Legal Implications for Searching Student Cell Phones

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Most schools regulate student cell phone use. Students who violate cell phone rules may be subject to disciplinary consequences, including confiscation of the cell phone. May school officials lawfully "search" the confiscated cell phone to look at stored text messages, photographs, videos, and logs of incoming and outgoing calls? Clearly, the circumstances of the search must satisfy the *T.L.O.* standard. Not as clear, however, is whether such a search violates federal or Michigan laws regarding stored electronic communications.

Search and Seizure. In *New Jersey v T.L.O.*, 469 US 325 (1985), the United States Supreme Court explained how the Fourth Amendment applies when school administrators carry out searches and seizures to investigate alleged violations of school rules. The Court explained that a search is reasonable only if it is "justified at its inception" and "reasonable in its scope." The Court defined the reasonableness test as follows:

> "[A] search of a student by a teacher or other school officials 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."

Accordingly, the determination of whether the *T.L.O.* standard has been met will depend on the facts of the particular situation.

Case Decision. In *Klump v Nazareth Area Sch Dist*, 425 F Supp 2d 622 (ED Pa, 2006), a federal district court denied the school's motion to dismiss a lawsuit filed by a student whose cell phone was searched. Students at Nazareth Area High School (Pennsylvania) were permitted to carry, but not use or display, cell phones during school hours. When Christopher Klump's cell phone fell out of his pocket, a teacher confiscated the phone. Subsequently, the teacher and the Assistant Principal used Christopher's phone to call nine students listed in his phone directory to determine whether they were also violating the school's cell phone policy. The teacher and AP next accessed Christopher's text messages and voice mail. Finally, the two used the cell phone, without identifying themselves, to have an Instant Messaging conversation with Christopher's younger brother.

Christopher's parents filed a 10-count lawsuit against the school district and school officials, seeking compensatory and punitive damages for the alleged unconstitutional search, violation of the Pennsylvania Wiretapping and Electronic Surveillance Control Act, invasion of privacy, and defamation. In response, the defendants filed a motion to dismiss the lawsuit.

Although some parts of the lawsuit were dismissed, other claims were found to be viable. The court ruled that the student had stated a claim for the alleged violation of his right to be free from an unreasonable search. While school officials were justified in seizing Christopher's cell phone for violation of school policy, there was no basis for them to search the text and voice mail messages stored on the phone. As for the Pennsylvania Wiretap Act claim, the court ruled that the student's case could go forward based on the claim of unlawful access to the stored voice mail and text message communications. The parties later settled the lawsuit for an undisclosed amount of money.

Michigan and Federal Statutes. The unauthorized access to a stored electronic communication could trigger the violation of Michigan and Federal criminal statutes. The Michigan Penal Code, in part, states:

> (2) A person shall not willfully and maliciously read or copy any message from any telegraph, telephone line, wire, cable, computer network, computer program, or computer system, or telephone or other electronic medium of communication that the person accessed without authorization.
>
> (3) A person shall not willfully and maliciously make unauthorized use of any electronic medium of communication, including the internet or a computer, computer program, computer system, or computer network, or telephone. MCL 750.540(2)-(3) (emphasis supplied)

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Likewise, the federal Stored Wire and Electronic Communications Act has penalties for accessing, without (or in excess of) authorization, an electronic communications service facility and thereby obtaining access to a wire or electronic communication in electronic storage. 18 USC § 2701(a).

While the statutory language could be broad enough to cover the unauthorized reading of text messages on a cell phone, there are no reported case decisions addressing this issue under the Michigan or federal statutes.

Conclusion. Administrators may lawfully confiscate student cell phones in circumstances where school rules are violated. For Fourth Amendment purposes, school officials should assume that the student has a reasonable expectation of privacy as to the information stored in the cell phone, *e.g.*, phone numbers, messages (text and voice), photographs, videos. Accordingly, the ability to lawfully search the cell phone is contingent upon satisfying the *T.L.O.* reasonable suspicion and scope standards. Nonetheless, it remains to be seen as to whether an unauthorized search of a student's cell phone triggers a violation of the Michigan or federal statutes addressing stored electronic communications. **Be careful out there!**

Student Discipline for Off-Campus Conduct

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A school district's authority to discipline students for conduct occurring away from school premises has been the subject of litigation in many states. Courts generally uphold discipline to students for off-premises conduct *if* school officials can demonstrate that the student's actions have a direct and immediate effect on school discipline or the school's general safety and welfare. Legal standards, board policy, and common sense AI contribute to this analysis.

Michigan Law. Two sections of the Revised School Code provide authority for disciplining students for off-premises conduct. Section lla(3)(b) authorizes schools to exercise appropriate powers to provide for student *"safety and welfare"* while at school or a school-sponsored activity *or "while en route to or from school or a school sponsored activity"* Section 1312(8) requires all school districts to "implement" and "enforce" a student code of conduct *"in a classroom, elsewhere on school premises, on a school bus or other school-related vehicle, or at a school sponsored activity or event whether or not it is held on the school premises."*

Student Handbooks. Notice of the application of school rules should be clearly stated in the student handbook. The following language is suggested:

> *These rules apply to any student who is on school premises, on a school-related vehicle, at a school-sponsored activity, or whose conduct at any time or place directly interferes with the operations, discipline, or general welfare of the school.*

Case Law. Court decisions result in rulings both for and against schools for disciplining students for off-campus conduct. While the facts and results differ, the analytical focus is generally consistent - how does the student conduct relate to the school? This analysis may also include application of the *`Winker"* standard to determine if the student's conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker v Des Moines Indep Corn Sch Dist,* 393 US 503 (1969).

Speech. In *Killion v Franklin Reg'l Sch Dist* (WD Pa, 2001), a federal court in Pennsylvania ruled that a 10-day suspension for "verbal/written abuse of a staff member" violated a student's First Amendment rights. The student compiled a vulgar "top 10" list about the athletic director, then e-mailed the list to his friends from his home computer. The court found that the school's policy was constitutionally overbroad because it could be (and was) interpreted to prohibit protected speech without geographical or contextual limitations.

In *Klein v Smith* (D Me, 1986), a federal court in Maine ruled that a student's 10-day suspension for giving "the finger" to a teacher off school premises violated the student's First Amendment rights. The incident took place in a restaurant far removed from school premises and at a time when neither the teacher nor the student were associated with their respective roles as teacher and student.

In *J S. v Bethlehem Area Sch Dist* (Pa App, 2000), a Pennsylvania court upheld discipline to a student for creating a web site entitled "Teacher Sux". In addition to derogatory comments about teachers, the web site solicited funds to cover the cost of a "hit man" for teacher executions. The court ruled that the student conduct caused a substantial disruption to the school.

Drugs. In *Giles v Brookville Area Sch Dist* (Pa Cmwlth, 1995), a Pennsylvania court ruled that a student could be expelled for selling drugs even though the actual exchange occurred off of school property. The agreement, however, was made on school property. Similarly, in *Howard v Colonial Sch* (Del Super, 1992), a Delaware court upheld a student expulsion for off-campus sale of cocaine. The court held that the presence of a drug dealer at school would have a detrimental impact on the health, safety, and welfare of the school's students. However, in *Labrosse v St. Bernard Parish Sch Bd* (La App, 1986), a Louisiana court ruled that a student could not be expelled for off-campus possession of drugs when the school rule was limited to on-campus possession.


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Assaults. In *Nicholas B. v School Comm of Worcester* (Mass, 1992), a student's expulsion for an off-campus assault of another student was upheld by a Massachusetts court because the assault "was a continuation of improper conduct that occurred on school grounds." School officials established that the assault was planned that day at school and was an extension of a student confrontation. Similarly, in *Pollnow v Glennon* (CA 2, 1985), a New York court upheld the discipline of a student who assaulted his friend's mother. On the other hand, in *Robinson v Oak Park and River Forest High Sch* Ill App, 1991), an Illinois court found no evidence of material disruption of school activities when a board expelled a student for striking another student off of school grounds after school hours.

Hazing: A Dangerous "Rite of Passage"

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A nationwide survey released in August, 2000 found that nearly half of the high school student respondents were victims of hazing, which the researchers defined as "any humiliating or dangerous activity expected of you to join a group, regardless of your willingness to participate." *Initiation Rites in American High Schools: A National Survey.* The report is available at www.alfred.edu.

While hazing is most likely to occur with sports teams, hazing is also a problem with other student clubs and activities. The survey concluded that "every high school organization, except newspaper and yearbook staffs, had significantly high levels of hazing." The survey also disclosed that most high school students did not perceive even the dangerous initiation rites to be hazing.

Most students indicated that they participated in hazing because it was "fun and exciting"and gave students the chance to feel closer to the group, prove themselves, or exact revenge. Because of peer pressure and the need to "belong," students reported that they went along with the hazing or were scared to say no.

Liability. Not surprisingly, civil lawsuits against educational institutions and school officials are prompted by injuries and deaths caused by hazing. Implement ing an anti-hazing policy after an incident may be too late to defend liability claims. Having a policy "on the books" is only a start to preventing hazing incidents and decreasing liability exposure. A comprehensive anti-hazing policy must be consistently enforced.

The policy and its disciplinary consequences should be communicated to students, parents, and school officials (particularly coaches and activity advisors). Coaches and activity advisors must be vigilant in supervising all aspects of their organization's activities and should be required to report all alleged incidents of hazing to school administrators. Many hazing activities take place in close proximity to adult supervisors-on busses, in locker rooms, and at camps.

Liability can be established for failure to supervise if the adult supervisor knows or has reason to know of an unsafe situation. Moreover, school officials may be found "deliberately indifferent" to a student's civil rights if they do not stop a continuing pattern or dangerous conduct that they know or have reason to know is occurring. Certain types of hazing may also be considered acts of sexual harassment. By the way, the student's "consent" to hazing is unlikely to be a legitimate defense in a civil suit for hazing.

Michigan Legislation. Michigan is one of nine states without an anti-hazing law. On October 4, 2000, Rep. David Woodward (D-Madison Heights) introduced a package of three bills to address hazing. The three bills have been referred to the House Criminal Law and Corrections Committee.

HB 6075 would amend the Michigan Penal Code to impose criminal penalties for hazing. HB 6076 would add Section 1315 to the Revised School Code to require schools to adopt a hazing policy by June 1, 2001. HB 6077 would amend the Revised Judicature Act to create civil liability for school districts and their employees where hazing occurred.

While the definition of hazing differs in all three bills, HB 6076 currently de-fines hazing as:

> *"Any method of initiation or pre-initiation into a student organization, or any pastime or amusement engaged in with respect to the student organization, that causes or is likely to cause a pupil bodily danger, physical harm, or personal degradation or disgrace resulting in physical or mental harm."*

Defining Hazing. Until such time as the Michigan Legislature adopts a statutory definition, school policies should clearly define hazing. While some may argue that it is difficult to determine whether a certain activity is hazing, common sense and the responses to the following questions provide good guides:

1. *Is alcohol involved?*
2. *Will current members of the group refuse to participate with the new members and do exactly what the new members are asked to do?*
3. *Does the activity risk emotional or physical abuse?*
4. *Is there a risk of injury or a question of safety?*
5. *Do you have any reservations describing the activity to your parents or school officials?*
6. *Would you object to the activity being photographed for the yearbook or filmed by the local TV crew?*

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If the answer to any of these questions is "yes," the activity is probably hazing. Adapted from *Death by Hazing,* Sigma Alpha Epsilon (1988).

Checklist. Efforts to deter hazing need not wait for the proposed Michigan legislation to become law. In the interim, school officials should review the following questions and assess the school's needs.

- Does your school have a policy or student handbook statement that clearly prohibits hazing and imposes appropriate disciplinary consequences?
- Are students aware of the dangers of hazing as well as the disciplinary consequences for engaging in this conduct?
- Do coaches and activity advisors reinforce the hazing prohibition or "look the other way"?
- Are school "traditions" or "initiation rites" positive bonding rituals which build group unity or do they approximate or invite hazing?

Additional resources on this topic can be found at www.stophazing.org

Still Going Strong: The *Tinker* Decision

by Lisa L. Swem, M.A.T., J.D.
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Which of the following situations is *least* likely to cause a student disciplinary referral: (a) t shirt with a graphic photo of an aborted fetus, (b) "under-ground newspaper" criticizing and demeaning the principal, (c) bright green hair and multiple body piercings, or (d) black armband with a "peace" symbol? Nine out of ten surveyed principals said that the correct answer is (d).

In December 1965, situations (a)-(c) were unimaginable. Forty years ago five Iowa kids created quite a stir in the Des Moines School District when they wore black armbands to school to protest the Vietnam War. Refusing to re-move the armbands as required by a recently enacted policy, the students were suspended until they returned to school without their armbands.

With support from the ACLU, the students sued the school district, seeking nominal damages and an injunction against their discipline. Working its way through the federal courts, this litigation was resolved in 1969 when the United States Supreme Court issued its landmark student speech decision - *Tinker v Des Moines Indep Community Sch Dist,* 393 US 503 (1969).

Tinker provided the oft-quoted line that students do not "shed their constitutional rights to freedom of speech or expression at the school-house gate." *Tinker's* greatest legacy, however, is its test by which school officials can constitutionally regulate student speech, i.e., does the student speech "materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others?"

In answering that question, *Tinker* noted that an administrator's "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. " Instead, school officials have the burden to "reasonably forecast" that the student's speech will indeed cause a substantial disruption or material interference with school activities. Translation: the principal's mere proclamation that the student speech is or will be disruptive rarely suffices to meet this standard. Instead, the principal must have a *reasonable basis* to predict the disruption.

Since *Tinker,* the Supreme Court has also ruled that school officials may regulate student speech that "would undermine the school's basic educational mission." *Bethel Sch Dist No. 403 v Fraser,* 478 US 675 (1986). School officials may also exercise control over the style and content of school-sponsored speech if the actions are "reasonably related to legitimate pedagogical concerns." *Hazelwood Sch Dist v Kuhlmeier,* 484 US 260 (1988). Decisions by the lower courts have also shaped the legal analysis of student speech.

Nonetheless, the analysis of student speech still begins with the the *Tinker* test. Visualize yourself as the "star witness" for the school district - you are in the courtroom's witness seat, wearing your best suit, sworn to tell the truth, under relentless cross-examination, and observed by members of the board of education, the superintendent, and the media. You will need to identify specific facts to truthfully support the answers to the following questions:

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Q: What is the disruption?

Q: How is that disruption substantial?

The application of this testimony to the *Tinker* test is frequently the key component of a court's determination about the constitutionality of the school's action.

Principals routinely handle student speech issues without incident. Lawful board policy, clear student conduct standards, and workable procedures typically pro-vide appropriate guidance. Some student speech issues, however, are not easily pigeon-holed into a "constitutional" or "unconstitutional" framework. While additional legal considerations may likely apply the principal's first inquiry remains the "substantial disruption" test.

U.S. Supreme Court Rules Student Strip Search Unconstitutional

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In an 8-1 decision, the U.S. Supreme Court ruled that school officials violated the Fourth Amendment rights of a 13-year-old student when they strip-searched her while looking for drugs at an Arizona middle school. *Safford Unified Sch. Dist. #1 v. Redding,* 129 S. Ct. 2633 (June 25, 2009). However, the Supreme Court ruled that the Assistant Principal who ordered the search was entitled to qualified immunity from liability.

This case involved an 8th-grade honor roll student, Savana Redding, who had no history of school discipline. Acting on a tip from a classmate, the Assistant Principal had reasonable suspicion to believe that Redding had brought forbidden prescription and over-the-counter drugs (400 mg. Ibprofen and 200 mg. Naprosyn) to school. The Assistant Principal searched Redding's backpack and after finding nothing, had two female school employees take her to the nurse's office and search her clothing.

Stripped to her underwear, Redding was ordered to shake out her bra and underpants so that anything hidden would fall out, "thus exposing her breasts and pelvic area to some degree." No pills were found.

Relying on *New Jersey v. T.L.O.,* 469 U.S. 325 (1985), the Supreme Court found that the Assistant Principal had "reasonable grounds" to search Redding's backpack and outer clothing. Although the initial search was justified at its inception, the strip search was not reasonable in scope. A school 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." *T.L.O.,* 469 U.S. at 342.

"Here, the content of the suspicion failed to match the degree of intrusion." *Safford,* 129 S. Ct. at 2642. The Supreme Court found that the Assistant Principal "must have been aware of the nature and limited threat of the specific drugs he was searching for, and while just about anything can be taken in quantities that will do real harm, [he] had no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills." *Id.*

The Court also criticized the Assistant Principal for failing to ask the student informant "followup questions to determine whether there was any likelihood" that Redding presently had pills and where she might be hiding them. *Safford,* 129 S. Ct. at 2640.

Rejecting the school's argument that students frequently hide drugs in their undergarments, the Court found that "general background possibilities fall short; a reasonable search that extensive calls for suspicion that it will pay off." *Safford,* 129 S. Ct. at 2642. In sum, what was missing from the suspected facts that pointed to Redding was any indication of danger to the students from the power of the drugs or their quantity, and any reason to support that Redding was carrying pills in her underwear. "We think that the combination of these deficiencies was fatal to finding the search reasonable. *Safford,* 129 S. Ct. at 2643.


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"We do mean, though, to make it clear that the *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts." *Id.*

In his dissent, Justice Clarence Thomas warned that students will now know where to hide their contraband.

Sixth Circuit Rules Student Strip Searches Unconstitutional, But Dismisses Litigation Because Defendants Had "Qualified Immunity"

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In a decision issued April 4, 2005, the United States Court of Appeals for the Sixth Circuit Court ruled that strip searches of 25 students in a high school physical education class were unconstitutional. The individual defendants, however, had "qualified immunity" from liability because their actions were not "clearly" unlawful. Accordingly, the lower court's denial of summary judgment to the individual defendants was reversed. *Beard, et al v Whitmore Lake School District, et al.,* 2005 FED App 0155P (6th Cir. 2005).

Background. A high school student told her physical education teacher that her prom money (at least a "few hundred dollars") had been taken from her book bag during class. The acting principal was advised of the theft and called the police. (The building principal was absent that day.) Searches of the gymnasium area as well as the students' book bags and lockers failed to locate the money. In their respective locker rooms, male teachers searched 20 boys and female teachers searched 5 girls.

Strip Search. The boys were required to lower their pants and underwear and remove their shirts. After observing this search, one of the police officers told the acting principal that the girls should be searched in the same manner to prevent any claims of gender discrimination. The acting principal and a teacher had the girls stand in a circle, pull down their pants, and pull up their shirts. The girls were not touched and did not remove their underwear. The money was never recovered.

Litigation. Represented by the ACLU, eight students sued the School District, the acting principal, five teachers, and two police officers. All defendants filed summary judgment motions seeking dismissal of the litigation. The federal district court granted summary judgment to the School District because of its policy about student searches. The court also granted summary judgment to one teacher (who was not involved in the strip search) and to one officer (who was not aware that the searches were taking place). Denying summary judgment to the remaining individual defendants, the district court held that qualified immunity did not apply since the law clearly established that a "strip search of students for missing money in the absence of individualized suspicion is not reasonable." Those defendants appealed.

Ruling. Applying the facts surrounding the searches to the legal standards articulated in *New Jersey v TLO,* 469 US 325 (1985), the Sixth Circuit held that the searches were unreasonable, and therefore unconstitutional, because they were highly intrusive, undertaken to find money, and performed on a substantial number of students without individualized suspicion and without consent. The searches of the girls were further unreasonable because, unlike the boys, the searches occurred in the presence of other students.

Student Searches. *New Jersey v TLO* remains the touchstone by which courts analyze school searches of students. In *TLO,* the United States Supreme Court held that the Fourth Amendment is not violated if the school search of a student is "reasonable" under all of the circumstances. To determine reasonableness, courts examine both the search's initial justification and subsequent scope. Justification is established if there is *"reasonable suspicion"* that the student has violated either the law or school rules. The scope of a search is generally permissible if it is "reasonably related" to the search objectives and "not excessively intrusive" in light of the infraction and the student's age and gender.

Focusing on the scope of the searches, the Sixth Circuit examined three factors: (1) the students' legitimate expectation of privacy, (2) the intrusiveness of the search, and (3) the significance of the school's needs met by the search. Even though a student may have a decreased expectation of privacy in a locker room, the Sixth Circuit concluded that the searches nonetheless exceeded what would "normally be expected by a high school student in a locker room." Finding that the searches were intrusive, the Sixth Circuit also concluded that a search to "find money serves a less weighty governmental interest" than a search for "items that pose a threat to the health or safety of students," *i.e.*, drugs or weapons. Failing all three factors, the Sixth Circuit readily concluded that the searches were unconstitutional.

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Qualified Immunity. Although the individual defendants participated in the unconstitutional searches, the Sixth Circuit concluded that they were nonetheless protected from the lawsuit by the "qualified immunity" doctrine because their conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *See Harlow v Fitzgerald,* 457 US 800 (1982). Accordingly, the Sixth Circuit reversed the district court's denial of summary judgment to the individual defendants.

When determining whether a right is "clearly established" for qualified immunity purposes, the analysis must be made in light of "the specific context of the case," and not as a "broad general proposition." *Brosseau v Haugen,* 125 S Ct 595 (2004).

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Student Strip Searches

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Case law hierarchy first looks to decisions of the United States Supreme Court, then to Sixth Circuit decisions and other courts within the circuit (*e.g.*, federal district courts of Michigan, Ohio, Kentucky, and Tennessee), then to decisions of the other federal circuit courts. While the Supreme Court's *TLO* decision set forth "basic principles of law" for school searches, the Sixth Circuit found that *TLO* did not offer the necessary guidance to place the individual defendants on notice that the searches were unreasonable. Similarly, the previous Sixth Circuit cases involving student strip searches did not "clearly establish" that the defendants' conduct was unconstitutional.

Lessons Learned. Strip searches of students based on missing money or property rarely, if ever, pass constitutional muster. While strip searches involving weapons or drugs may provide a more compelling argument to satisfy the justification standard, the scope of the search must still be reasonable. Student searches should not be conducted *en masse,* but rather should be limited to those students for which there is "individualized" suspicion. The actual search should be conducted in a manner that minimizes intrusiveness of the student's privacy, *e.g.,* conducted by persons of the same gender as the student; held in an area that precludes observation by others (especially students); and is appropriate in scope for the attendant circumstances.

The Sixth Circuit's opinion can be found at:

http://pacer.ca6.uscourts.gov/opinions.pdf/05a0155p-06.pdf

Random, Suspicionless Searches Are Unconstitutional

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A class action lawsuit on behalf of all secondary public school students was filed against the Little Rock School District challenging the school's practice of subjecting its secondary students to random, suspicionless searches of their persons and belongings. The Eighth Circuit Court of Appeals ruled that this practice violated the students' Fourth Amendment rights because the searches unreasonably invaded their legitimate expectations of privacy. *Jane Doe v Little Rock Sch Dist,* 2004 US App LEXIS (CA 8, August 18, 2004).

Facts. The search practice required students to remove everything from their pockets and place all of their belongings, including their backpacks and purses, on their desks. The students exited the classroom and remained in the hallway while school personnel searched the items that the students left behind. Contraband discovered during the search was routinely turned over to law enforcement officials.

Legal Analysis. In determining whether a particular school search is constitutionally reasonable, courts engage in a fact specific analysis which balances the scope of the student's "legitimate expectation of privacy at issue, "with the" character of the intrusion that is complained of," and the "nature and immediacy of the governmental concern at issue." *Vernonia Sch Dist. 47J v Acton,* 515 US 646, 654-66 (1995); *New Jersey v TLO,* 469 US 325, 337 (1985).

Expectation of Privacy. Finding that students have a legitimate "though limited" expectation of privacy in their personal belongings that they bring into public schools, the court held that those privacy rights "are not nonexistent" The court quoted from *TLO: "A* search of a child's person or of a closed purse or other bag carried on her person ... is undoubtedly a severe violation of subjective expectations of privacy." 469 US at 337-38. Accordingly, the court ruled that a full-scale, suspicionless search "eliminates virtually all of their privacy in their belongings."

The school nonetheless argued that the students had waived this expectation of privacy. Noting that book bags, backpacks, purses, and similar containers are permitted on school property as a convenience for students, the student handbook stated: "if brought onto school property, such containers and contents are at all times subject to random and periodic inspections by school officials." The court, however, ruled that this statement does not waive the students' expectations of privacy that they would otherwise have, stating that the school "may not deprive its students of privacy expectations protected by the Fourth Amendment simply by announcing that the expectations will no longer be honored."

Character of Intrusion. The school's search practice subjected all personal belongings to search at any time, without notice, individualized suspicion, or any apparent limit to the extensiveness of the search. The court found such searches "highly intrusive." In contrast, the court noted that large scale "administrative" searches effected by metal detectors or dogs are "minimally intrusive" and can result in requisite degree of individualized suspicion to conduct a further, more intrusive search.

Governmental Concern. Although the school cited to general concerns about drugs and weapons at school, the court found "no evidence in the record of special circumstances" that would justify the intrusion. While recognizing the school's interest in minimizing the harm of weapons and drugs, the court held that a "mere apprehension" of such a problem has never entitled a public school to conduct random, full-scale searches of students' personal belongings. The court stated:


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> "The mere assertion that there are substantial problems associated with drugs and weapons in its schools does not give the [school]carte blanche to inflict highly intrusive, random searches upon its general student body."

Application. Although this case is not binding precedent for Michigan courts, it nonetheless provides authority to challenge School Code § 1306 which permits a public school principal to search a student's "locker *and the locker's contents* at any time." MCL 380.1306. While a random, suspicionless search of the locker is constitutional, a question arises as to whether reasonable suspicion is needed to search the student's belongings inside the locker, even though § 1306 gives such permission and states that the student who uses a public school locker "is presumed to have no expectation of privacy in that locker *or that locker's contents."* The *Doe* court clearly found that a similar declaration in the student handbook did not trump the Fourth Amendment. Any volunteers for a test case?

School Officials Are Not Required to Read "Miranda" Rights to Students

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"Read 'em their rights." Due to repeated scenes in movies and television shows about police matters, most viewers are able to repeat the mantra, *"you have the right to remain silent .... "*

In *Miranda v Arizona,* 834 U.S. 436 (1966), the Supreme Court ruled that government officials must immediately inform persons in custody of their fifth amendment (self-incrimination) and sixth amendment (legal counsel) rights *before* the individual waives those rights. The requirement to provide this notice is known as a person's *Miranda* rights. If the government fails to implement these procedural protections, the defendant may seek to "suppress" the use of the statement or evidence.

Efforts to apply the *Miranda* warning to most school situations have not been successful. The overwhelming weight of case law authority provides that pre-confession *Miranda* warnings do not apply to situations in which a school official questions a student about a disciplinary matter. Rather, *Miranda* warnings are only necessary "when a defendant is subject to questioning by law enforcement officials, their agents, and the agents of the court while the suspect is in official custody." *Harold S. v Thompson Middle School,* (Rhode Island, 1999).

In this case, the student (Harold S.) was called to the principal's office. In response to the principal's questions, Harold first denied, then admitted hitting another student. Following school policy, the principal later submitted Harold's statement to the police. In defending against criminal assault charges, Harold S. argued that his confession should be excluded from the criminal proceedings because the principal did not provide a *Miranda* warning. The court disagreed and held that "because the principal was not acting an agent of the police . . . and because [the student] was not subjected to a custodial interrogation by law enforcement authorities, it was unnecessary to inform [the student] of his rights prior to this questioning."

Miranda warnings, however, usually apply to police interrogations which hap-pen on school grounds or in the presence of school officials. Like the "probable cause" versus "reasonable suspicion" standard for searches, determining whether the criminal law standard applies to a school liaison or resource officer is very fact dependent. For example, an Idaho court held that *Miranda* warnings are required when a student was questioned by school resource officer in the principal's office. *State v Doe,* 948 P2d 166 (Idaho App, 1997). A Florida court, however, held that *Miranda* did not apply to a principal's questioning of a student in the presence of a sheriff's deputy who was the school resource officer. *In Re JC,* 591 So2d 315 (Fla App, 1991).

Determining whether an interrogation takes place while the student is in "custody" depends upon many factors, including whether the student believes that he or she is free to leave. An Oregon court held that *a Miranda* warning should have been given to a junior high school student who was questioned in the principal's office by an armed, uniformed police officer. The court found the interrogation to be custodial because the student would have been subject to school discipline if he had not come to the office. *In Re Killitz,* 651 P2d 1382 (Or App, 1982) A Washington court also required a *Miranda* warning when a student was questioned by a plain-clothes detective in the presence of the school principal, even though the student was told that he did not have to answer questions. *State v DR_, 930* P2d 350 (Wash App, 1997).


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By contrast, *a Miranda* warning was not required where the student was inter-viewed by a police officer in the principal's office because the officer told the student that he was not under arrest, could leave if he wanted, and did not have to answer questions. *State v Redo,* 125 Or App 390 (1993).

Miranda only applies to criminal proceedings. A student's *"un-Mirandized"* statement may be used *in* a school disciplinary hearing. An Illinois court wrote: "the essence of school expulsion hearings is to decide a student's fitness to remain in school which does not implicate the right against self-incrimination." *Bills v Homer Consol Sch Dist No. 33-C,* 967 F Supp 1063 (ND III, 1997).

Law enforcement officials typically receive extensive training on those circumstances which trigger the need for a *Miranda* warning. If the officer makes a mistake in this regard, the penalty can be significant. Under the "exclusionary" rule, any statement or other evidence improperly gained may be excluded from the criminal proceeding.

REASONABLE AT INCEPTION AND IN SCOPE?

Not All "Strip Searches" Pass Fourth Amendment Criteria

by Lisa L. Swem, M.A.T., J.D.
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Three Connecticut students subject to a strip search recently sued the school employees involved in the search. The suit, filed in federal court in December, 1998, claims that the defendants violated the students' constitutional rights to due process and freedom from unreasonable searches. The students were among 22 girls in a physical education class who were searched after $40 was reported missing. The girls said that the class instructor and a security aide (both female) called them into an office individually and asked each student to strip. The assistant principal (also female) allegedly stood outside the office door.

The outcome of this litigation remains to be seen. Although some courts appear to be easing a perceived absolute bar against strip searches, school officials should *not* view this trend as carte blanche to conduct strip searches in public schools. Generally speaking, courts may support an appropriate strip search for an exigent and dangerous situation (i.e., weapons or illicit substances), but typically do *not* support a strip search for missing property.

Applying *T.L.O.* In analyzing student searches, including a strip search, courts continue to apply the U.S. Supreme Court standard articulated in *New Jersey v T.L.O.,* 469 U.S. 325 (1985). A school official may search a student based upon a reasonable suspicion that the search will uncover evidence of a violation of the law or of the school's rules. To determine whether the reasonable suspicion standard was met, the Supreme Court adopted a two-prong analysis:

(1) Was the search justified *at its inception?*

(2) Was the search *reasonably* related in scope to the circumstances which justified the search in the first place?

Although the *T.L.O.* case involved the search of a student's purse, and-not a strip search, courts nonetheless use the *T.L.O.* standard to analyze the propriety of strip searches.

Recent Court Decisions. The trend toward court approval of *certain* strip searches which meet the *T.L.O.* standards is best demonstrated by two cases from the Seventh Circuit Court of Appeals. In *Doe v Renfrow,* 631 F2d 91 (CA 7, 1%0), the court condemned a strip search of a student suspected of possessing drugs. The court characterized the strip search as "outrageous" and a "violation of any known principle of human decency." Thirteen years later, in *Cornfield by Lewis v Consolidated High Sch Dist No. 230,* 991 F2d 1316 (CA 7, M), the same court upheld a strip search of a student suspected of "crotching" drugs. The court found that the search was justified at its inception based on recent drug-related incidents involving the student, as well as observations of an "unusual bulge" in the student's crotch area. The court also found that the search was reasonable in scope because it was conducted in the privacy of a locker room, as well as the fact that the student was permitted to wear a gym uniform during the search.

The Sixth Circuit Court of Appeals (whose decisions are binding on Michigan schools), also upheld a strip search of a student suspected of possessing drugs. *Williams by Williams v Ellington,* 936 F2d 881 (CA 6, 1991). Although the search failed to disclose any drugs, the court found that corroborated information and specific evidence provided reasonable grounds for the search.

In contrast to strip searches for weapons and illicit substances, courts are much more likely to rule against school officials who conduct strip searches for missing property. As part of analyzing the *T.L.O.* factors, courts will inquire as to whether the search is overly intrusive, particularly in light of the object of the search and whether there was threat of imminent or serious harm that would result from the contraband. In *Jenkins v Talladega City Bd of Educ.,* 95 F3d 1036 (CA 11, 1996) and *Oliver v McClung,* 919 F Supp 1206 (ND Ind, 1995), federal courts ruled that strip searches to locate $7 and $4.50, respectively, violated the Fourth Amendment.


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Personal Liability. School officials should take note that all of the cases reviewed above (including the recent Connecticut case) were filed as civil suits for monetary damages against the involved school employees and, sometimes, the school district. The *Jenkins* court (strip search for $7) ruled that because school officials could not have reasonably believed that such a search was permissible under the Fourth Amendment, they were *not* entitled to qualified immunity from liability. On the other hand, the *Cornfield and Williams* courts (strip search for drugs) ruled that the school officials had qualified immunity from suit because the searches met the *T.L.O.* standard.

Summary. When faced with a possible strip search situation, principals should first review the following considerations *before* acting:

- Does the contemplated search conform with established District policy or procedure?
- Does the suspected contraband justify the search (*i.e.*, weapons or illicit substances as opposed to missing property)?
- Is there individualized reasonable suspicion to conduct the search?
- Is the search reasonable in scope under all the circumstances?
- What measures can be taken to minimize the intrusiveness of the search?

Searches and Interrogation of Students by Police and School Liaison Officers

by Lisa L. Swem, M.A.T., J.D.
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To address school safety concerns, many school districts rely on police officers to parole school grounds and assist with student conduct issues. The involvement of police officers in school searches and interrogations generates questions about the constitutional protections afforded students.

In *New Jersey v T.L.O.*, 469 US 325 (1985), the United States Supreme Court ruled that the Fourth Amendment's prohibition against reasonable searches applies to school officials who search public school students. School officials, however, are not subject to the more stringent "probable cause" standard necessary to justify a police officer's warrantless search (or seizure) of a person, but may instead search a student based upon "reasonable suspicion" that the search will uncover a violation of law or school rules.

T.L.O. did not address the requirement for student searches when the police are involved. Courts considering this issue have reached varying conclusions, some requiring "probable cause," others finding that "reasonable suspicion" is sufficient. The determination depends on the respective roles of school officials and police officers in conducting searches and interrogations.

Police Officers Conducting Searches

When police officers search or interrogate students in school on their own initiative, they are bound by the probable cause standard. The fact that such law enforcement action occurs on school property does not lessen this requirement. Courts will not allow police officers to circumvent the probable cause requirement by searching or questioning students on school grounds. *See, e.g, State v Tywayne H.*, 933 P2d 251 (NM Ct App, 1997) (probable cause standard applied where two police officers at a school dance conducted a search on their own initiative with only minimal contact by school officials).

A Florida court ruled that when a police officer directs, participates, or acquiesces in a search by school officials, the search must be based upon probable cause. *In re A.J.M.*, 617 So2d 1137 (Fla App, 1993) (invalidating a school resource officer's search of a student and suppressing cocaine evidence because the officer lacked probable cause). A Pennsylvania court, however, upheld an undercover police officer's search of a student (finding cocaine), based upon reasonable suspicion from informants and the officer's own observations. *In re S.F.*, 607 A2d 793 (Pa Super, 1992).

Police Officers Present During Searches by School Officials

If police officers merely observe searches or interrogations of students conducted by school officials, the reasonable suspicion standard generally applies, particularly when the student does not face criminal charges. In *Martens v District No. 220 Rd of Educ,* 620 F Supp 29 (DC, 1) , a federal court upheld a principal's search and interrogation of a student suspected of selling marijuana at school. A deputy sheriff entered the principal's office while the principal was questioning the student, advised the student he should cooperate, and asked the student to empty his pockets. The student complied and a pipe with marijuana was found. The student was expelled from school, but was not subject to criminal charges. The court noted that there was no evidence that the deputy directed the principal to act, that he and the principal were acting in concert, or that he was attempting to avoid the probable cause requirements.

Similarly, the Colorado Supreme Court found that the reasonable suspicion standard applied to a principal's search and interrogation of two students suspected of selling marijuana even though a police officer (at school to investigate a bicycle theft) had notified the principal about the possible drug sale and remained on campus during the investigation. Observing that the police officer did not request or participate in the searches, the court refused to find that the school officials were acting as agents of the police. *In re P.E.A.,* 754 P2d 382 (Colo, 1988).


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School Security Officers

When school security officers conduct searches or interrogations of students as part of their school-related duties, the officers are generally viewed as school employees. Depending upon the circumstances, their investigative actions will pass constitutional muster when based upon reasonable suspicion.

In *People v Dilworth,* 661 NE2d 310 (Ill, 1996), the Illinois Supreme Court ruled that the reasonable suspicion standard applied to a school liaison officer's search of a student's flashlight.

The court emphasized that the officer was a member of the school staff and conducted the search in furtherance of the school's goal to maintain a proper educational environment. *See also S.A, v State*, 654 NE2d 791 (Ind App, 1992) (upholding a police officer's search of a student under reasonable suspicion where the officer was

Searches and Interrogations of Students by Police and School Liaison Officers (Continued)

acting in his capacity as a school security officer).

Courts also consider the dangerousness of the suspected violation of law or school rules. The Wisconsin Supreme Court applied suspicion standard to a school liaison officer's search of a student suspected of bringing a knife to school. While the court noted that the officer acted in conjunction with school *officials* and only because involved in the search upon their request, the court also stressed that school *officials* should be encouraged to seek police intervention when confronted with dangerous weapons. *In re Angelia: D.B.,* 564 NW2d 682 (Wise, 1997). *See also J.A.R. v State*, 689 Sold 1242 (Fla App 2 Dist, 1997 (a school official with reasonable suspicion that a student possesses a dangerous weapon may request *any* police officer to pat-down the student without fear that police involvement requires probable cause or violates the Fourth Amendment).

Legal Risks

When a police officer's search or interrogation of a student uncovers a violation of law or school rules, those actions may be challenged by a student in subsequent criminal or school disciplinary proceedings. One avenue for challenge is a motion to suppress the evidence obtained. Although motions to suppress improperly obtained evidence may be successfully brought in criminal proceedings, they do not generally apply in school disciplinary hearings. As a practical matter, if a search or interrogation is supported by reasonable suspicion, it may also pass constitutional muster under the probable cause standard.

A police officer's search or interrogation of a student may also be the basis for a civil lawsuit brought pursuant to 42 USC § 1983 alleging a Fourth Amendment violation. However, school officials and police officers may be entitled to qualified immunity from damages due to the difficulty in determining whether the probable cause or the reasonable suspicion standard applies. *See, e.g., James v Unified Sch Dist No. 512,* 952 F Supp 1407 (D Kan, 1997) (police officer who searched student vehicle after receiving anonymous tip about handgun was entitled to qualified immunity because it was not clearly established that probable cause was needed for search).

Conclusion

Determining whether the reasonable suspicion or the probable cause standard will apply to a police officer's search or interrogation of a student on school property will depend on the circumstances presented. Factors that a court may consider in making such a determination include: Whether the police officer or a school official initiated the search or interrogation.

- Whether the police officer acted independently or in conjunction with school officials in searching or questioning the student.
- The timing and the extent of the police officer's participation in the search or interrogation.
- The employment status, assignment, and/or job description of the police officer.
- The anticipation or likelihood of criminal prosecution.
- The dangerousness of the suspected violation of law or school rules.
- Whether other legal standards (including FERPA and the Child Protection Law may apply.

The "Dog Days" of Canine School Searches

by Lisa L. Swem, M.A.T., J.D.
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A recent, random, and unscientific survey determined that canine searches edged out Madeline Hunter's "anticipatory set" as the most popular topic discussed by Michigan school principals! Acknowledging the popularity of this topic, this month's column will address the legal issues regarding canine searches in schools.

The use of trained "sniffer" dogs to combat school drug problems raises potential legal issues for school officials. The reported appellate court cases addressing canine searches in schools all arose from civil actions in which the student sued the school district and/or the involved school administrators. *See Jennings v Joshua Indep Sch Dist* (1991), *Horton v Goose Creek Indep Sch Dist* (1982), *Zamora v Pomeroy* (1981), *Jones v Latexo Indep Sch Dist* (1980), *Doe v Renfrow,* (1979). Although these case law decisions are not binding precedent upon courts having jurisdiction over Michigan schools, they nonetheless provide important guidance to school principals who are considering ca-nine searches in schools.

The legal analysis regarding sniffer dogs in schools largely depends upon the "object" which is being sniffed. The case law is fairly consistent in determining that the use of dogs to sniff the exterior of lockers and automobiles is not a search under the Fourth Amendment because a person does not have a "reasonable expectation of privacy" in odors surrounding the locker or automobile. This conclusion is further strengthened when schools notify students that lockers and parking lots are school property and subject to random inspection.

The courts are generally more restrictive when dogs are used to sniff students. In *Horton* and *Jones,* the courts held that a blanket search of students by sniffer dogs violated the Fourth Amendment, because the searches lacked individualized suspicion. In *Doe,* however, the court found that the sniffing of each students was not a "search" and was a reasonable method to detect drugs in school.

The cases referenced above do not address the use of dogs to sniff athletic bags, knapsacks, purses and other personal items belonging to students. Except for the *Jennings* decision, the other canine search cases were decided before two significant decisions of the United States Supreme Court -- *United States v Place* (1983), in which the Court held that a dog sniff of luggage at an airport was not a "search" under the Fourth Amendment and *New Jersey v T.L.O.* (1985), in which the Court held that school officials must have "reasonable suspicion" to search students and their belongings at school.

School principals should carefully consider the following issues if canine searches will be used in your building:

Check the district's policy book to determine if the board of education has addressed student searches, including canine searches.

Always obtain permission from the superintendent or appropriate central office administrator before implementing canine searches in your building.

Include a statement in the student handbook that lockers and parking lots are school property and are subject to searches, including canine searches, at any time.


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Provide a general notice to students and their parents that canine searches may be conducted in the building during the school year. It is not necessary to provide specific notice of a search such as "the canine corps will be at the high school Monday morning to sniff student lockers and cars."

Determine whether the dogs and their handlers are appropriately trained and certified. Always confirm credentials and ask for references from other schools.

Review district insurance policies for coverage and/or exclusions relative to canine searches, including damage to property which may be caused by the dog. For example, who will pay to have a student's car repainted after the dog "alerts," jumps on the car, and severely scratches the car's finish?

To the extent possible, limit canine searches to lockers and parking lots. Canine sniffs of students and canine sniffs of personal belongings should be avoided until after individualized suspicion has been established. At least one court has implied that the dog's "alert" can provide such "individualized" and "reasonable" suspicion.

Lisa received appropriate assistance in writing this article from her dog, Maggie.