

## SEARCHING STUDENTS IN PUBLIC SCHOOLS

### I. Definitions:

- A. Individualized suspicion means more than a generalized probability that a search will turn up evidence that law or rules have been violated by someone. Individualized suspicion means that the suspicion is particularized with respect to each individual searched. A search can also be focused on a group of students.
- B. Reasonable suspicion
- A particularized and objective basis, supported by specific articulable facts, for suspecting a person of criminal activity; reasonableness extends to both the reason for the search (reasonable at the inception) and the appropriateness of the scope of the search (reasonable in scope).
- C. Appropriate school official
- The most appropriate school employee, considering all the circumstances, who should search a student. Generally, the more intrusive the search, the higher the level of school official should be who conducts the search. But other factors could include age of the child, gender of the child, if the child has an IEP, child's background, seriousness of the item(s) being searched for, which official is reasonably available, urgency of the situation, etc.
- D. Probable cause
- the standard that law enforcement must meet to search a person suspected of committing a crime
  - Under the 4<sup>th</sup> Amendment, probable cause is more than a bare suspicion, but less than evidence that would justify a conviction
- E. Police officer, law enforcement official, school resource officer or school security officer
- the distinction is important because, most often, trained law enforcement personnel/police officers, even when working in a school, are usually held to the probable cause standard when initiating a search of a student.
  - school resource officers—if they are primarily educators with supplementary law enforcement duties, the reasonable suspicion standard to initiate a search usually applies. The individual's primary duties and assignments matter more than his label.
  - Typically, if a law enforcement officer is trained as a police officer and/or initiates a student search rather than is in the room to assist with school safety, he is held to the probable cause, rather than the reasonable suspicion standard.

## F. Search

- A government action that intrudes upon and invades an individual's justifiable expectation of privacy.
- The 4<sup>th</sup> Amendment to the US Constitution recognizes that each individual has a sphere of privacy that he can justifiably expect government officials not to invade.
- A demand to disclose or produce a concealed object is treated as a search where clearly involuntary. The 4<sup>th</sup> Amendment protects people, not just places.
- A request to search is not a search. No justification is needed for a school person to ask a student for permission to search student's property—so long as the person recognizes she is free to refuse to consent.
- Usually, use of metal detectors, drug-sniffing dogs (checking *students* not things), physical tests or examinations are considered searches.

## II. Reasonableness standard/what circumstances justify “reasonable suspicion?”

A. Courts have said that student searches must be based on “reasonable suspicion.” The standard should be one of “reasonableness under all the circumstances [of the situation].”

B. Reasonableness is a two-pronged test:

- (1) A search must be justified at its inception. In other words, to begin the search a school official must have reasonable grounds for expecting that the search will turn up evidence that the student has violated the law or rules of the school.
- (2) A search must be justified in scope. The breadth of the search should be reasonably related to the objectives of the search. The methods and scope should also be reasonable in light of the age of the student, sex of the student, and the object of the search.

C. Examples of reasonable suspicion circumstances :

- (1) a student's bulging pockets
- (2) student's flushed face, glassy, red and bloodshot eyes
- (3) student looked stoned, smelled of marijuana and was incoherent
- (4) student was “messaging” with pockets
- (5) student made furtive gestures and had “obvious consciousness of guilt”
- (6) student had nervous or fidgety behavior
- (7) student failed to consent to search after other class members gave consent
- (8) a student who was a known drug experimenter refused to give principal his coat
- (9) student gave evasive statement, used profane language and gave false names
- (10) student's record of concealed weapons plus suspicious behavior
- (11) student's history, suspicion, or appearance of drug use
- (12) students entering a school bathroom where others have been arrested for possession; other students act as look-outs
- (13) student's presence in a school bathroom without a pass, together with student's faltering and nervous behavior—school restrooms are frequent scenes of narcotics activities
- (14) student out of class and in a prohibited area without a pass

- (15) student in an immediate vicinity of an incident together with a suspicious reaction when spotted or questioned
- (16) observation of students smoking and/or the odor of marijuana
- (17) drug paraphernalia seen through car window of student's car
- (18) observation of a request to sell drugs or of several pill sales
- (19) overhearing student's conversation about drinking beer at school
- (20) smell of marijuana from students, students' hotel rooms
- (21) student possession of drug paraphernalia or other items illegal for students to possess
- (22) admission by a student that he had illegal items in his backpack
- (23) student threats of crime or violence
- (24) information from reliable student informants

### III. *WHO should search students?*

- A. An appropriate school official should search a student depending upon type and circumstances of search. For instance, if a more intrusive search of a student is anticipated, a higher level school official should search the student. A younger student should be searched by a familiar school employee. Generally, male employees should search male students and female employees should search female students. Typically, a single school official should not search a student. It is preferable to have two school officials or employees involved with search. Too many employees could be seen as intimidation.
- B. Law enforcement/police involvement in search
  - (1) If police or law enforcement personnel (this includes police-trained school resource officers or police officers employed by an LEA) *conduct or participate actively in search*, students are entitled to Miranda rights.
  - (2) If police/law enforcement merely observe the search or are on site to assist in the event of violence or an unexpected event, students are not entitled to Miranda rights and the "reasonable suspicion standard" applies to the search.
  - (3) The training of law enforcement personnel involved in a search also influences whether a probable cause standard or a reasonable suspicion standard applies to a student search. If the officer or employee has police officer training and several other elements are in place, there is a likelihood that students are entitled to Miranda warnings. A June, 2011 U.S. Supreme Court case, *J.D.B. v. North Carolina*, determined that a 13 year old student was entitled to a Miranda warning before he was searched because the court found that the student was in police custody during the search and did not feel able to leave. Additionally, the student's actions occurred outside of a school setting. Police, not school personnel, are responsible for Miranda warnings.
  - (4) Other considerations to be weighed in determining whether a reasonable suspicion or probable cause standard should apply to a student search include agreements between the school and the law enforcement agency, school policies about the school resource officer or program, which governmental entity pays the officer's salary, whether the officer is in uniform and armed, whether the officer is present primarily as an educator and only supplementary as a law enforcement officer.

## V. Parent notification of searches

School officials have no obligation to contact parents before detaining and questioning students. Schools could consider the age of the child, the nature of the alleged misconduct, the possible difficulty in reaching the parents, the likelihood of truthfulness by the student with or without parents present, the credibility of the information leading to the questioning of the student, the role of the student in the alleged misbehavior, urgency of the purpose for questioning the student and other factors that would favor parent notification over not notifying parents.

## VI. Types of searches

- A. **Searches of students–body** searches are infrequent in the school setting and should be. More often, searches are limited to a student’s pockets, outer clothing, bags, or belongings. A “pat-down search” of students may be justified and is a comparatively slight invasion of a student’s privacy. Age of students, necessity for search and nature of item(s) being searched for should be evaluated prior to touching students. Strip searches of students are rarely justified. They have been variously described by courts as “. . . degrading, demeaning, dehumanizing, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.” They may be justified as expedient in extraordinary circumstances. The U.S. Supreme Court recently condemned a strip search of a 13year old female student for over-the-counter, but banned, medications.
- B. **Searches of pockets, clothing, bags and effects**—usually these searches are justified and upheld by the courts. Clearly they are less intrusive than a search of a student’s person. Search must be reasonable in its scope as required by *TLO v. New Jersey*. An Oregon appellate court did not uphold a search of a student’s jacket for a weapon, when the search was continued to look for drugs.
- C. **School or class-wide searches** of persons or belongings
- (1) Traditionally, courts prefer “individualized suspicion” for student searches, including searches of students’ belongings. But, often circumstances justify group searches.
  - (2) The need to ensure safety in schools is serious enough to allow such practices.
  - (3) The search of students’ belongings at point of entry, even without individualized suspicion, has become commonplace.
  - (4) Usually searches are justified in conjunction with **school field trips**. Parent permission for the field trip with an accompanying explanation of school employee supervision would strengthen a school’s authority for a student or room search.
- D. **Searches of places, things, related issues and intrusions**
- (1) **Lockers**—usually courts allow searches of student lockers. The 10<sup>th</sup> Circuit Court emphasized the importance of school board policies expressing joint control of lockers in upholding locker searches. Students have even less expectation of privacy in gym lockers.

- (2) **Motor vehicles**—most courts have found that the right to search student vehicles on school property is similar to the right to search school lockers. As a practical matter, students are likely to hide or carry contraband in their cars and school safety is a legitimate concern. The better policy is to distribute or sell student parking permits that require students/parents to allow vehicles parked on school property to be checked based on the reasonable suspicion standard. Courts are not consistently supportive of searches of student vehicles that are parked off school property.
- E. **Urinalysis or drug tests**—state-compelled collection and testing of urine constitutes a search subject to the demands of the Fourth Amendment. Schools can require these tests of students (usually the school pays) for individualized reasonable suspicion. The more often litigated issue is whether suspicionless testing as a school policy is constitutional. The U.S. Supreme Court has approved such a policy **IF** the policy is limited to students participating in athletics or extracurricular activities. Courts often look for an additional element when reviewing such policies of a previous pattern of drug use in the school, district or community.
- F. Searches of student **electronic devices**—student electronic devices can be searched by school officials on the same basis as other searches—there must be reasonable suspicion to search a student’s phone; the search must be reasonable in its inception (e.g. the tip or information leading the principal to the search must be legitimate and believable) and the search must be reasonable in its scope (e.g. a believable tip that a student’s phone has nasty pictures would not justify a search of all of the student’s contacts). As with other student searches, a school or district policy that outlines for parents appropriate practices and consequences for misbehavior greatly strengthens the school’s position.
- G. **Drug-sniffing dogs**—generalized canine searches of student lockers, automobiles, backpacks and personal items have been approved as not involving a search. Some state statutes require individualized suspicion. If probable cause is required, the dog’s sniffing may establish the probable cause for a more intrusive search; at least one court has determined that a dog’s sniff can establish reasonable suspicion. Cases are sharply divided on dogs sniffing *students*. If dogs are used to search for drugs in a school, it is wise to have two standards: (1) the search should be due to evidence of a drug crisis or problem and (2) items or areas should be searched and student searches should be avoided.
- J. **Surveillance and videotaping of students**—usually various types of surveillance of students are not held to be violations of student privacy. This includes aids or cameras patrolling school parking lots and looking into windows, organized surveillance of school smoking areas, video cameras in student common areas. Surveillance and especially videotaping becomes more problematic (and less defensible) in areas where students have some expectation of privacy such as school locker rooms or other areas where students dress for athletic activities.

## VII. Other issues

- A. The effect of a student’s consent to a search—students can consent to be searched and

thus avoid all 4<sup>th</sup> Amendment issues. Of course the consent must be age-appropriate and not coerced. Additionally, school officials have broad authority to question students, with or without cause, in the interest of school safety. This questioning for student disciplinary purposes is very different from the parent consent required under state and federal laws prior to students taking surveys or participating in discussions of sensitive or confidential subjects with school employees.

- B. School official immunity—generally school officials are protected by a qualified degree of immunity from liability for their professional actions. If school personnel act reasonably, with good faith and within the scope of their assignments, courts are reluctant to find them personally responsible for minor mistakes. Courts expect more from school officials, however, in the area of investigating student conduct. School officials often cannot claim immunity when rights of students are well-settled. Similarly, administrators' actions must be reasonable under the circumstances.