STUDENT SEARCHES & THE LAW

NSSC RESOURCE PAPER

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STUDENT SEARCHES & THE LAW

With the alarming increase of drugs and weapons on American school campuses, teachers, administrators and other school officials have, of necessity, stepped up their efforts to search lockers, other school property and, sometimes, students themselves. Several disputed searches have been brought to state courts, and a few, most notably the 1985 landmark case of New Jersey v. T.L.O.,[1] have been settled by the U.S. Supreme Court.

Despite court-imposed safeguards on students' constitutional rights, schools still have greater leeway in conducting searches than police officers. In many cases, law enforcement officers must have a warrant to conduct a search and must meet a "probable cause" standard that incriminating evidence will be found. The Fourth Amendment, which protects citizens against unlawful and unreasonable searches, originally set forth this "probable cause" standard. School officials, however, have successfully demonstrated to the courts that such a stringent requirement would seriously impair their ability to maintain discipline and a safe school environment. Because of this, they are only obligated to meet a "reasonable suspicion" standard.

Court decisions have helped define what constitutes an appropriate search based on reasonable suspicion and have helped guide school administrators, teachers and security agents to conduct searches in a manner that is simultaneously non-intrusive and respectful of students' constitutional rights. Still, each new case poses its own particular nuances, and no school official, even if carefully following the standard established by T.L.O., can be guaranteed that a student may not sue, and possibly win his case in court.

However, court cases since T.L.O. have generally upheld the legality of searches, provided they were handled consistent with T.L.O.'s standards. A look at the basic guidelines for student searches set down by the T.L.O. decision and the cases that followed it is helpful. These guidelines comply with and clarify the "reasonable suspicion" standard:

* Searches must be based on reasonable suspicion that the student has violated school rules or the law.

* Those responsible for conducting the search must be able to clearly state which school rule or law has been violated.

* The information must be recent and credible and must connect the student to the violation.

* Searches must be reasonable in scope in light of the age and sex of the student and the nature of the infraction.

Conversely, school officials, though not obligated to meet the law enforcement "probable cause" standard, may be liable for violating students' constitutional rights if they:

* Knew or should have known their actions violated students' rights.

* Acted with malicious intent to deprive students of their rights.

School officials, therefore, must be familiar with students' basic constitutional rights as well as current court opinions on student searches.

WHAT RECENT COURT CASES HAVE RULED

Post-T.L.O. opinions have followed a common-sense approach to upholding or denying the legality of student searches. School administrators, teachers and security guards who find themselves in the position of conducting a student search should above all use good judgment and not search a student's belongings or person without meeting the "reasonable suspicion" standard. A few recent cases, similar in circumstance to the T.L.O. scenario, provide further illustration.

In California Court of Appeals case, In re Robert B.,[2] a high school security guard saw two students exchange money near the school's science building. These students had been involved with marijuana before, raising the guard's suspicions as to their activities. He asked the students to go to the vice principal's office, and on the way, saw one boy pull a pack of cigarettes out of his pocket and slide it in his jacket sleeve. Inside the office, the guard examined the contents of the boys' pockets, including the cigarette pack. The pack contained what proved to be 13 hand-rolled marijuana cigarettes.

In ruling to uphold the search, the court wrote in part: "Inasmuch as Robert was suspected of possession of a controlled substance, it was reasonable to search his pockets and the cigarette box he had apparently attempted to hide."

Another related case was decided by a different panel of the California Court of Appeals. In In re Bobby B.,[3] a high school dean, during morning rounds of the campus, found two boys in the restroom without passes. When the dean asked the boys what they were doing, one boy, Bobby, hesitated nervously in his answer. Because the dean knew drug use was common in the restrooms, and because the boys had no passes and Bobby obviously was nervous, he asked the boy to empty his pockets. Inside Bobby's wallet were two marijuana cigarettes and a packet of cocaine.

Like the first case, Bobby's case went to an appellate court, which upheld the search. The court wrote: "(The boys') illicit

conduct would arouse suspicions of a reasonably prudent person to believe that in fact narcotic activities might be taking place."

Meeting the "Two-Prong" Test

These cases share characteristics that helped them weather intensive legal scrutiny. First, school officials focused their searches on a few individuals, whose specific actions (the exchange of money, lack of passes and nervousness) provided reason for suspicion. Second, the officials conducting the searches limited the scope of their investigation and searched only the students' outer clothing. To use the U.S. Supreme Court's phraseology in the T.L.O. case, both cases meet the "two-prong test" of a search that is "reasonable in its inception" and "reasonable in scope."

ILLEGAL SEARCHES

Under no circumstances should school officials be careless or whimsical in conducting student searches. In 1985, a Florida District Court of Appeals ruled unconstitutional a search that uncovered a marijuana cigarette.[4] In this instance, a teacher saw two students walk to an area of campus considered "off-limits." The students exchanged an unidentified item and one student held an unlit cigarette, later found to be tobacco. The teacher took both students to the dean's office and did a pat-down search of the students' clothing. This search produced no contraband. The teacher told the students to place their belongings on the table, and inspected the items. Inside one of the student's wallets was the marijuana cigarette.

This search was unanimously found by the court to be unwarranted because the teacher's suspicions were vague (the teacher did not smell marijuana when first seeing the students), the students had not been involved in drug activity before, and the area considered "off-limits" was not posted as such and was not universally known to be off-limits to most students. Finally, the search was ruled unreasonable because the school's general disciplinary action against students with cigarettes was simply to take the cigarettes away.

LOCKER SEARCHES

T.L.O. answered many questions for school officials, but it left just as many unanswered. For example, T.L.O. dealt with the legality of a search of a student's purse, but what about a student's desk, locker, car and body?

So far, courts have usually followed T.L.O. standards for locker searches. A 1986[5] case from the Washington Court of Appeals provides a good example. This case began when Vicki Sherwood, vice principal of a Seattle high school, was tipped off by a student that another student, Steven, sold marijuana from a box in a locker not assigned to him. The tipster's credibility was

greatly enhanced because he was able to point to a particular student, a specific locker and some details about the suspected crime. A more vague tip, from either a student or teacher, might not have justified the search. Sherwood suspected Steven on her own because she had seen him at a place believed by school officials to be a drug dealing site. In addition, she had heard reports just the previous week that Steven was selling drugs. That report prompted a search of his assigned locker, which revealed no illegal substances.

Sherwood and the school principal opened the locker identified by the tipster. Inside was a blue metal box. They called Steven from class and threatened to call police if he didn't open the box. He did, disclosing hallucinogenic mushrooms. Police were called, and Steven was arrested.

Steven claimed unsuccessfully that the mushrooms should be excluded from the evidence because the locker and box searches were illegal. But the Court of Appeals affirmed his conviction, applying T.L.O. standards. The detailed report from the student informant, along with Sherwood's own articulable suspicions, justified the search. Because the search was limited in scope to the locker and box, the only items mentioned in the tip, the search was not considered more intrusive or extensive than necessary.

Students have trouble claiming locker searches are illegal because courts have generally ruled students have a diminished expectation of privacy on school campuses and also because lockers are technically school property. Large school districts are with increasing frequency protecting themselves by writing policies in which they assert ultimate control over lockers and reserve the right to search them for discipline and safety reasons. Courts generally accept the validity of these policies, if they are fair and given to students in writing, and thus defeat most students' claims of control over their lockers. Smaller school districts are well-advised to follow this lead and protect themselves as well. (Some sample written policies are included at the end of this NSSC Resource Paper.)

General locker searches for health and safety reasons are more likely to be upheld by courts than targeted searches of lockers when there is little evidence to justify them. Benjamin Sendor, an attorney and assistant professor of public law and government at the University of North Carolina's Institute of Government, warns school administrators not to abuse their authority to conduct locker searches.

"School officials should have strong reasons to suspect that searching a locker will disclose evidence of illegal possessions or activity," Sendor says. "Administrators should not take the attitude of 'Let's see if Johnny has any drugs in his locker today.'"

These high standards for calling locker searches should also apply to searches of students' cars on school grounds, students' clothing and other possessions.

When Evidence is Found

How should school administrators respond if they do discover illegal substances or weapons that could be used in a criminal proceeding? Sendor advises that the contraband materials be locked in a secure place where only the school principal and perhaps one other person have access to maintain a "chain of custody."

"The legal concept of a 'chain of custody' means that school officials must be able to prove exactly who had access to the materials," Sendor notes. "After it is taken from the student's hands, you must know who has had access to it."

Sendor also suggests that if school officials seize any weapon or illegal substance, they should call law enforcement officers and hand the items to them, even if no criminal proceedings will result. "People should never flush marijuana or other drugs down the toilet or toss a gun or knife into a river," he says. "Although state laws vary, in many states officials who fail to hand weapons or drugs over to law enforcement may be concealing evidence and therefore breaking the law."

There are other good reasons to follow this practice, Sendor adds. "A school needs to be consistent in its approach to these matters, and if on one occasion a principal looks the other way and throws a marijuana cigarette out, the next time the student will expect the same treatment. Or, if one student's drugs are thrown away and another's given to the police, the school also leaves itself open to a discrimination lawsuit. Uniformity is important."

STRIP SEARCHES

Although schools are generally free to search students' lockers, provided administrators follow T.L.O. standards, strip searches are another matter. Courts have consistently upheld students' claims that strip searches violate their rights. They are simply too intrusive for most courts to sanction, especially given the students' young age. Only in dire cases, such as if a student is suspected of possessing a dangerous drug, like heroin, or a weapon, might strip searches be upheld. Even then, school officials would be wise to call in law enforcement officers, who are obligated to show "probable cause" for this extreme measure. Courts would likely demand this higher standard for student strip searches, so the additional caution is well-founded.

For example, in 1985 a federal court ruled in favor of 15-year-old Ruth Cales,[6] who, after being caught in the school parking lot during classtime by a security guard, was taken to an

assistant principal's office and had her belongings searched. Ruth had lied to the guard about her name, raising his suspicions. The only questionable articles discovered in Ruth's purse were several readmittance slips improperly in her possession. Still, she was asked to turn out her jeans pockets. Ruth not only did so, but took her jeans completely off. She was then asked to lean over to see if she had hidden anything in her bra. Again, no illegal substances were found.

The court ruled that Ruth's strange behavior was insufficient reason to conduct so intrusive a search. "Plaintiff's conduct was clearly ambiguous. It could have indicated that she was truant, or that she was stealing hubcaps, or that she had left class to meet a boyfriend," the court said. There were no specific, articulable facts to assume Ruth had anything illegal on her.

The American Civil Liberties Union (ACLU) is, not surprisingly, against all strip searches as a matter of policy and consistently challenges the legality of other less intrusive searches as well. In May 1986, the ACLU sued the Michigan School for the Deaf after two female students were asked to strip (one completely, one down to her underwear) during drug searches in the bathrooms in October 1984.

The ACLU has been particularly active in Michigan pursuing this and another case involving Davison High School. The organization vociferously criticized the high school for allegedly conducting frequent strip searches, a charge that school principal Robert Slevak has refuted. Slevak was quoted in a news article stating that the issue had been blown out of proportion and that strip searches were rare events on campus.

This heightened sensitivity to strip searches is echoed throughout the country. For example, in the summer of 1986 the Marlboro Township (New Jersey) Board of Education quickly rescinded its decision to establish a strip search policy after students, parents and the ACLU threatened legal action. At the same time, several school districts in the state, as well as in New York and Connecticut, were drafting policies making it easier to conduct searches of lockers and students' property.

An editorial from a New Jersey newspaper in June 1986 reflected that community's struggle to balance the need for appropriate search policies and its aversion to the idea of strip searches. While acknowledging that "serious problems" necessitate "serious measures," the editorial voiced its concern that school officials exercise vigilant restraint just as they exercise their responsibility to protect school campuses.

SEARCHES BY PROBATION OFFICERS

Students who are placed on probation by the court lose many of the protections and privileges enjoyed by their classmates.

Under terms of their probation, students must agree to searches for virtually any reason.

A sample probation "search term" might read as follows: "You shall now consent to a search at any time by a law enforcement officer or your probation officer of your person, possessions, vehicle and area where you sleep."

Many terms of probation also assert that probationers are responsible for attending school, making progress toward graduation, and behaving themselves. In the best possible scenario, probation officers will establish contact with school administrators to remain alert to a probationer's progress and behavior. If school administrators know a student is on probation but haven't been contacted by the probation officer, they should call the officer personally to make this valuable connection.

If school administrators suspect a probationer of violating school rules and believe a search is needed, they should, if possible, call the student's probation officer. School administrators should allow the probation officer, who is trained to handle potentially violent situations and who has sweeping search powers, to conduct the needed search.

DOGS ON CAMPUS: IS A SNIFF A SEARCH?

Using dogs to detect drugs in school is a delicate task, since the U.S. Supreme Court has refused to hear two major federal circuit court cases on the subject. This forces school administrators to interpret the complicated and conflicting court rulings: Doe v. Renfrow,[8] a liberal reading of schools' authority to conduct dog sniffs, and Horton v. Goose Creek,[9] a ruling more protective of students' rights.

The Doe Case: Liberal Approach to Dog Sniffing

In 1981, the Seventh Circuit Court of Appeals (Illinois, Indiana, Wisconsin) upheld the legality of using dogs to detect drugs throughout the schools in Doe v. Renfrow. In fact, in this case the court ruled that a sniff of a student was not a search, and therefore was free from Fourth Amendment consideration of due process. Dogs had sniffed more than 2,700 junior and senior high students, and had "alerted" to five students several times. These five were thoroughly searched. In addition, four junior high school girls were strip searched. No drugs were found in these searches.

According to Doe, the use of the dogs was considered reasonable because of numerous drug incidents at the school, the students' apparent fear of disclosing who was using or selling drugs, and school administrators' mounting frustration with the problem. The examination of the students' possessions was declared a search, the court said, but that too was justified by the

continued response of the dogs to those students. The strip searches, however, were unreasonable in the court's view and reflected a serious invasion of students' constitutional rights.

The Horton Case: Cautious Approach to Dog-Sniffing

School officials should also look closely at the 1983 federal Fifth Circuit Court of Appeals case (Louisiana, Mississippi, Texas) of Horton v. Goose Creek. The Goose Creek Independent School District arranged for trained dogs to sniff for more than 50 substances on campus, including alcohol and drugs. Students were informed about the "canine drug detection program," and dogs were taken on rounds of various schools on a random and unannounced basis. They sniffed lockers, cars and students themselves.

If a dog "alerted" to a substance, the student's outer garments and possessions were inspected in an administrator's office. A positive reaction from the dog to an automobile led to the student owner being asked to open the doors and the trunk. When a dog "alerted" to a locker, school officials opened and searched the locker without the student's consent.

Some students who triggered alerts brought the case to court, claiming the school violated their Fourth Amendment rights of due process and protection against unreasonable searches.

The Horton case contains two significant opinions. First, dog sniffing of students' lockers and cars is not a search (although school officials may not open and search them based only on dogs' reactions unless they can prove the dogs' responses are reasonably reliable). Second, sniffing students' bodies is unquestionably a search and is only constitutional if school officials have "reasonable cause" based on "individual suspicion." In other words, dogs may only be used to sniff a student if there is reasonable cause to believe that a specific student is in control of contraband.

Guidelines for dog sniff searches must be fashioned with your school attorney's help. If you live in a state controlled by the Fifth (Doe) or Seventh (Horton) federal circuit courts, you must follow their guidelines. Only the ninth Circuit Court of appeals jurisdiction[10] (Alaska, Arizona, California, Guam, Hawaii, Nevada, Oregon, Washington) holds that sniffs of objects or persons is a search, which must be based on reasonable cause. Except in the Ninth Circuit, the following general rules should be kept in mind:

* Schools may use dogs to sniff lockers and cars without Fourth Amendment restrictions.

* A dog's alert is never enough to warrant a student strip search. Strip searches conducted under these conditions

leave school administrators open to liability for violating students' clearly established constitutional rights.

* Reliability of sniff dogs must be well-established before use in schools. Test results on individual dogs will be required if the case proceeds to court.

* Except in the Seventh and Ninth Circuits, students' outer clothing may be searched for contraband after the dog's alert.

DRUG TESTING

Many schools have successfully adopted voluntary drug testing programs. These tests are given with students' consent, so there is no issue of illegal search and seizure. Only one case involving mandatory, non-consensual student drug testing has emerged in a state court. In Odenheim v. Carlstadt-East Rutherford Regional School District[11] (New Jersey, 1985), the court struck down the school district's policy to insist upon annual physical examinations, including urine testing for traces of drugs, of all students enrolled in the district. As written in the policy, these examinations were designed to "identify the existence of any physical defects, illnesses or communicable diseases. These examinations will also help to identify any drug or alcohol use by the pupils."

A group of students and their parents challenged the policy in August 1985 and, one month later, was granted a preliminary injunction against the schools to withhold these examinations.

The defendants argued that the urine samples were tested for a variety of medical conditions and that no civil or criminal sanctions were to be imposed if a student's urine tested positive for narcotics. In addition, students' test results would remain confidential and be maintained separately from mandatory school files. Finally the school district argued that because drug use is an illness, it is beyond the parameters of search and seizure laws.

However, the court did not accept this logic and ruled that the "policy is an attempt to control student discipline under the guise of a medical procedure, thereby circumventing strict due process requirements."[12]

In applying T.L.O. standards, the court found the policy violated students' Fourth Amendment rights to be free of unreasonable search and seizure, as well as their rights of due process, privacy and personal security.

METAL DETECTORS AS A SEARCH TOOL

Detroit, a city with a dramatic problem of weapons on campus, has periodically conducted weapons searches on campuses with

hand-held metal detectors. This began in 1984, when a school policy went into effect authorizing random and individualized searches. In the 1985-86 school year, 59 guns were recovered in Detroit's schools using all search methods, including metal detector sweep searches, according to Detroit Board of Education figures.

In the midst of an ACLU challenge to the searches, U.S. District Judge Avern Cohn developed new regulations covering weapons sweeps that were more protective of students' rights, but at the same time increased penalties for those found with guns. Under these guidelines, parents would also be prosecuted for negligence for allowing their children to obtain guns.

Judge Cohn's regulations include the following:

* Students and parents must be given written notice that metal detector searches will occur.

* Students must have an opportunity to remove metal objects in lockers that could set off the detectors.

* Schools are forbidden from using detectors unless school officials suspect students have weapons or if there are several incidents of violence or weapons at school.

* School personnel must conduct the searches, and three signals from the detector are needed before a personal search of a student may take place in private.

Deborah Gordon, a volunteer attorney for the ACLU in Michigan who has been involved with other search cases on the ACLU's behalf, hopes Detroit won't set a precedent for other cities to begin using metal detectors to uncover weapons on campus.

"It sounds good on paper but doesn't get to the root of the problem," Gordon says of metal detectors. "Metal detectors are expensive to use and logistically complex. Some large schools may have dozens of doors. Are you going to have someone standing at every door? It's also disruptive to the school day. Besides, from 1984 to fall 1985, when school security used their routine, individualized search techniques, they found 77 guns. With metal detectors used on more than 35,000 high school students, they only found six."

Frank Blount, chief of security for Detroit's public schools, says that according to the judge's regulations, hand-held metal detectors are meant to be used against targeted groups of students who officials have probable cause to believe may have guns and other weapons. He adds that most of Detroit's citizens support using metal detectors to help deal with a serious problem of weapons on campus.

"These searches are humiliating for all students. We're not insensitive to that," Blount says. "But extraordinary events demand extraordinary measures. I think we may see more metal detectors used in other cities. I know I'm getting calls from all over the country about it."

CONCLUSION

Schools without a conduct code and/or search and seizure policy are well-advised to draft one in conjunction with a school attorney and give a copy to students to sign and keep. These policies should spell out exactly what kind of behavior is expected of students, and what consequences they may expect to face if they violate school rules or the law by possessing drugs, weapons or other contraband.

Use the following sample policies as a guide, but closely review the general guidelines on page 2 of this resource paper--they reflect the latest thinking from state courts and the U.S. Supreme Court on student searches.

Don't try to innovate new search practices; familiarize yourself and your staff with the cases explained in this paper and the legal reasoning behind court decisions. This will help you make intelligent, informed judgments about searches at your school.

RESOURCES

NOLPE (National Organization On Legal Problems of Education)
Thomas N. Jones, executive director
3601 Southwest 29th
Suite 223
Topeka, KS 66614
913/273-3550

The Law, Youth and Citizenship Program
New York State Bar Association
Dr. Eric S. Mondschein, director
1 Elk Street
Albany, NY 12207
518/463-3200

(Law-related education, teacher training, publications, conferences, mini-grants awarded for law-related education programs)

National Association of Secondary School Principals
Ivan Gluckman, general counsel
1904 Association Drive
Reston, VA 22091
703/860-0200

National Alliance for Safe Schools
Dr. Robert Rubel, director
7201 Wisconsin, Suite 620
Bethesda, MD 20814
301/654-2774

(Two articles published by the Alliance are of particular interest: Interviewing and Interrogating, Item 309 on the organization's order form, $3; and Legal Issues: Schools and the Law, Item 403, $2.50.)

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