff, involving her friends and a reference to a "rich man's drug" which the girls convinced the teacher was a joke. Id.

The principal then spent the next few days investigating the allegation, including discussing it with the school guidance counselor, who was also the plaintiff's aunt, and Michelle's father. Williams, 936 F.2d at 882. Michelle's father reported that she had recently stolen $ 200 from his dresser drawer, and he expressed fear that Michelle was using illegal drugs. Id. During the same week, Michelle came to the principal and told him that two students, Kim and her boyfriend Steve, were inhaling a drug known as "rush." Id. Kim and Steve came to the principal and told him that it was other students, not them, inhaling "rush," so the principal "questioned the motives of these students in coming forward and the validity of the information." Id.

On Friday, when the original informant, Ginger, made another report to the principal, the principal and the assistant principal confronted the plaintiff and Michelle. Williams, 936 F.2d at 883. Upon confrontation in an administrative office, Michelle produced a vial of "rush" from her purse but claimed that it was Kim's. Id. The girls' own lockers were first searched, and then another locker that the plaintiff was known to have been using was searched. Id. The plaintiff's books and purse were then searched, and the search produced nothing. Id. Then the plaintiff was taken into an office and searched by the female assistant principal and a female secretary. Id. The plaintiff was told to empty her pockets, and she did. Id. After being told twice to do so, the plaintiff took off her T-shirt. Id. The plaintiff was then required to lower her jeans to her knees. Id. The plaintiff claimed, and the assistant principal disputed, that the assistant principal pulled on the elastic of her undergarments "to see if anything would fall out." Id. Finally, Williams was told to remove her shoes and socks, and no drugs were found after this search. Id.

Despite the fact that Ellington was satisfied that Ginger had no ill motive towards the girls, Ellington attempted to verify the information with other individuals. Williams, 936 F.2d at 887. Based upon all the information that Ellington had collected, the Sixth Circuit found that qualified immunity shielded the defendants from suit because it was reasonable to believe that the search comported with the Fourth Amendment. Id. at 886-87. n14

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n14 The Sixth Circuit did not take up the issue of whether the search violated the Fourth Amendment, having decided the qualified immunity question in the defendants' favor. Cf. Williams, 936 F.2d at 886-87.

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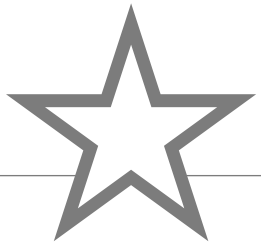
Importantly, the Sixth Circuit also examined to what extent an informant's tip could be used to create reasonable suspicion. See id. at 888. In analyzing the tip of an informant, a court is to use a "totality-of-the-circumstances" inquiry and take into account the quantity and quality of the information comprising a tip. Id. "While there is concern that students will be motivated by malice and falsely implicate other students in wrongdoing, that type of situation would be analogous to the anonymous tip. Because the tip lacks reliability, school officials would be required to further investigate the matter before a search or seizure would be warranted." Id. at 888-89.



The Williams Court found that Ellington carefully questioned Ginger, the informing student, to ascertain whether any improper motive existed and satisfied himself that none existed, and thus Ellington assured himself that Ginger's tip was reliable. Id. at 889. In addition, Ellington took steps to verify the information. Id.

Other cases where school searches have been found constitutional also include the presence of more evidence and evidence of greater reliability than the instant case. The Sixth Circuit found that there was reasonable cause to search a student where school officials personally observed activity they reasonably believed to be the student's use of marijuana and sale of marijuana to another student. Tarter, 742 F.2d at 983. In addition, another student identified the plaintiff's picture from a yearbook as a student who sold him marijuana. Id. See also Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316, 1319, 1322 (7th Cir. 1993) (strip search found reasonable where school officials observed an unusual bulge in the crotch area of the plaintiff's sweatpants and had collected various allegations that the plaintiff had, on previous occasions, allegedly smoked marijuana on a school bus, hid marijuana in his crotch area, dealt drugs, tested positive for marijuana, and failed to successfully complete a drug rehabilitation program); Widener v. Frye, 809 F. Supp. 35, 38 (S.D. Ohio 1992) (holding search reasonable where student who smelled of marijuana and appeared "lethargic" in a manner consistent with marijuana use and gave an unsatisfactory explanation for those factors was told to remove his jeans but not his undergarments).

Conversely, even where school officials had a personal observation by a school employee and some evidence after an initial purse search to indicate improper conduct on the part of a student, more evidence than was present in the instant case, another district court still found that a strip search later undertaken was not justified at its inception. See Cales v. Howell Public Schools, 635 F. Supp. 454, 455 (E.D. Mich. 1985). A female student was observed in the school parking lot during the day by the school security guard, who reported that she attempted to avoid detection by "ducking" behind parked cars. Id. Upon being asked who she was, the student gave a name other than her own, and she was taken to the assistant principal's office. Id. The student's purse was then searched, which turned up school "readmittance slips" improperly in her possession. Id.

The student was then made to empty her pockets, take off her jeans, and bend over so a female administrator could "visually examine the contents of her brassiere." Cales, 635 F. Supp. at 455. The school official in charge stated he believed on the basis of the evidence available the student was in possession of illegal drugs. Id. The court held that the search was not reasonable at its inception because while there was reasonable suspicion that the student was violating a school rule or a law, there was not reasonable suspicion that a search would turn up evidence of possession of drugs. Id. at 457. As the court pointed out, the student could have been guilty of truancy, stealing hubcaps, or meeting a boyfriend in the middle of the day, but very little if anything from her conduct and the evidence indicated that she was hiding drugs on her person. Id.

There are a number of circumstances which would not require an investigation on the scale of what took place in Williams before a constitutional search of a student could be performed. "Like police officers, school officials need discretionary authority to function with great efficiency and speed in certain situations, so long as these decisions are consistent with certain constitutional safeguards. To question an official's every decision with the benefit of hindsight would undermine the authority necessary to ensure the safety and order of our schools." 936 F.2d at 886 (emphasis added). On the other hand, the circumstances in this case were simply not enough to create reasonable suspicion justifying a strip search. To put it another way, one does not need the benefit of hindsight in this situation to know this search was unreasonable at its inception.

The informants' credibility was of a highly questionable nature, given their potential ill motives. After the first search of the gym bag and Joseph Fewless' pockets, which also included a search of the item said to contain the marijuana, Joseph Fewless' dime roll, no marijuana was found. There was no other corroborating evidence of marijuana possession, like the smell of marijuana. The only adult to make an accusation was apparently only reporting secondhand information received from the informants themselves. Moreover, the second accusation that Joseph hid marijuana in his "butt crack" to evade discovery is exactly an accusation of the type which might be expected to potentially result in a highly invasive and humiliating search. For this reason, this type of accusation should have been suspect, particularly given the dubious position from which the informants

were providing their information.
While much has been made by Defendants about the usually credible nature of the student-informants and the manner in which the reports were made, i.e., that Chet Kemp was apparently upset and therefore appeared more credible, the Court does not see that as enough to remove the taint of the students' obvious motive to falsely accuse Joseph. In addition, while one of the original informants was not associated with the lawnmower incident, the fact that this student made his report in conjunction with the students who were associated with the lawnmower incident render his word alone not enough to make these reports sufficiently credible to justify the strip search.
The fact that Joseph Fewless has lied to authority figures in the past and demonstrated behavioral problems does not somehow make the student-informants more credible, either. The Court's analysis assumes that Defendants' version is the truth, since the Court is analyzing Plaintiffs' motion for summary judgment. Joseph, despite all of his other discipline problems at school, was never before in any drug-related trouble at school or in any other setting to Defendants' knowledge. Defendants have also brought up incidents occurring after the search at issue where Joseph has been accused of possessing or using marijuana, incidents which do not appear to have yet been proven, and nevertheless are still irrelevant. At the time Defendants Cutler and Medendorp undertook the strip search of Joseph, Defendants had far from enough evidence to form reasonable suspicion.
Second, the record evidence also leads this Court to conclude, even considering the evidence in a light most favorable to Defendants, the strip search conducted was not reasonable in scope. Peering into Joseph Fewless' boxer shorts at his bare buttocks may not have been the least intrusive way to detect marijuana, depending on its form and container, hidden between his buttocks. For example, assuming an otherwise constitutionally-justified search, a student could be asked to shake his or her underwear, while not exposing themselves, to see if any contraband were to come loose and become visible beneath the underwear. In addition, the search that was performed seems unlikely to have discovered marijuana placed deeply between the buttocks. This fact makes the search performed unreasonable in scope because of its pointlessness: the search could not achieve its aim of conclusively determining whether marijuana was hidden between the buttocks. n15 A strip search which has no hope of achieving its purported aim is not reasonable in scope.

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n15 Doing a visual inspection of the perianal area would be the only true way to rule out possession of marijuana between the buttocks, but the invasiveness of that type of search would have rendered it unreasonable in scope as well. Of course, this Court is not saying that making the search more invasive and more of an affront to Joseph's constitutional rights would have been the proper course of action.

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C. Whether The Defendants Sued Only In Official Capacities Can Be Held Liable
Defendants Cutler and Medendorp have been sued in their personal capacities n16 and their official capacities, and the other Defendants have been sued in their official capacities. Personal capacity suits seek to impose personal liability upon a government official for actions he or she takes under color of state law. Kentucky v. Graham, 473 U.S. 159, 165, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985). In contrast, official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent. Id. at 165. As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. Id. at 166.

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n16 Personal capacity and individual capacity are used interchangeably to describe the same legal concept. Graham, 473 U.S.

at 165 n.10.

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To establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. Graham, 473 U.S. at 166. More is required in an official-capacity action, however, because a governmental entity is liable under § 1983 only when the entity itself is a moving force behind the deprivation. Id. at 166.

In Monell v. Department of Soc. Servs. of New York, the Court concluded that a municipality is a "person" within the meaning of § 1983. Monell, 436 U.S. 658, 689, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). The Court eliminated respondeat superior liability for government bodies when it concluded that a municipality may not be sued under § 1983 for an injury inflicted solely by its employees. Id. at 694. Accordingly, the Monell Court required a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal policy or custom, whether made by its lawmakers or by those whose acts may fairly be said to represent official policy, that caused the plaintiff's injury. Id. at 694. The municipal policy at issue in this case involves the school's search and seizure policy and guidelines and the custom at issue involves the application of that policy by school officials and the Board of Education.

Congress did not intend to impose liability on a municipality under § 1983 unless deliberate action attributable to the municipality itself is the "moving force" behind the plaintiff's deprivation of federal rights. Board of the County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 400, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997). The Brown Court further stated that a § 1983 plaintiff must "show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." Id. at 404. The Court then elaborated the level of proof necessary for recovery under § 1983:

Proof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably. Similarly, the conclusion that the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains.

Id. at 405. However, the Court further stated that "where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." Id. at 405.

In Pembaur v. Cincinnati, the Supreme Court recognized that under the appropriate circumstances, municipal liability may be imposed for a single decision by municipal policymakers. Pembaur, 475 U.S. 469, 480, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986). However, in City of Oklahoma City v. Tuttle, the Supreme Court stated that where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary to establish both the requisite fault on the part of the municipality, and the causal connection between the policy and the constitutional deprivation. Tuttle, 471 U.S. 808, 824, 85 L. Ed. 2d 791, 105 S. Ct. 2427 (1985).

The relevant question, regarding the official liability of Board of Education of Wayland Union Schools, Jack Deming, and Thomas Tarnutzer, is whether these Defendants' deliberate actions were the moving force behind the violation. The policy in existence regarding student searches mirrors the legal standard for school searches, repeated above. "The Board .. directs that no student be searched without reasonable suspicion or in an unreasonable manner. The extent of the search will be governed by the seriousness of the alleged infraction, the student's age, and the student's disciplinary history." (Plaintiffs' Motion for Summary Disposition, Ex. G, Search and Seizure Policy, WS 0001.) Therefore, the Wayland Schools policy governing student

searches is constitutional. Moreover, Plaintiffs have presented no evidence suggesting any deliberate actions behind the violation and are not entitled to summary judgment as to any of Defendants sued only in their official capacities.

D. Qualified Immunity
Defendants Cutler and Medendorp are still entitled to summary judgment as to claims made against them in their personal capacities if they can show entitlement to qualified immunity. Qualified immunity is intended to provide municipal officials sued in their personal capacities with the ability to reasonably anticipate when their conduct may give rise to liability for damages. Anderson v. Creighton, 483 U.S. 635, 638, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987).

When government officials abuse their offices, action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees. On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a [sic] qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.

Id. (internal citations and quotations omitted). An official protected by qualified immunity may be held personally liable for an allegedly unlawful official action if the action assessed in light of the legal rules that were clearly established at the time of the action does not meet an "objective legal reasonableness" standard. Id. at 639.
The right must be sufficiently clear that a reasonable official in the defendant's position would understand that what he or she is doing violates the right at issue under the circumstances. Anderson, 483 U.S. at 640. The very action in question need not have been previously held unlawful, but in light of pre-existing law, the unlawfulness of the action must be apparent. Id. "The determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials." 469 U.S. at 341. See also Wilson v. Layne, 526 U.S. 603, 609, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999) (stating that "clearly established," for purposes of qualified immunity, means that the contours of the right must be sufficiently clear that a reasonable official would understand that the action in question violates that right).
In light of pre-existing law, the Court does not find that qualified immunity precludes the personal liability of Defendants Cutler and Medendorp. Having examined the information possessed by them, the Court concludes it was not objectively legally reasonable to believe that Joseph Fewless gave valid consent to be strip searched, n17 nor that the search was justified by reasonable suspicion or was reasonable in scope.

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n17 The Court could not find any cases involving school officials attempting to obtain legally valid consent from youths with disabilities like ADHD. The cases involving school searches of students either did not address the issue of consent at all or involved situations where consent was clearly not present. See, e.g., Cornfield, 991 F.2d at 1319 (school called student's mother to attempt to obtain consent to search, and mother refused). Other cases deciding the voluntariness of consent to search were factually inapposite to the instant case. However, Schneckloth clearly instructs courts to examine the totality of the circumstances, specifically naming factors like youth, intelligence, education, and the potentially vulnerable state of the person who consents. Schneckloth, 412 U.S. at 226, 229. "In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary.

But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." Hope v. Pelzer, 153 L. Ed. 2d 666, 122 S. Ct. 2508, 70 U.S.L.W. 4710, 2002 WL 1378412 (U.S. 2002) (internal quotations and additions omitted). The question is whether the officials had "fair warning" as to the law governing their conduct. See Hope, 153 L. Ed. 2d 666, 122 S. Ct. 2508, 70 U.S.L.W. 4710, 2002 WL 1378412. This Court finds that Schneckloth gave "fair warning" that Joseph's personal characteristics, as they affected the totality of the circumstances, rendered him unable to voluntarily consent to be searched.

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As to Joseph Fewless' "consent," even ignoring for the moment Joseph's personal characteristics, he only ever said that he had "nothing to hide." This does not indicate clear and unequivocal consent to be searched. Moreover, it is well-settled law that the scope of the consent defines the scope of a search based on consent. Without informing Joseph in some manner about what they were planning to do, no reasonable official could believe that they had Joseph's express permission to conduct the search that Defendants Cutler and Medendorp allege took place. Finally, Defendants Cutler and Medendorp were well aware of Joseph's personal characteristics, and the law is clear that those characteristics, considered in total, can lead to a conclusion of inability to render voluntary consent to a search.

As to the reasonableness of the strip search, a Sixth Circuit case on point, Williams v. Ellington, held the school officials protected by qualified immunity only after an investigation much more extensive and reliable than the one that was conducted here. Williams, 936 F.2d at 886-87. Moreover, that case specifically discussed how information from student-informants, if reason existed to believe it was unreliable, would require further investigation before reasonable suspicion would exist which justified a search. Id. at 888-89. Thus, the decision to strip search Joseph Fewless was not objectively legally reasonable. Moreover, the decision was highly questionable in light of common sense and general experience. Qualified immunity does not bar the personal liability of Defendants Cutler and Medendorp.

IV. Analysis of Defendants' Motion for Summary Judgment

Having found that Plaintiffs' Motion for Summary Disposition should be granted as to the claim against Defendants Cutler and Medendorp in their personal capacities, Defendants' Motion for Summary Judgment as to those Defendants will be denied. As noted above, Plaintiffs have presented no evidence suggesting any deliberate actions behind the violation and are not entitled to summary judgment as to any of Defendants in their official capacities. Therefore, Defendants' Motion for Summary Judgment will be granted as to all of the Defendants in their official capacities.

V. Conclusion

The Court will grant summary judgment for Plaintiffs as to the claim made against Defendants Cutler and Medendorp in their personal capacities and will grant summary judgment for Defendants as to the claim made against them in their official capacities. A Judgment consistent with this Opinion will be entered. The issue of Plaintiffs' damages is the sole issue remaining for trial.

Hugging and Sexual Harassment - Best Case Scenario

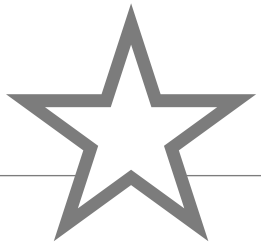
GINNY GORDON by Sherry Gordon, her Mother and Next Friend, and SHERRY GORDON, Individually, Plaintiffs, v. OTTUMWA COMMUNITY SCHOOL DISTRICT and HAROLD FRANCIS SKINNER, Defendants.
Civil No. 4-99-cv-30167
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION
115 F. Supp. 2d 1077; 2000 U.S. Dist. LEXIS 14552

August 23, 2000, Decided
August 23, 2000, Filed

JUDGES: ROSS A. WALTERS, CHIEF UNITED STATES MAGISTRATE JUDGE.

OPINIONBY: ROSS A. WALTERS

OPINION:
RULING ON DEFENDANT OTTUMWA COMMUNITY SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT
This matter is before the Court on the motion for summary judgment filed by defendant Ottumwa Community School District (# 21). Plaintiffs allege that in April 1997 Ginny Gordon, an elementary school student, was sexually abused by defendant Harold Skinner, an employee at Lincoln Elementary School in the Ottumwa Community School District (hereinafter "the District"). The Complaint states claims (1) against both defendants for violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681-1688; (2) against both defendants under 42 U.S.C. § 1983 for violating Ginny Gordon's constitutional rights; (3) under state law against defendant Skinner for intentional infliction of emotional distress and battery; (4) against the District under state law for respondeat superior liability and negligent hiring, retention and supervision of Skinner; and (5) for loss of parental consortium against both defendants.
Defendant Skinner has been served but has not appeared or answered. Default has been entered and proceedings against him have been bifurcated for separate determination. Plaintiff and the defendant District have consented to proceed before a United States Magistrate Judge and the case was referred to the undersigned for all further proceedings on August 25, 1999. See 28 U.S.C. § 636(c).
The District's motion came on for hearing on June 28, 2000. Attorney Andrew Bracken appeared for the defendant. Attorney Andrew Howie appeared for plaintiffs. The matter is fully submitted.
I.
The motion for summary judgment is subject to the following well-established standards. A party is entitled to summary judgment only when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Helm Financial Corp. v. MNVA Railroad, Inc., 212 F.3d 1076, 1080 (8th Cir. 2000)(citing Fed. R. Civ. P. 56(c)); accord Bailey v. USPS, 208 F.3d 652, 654 (8th Cir. 2000). An issue of material fact is genuine if it has a real basis in the record. Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)). A genuine issue of fact is material if it "might affect the outcome of the suit under governing law." Hartnagel, 953 F.2d at 395 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)); see Rouse v. Benson, 193 F.3d 936, 939 (8th Cir. 1999).



In assessing a motion for summary judgment a court must determine whether a fair-minded jury could reasonably return a verdict for the nonmoving party based on the evidence presented. Anderson, 477 U.S. at 248; Herring v. Canada Life Assurance Co., 207 F.3d 1026, 1030 (8th Cir. 2000). The court must view the facts in the light most favorable to the nonmoving party, and give that party the benefit of all reasonable inferences which can be drawn from them. Matsushita, 475 U.S. at 587; accord Lambert v. City of Dumas, 187 F.3d 931, 934 (8th Cir. 1999); Kopp v. Samaritan Health System, Inc., 13 F.3d 264, 269 (8th Cir. 1993). The court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue meriting a trial. Gremmels v. Tandy Corp., 120 F.3d 103, 105 (8th Cir. 1997)(citing Grossman v. Dillard Dep't Stores, Inc., 47 F.3d 969, 971 (8th Cir. 1995)); Johnson v. Enron Corp., 906 F.2d 1234, 1237 (8th Cir. 1990). A conflict in the evidence ordinarily indicates a question of fact to be resolved by the jury. Schering Corp. v. Home Ins. Co., 712 F.2d 4, 9 (2d Cir. 1983).

II.

The following facts are either undisputed or represent the version favorable to plaintiffs. Ginny Gordon, now age 10, is the daughter of Sherry Gordon. They live in Ottumwa, Iowa. Ginny attended the District's Lincoln Elementary School in Ottumwa. The District is duly organized and existing under the laws of the state of Iowa, and it receives federal financial assistance for its public education program.

Defendant Harold Francis Skinner is a 72 year-old male. During the early to mid-1990's Skinner was a volunteer and later the volunteer coordinator at Lincoln. He volunteered hundreds of hours to the school. His grandchildren attended the school. He was well known and liked by students and staff who referred to him as "Grampa" or "Grampa Skinner."

Two incidents involving Skinner preceded his employment with the District. On Friday, September 29, 1995, a parent complained to the principal at Lincoln, Kevin Farmer, that after her daughter hugged Skinner, he kissed her on the lips, was slow to release her from his embrace, and patted her on the rear end. (Farmer Depo. at 22-23; n1 Def. Ex. 12). n2 Farmer initiated an investigation and called Skinner in for an interview that evening. (Farmer Depo. at 23; Def. Ex. 12). Skinner admitted he had been in the building to pick up his grandchild. While there a student approached him to give him a hug. Skinner denied making any facial contact or kissing the student, and asserted that any touching of the rear end, if it happened at all, was strictly an accident. (Farmer Depo. at 23; Def. Ex. 12). Farmer at that time told Skinner not to come into the school until further notice.

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n1 For the record, two depositions were taken of Farmer, one on April 26, 1998, in the criminal case against Skinner and one on December 6, 1999 in the present civil action. Excerpts from both depositions are included in Def. Ex. 2. All references to "Farmer Depo." are contained in Def. Ex. 2.

n2 The complaint was initially made to a substitute principal, Bill Evans. Farmer returned to the school that afternoon and found Evans and a teacher talking with the parent and student. (Def. Ex. 12).

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Farmer reported the results of his investigation to the parent on Monday, October 2, 1995. He met with the parent and explained what he found and told her she could call the police. Farmer initiated a conference call with the police and the parent so she could be advised of her options. The parent ultimately decided she would not file charges against Skinner. (Farmer Depo. at 23-24; Def. Ex. 11, 12).

Farmer did not think the student was credible and believed the complaint was unfounded. (Farmer Depo. at 48-49). Nonetheless, later on October 2, Farmer met with Skinner again, explained the District's expectation of how to return a hug to a student (patting the student on the back with one hand) and told him it is never appropriate to make facial contact with a student. (Def. Ex. 11; Def. Ex. 13).

About a week after this incident a fifth or sixth grade student raised a concern about Skinner's conduct during a car ride home from a skating party. (Farmer Depo. at 24, 28). The student had just listened to a talk on inappropriate touching and was not sure if Skinner's conduct was appropriate. (Id.) The student explained to Farmer and a school counselor that she had been riding next to Skinner in a carload of students and that Skinner slapped the top of her thigh. (Id.) Farmer, the counselor, and the student discussed the incident and concluded that the touch was not something to be concerned about. (Id.)

In March of 1996, the District hired Skinner as a substitute crossing guard. (Def. Ex. 9). After he was hired, Skinner also worked from time to time as a substitute custodian and teacher's aide or associate. (Def. Ex. 1, P 7; Farmer Depo. at 5-6).

A third incident of reported inappropriate conduct by Skinner occurred before the incident with Ginny Gordon. In late March or early April 1997 a substitute teacher reported that Skinner, while substituting as a teacher associate in the "Severe and Profound" room, had slapped a student who had a "severe communication disorder." (Pl. Ex. 6). The student could not communicate what had happened and had been exhibiting "extreme behavior." (Id.) Farmer inquired if the student's teacher or other classroom aides had seen Skinner slap the student. They had not. Skinner denied slapping the student. Farmer examined the child and saw no marks on his face. Farmer was not convinced the incident had taken place, in part because Skinner and the reporting substitute were competing for a position in the classroom, but instructed that Skinner was not to substitute in that room again. (Farmer Depo. at 77-79; Pl. Ex. 6).

On or about April 15, 1997, while working as a substitute crossing guard, Skinner touched Ginny under her dress, on top of her underpants, in the vaginal area. (Def. Ex. 1 at P 9; Def. Ex. 4 at 14-19). Skinner allegedly shortly afterward asked Ginny to raise her legs and spread them apart, and she said no. (Def. Ex. 4 at 19-21). On a prior occasion while Skinner was working as a substitute teacher's aide in Ginny's classroom, he allegedly took Ginny's hand and made her hand touch his groin area, on the outside of his clothes. (Def. Ex. 4 at 24-29; Def. Ex. 8 at Interrogatory No. 12). n3

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n3 Not all of the deposition pages cited in this paragraph are in the summary judgment record, but as defendant's factual statement containing the citations is not disputed and favorable to plaintiffs, the Court has taken these allegations as true.

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Ginny reported both of these incidents to her mother, Sherry Gordon, after school was dismissed on April 23, 1997. (Def. Ex. 3 at 12). Ms. Gordon then reported the allegations to the police and called Farmer on April 23. (Def. Ex. 1 at P 10; Farmer Depo. at 6). The same day Farmer received the report from Ms. Gordon, Farmer reported the allegations of abuse to Superintendent Joe Scalzo, and they took steps to ensure that Skinner was not used as a substitute employee at the school until the allegation was cleared up. (Farmer Depo. at 10-11). Farmer also notified Skinner that the school could not use him as a substitute employee at the school until further notice, and advised Skinner to stay away from school premises. (Id.; Def. Ex. 6 at Interrogatory No. 6). Skinner did not work at the school after Farmer received the allegation of misconduct on April 23, 1997. (Def. Ex. 17). There was no contact between Ginny and Skinner after the school received Ms. Gordon's report.

Farmer initiated an investigation of the allegations on April 24, 1997, by interviewing Ginny and her sister, Ashley. (Farmer Depo. at 11-12, 32; Def. Ex. 8 at Interrogatory No. 2). Ginny repeated her allegations of inappropriate touching. (Farmer Depo. at 14-15). During her interview, Ginny's sister told Farmer that Skinner had once hugged her, but that it was not in an inappropriate manner. (Id. at 15-16). Farmer interviewed Skinner on April 25, 1997. Skinner denied the allegations. (Def. Ex. 15). Nonetheless, Skinner resigned on April 25. (Farmer Depo. at 25; Def. Ex. 6 at Interrogatory No. 6; Def. Ex. 10). The District completed its investigation and cooperated with law enforcement. (Def. Ex. 6 at Interrogatory No. 6). On June 29, 1998 Skinner was convicted of two counts of indecent contact with a child, an aggravated misdemeanor in violation of Iowa Code § 709.12. (State v. Skinner, FECR004968, Judgment Entry (Iowa Dist. Ct. Wapello Co. June 29, 1998)).

Plaintiffs do not resist defendant's motion except as it relates to the Title IX claim and the state law negligent hiring, retention, and supervision claim. Therefore, plaintiffs' claims against the District under 42 U.S.C. § 1983 (Count II), respondeat superior (Count V), and loss of parental consortium (Count VII), as well as plaintiffs' claims for punitive damages against the District will be dismissed without further discussion.

III.

The law provides a difficult hurdle for plaintiffs to overcome in this case. Title IX liability requires a showing of actual notice of, and deliberate indifference to, Skinner's misconduct, and state law insulates the District from tort liability in the performance of discretionary functions. Upon careful review of the summary judgment record the Court concludes the evidence is insufficient to support a finding in plaintiffs' favor on either of these remaining claims.

A. Title IX

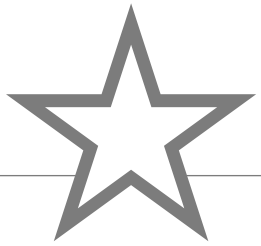
Title IX provides "no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a). Title IX may be enforced by a private cause of action. Cannon v. University of Chicago, 441 U.S. 677, 709, 717, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979). Sexual abuse or harassment of a student by a public school employee is actionable sex discrimination under Title IX for which monetary damages are available. Franklin v. Gwinnett Cty. Pub. Schools, 503 U.S. 60, 74-76, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992). Franklin, however, did not outline what a Title IX plaintiff must prove. That issue was addressed in Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 141 L. Ed. 2d 277, 118 S. Ct. 1989 (1998). Gebser held damages may be recovered under Title IX upon a showing of actual notice to school officials of sexual abuse or harassment and deliberate indifference in responding to it. Id. at 290, 292-93. More specifically, to hold the District liable for such conduct, plaintiffs must show (1) "a district official with the authority to address the complained-of conduct and take corrective action had actual notice" of the discriminatory conduct and (2) was deliberately indifferent to the conduct amounting to "an official decision not to remedy the violation." Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 610 (8th Cir. 1999)(citing Gebser, 524 U.S. at 290).

"Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference. . . ." Doe v. Dallas Ind. School Dist., 153 F.3d 211, 219 (5th Cir. 1998)(same sex harassment case). In Gebser, the Court analogized he Title IX deliberate indifference standard to that pertaining to municipal liability under § 1983. 524 U.S. at 291; see Doe v. Gooden, 214 F.3d 952, 955 (8th Cir. 2000). In that context, the Supreme Court has said that ". . .'deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." Board of Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397, 408, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997)(citing City of Canton v. Harris, 489 U.S. 378, 388-92, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989)). Essentially what is required in this case is sufficient evidence to conclude the District turned a "blind eye" to a known or obvious risk that Skinner would sexually abuse children. Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 467 (1996).

The parties' briefs do not go head to head on the required elements. The defendant District's motion primarily challenges plaintiffs' evidence regarding deliberate indifference. Plaintiffs' resistance focuses on the notice element.

(i) Notice

Principal Farmer had the authority to address any misconduct by Skinner as shown by the investigations and actions taken by him in connection with the incident involving Ginny and those which preceded it. The significant facts for notice purposes are not those involving the abuse inflicted on Ginny. Ginny's report was immediately taken up and Skinner did not return to work after his abuse was disclosed. Rather, the question is whether, prior to the incidents involving Ginny, Farmer was "aware of facts that indicated a likelihood of discrimination" by Skinner. Massey v. Akron City Bd. of Educ., 82 F. Supp. 2d 735, 744 (N.D. Ohio 2000). It is difficult to define what kind of notice is sufficient, but this Court agrees with a recent decision in the District of Maine in which that court stated actual notice "requires more than a simple report of inappropriate conduct" on the part of



a school employee but "the . . . standard does not set the bar so high that a school district is not put on notice until it receives a clearly credible report of sexual abuse from the plaintiff-student." Doe v. School Admin. Dist. No. 19, 66 F. Supp. 2d 57, 63 (D. Me. 1999). At some point between these poles a supervisory school official knows, or it should be obvious to him or her, that a school employee is a substantial risk to sexually abuse children.

Of the three prior alleged incidents involving Skinner, only one could provide the requisite notice. The allegation that Skinner slapped a seriously impaired student, even if true, gave no notice of the likelihood that he would sexually abuse a student. See Gebser, 524 U.S. at 291 (sexually inappropriate comments by a teacher during class were "plainly insufficient to alert the principal to the possibility that [the teacher] was involved in a sexual relationship with a student"). The information about the thigh slapping incident was equally consistent with innocent behavior. After talking with the student and a school counselor Farmer concluded that the touching was not a concern. Nothing in the summary judgment record impeaches the honesty or reasonableness of that conclusion.

The September 1995 allegation that Skinner hugged a female student, accompanied by kissing her on the lips and patting her rear end was an allegation of sexually inappropriate conduct. Returning a hug initiated by a student does not suggest that a school employee has a propensity toward sexual abuse. The length of the hug, the kiss and the patting were the concern and were disputed by Skinner. That these facts were serious enough to give Farmer notice of a likelihood that Skinner would sexually abuse another student is open to question. However, viewing the record favorably to plaintiffs, the Court concludes a reasonable fact finder could find from the specificity of the information, its source from the student and her mother, and the manner in which it was reported that the report had enough indicia of credibility to put the District on notice that Skinner presented a risk of sexually inappropriate conduct sufficient to require a response to the allegation.

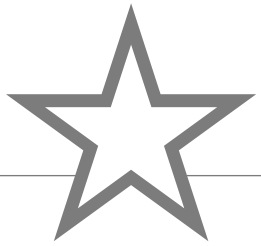
(ii) Deliberate Indifference

Not every feeble response to a student's complaint of sexually inappropriate conduct by a teacher or school employee will insulate a school district from liability under Title IX. The Court must examine the "adequacy of the response," Kinman, 171 F.3d at 610, in light of the "seriousness and credibility of the complaint that puts school officials on notice." Doe, 66 F. Supp. 2d at 64. This analysis does not invite second guessing school officials through the application of hindsight. A lack of response must, in the circumstances, be inadequate to the point it amounts "to an official decision by the recipient [school district] not to remedy the violation", the "premise" of remedies available under Title IX. Gebser, 524 U.S. at 290; see Kinman, 171 F.3d at 610.

On each occasion Farmer received a complaint about Skinner, he inquired further and, with respect to the September 1995 incident, took corrective action. The focus is on the September 1995 incident because, as noted previously, the other two did not give notice of discriminatory conduct. The credibility of the information was in dispute. Skinner denied kissing the student, or intentionally touching her rear end, the most disturbing features of the allegation. Moreover, although the allegations were clearly a cause for concern, they were much less serious than, and not necessarily suggestive of, the type of indecent contact with Ginny which resulted in Skinner's criminal conviction. The fact that Skinner was not a school employee at the time is another factor to weigh in assessing Farmer's response.

Farmer initiated an investigation as soon as the complaint came to his attention. He told Skinner not to come to the school until the matter was resolved. He talked to the student and to her mother. He assisted the mother in contacting the police to discuss the filing of charges. He spoke with Skinner about the allegations. From Farmer's interaction with Skinner as a school supporter and volunteer who donated many hours of time to the school, he found it difficult to believe that Skinner would harm a student (Farmer Depo. at 49; Def. Ex. 12). In the end Farmer made a determination about the credibility of the report and concluded the complaint was unfounded. (Farmer Depo. at 49).

Despite Skinner's denials and his own doubts about the incident, Farmer instructed Skinner on how to return a hug from a student and told him it was not appropriate for an adult to have facial contact with a student. The mother of the child told Farmer she did not think it was necessary for Skinner to be banned from school premises (Def. Ex. 11). Farmer told the



mother that school officials would watch Skinner closely while he was in the building (id.), though it appears nothing specific was done to monitor Skinner's activities. (Pl. Statement of Facts; Farmer Depo. at 68-71).

In the Court's judgment, a reasonable fact finder could not conclude from this evidence that Farmer, and therefore the District, was deliberately indifferent to the allegations against Skinner. Farmer promptly and adequately investigated. He kept the parent fully informed. He took remedial action he thought appropriate. He did not turn a blind eye to the incident, nor can his response be fairly described as "an official decision not to remedy the violation". Kinman, 171 F.3d at 610.

In Doe v. Special School Dist. of St. Louis Cty., 901 F.2d 642 (8th Cir. 1990), a § 1983 deliberate indifference case, our circuit court was faced with a situation very similar to the present, except that the school district there perhaps had more notice of problem conduct. The case involved a school bus driver who transported, and was convicted of sexually abusing, five disabled children. Before his arrest, misconduct on the part of the bus driver (Cerny) had been reported to school officials on a number of occasions. The superintendent had received a report that Cerny had kissed a child on the bus. The district's director of transportation had the same information, and had been told Cerny used foul language on the bus. Two other supervisors received complaints that Cerny had used profanity, kissed a boy on the bus, and pushed one of the children down the bus steps. One of those supervisors had also received a complaint that Cerny had kissed and "kicked a child" and given him a "snuggle." The district area coordinator received many of the same complaints and, in addition, had received a complaint that Cerny had put his hand down a boy's pants and had pulled a boy's pants down and spanked him. Shortly before Cerny's arrest, one of the children told the area coordinator that Cerny had been touching boys' crotches. See 901 F.2d at 644.

In affirming the district court's summary judgment ruling that the evidence was insufficient to show that the defendants "had notice of a pattern of unconstitutional acts and displayed deliberate indifference to or tacitly authorized the alleged unconstitutional conduct," id. at 645 (quoting Doe v. Special School Dist. of St. Louis Cty., 682 F. Supp. 451, 455 (E.D. Mo. 1988)), the Eighth Circuit summarized its view of the case in terms which hold true here:

That subsequent events proved [Cerny] to be a sexual reprobate . . . should not result in after-the-fact imposition of the requirement of character-discerning omniscience on the part of the individual defendants or the District. Viewed in retrospect, some of Cerny's pre-arrest conduct portrays his true nature with a clarity that pre-arrest circumstances at the most only hinted at. If negligence could form the basis for a finding of liability, plaintiff's showing might have been adequate to take the case to a jury. Measured against the deliberate indifference-official policy standard of liability, however, plaintiffs have failed to establish a submissible case.

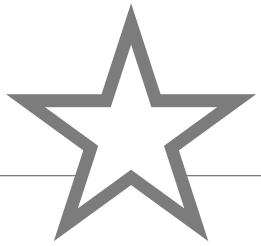
901 F.2d at 646-47. The evidence in this case is likewise insufficient to support a finding that the District was deliberately indifferent to the reports it received about Skinner's conduct.

B. Negligent Hiring, Retention and Supervision

In 1999 the Iowa Supreme Court expressly recognized a cause of action against an employer for negligent hiring, retention or supervision of an employee. Godar v. Edwards, 588 N.W.2d 701, 709 (Iowa 1999). Plaintiffs must prove:

(1) that the employer knew, or in the exercise of ordinary care should have known, of its employee's unfitness at the time of hiring;

(2) that through the negligent hiring of the employee, the employee's incompetence, unfitness, or dangerous characteristics proximately caused the resulting injuries; and



(3) that there is some employment or agency relationship between the tortfeasor and the defendant employer.

Id. at 708-09 (quoting 27 Am. Jur. 2d *Employment Relationship* § 473 at 913-14 (1996)).
As a municipality, n4 the District can only be held liable in tort under the Iowa Municipal Tort Claims Act, Iowa Code Ch. 670. n5 See Keystone Elec. Mfg. Co. v. City of Des Moines, 586 N.W.2d 340, 345-46 (Iowa 1998); Baker v. City of Ottumwa, 560 N.W.2d 578, 582-83 (Iowa 1997). The District argues that hiring, retention and supervision of employees are discretionary functions for which it is immune from tort liability under Iowa Code § 670.4(3). That provision exempts municipalities from liability for:

Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the municipality or an officer or employee of the municipality, whether or not the discretion is abused.

The discretionary function exception in the Iowa Code is virtually identical to that found in the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(a). Goodman v. City of Le Claire, 587 N.W.2d 232, 236 (Iowa 1998). Because of the similarities between state and federal law on this and other immunity provisions, "federal decisions interpreting the federal immunity provision are persuasive authority in [the Iowa Supreme Court's] interpretation of the municipal immunity provision." Id. at 236. Specifically with respect to discretionary functions, the Iowa Supreme Court has adopted the two-step analysis set out by the United States Supreme Court in Berkovitz v. United States, 486 U.S. 531, 536, 100 L. Ed. 2d 531, 108 S. Ct. 1954 (1988). Goodman, 587 N.W.2d at 238.

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n4 A school district falls within the statutory definition of "municipality." Iowa Code § 670.1(2).
n5 Chapter 670 is also referred to as the Iowa Tort Liability of Governmental Subdivisions Act. Keystone Mfg., 586 N.W.2d at 345.

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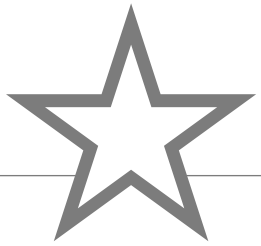
To establish application of the discretionary function exception, it must be shown (1) "the action is a matter of choice for the acting employee" and (2) "the judgment is of the kind that the discretionary function exception was designed to shield." 587 N.W.2d at 237 (quoting Berkovitz, 486 U.S. at 536-37). As to the second prong of this analysis, "the discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment." Berkovitz, 486 U.S. at 539. It does not apply where a statute, regulation or policy prescribes a mandatory course of action for the employee to follow. Id. at 536; see United States v. Gaubert, 499 U.S. 315, 324, 113 L. Ed. 2d 335, 111 S. Ct. 1267 (1991)("if the employee violates [a] mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy").
Hiring, retention and supervision of an employee are often spoken of in the same breath, but they are three different things. The parties do not appear to be in agreement on which are involved in plaintiffs' cause of action. The Complaint pleads only negligent supervision. Complaint P45. In their brief, plaintiffs state the case "deals with the negligent retention and supervision of an employee...." Plaintiffs' Brief at 6. Defendants categorize the action as one for negligent hiring and supervision. Defendant's Brief at 9, 15. The Court will assume all three are presented, though since Skinner was not an employee or acting as a volunteer when two of the three prior instances of alleged misconduct occurred, and left employment immediately after the incidents involving Ginny, it would be difficult for plaintiffs to prevail on a theory of negligent retention.



The District argues its decisions with respect to the hiring, retention and supervision of Skinner satisfy the Berkovitz/Goodman two-step analysis so as to immunize it from liability. Plaintiffs respond that Iowa's mandatory child abuse reporting statutes deprived the District of the element of choice in dealing with Skinner, and as to the second element, the failure to act after notice of Skinner's misconduct did not involve a permissible exercise of policy judgment.
Whether to hire or retain an employee, as well as how to supervise him, are ordinarily matters of choice for a supervisor charged with these functions. The Iowa statutes pertaining to child abuse reporting on which plaintiffs rely do not prescribe a mandatory course of action which eliminates discretion in making these decisions in the case of school employees accused of abuse. Iowa Code § 280.17 requires the boards of directors of public and non-public schools to "prescribe procedures" following guidelines developed by state officials, for handling reports of child abuse committed by school employees or agents. It does not require any particular action be taken toward the employee. Iowa Code § 232.69(1)(b) identifies those persons, including "a licensed school employee" who are mandatory reporters of reasonably suspected child abuse. The obligation to report is mandatory, but, beyond investigation, the statute does not say what action is to be taken with respect to the report. Iowa administrative regulations require the investigation of reports of physical and sexual abuse of students at the hands of school employees, but it is for the investigator to determine, based on the preponderance of the evidence, whether it is likely an incident of abuse occurred. Iowa Admin. Code § 281-102.8, 9. n6 The regulations do not specify what employment action is to be taken, if any, with respect to the employee concerned. The District's policies n7 apparently require disciplinary action in the event of a finding of abuse against an employee, but do not specify what the disciplinary findings must be.

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n6 It is unclear whether Skinner's work as a volunteer brought him within the scope of these regulations, which define "school employee" to include a volunteer "under the direction and control of" a public school board of directors. Iowa Admin. Code § 281-102.2. See also id. at 102.3.
n7 In their brief in resistance to motion for summary judgment, plaintiffs reference "Ex. A" as the policies of the District, however, "Ex. A" is not attached nor found anywhere in the file.

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None of the statutes and regulations just described prescribed a course of action for Farmer to follow in making decisions about the hiring, retention, or supervision of Skinner in light of the information he had about him. They do not say he could not be hired, must be fired, or give mandatory instructions for his supervision. It follows that the principal retained the ability to exercise judgment and discretion in these regards. Concerning the second element of the discretionary function exception, whether the employee's judgment is the kind that the exception was designed to shield, the Eighth Circuit has opined generally that employment decisions which relate to the hiring, supervision and retention of employees are sufficiently related to policy judgments so as to fall within the exception. Tonelli v. United States, 60 F.3d 492, 496 (8th Cir. 1995) (an FTCA case). The Tonelli court identified the policy implications involved in hiring decisions as follows:

The post office's choice between several potential employees involves the weighing of individual backgrounds, office diversity, experience and employer intuition. These multi-factored choices require the balancing of competing objectives, and are of the "nature and quality that Congress intended to shield from tort liability."

60 F.3d at 496 (quoting United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 813, 81 L. Ed. 2d 660, 104 S. Ct. 2755 (1984)); see Red Elk v. United States, 62 F.3d 1102, 1107 (8th Cir. 1995)(involving the rape

of a child by a tribal police officer; "the hiring and selection of an employee is a discretionary function" under the FTCA). The District of Columbia Circuit in Burkhart v. Washington Metro. Area Transit Authority, 324 U.S. App. D.C. 241, 112 F.3d 1207 (D.C. Cir. 1997) n8 relied on Tonelli in holding that the hiring, training and supervision decisions of the Transit Authority were "susceptible to policy judgment." 112 F.3d at 1217. The Court found policy judgments involved in the supervision of employees because supervision "involved a complex balancing of budgetary considerations, employee privacy rights, and the need to ensure public safety." Id.; see also Beebe v. Washington Metro. Area Transit Authority, 327 U.S. App. D.C. 171, 129 F.3d 1283, 1287-88 (D.C. Cir. 1997)(applying Burkhart); Kirchmann v. United States, 8 F.3d 1273, 1277 (8th Cir. 1993) (holding that supervision of government contractors is a "discretionary function"); Cooper v. United States, 897 F. Supp. 325, 328 (W.D. Tex. 1995), aff'd, 85 F.3d 624 (5th Cir. 1996) (Table); Taylor v. United States, 668 F. Supp. 1302, 1304 (W.D. Mo. 1987).

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n8 Burkhart involved a bus driver who had allegedly assaulted a deaf patron.

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In Larson v. Miller, 76 F.3d 1446 (8th Cir. 1996) (en banc) the Court considered a Nebraska discretionary function exception similar to Iowa's in the case of a school van driver who touched a nine year old special education student in the vaginal area. Some months prior to the incident in question the student had reported sexually inappropriate comments by the driver. Id. at 1451. The driver also had a prior arrest, but no conviction, for alleged sexual assault of his stepdaughter, which school officials did not know about because no background check was conducted. Id. at 1451-52. The student and her parents sued the school district for, among other things, negligent screening and supervision of the driver. Id. at 1456.
Under Nebraska law the discretionary-function exemption extended only "to the basic policy decisions and not to ministerial acts arising therefrom." Id. (quoting Koepf v. County of York, 198 Neb. 67, 251 N.W.2d 866, 870 (1977)). The Eighth Circuit affirmed the district court's determination that the exemption immunized the school district from liability.

We agree with the district court's assessment that decisions to "investigate, hire, fire and retain" employees are generally discretionary. Thus, these decisions fall within the discretionary function exemption and cannot be the basis for liability on the part of the school district.

76 F.3d at 1457.
In view of the "great weight" given by the Iowa Supreme Court to federal case law in this area, Goodman, 587 N.W.2d at 236, it is likely the Iowa Supreme Court would follow the lead of the Eighth Circuit in Tonelli and Larson, and the other federal case authority above, to conclude that the hiring, retention and supervision of public employees, and specifically employees of school districts, is sufficiently connected to considerations of public policy to fall within the discretionary function exception of Iowa Code § 670.4(3). n9

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n9 The Iowa Supreme Court has not decided the issue. In an unpublished opinion the Iowa Court of Appeals held, in a case involving a sexual assault by a police officer who, it had been rumored, had previously sexually abused a child, that the investigation of the previous episode, as well as the retention and supervision of the officer were discretionary-functions within the meaning of Iowa Code § 670.4(3). Joyce v. City of Creston, No. 9-037/98-0881, Ruling at 17-20 (Iowa App. May 26, 1999).

The Court applied the two-step analysis called for in Goodman and Berkovitz and cited Burkhart and Tonelli approvingly. Because the opinion was unpublished, it may not be cited as authority, Iowa R. App. P. 14(e), but the ruling is useful in predicting how the Iowa Supreme Court would resolve the issue. Moreover, the analysis reflected in the opinion is persuasive.
It is worth noting here that a panel of the Eighth Circuit has just held that its counterpart to Iowa R. App. P. 14(e), Eighth Circuit Rule 28A(i) which states that unpublished opinions are "not precedent and parties generally should not cite them," is unconstitutional under Article III of the federal Constitution "because it purports to confer on the federal courts a power that goes beyond the 'judicial.'" Anastasoff v. United States, 223 F.3d 898, 2000 U.S. App. LEXIS 21179, *4, 2000 WL , at 3 (8th Cir. 2000). The problem is that such a rule "expands the judicial power beyond the limits set by Article III by allowing [the court] complete discretion to determine which judicial decisions will bind us and which will not." Id. at 13.

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As the District points out, several other state and federal courts in similar circumstances have found that the hiring, retention, training and supervision of public employees involves discretionary, policy-related decisions for which a public entity is immune from liability under applicable state law. See Davis v. DeKalb Cty. Sch. Dist., 996 F. Supp. 1478, 1484 (N.D. Ga. 1998); Does 1, 2, 3 and 4 v. Covington Cty. Sch. Bd., 969 F. Supp. 1264, 1285-87 (M.D. Ala. 1997); C. B. v. Bobo, 659 So. 2d 98, 101 (Ala. 1995); Willoughby v. Lehrbass, 150 Mich. App. 319, 388 N.W.2d 688, 700-01 (Mich. App. 1986); Doe v. Park Center High School, 592 N.W.2d 131, 135-36 (Minn. App. 1999); Oslin v. State, 543 N.W.2d 408, 415-16 (Minn. App. 1996); Kimpton v. Sch. Dist. of New Lisbon, 138 Wis. 2d 226, 234-36, 405 N.W.2d 740, 744-45 (Wis. App. 1987). See generally 57 Am. Jur. 2d *Municipal Tort Liability* § 534. The Court's attention has not been directed to any persuasive authority from another jurisdiction holding otherwise. n10

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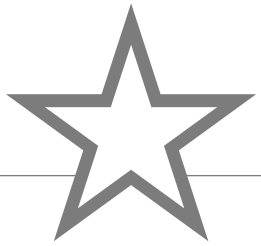
n10 There are some cases which have reached a different result for reasons that distinguish them from the present. In S.B.L. v. Evans, 80 F.3d 307 (8th Cir. 1996), the court found that defendant, a principal and school superintendent, was not immune from liability for the sexual assault of two students by a teacher he supervised because Missouri case law held that principals and superintendents were not immune from suit for their negligent acts and omissions. Id. at 310. Under the Missouri official immunity doctrine only "public officers" acting within the scope of their authority were immune from liability for discretionary actions. Bolon v. Rolla Public Schools, 917 F. Supp. 1423, 1431 (E.D. Mo. 1996)(quoting Kanagawa v. State, 685 S.W.2d 831, 835 (Mo. 1985)(en banc)). Principals and school superintendents did not qualify as "public officials." S.B.L., 80 F.3d at 310; Bolon, 917 F. Supp. at 1431-32. In Bolon, the district court held a school board member was a "public official" under Missouri law, and that a claim of, in essence, negligent hiring and supervision against the board member was precluded by the official immunity doctrine because the conduct involved "discretionary" acts. Bolon, 917 F. Supp. at 1432.
In Doe v. Estes, 926 F. Supp. 979 (D. Nev. 1996), the court appeared to apply the planning/operational dichotomy derived from Dalehite v. United States, 346 U.S. 15, 97 L. Ed. 1427, 73 S. Ct. 956 (1953), and modified, if not rejected, by the United States Supreme Court in Berkovitz and Gaubert, supra 499 U.S. at 320-21, and by the Iowa Supreme Court in Goodman, 587 N.W.2d at 237-38. Applying a different analytical framework, the Doe court held that hiring was a discretionary function, but that retention and supervision were "operational" functions which were not exempt from liability under the relevant Nevada immunity statute.
Finally, the Kansas Supreme Court in Kansas State Bank & Trust Co. v. Specialized Transp. Services, 249 Kan. 348, 819 P.2d 587 (1991), denied immunity to a school district under a statutory discretionary function exception like Iowa's because the district's employees had failed to follow a mandatory reporting procedure which might have alerted a student's parent to a school bus driver's sexual molestation of her daughter. Id. 249 Kan. at 368, 819 P.2d at 601-02. The first prong of the discre-



tionary function test was not satisfied.

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Plaintiffs argue that while the Tonelli court observed generally that employee supervision and retention falls within the discretionary function exception, it did not apply the exception in that case because there was a factual dispute about whether the federal employer "failed to act when it had notice of illegal behavior." 60 F.3d at 496. "Failure to act after notice of illegal action does not represent a choice based on plausible policy considerations." Id. Plaintiffs argue this case is in the same posture. As noted previously, the District, in the person of school principal Farmer, did act when it received notice of alleged inappropriate behavior by Skinner. Each incident was investigated and Skinner was instructed on his dealings with students following the September 1995 report. Though the District's response distinguishes Tonelli in this regard, it serves to illustrate the policy implications involved when a school official is confronted with allegations like those made against Skinner. It is difficult to imagine a more sensitive situation. The allegations have to be investigated and a decision made about them. In doing so in this case Farmer had to be mindful of the strong public policy to protect children from child abuse and his duty as principal for the care and safety of children placed in his charge for educational purposes. He also had to be careful to respond in a manner which would not deter the students involved, their parents, or others from reporting future incidents of suspected child abuse. At the same time, fairness to Skinner dictated that any adverse action be supported by credible evidence. The privacy and personal interests of both the students and Skinner had to be borne in mind for disclosure beyond what was necessary or an ill-considered reaction risked harm to the reputation and emotional well being of both accuser and accused. The balancing of all of these concerns, and the judgments which resulted from them, are grounded in policy as a review of the statutes and regulations discussed supra at 21-23 indicates. See also Iowa Code § 232.67 (legislative findings concerning child abuse). For example, by regulation an investigator of alleged abuse of a student by a school employee is to base his or her determination on the preponderance of the evidence, maintain the confidentiality of the report of abuse to the extent possible, and "exercise prudent discretion in the investigative process to preserve the privacy interest of the individuals involved." Iowa Admin. Code § 281-102.8(4), (5), .9(3), (4). Investigation of complaints like those lodged against Skinner prior to the incident with Ginny and the decision about what, if any, action should be taken in response to them are "necessarily beset with policy-making considerations." Oslin, 543 N.W.2d at 416; see Doe 592 N.W.2d at 136.

Plaintiffs' claim against defendant for negligent hiring, retention and supervision is a claim based upon the exercise, or failure to exercise or perform a discretionary function and, accordingly, the defendant District is exempted from liability by Iowa Code § 670.4(3).

IV.

Defendant Ottumwa Community School District's Motion for Summary Judgment will be granted as to all of plaintiffs' claims against the District. However, no judgment will be entered at this time. Default proceedings concerning the claims against Defendant Skinner are pending. The Court will defer entry of judgment on the claims against the District until the bifurcated proceedings involving Skinner are completed. The final pretrial conference and trial of the claims against the District now set for September 8, 2000 and September 25, 2000 respectively are canceled.

IT IS SO ORDERED.

DATED this 23rd day of August, 2000.

ROSS A. WALTERS

CHIEF UNITED STATES MAGISTRATE JUDGE

DISTRICT OF COLUMBIA

STATUTORY PROVISIONS ON JUVENILE RECORDS

State Statutes on Juvenile Interagency Information and Record Sharing

DISTRICT OF COLUMBIA

RULES GOVERNING JUVENILE PROCEEDINGS

X. GENERAL PROVISIONS

Rule 55. Records

(a) Records required.

The Clerk of the Division shall keep a book known as the "juvenile docket" in which, among other things, shall be entered each order or judgment of the Division. The entry of an order or judgment shall show the date the entry is made. In the alternative, the requirements of the foregoing 2 sentences may be met by a system in which each paper, appearance, order, verdict, and judgment, etc. in a case is microfilmed and, where such a system is utilized, the date a document is photographed, which date must be entered on the document, shall be regarded as the date of entry. The Clerk of the Division shall also keep such case and social records and other books and records in juvenile proceedings as may be required from time to time by the Executive Officer of the District of Columbia Courts subject to the supervision of the Chief Judge.

(b) Inspection and copying juvenile records.

(1) Who can inspect.

In addition to persons or agencies otherwise authorized by statute, the following persons or agencies may also inspect the records of any juvenile who was previously or is now within the jurisdiction of the court, unless such records have been sealed pursuant to D.C. Code @ 16-2335:

(A) The prosecutor and the attorney for the respondent in a criminal proceeding in which the respondent's mental competence is at issue or in which respondent has challenged the respondent's transfer from the Family Division to the Criminal Division, to inspect that respondent's records, upon approval of the judicial officer assigned to the case or the Judge in Chambers;

(B) The United States Attorney for the purpose of determining whether the juvenile should be prosecuted as an adult pursuant to D.C. Code @ 16-2301(3) (D.C. Code @ 16-2331 case records only), or where otherwise provided by law;

(C) Any judicial officer referred to in D.C. Code @ 23-1321 for the limited purpose of assessing the respondent's past conduct to determine a motion for pretrial detention or to establish conditions of release;

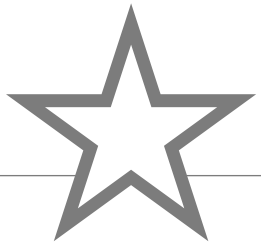
(D) Any person, hospital, institution or agency engaged in mental or physical evaluation or diagnosis pursuant to an order under D.C. Code @ 16-2315;

(E) Any hospital, institution or agency to which the child could be committed under D.C. Code @ 16-2320, provided the allegations of the petition have been adjudicated, and such hospital, institution or agency is being investigated as a dispositional possibility by the Director of Social Services or the attorney for the child;

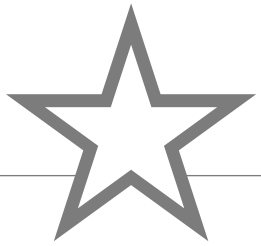
(F) Other persons, agencies or organizations having a professional interest in the work of the Division

and certifying in writing to the clerk of the Division:
(i) That inspection of juvenile records will be conducted as part of a research survey of Division records;
(ii) That individual case histories shall not be included in any report of or other publication pertaining to the research survey unless authorized by the Division in accordance with the provisions of subsections (b)(2) and (b)(3) of this Rule; and
(iii) That the research will be conducted in accordance with administrative procedures established by the Clerk of the Division.
(2) Application for special order to inspect case records.
Judicial officers and professional staff of the Superior Court may inspect case records at any time. The Corporation Counsel and the Corporation Counsel's assistants assigned to the Division, and the respondent, the respondent's parent, guardian, or custodian, and the respondent's attorney may inspect or copy case records at any stage of a proceeding in the Division. In all other cases, a person or agency shall apply in writing to the Presiding Judge of the Division for a special order to inspect or copy case records pursuant to D.C. Code @ 16-2331(b)(7). The application for a special order to inspect case records shall state in writing the name, address, and telephone number of the person or agency desiring to inspect the respondent's case records, the professional affiliation of the person or agency, and the reason for which the special order is sought. The application shall also state that the information obtained from the case records will not be used in a manner which is reasonably likely to identify the respondent.
(3) Application for special order to inspect social records.
In addition to the requirements under subparagraph (b)(2) of this Rule, a copy of an application to inspect the juvenile's social records pursuant to D.C. Code @ 16-2332(b)(5) shall be served upon the respondent, the respondent's parent, guardian, or custodian, and the respondent's attorney. If the application is accompanied by written consent to the application by the respondent, the respondent's parent, guardian, or custodian, and the respondent's attorney, on forms provided by the Division, the Presiding Judge of the Division may grant the application to inspect or copy a juvenile's social record. If the respondent, the respondent's parent, guardian, or custodian, or the respondent's attorney objects to the application within 10 days of service thereof upon them, the Division shall conduct a hearing on the record to determine whether the application to inspect the social record should be approved or denied in whole or in part. If there is objection or if the application to inspect or copy the social record is not accompanied by written consent to the application by the respondent, the respondent's parent, guardian, or custodian, and the respondent's attorney, then the Presiding Judge of the Division shall deny the application unless it appears:
(A) That information contained in the social records and sought by the applicant is not otherwise available to the applicant; and
(B) That
(i) The applicant has a professional interest in the protection, welfare, treatment, or rehabilitation of the respondent or the respondent's family; or
(ii) The applicant has a professional interest in the work of the Superior Court and inspection of the social record and the intended use by the applicant of the information are not reasonably likely to cause the respondent or the respondent's family embarrassment or emotional or psychological harm; and

(C) That the applicant will not use information obtained from the social files in a manner which is reasonably likely to identify the respondent or reveal or publish information of a personal nature about the respondent or the respondent's family of which those who know the respondent are not otherwise likely to have knowledge.
(4) Court action on application for special order.
The application for any special order shall be approved or denied in writing by the Presiding Judge of the Division and shall be filed by the clerk of the Division in the juvenile's case record.
(5) Procedure for inspection and copying.
The clerk of the Division shall maintain a suitable room for the inspection of records and shall maintain a duplicating machine for copying records at reasonable cost for the use of any person or agency authorized or approved to inspect or copy records pursuant to D.C. Code @@ 16-2331 and 16-2332 and paragraph (b) of this Rule. Any person or agency authorized to inspect or copy records under D.C. Code @@ 16-2331(b)(4) through (7) or 16-2332(b) (3) through (5) or paragraph (b) of this Rule shall file with the clerk of the Division a form indicating name, address, record inspected or copied and date when inspected or copied. Such form shall be filed by the clerk of the Division in the juvenile case records of the juvenile whose records were inspected or copied.
DISTRICT OF COLUMBIA CODE
PART II. JUDICIARY AND JUDICIAL PROCEDURE
TITLE 16. PARTICULAR ACTIONS, PROCEEDINGS AND MATTERS.
CHAPTER 23. Family Division Proceedings.
Subchapter I. Proceedings Regarding Delinquency, Neglect, or Need of Supervision.
§ 16-2331. Juvenile case records; confidentiality; inspection and disclosure
(a) As used in this section, the term "juvenile case records" refers to the following records of a case over which the Division has jurisdiction under section 11-1101(13):
(1) Notices filed with the court by an arresting officer pursuant to this subchapter.
(2) The docket of the court and entries therein.
(3) Complaints, petitions, and other legal papers filed in the case.
(4) Transcripts of proceedings before the court.
(5) Findings, verdicts, judgments, orders, and decrees.
(6) Other writings filed in proceedings before the court, other than social records.
(b) Juvenile case records shall be kept confidential and shall not be open to inspection; but, subject to the limitations of subsection (c) of this section, the inspection of those records shall be permitted to --
(1) judges and professional staff of the Superior Court;
(2) the Corporation Counsel and his assistants assigned to the Division;
(3) the respondent, his parents or guardians, and their duly authorized attorneys;
(4) any court or its probation staff, for purposes of sentencing the respondent as a defendant in a criminal case and the counsel for the defendant in that case;
(5) public or private agencies or institutions providing supervision or treatment or having custody of the child, if supervision, treatment, or custody is under order of the Division;
(6) the United States Attorney for the District of Columbia, his assistants, and any other prosecuting attorneys involved in the investigation or trial of a criminal case arising out of the same transaction or occurrence as a case in which a child is alleged to be delinquent, or where the records are involved in



determining the conditions of release or bail for a person charged with a criminal offense;
(7) other persons having a professional interest in the protection, welfare, treatment, and rehabilitation of the respondent or of a member of his family, or in the work of the Superior Court, if authorized by rule or special order of the court.
(8) the Mayor in accordance with the Motor Vehicle Operator's Permit Revocation Amendment Act of 1988;
(9) a court in which a person is charged with a criminal offense for the purposes of determining conditions of release or bail; and
(10) the Child Fatality Review Committee for the purposes of examining past events and circumstances surrounding deaths of children in the District of Columbia or of children who are either residents or wards of the District of Columbia, or for the discharge of its official duties.
Records inspected may not be divulged to unauthorized persons. The prosecuting attorney inspecting records pursuant to paragraph (6) of this subsection may divulge the contents to the extent required in the prosecution of a criminal case, and the United States Attorney for the District of Columbia and his assistants may inspect a transcript of the testimony of any witness and divulge the contents to the extent required by the prosecution of the witness for perjury, without, wherever possible, naming or otherwise revealing the identity of a child under the jurisdiction of the Division.
(c) Notwithstanding subsection (b), the Superior Court may by rule or special order provide that particular items or classes of items in juvenile case records shall not be open to inspection except pursuant to rule or special order; but, in dispositional proceedings after an adjudication, no item considered by the judge (other than identification of the sources of confidential information) shall be withheld from inspection (1) in delinquency or need of supervision cases, by the attorney for the child, or (2) in neglect cases, by the attorney for the child and an attorney for the parent, guardian, or other custodian of the child.
(d) The Superior Court may by rule or special order provide procedures for the inspection or copying of juvenile case records by persons entitled to inspect them. No person receiving any record or information pursuant to this section may publish or use it for any purpose other than that for which it was received without a special order of the court.
(e) No person shall disclose, inspect, or use records in violation of this section.
DISTRICT OF COLUMBIA CODE
PART II. JUDICIARY AND JUDICIAL PROCEDURE
TITLE 16. PARTICULAR ACTIONS, PROCEEDINGS AND MATTERS.
CHAPTER 23. Family Division Proceedings.
Subchapter I. Proceedings Regarding Delinquency, Neglect, or Need of Supervision.
§ 16-2332. Juvenile social records; confidentiality; inspection and disclosure
(a) As used in this section, the term "juvenile social records" refers to all social records made with respect to a child in any proceedings over which the Division has jurisdiction under section 11-1101(13), including preliminary inquiries, predisposition studies, and examination reports.
(b) Juvenile social records shall be kept confidential and shall not be open to inspection; but, subject to the limitations of subsection (c), the inspection of those records shall be permitted to --
(1) judges and professional staff of the Superior Court and the Corporation Counsel and his assistants assigned to the Division;



(2) the attorney for the child at any stage of a proceeding in the Division, including intake;
(3) any court or its probation staff, for purposes of sentencing the child as a defendant in a criminal case, and, if and to the extent other presentence materials are disclosed to him, the counsel for the defendant in that case;
(4) public or private agencies or institutions providing supervision or treatment, or having custody of the child, if the supervision, treatment, or custody is under order of the Division;
(5) other persons having a professional interest in the protection, welfare, treatment, and rehabilitation of the respondent or of a member of his family, or in the work of the Division, if authorized by rule or special order of the court;
(6) professional employees of the Social Rehabilitation Administration of the Department of Human Services when necessary for the discharge of their official duties; and
(7) the Child Fatality Review Committee for the purposes of examining past events and circumstances surrounding deaths of children in the District of Columbia or of children who are either residents or wards of the District of Columbia, or for the discharge of its official duties.
Records inspected may not be divulged to unauthorized persons.
(c) Notwithstanding subsection (b), the Superior Court may by rule or special order provide that particular items or classes of items in juvenile social records shall not be open to inspection except pursuant to rule or special order; but, in dispositional proceedings after an adjudication, no item considered by the judge (other than identification of the sources of confidential information) shall be withheld from inspection (1) in delinquency or need of supervision cases, by the attorney for the child, or (2) in neglect cases, by the attorney for the child and an attorney for the parent, guardian, or other custodian of the child.
(d) The Superior Court may by rule or special order provide procedures for the inspection or copying of juvenile social records by persons entitled to inspect them. No person receiving any record or information pursuant to this section may publish or use it for any purpose other than that for which it was received without a special order of the court.
(e) No person shall disclose, inspect, or use records in violation of this section.
DISTRICT OF COLUMBIA CODE
PART II. JUDICIARY AND JUDICIAL PROCEDURE
TITLE 16. PARTICULAR ACTIONS, PROCEEDINGS AND MATTERS.
CHAPTER 23. Family Division Proceedings.
Subchapter I. Proceedings Regarding Delinquency, Neglect, or Need of Supervision.
§ 16-2333. Police and other law enforcement records
(a) Law enforcement records and files concerning a child shall not be open to public inspection nor shall their contents or existence be disclosed to the public unless a charge of delinquency is transferred for criminal prosecution under section 16-2307, the interest of national security requires, or the court otherwise orders in the interest of the child.
(b) Inspection of such records and files is permitted by --
(1) the Superior Court, having the child currently before it in any proceedings;
(2) the officers of public and private institutions or agencies to which the child is currently committed, and those professional persons or agencies responsible for his supervision after release;
(3) any other person, agency or institution, by order of the court, having a professional interest in the

child or in the work of the law enforcement department;
(4) law enforcement officers of the United States, the District of Columbia, and other jurisdictions when necessary for the discharge of their current official duties;
(5) a court in which a person is charged with a criminal offense for the purposes of determining conditions of release or bail;
(6) a court in which a person is convicted of a criminal offense for the purpose of a presentence report or other dispositional proceeding, or by officials of penal institutions and other penal facilities to which he is committed, or by a parole board in considering his parole or discharge or in exercising supervision over him;
(7) the parent, guardian, or other custodian and counsel for the child;
(8) professional employees of the Social Rehabilitation Administration of the Department of Human Services when necessary for the discharge of their official duties; and
(9) the Child Fatality Review Committee when necessary for the discharge of its official duties.
(c) Photographs may be displayed to potential witnesses for identification purposes, in accordance with the standards of fairness applicable to adults.
(d) No person shall disclose, inspect, or use records or files in violation of this section.

(Footnotes)

[1] 515 U.S. 646,652 (1995)

[2] Vernonia, 515 U.S. at 664.

[3] 536 U.S. 822; 122 S. Ct. 2559; 2002 U.S. LEXIS 4882 (2002),

[4] 2002 U.S. LEXIS 4882, at 14-15.

[5] 2002 U.S. LEXIS 4882, at 30

[6] See Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514, 1517 (9th Cir. 1994), vacated, 115 S. Ct. 2386 (1995) (hereinafter Acton I).

[7] See id.

[8] See id.

[9] Justice Scalia was joined by Chief Justice Rehnquist, Justice Kennedy, Justice Thomas, Justice Ginsburg and Justice Breyer. See Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2388 (1995) (hereinafter Acton II).

[10] See id. at 2396. The Supreme Court thus reversed the Ninth Circuit holding which held that because of the lack of individualized suspicion and the seriousness of the intrusion, random drug testing of student athletes was unconstitutional. See Acton I, 23 F.3d at 1527.

[11] 2002 U.S. LEXIS 4882, at 13

[12] 536 U.S. at 829.

[13] In Tinidad School Dist. No. 1 v. Lopez By and Through Lopez, 963 P.2d 1095, 129 Ed. Law Rep. 812, 98 CJ C.A.R. 3450 Colo. (1998), a member of the school band refused to consent to suspicionless drug testing implemented by the school for participants in extra-curricular activities.. The state court held that the testing policy was unconstitutional because the policy was expanded to include students involved in all extra-curricular activities without proof that band members were actually involved in drugs.

In Tannahill v. Lockney Independent School Dist, 133 F.Supp.2d 919, 152 Ed. Law Rep. 549 N.D.Tex., Mar 01, 2001,, the federal dicstrint court invalidated a mandatory drug testing programs for all students and staff. A parent's refusal to consent to drug testing was construed as the equivalent of a "positive" test. The suspicionless program was too wide and too intrusive. Once again, the school district was unable to show a special need for such broad testing. The Court found that there was insufficient evidence to support the claim by educators that drug use by students and staff was increasing.

In addition, therre is the lower court ruling in Earls, 242 F.3d 1264, 151 Ed. Law Rep. 752, 2001 CJ C.A.R. 1521 10th Cir.(Okla.) Mar 21, 2001 where the court held that the testing all participants in extracurricular activities was unconstitutional. The appellate court held that neither a concern for safety nor a concern about the degree of supervision provided a sufficient reason for testing the particular students whom defendants chose to test under the policy. Also, the immediacy of defendants' concern was greatly diminished because the evidence did not show an epidemic of illegal drug use in the school district. Defendants failed to demonstrate that there was some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students would actually redress its drug problem.. Similarly, in [PUT INDIANAN CASE HERE].

[14] See Brousseau v Westerly et al., 1998 WL. 313321 (D. Rhode Island, 6/11/98). Parents on behalf of the student brought a suit alleging Fourth Amendment violations when the school officials conducted a suspicionless search of minor and her classmates when a knife was discovered missing in the cafeteria. The students were separated by sex and patted down by an employee of the same sex. The minor asserts that the searches were unreasonable. The court in applying Acton determined the search to be reasonable. The court reasoned that the government's interest in determining the whereabouts of the knife out weighed the student's interest in their privacy. The court further reasoned that school officials reasonably suspected the knife to be taken by a student with the culprit having the intent to injure someone. The court further reasoned that the pat down of the students were the least intrusive and was consistent with the goal of finding the knife.

In Commonwealth v. Cass, 709 A.2d 350 (Supreme Ct. of Penn., 1/7/98), a student was charged with possession of marijuana on school grounds when a general search of the school lockers by drug sniffing dogs revealed the presence of the drugs. The court in citing Acton

upheld the search as constitutional. The court reasoned that the interest of the government in keeping drugs out of schools outweighed the students' interest in privacy. The court further reasoned that the students had a limited expectation of privacy to their lockers since the know they are subject to search by school officials. The court further reasoned that the use of a dog, which has already been determined to not be a search, was an appropriate means for determining the presence of drugs and was minimally intrusive. Finally, the court determined the search "was a practical means to effectuate the principal's concerns over possible drug use".

In Beth Smith v. James McGlothlin, 119 F.3d 786 (U.S. Ct of Appeals, 9th Cir., 7/17/97) students brought an action against the school when a group of students were searched. The group of 20 students was off campus on a school morning when they were approached by the principal and a school security guard. The principal observed a cloud of smoke over the heads of the students and saw activity that he believed to be the discarding of cigarettes. Having no individual suspicion, the principal ordered all the students to school and conducted a mass search which revealed the defendant in possession of knives. The court found that the search was reasonable. The court reasoned, pursuant to Acton, that individual suspicion was not necessary to justify a search conducted by a school official in keeping with enforcing school policy.

In Louisiana v. Barrett, 683 So.2d 331, (La.App. 1st Cir., 11/8/96). The minor was in a classroom at school when all the students were instructed to empty the contents of their pockets onto the top of the desk and leave the room. After the students left, a drug sniffing dog was brought into the room and sniffed the items on the desk and the students book bags. The dog subsequently indicated the presence of marijuana in the minor's wallet and book bag. The searches were done randomly as too the individual students, but the administrator admitted that the classes licked were "troubled" classes. The student argued that the statute (LSA-R.S. 17:416.3(A)) that governs searches in schools only allow the use of metal detectors when searching without reasonable suspicion. The court, however, determined the searches to be reasonable. The court reasoned that the statute was created not to limit the type of searches school officials could conduct, rather, the statute serves to give a legal defense to those school officials. The court further reasoned that in the event the search did violate the statute, it does not make it unconstitutional and thus requiring the application of the exclusionary rule. Finally, in applying Acton, the court reasoned that the use of drug dogs was minimally intrusive to the student while the great interest of the government in keeping drugs out of the schools was met.

In Florida v. J.A., a juvenile, 679 So.2d 316, (Ct of Appeal of Florida, 3rd District, 10/2/96). The minor was found to be in possession of a gun when his room was subjected to a random search with the use of a hand held metal detector. The minor filed a motion to suppress in district court arguing the need for individual suspicion to justify search. The minor further argued the use of a independent search team not consisting of school officials or personnel amounted to a police search and therefore required probable cause. The trial court agreed with the minor and suppressed the evidence. The Court of Appeals of Florida, however, determined the searches to be legal and reversed the decision. The court reasoned that the Acton decision allowed for the use of suspicionless searches. The court further reasoned that the searches by use of the metal detector was minimally intrusive and only resulted in physical contact when the student possible had contraband detected by the detector. The court further reasoned that the presence of violence in schools and the government need to protect students outweighed the students right to privacy.

In In the Interest of S.S., 680 A.2d 1172, (Superior Ct. of Penn., 7/15/96). The minor upon entering the high school was immediately subjected to a search by a metal detector and a pat down. The procedure led to the discovery of a box cutter in the coat of the minor. Minor was subsequently arrested and unsuccessfully sought an order making the cutter inadmissible in court due to a illegal search. The court determined the search, in keeping with the holding in Acton, was legal. The court reasoned that the high rate of violence in Philadelphia high schools justified the use of random, suspicionless searches. The court further reasoned that the school's interest in ensuring security outweighed the students' interest in their privacy.

In People v. Pruitt, et al., 278 Ill.App.3d 194, (Appellate Ct. of Illinois, 2/26/96). Pruitt was discovered to be in possession of a gun when he went through metal detectors at school. The use of metal detectors at the school is random and assisted by police officers. The trial court suppressed the gun, the appellate court, however, reversed. The court, in applying Acton, reasoned that the searches were minimally intrusive since it did not involve any touching unless the detector went off. The court further reasoned that the government interest in protecting students in an age of school violence out weighed the student's interest in their privacy.

In Thompson v. Carthage School District, 87 F.3d 979, (U.S. Ct of Appeals, 8th Cir., 6/28/96). All of the male children from the sixth to twelfth grade were searched when a school bus driver indicated to the school principal that there might be a knife on campus. The bus driver apparently reached this conclusion when she found one of the seats on the bus with multiple slashes. The searches were conducted with in each class and involved the students emptying their pockets and being searched by a metal detector. While the minor did not have a weapon, the minor did have a matchbox that contained a white substance later determined to be crack. The minor was subsequently expelled and brought this action for wrongful expulsion. The trial court found that the search was in violation of minor's fourth amendment right and found for the minor. The U.S. Court of Appeals, however, found that the search was legal. The court, in citing Acton reasoned that the search not based on individual suspicion was not a violation of the Fourth Amendment. The court further reasoned that, while the school does not have a serious problem with violence, the principal had reason to believe there was a weapon on campus, creating a hazard to the children. The court additionally reasoned that the search was minimally intrusive and well within the guidelines of Acton.

People v. Dilworth, 169 Ill.2d 195, (Supreme Court of Illinois, 1/18/96). Dillworth was a student at n alternative high school for students with behavioral problems. The minor was searched by a liaison police officer permanently assigned to the school when a teacher reported that the student may be in possession of drugs. After searching minor and finding no drugs, the officer seized an searched a flashlight in minor's possession, thus finding the drugs. Dilworth, in his motion to suppress argued that the search was illegal because a officer conducted the search, thereby requiring probable cause, not reasonable suspicion. The trial court did not agree, but the Appellate court did and suppressed the evidence. The Supreme Court of Illinois, however, reversed the Appellate court's decision. The court reasoned that, per Acton, the students' level of expectation of privacy is lower when balanced against the school need to maintain a "proper educational environment". The court further reasoned that the need to keep students safe "not only warranted, but required, a departure from the probable cause standard. The court, therefore determined that reasonable suspicion was required and held the search to be constitutional.

A.J.Moule v. Paradise Valley Unified School District, 66 F.3d 335, (U.S. Court of Appeals, Ninth Cir., 7/10/95). The minor brought a suit through his parents challenging the school district's policy of randomly drug testing all athletes. The plaintiff won the initial petition with the district court determining that the policy violated the students Fourth Amendment rights. However, this decision was over turned when the Supreme Court decided Acton.

Desroches v Caprio et al., 974 F.Supp. 542, (Virginia, 7/31/97) reversed in DesRoches v. Caprio, 156 F.3d 571, 1998 U.S. App. LEXIS 23361 (4th Cir. Va. 1998). Desroches filed a suit alleging that his constitutional rights were violated in connection with a search of his and other student's backpacks when a fellow student reported their shoes missing. Desroches asserts that the search was illegal due to the lack of individual suspicion. The court determined that the search was illegal. The court, in citing Acton, determined that the requirement of individual suspicion can only be overcome when there are strong government interest. The court further reasoned that an balancing test that weighed an individual rights against a intrusive search versus the schools interest in keeping order was necessary to determine if a suspicionless search would be allowed. In balancing the schools need to determine the whereabouts of the shoes versus the minor's rights,

the court found the search in violation and ordered the school to remove all references of the incident from his school records. On reversal, the appellate court held that the school officials had authority to conduct the searches.

In re Latasha W..
60 Cal. App. 4th 1524 Pa. (1998 Cal. Court of Appeal)

Court upheld school district policy of random, suspicionless searches of students for weapons using hand-held metal detectors. Educators were able to show a special need. No individualized suspicion was needed in the face of evidence of the presence of guns causing an unsafe campus climate.

In re F.B.
555 Pa. 661, 726 A.2d 361, 133 Ed. Law Rep. 528
Pa. (Mar 02, 1999)

Juvenile was arrested following a search for weapons conducted as a pre-condition to entry for all students at the high school. The court upheld the search under both federal and state law. Notice of the high school's search policy had been set forth in its manual and notices were both posted in the building and mailed to students. The interest in keeping weapons out of public schools was obvious.

[15] 536 U.S. 832.
[16] 536 U.S. 837.
[17] 536 U.S. 837.
[18] The policy in Tecumseh, Oklahoma, was, in fact, bases around such a combination. Justice Ginsberg's diisent notes, "the School District here has not exchanged individualized suspicion for random testing. It has installed random testing in addition to, rather than in lieu of, testing "at any time when there is reasonable suspicion." (cite to Earls).

[19] See In RE Patrick Y; 358 Md. 50; 746 A.2d 405 (2000) . It is in the Appendix.