School Safety

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TRUANCY

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SCHOOL

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National School Safety Center
7311 Greenhaven Drive
Sacramento, CA 95831
916/427-4600

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George Nicholson, Executive Editor
Stuart Greenbaum, Editor/Art Director
Vicky Kleppe Leavitt, Associate Editor
Mike Gold, Graphic Designer/Illustrator
Monica Winegar, Compositor

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About the cover:

Truancy is one of the most critical problems affecting our nation's schools. With this cover and the related feature articles, we hope to encourage educated and continued awareness and involvement in this important subject. *Cover art and design by Mike Gold. Photography by Stuart Greenbaum.*

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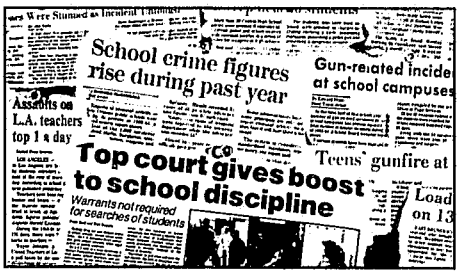
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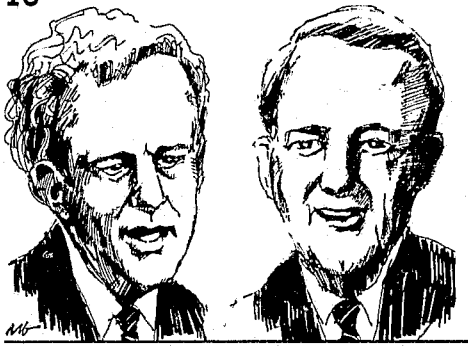

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Sections

A potpourri of legal issues related to school safety

By George H. Margolies

Legal constraints and judicial dictates are impacting schools in a myriad of issues requiring school officials, perhaps now more than ever, to stay on top of legislative and judicial actions.

George H. Margolies is legal counsel of the District of Columbia Public Schools.

As evidenced by the U.S. Supreme Court's decision in the matter of *T.L.O.* (discussed *infra),* school officials must be ever-cognizant of pertinent legal constraints and judicial dictates. This article seeks to shed some light as to how such myriad issues as trespassing, metal detectors, surveillance, *Miranda* warnings, polygraph tests, fingerprinting, and drug testing have been addressed by various legislatures and courts.

(Editor's note: the issue of search and seizure and the T.L.O. *case, recently before the United States Supreme Court, is analyzed in the "Legal Update" of this issue of* School Safety.)

Trespassing

Many state legislatures have long prohibited, as a distinct criminal code offense, trespassing in school buildings and on school grounds. In the wake of increasing crime on campuses, other states are now considering the enactment of similar statutes.

Trespassing laws have been challenged on such varied grounds as: being beyond the police powers of the state; being unconstitutionally vague or overly broad; or being an infringement of one's First Amendment rights. As long ago as 1938, a California court upheld a statute that defined a vagrant as any person who loiters about any school or public place at or near which school children attend.[1] In upholding the statute, the Court observed that the prohibition against loitering had been limited essentially to schools and held that a legislature has a right to protect children in this manner, even assuming that some innocent people might otherwise desire to loiter. Similarly, in 1955 a New York court upheld as reasonable a statute providing that any person, not a parent of a pupil, who loiters in or about any public school building or grounds without written permission from the principal is guilty of disorderly conduct.[2] The Court reasoned that any individual right to loiter was subservient to the welfare of the general public, and that the desire for the safety of school children certainly justified the exercise of the state's police power for their protection.

In December of 1984, a Florida court, in a delinquency proceeding, wrestled with the question as to whether or not a statute that prohibited trespassing upon school grounds was applicable to a student of one public school who entered or remained upon the campus of another public school.[3] The Court, answering in the affirmative, doubted that the legislature intended that "*any* student of *any* public school *anywhere* could enter and remain on the premises of a school in which he or she was not enrolled and, otherwise, had no legitimate business."

School districts should demand rigid enforcement of trespass statutes, not only for the sake of prosecution, but to have a deterrent effect. For entry by an

intruder to be deemed violative of a trespassing statute, however, it must occur after he or she has been warned or placed on notice to keep off the premises. Such warning need not be verbally expressed; it can be communicated by a cogently worded sign posted at entrances to schools.[4]

Metal detectors

As one means of increasing the security of school premises against individuals intent on committing criminal acts with the use of weapons, some school districts have resorted to the use of metal detectors. Some use them routinely at the entrances of all schools, while other districts only use them for specific events (e.g., dances and athletic contests).

The use of metal detectors in a school setting represents no more of an intrusion than occurs when this writer walks regularly through such detectors in the U.S. Capitol to transact business, or a citizen visits the halls of Congress to witness our Government in action. To those who would argue that the use of metal detectors is an infringement of one's Fourth Amendment right against unreasonable searches and seizures, their attention should be called to the many cases that have upheld their use at airports.

In a New York case, a defendant, who had been discovered to possess narcotics after having been searched at a LaGuardia Airport gate, contended that the use of a magnetometer constituted an unreasonable search. The Court found such an assertion to be baseless, reasoning that "[i]n view of the magnitude of the crime sought to be prevented and the exigencies of time which clearly precluded the obtaining of a warrant, the use of the magnetometer is in our view a reasonable caution."[5] This logic is equally as compelling in a school setting.

Should school districts elect to utilize metal detectors, it is imperative–so as to withstand a later challenge–that the magnetometer be regularly checked and calibrated. Furthermore, in those instances where metal detectors are used, the individuals monitoring them should have access to a two-way radio, if need be, to make an immediate arrest or to avoid physical harm.

Surveillance

Increasingly, school districts have turned to the use of closed-circuit cameras and undercover agents and spotters to observe the actions of employees or students and to detect criminal conduct on school premises. Undoubtedly, claims will be made that such techniques intrude into the individual's privacy. Of course, the invasion of one's privacy is greater if used in areas such as lavatories and lounges, where individuals tend to have a certain expectation of privacy.

Before utilizing such procedures, school districts would be well advised to check with their legal counsel or law enforcement officials to ascertain whether there is any specific prohibition in their state or local law or ordinance that would preclude the use of such surveillance techniques. For example, Connecticut employers are prohibited from the use of sound or photographic equipment "in areas designed for the health or personal comfort of the employees."[6] In Nevada, the discipline or discharge of an employee, based upon the report of a spotter, is prohibited unless the employee is afforded notice, hearing and the right to confront his accuser.[7]

The U.S. Court of Appeals for the 9th Circuit has passed upon circumstances in which the authorities had placed an electronic device emitting beeping signals into a suspect parcel so as to allow agents to follow the parcel (the beep would change tone if the parcel were opened). The Court stated, in language instructive to school security officials, that "permissible techniques of surveillance include more than just the five senses of officers and their unaided physical abilities. Binoculars, dogs that track and sniff out contraband, search lights, fluorescent powders, automobiles and airplanes, burglar alarms, and radar devices contribute to surveillance without violation of the Fourth Amendment in the usual case."[8]

Therefore, the use of undercover agents or closed-circuit cameras (absent a statutory prohibition) would not be an infringement of one's rights. An employee's actions during working hours are *not* private actions. Essentially, all that a school district would be doing–in using a camera–is substituting the electronic eye for the human eye in situations where the employee has no expectation of privacy.

An interesting twist to the matter of surveillance was raised in a Michigan case in which officials had placed an undercover policewoman in high school classes to investigate drug trafficking.[9] A legal challenge to her presence was brought by teachers and students who claimed an infringement of their First Amendment rights in that the covert operations, once known, allegedly stifled the open discussions that had characterized classrooms, interfered with academic freedom, and stigmatized teachers and students.

The Court found that "[t]he mere presence of an intelligence data gathering activity in the classroom does not create a justiciable controversy." The Court characterized as too vague and general the allegation that students and teachers were harmed when news of the covert operation spread through the community, finding that any "subjective fear that the content of class discussions could be reported to school administrators or others [was] insufficient to establish a First Amendment claim."

Miranda warnings

As noted earlier, the U.S. Supreme Court's decision in *T.L.O.* did not address the matter of searches of students on school grounds when conducted by school officials in conjunction with law enforcement authorities. Interestingly, the presence of police officers was determined *not* to be a factor in a South Carolina case, that raised the issue as to whether or not *Miranda* warnings apply in a school setting.[10]

At the request of investigating police officers, a juvenile, suspected of having committed malicious injury to property, voluntarily reported to his school principal's office where he was questioned by school officials in the presence of the officers as to his activities of the

previous weekend. Neither police officer participated in the actual questioning. At that time, the juvenile confessed to acts of vandalism for which he was subsequently convicted.

On appeal, the juvenile's attorney contended that he had been entitled to *Miranda* warnings prior to answering any questions in the principal's office. The Supreme Court of South Carolina disagreed, observing that, merely because the questioning took place in the principal's office in the presence of police officers did not render it a custodial interrogation, citing a Supreme Court decision[11] for the proposition that *Miranda* applies "only where there has been such a restriction on a person's freedom as to render him in custody."

Of course, it may have been pertinent to the Court (although not so stated) that the student voluntarily reported to the school office, and that the police officers did not participate in the questioning. Notwithstanding the South Carolina ruling, school officials should not assume, with any degree of certainty that whenever a school official initiates an investigation and inquires as to the whereabouts or actions of a student, after having contacted police, that *Miranda* would not apply in the context of any subsequent prosecution–particularly if the interrogation takes place in the presence of the police. Of course, *Miranda* is not applicable in circumstances that merely lead to the imposition of school-imposed discipline for infraction of school district regulations.

Polygraph tests

As the incidence of employee theft becomes increasingly costly to school districts as well as to private businesses, more and more employers have begun using lie detectors as an integral part of their security programs. Polygraph tests have been used to prescreen applicants for employment, to reexamine current employees, and to examine employees in connection with a particular occurrence such as theft of foodstuffs.

Many jurisdictions, though, have specifically prohibited employers–including school systems–from subjecting employees to lie detector tests. For example, in the District of Columbia, employers are precluded from using lie detectors in connection with the employment, application or consideration of any individual for employment.[12] To administer lie detector tests to an employee or person seeking employment is considered, under District of Columbia laws, to be an unwarranted invasion of privacy, subject to damages for tortious injury as well as fines imposed upon the employer. District of Columbia law, however, does not speak to the use of lie detectors to investigate specific incidents.

Other states preclude involuntary administration of lie detector tests or preclude employers from requesting or requiring employees to submit to them as a condition of employment. California has gone so far as to state that nongovernmental employers must advise persons in writing at the time the test is administered that the individual is not required to submit to it.[13]

The trend toward regulation of lie detectors appears likely to continue. The Minnesota Supreme Court has rejected a challenge to a statute that prohibits employers from requiring employees or prospective employees to take polygraph or voice stress analyses or any examination purported to test honesty.[14] Not surprisingly, the legal challenge was brought by those companies that sell, administer, and interpret polygraph tests who stood to lose business if the statute were applied! The Court found that the State of Minnesota had an interest in protecting an employee's expectation of privacy in a way that discourages potential unfair practices.

It is not this writer's intent to steadfastly vouch for the accuracy of lie detector tests. Readers should consult their own state court's rulings to determine whether or not results of polygraph tests have been deemed admissible as evidence in a court proceeding.

Arbitrators continue to rule on the admissibility of polygraph examinations into evidence, tending toward the exclusion of the results more often than not. As with many courts, arbitrators tend to feel uncomfortable with the reliability of polygraph tests, in the face of varying contentions as to their accuracy and reliability. On the other hand, in the private sector, the National Labor Relations Board has held that an employer does *not* violate Federal labor laws by requiring an employee to take a polygraph examination and to act upon the results.[15]

Courts in both California and Washington State have upheld the dismissal of public employees who refused to submit to polygraph examinations.[16] The U.S. Supreme Court has yet to address whether or not a public employee may be disciplined or discharged for refusing to submit to a polygraph test. It is unlikely that the Supreme Court would find any constitutional protection of the right to refuse to take such tests.

Provided there is a connection between the interrogation and one's competence or trustworthiness to do the job in question, an employee cannot simply hide behind the Fifth Amendment. No Fifth Amendment privilege against self-incrimination is encroached upon by polygraph tests since there is no privilege to lie!

The only public education case, which this writer could discover, addressing the admissibility of polygraph test results, was decided this past year by the Court of Appeal of Iowa.[17] A teacher was terminated based upon charges of improper sexual conduct with a student. The teacher denied having done so. Over the objection of the teacher, evidence was admitted (during the appeal hearing conducted by the Board of Education) that the student had taken a polygraph test with the results evidencing that the student was not deceptive when she answered that she had engaged in sexual intercourse with the teacher.

The Court held that the teacher was not unduly prejudiced by the introduction of such evidence, emphasizing that school boards are not as restricted in receiving evidence as are courts. Thus, the fact that the evidence might not be admissible in a jury trial would not be a bar to its consideration in an admin-

istrative proceeding. By way of analogy, the Court noted that the school board would be entitled to consider hearsay testimony in deciding whether to terminate a teacher's contract, even though such hearsay testimony may not be admissible in a court proceeding.

Nonetheless, given the lack of complete acceptance by the scientific community of polygraph test results and the inconsistency among state courts, it is best that the following conditions be met where a polygraph test is to be utilized to probe into specific incidents of misconduct:

- the test should be administered by a qualified examiner;
- the examination should be administered promptly after an incident in question;
- the test should be voluntary; and
- the examiner and his record of the test should be available for cross-examination.[18]

Obviously, if a school district's security office or the police department is able to secure more direct evidence of one's guilt, it would be better not to premise an action solely on the results of a polygraph test. Yet, the use of a polygraph test as but one element of an investigation may very well be appropriate as investigators sort through various leads to determine which avenue to pursue next.

Use of a polygraph test as a device for pre-employment screening is more questionable, inasmuch as the questioning would not be as to specific incidents and, therefore, the results may not be a reliable predictor of future conduct. Accordingly, polygraph tests should be limited to the investigation of specific incidents of misconduct or crime.

Fingerprinting

Many employers obtain employees' fingerprints for purposes of identification, background checks or investigations of a particular act or misconduct. Fingerprinting has, at times, raised privacy issues, although employment-related fingerprinting is not extensively regulated at this time. While at least one state has prohibited employers from passing on employee's fingerprints to other employers to the detriment of the employee,[19] other states have enacted prohibitions on employees requiring persons to be fingerprinted for obtaining or continuing employment.[20]

Assuming that there is no statutory prohibition, fingerprinting to ascertain whether the individual has any past criminal convictions appears to be reasonable. The litmus test comes, though, when a school district decides what to do with this information. Does one merit termination or non-hire simply as a result of a conviction? More than likely, it will be necessary to show that the offense for which the individual has been convicted has a nexus or relationship to the duties and responsibilities which the individual would or does perform.

Drug testing

Another controversial area is that of drug testing of employees–whether they be bus drivers, security officers, heavy equipment operators, or teachers. Prior to commencing a policy of drug testing by urinalysis, a school district should articulate a clear rationale and compelling need for such testing–whether it be because of evidence of widespread abuse of illicit drugs, an increasing number of accidents on the work site, or increased absenteeism coupled with visual observation of increasing numbers of employees under the influence of drugs. Moreover, any drug testing program should entail a reliable and validated method of laboratory screening of drugs in urine samples that can be confirmed by a second method of detection.

Further, a school district's drug testing program should be utilized for employment purposes, not for criminal prosecution. All employees should be put on notice as early as possible that they may be subject to testing, either at random or after specific incidents in which their conduct has been called into question.

Counsel for school districts should feel comfortable in arguing in opposition to any contention that such testing is violative of Fourth Amendment rights of employees. Compulsory testing has been upheld against claims that government employees have "an expectation of privacy."

Their special relationship to the public and the need for dependability in providing public services are sufficient bases to countervail any claim to individual rights.[21] Expectations of privacy can vary, depending on circumstances and location and on the governmental interests that may be involved.[22] Thus, a public employee's expectation of privacy should be viewed as significantly different than a private individual's expectation when encountering the Government as an enforcer of the Constitution and protector of one's rights.

This article has touched upon but a few areas of concern and interest to security and safety officials. As school districts consider further measures to provide a secure environment in which to offer education, the legal considerations addressed herein should be weighed carefully. By doing so, litigation may be avoided, individual rights can be protected, and the safety of students and staff enhanced. □

Footnotes

1. *Phillips v. Municipal Court of Los Angeles*, 24 Cal.App.2d 453, 75 P.2d 548 (1938).
2. *People v. Parker*, 138 N.Y.S.2d (1955).
3. *State of Florida v. E.N.*, 455 So.2d 636 (Fla. 1984).
4. *W. H. Bowman v. United States*, 212 A.2d 6.0 (D.C. 1965).
5. *United States v. Bell*, 464 F.2d 667, 673 (2nd Cir. 1972), *cert. denied* 409 U.S. 991 (1972).
6. Conn. Gen. Stat. §31-48b(b) (West Supp. 1984).
7. Nev. Rev. Stat. §613.160.
8. *U.S. v. Dubrofsky*, 581 F.2d 208, 211 (9th Cir. 1978).
9. *Gordon v. Warren Consolidated Board of Education*, 706 F.2d 778 (6th Cir. 1983).
10. *In re Drolshagen*, 310 S.E.2d 927 (S.C. 1984).
11. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).
12. *D. C. Code* §36-801 *et seq.* (Michie 1981).
13. Cal. Lab. Code § 432.2 (Deering Supp. 1985).
14. *State v. Century Camera*, 309 N.W.2d 735 (Minn. 1981).
15. *American Oil Co.*, 189 NLRB No. 2, 76 LRRM 1506 (1971).
16. *Fischera v. State Personnel Board*, 217 Cal.App.2d 613 (1963); *Seattle Police Officers' Guild v. City of Seattle*, 494 P.2d 485 (Washington 1972).
17. *Libe v. Board of Education of Twin Cedars Comm. School District*, 350 N.W.2d 748 (Iowa 1984).
18. O. Fairweather, *Practice and Procedure in Labor Arbitration* 263 (BNA Books 1973).
19. Cal. Lab. Code §§1051, 1052 (Deering 1976).
20. See, e.g., N. Y. Labor Law §201-a. (McKinney Supp. 1984).
21. *Division 241, Amalgamated Transit Union v. Susey*, 405 F.Supp. 750 (N.D. Ill. 1975), aff'd 538 F.2d 1264 (7th Cir.), *cert. denied* 429 U.S. 1029 (1976); *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983).
22. *United States v. Thomas*, 729 F.2d 120 at 123, 124 (2nd Cir. 1984).