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It may well be that educators and school resource officers have given more attention and concern to student searches than to all other school safety concerns put together. As straightforward as the Fourth Amendment is ("the right of the people to be secure in their persons...against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause.") there is an enormous amount of guesswork, gossip, and superstition surrounding its application. This uneasiness has been noticed by the U.S. Supreme Court, with the justices saying: "[w]e have frequently observed...the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment." Anderson v. Creighton, 483 U.S. 635 (1987).

Therefore, the Supreme Court’s decision in Safford Unified School District No. 1 v. Redding, 129 S. Ct. 2633 (2009) qualifies as big news. In the first ruling on student searches since the landmark case of New Jersey v. T.L.O., 469 U.S. 325 (1985), the Court announces changes in the rules for student searches in response to an unconstitutional strip search by educators in California. The Court ruled that educators violated the constitutional rights of a 13-year-old student when they conducted a strip search for over-the-counter ibuprofen. The ruling offers needed clarity on the authority of school officials to search generally and imposes new limits on strip searches in particular. After Safford, a strip search of a student will be upheld if (1) there is any indication of danger to the students because of the nature of the item sought or (2) there is suspicion that the student is concealing the item sought in his or her underwear.

The lower courts have wasted little time in applying the Safford rules. The message in these cases is that the courts now consider the rules for strip searches clearly established.

2 Two students reported to their instructor, that cash, a credit card and two gift cards were missing from their purses. The teacher stopped his instruction, directed the students to sit down, and searched each student’s books, shoes, socks and pockets. Then several school officials collaborated to take the students into the restroom one at a time for a strip search. Female students were told to unhook and shake their bras underneath their tops and take their pants halfway down their thighs. Several students challenged these searches in the restroom.

Did the strip searches comply with the Fourth Amendment? Y  N

3 School administrators collaborated with members of the staff to combat vandalism of the bathrooms. The school custodian would occasionally climb up above the panels in the bathroom ceiling and look down into the stalls of both the boys’ and girls’ restrooms. One day, a student was observed by the custodian entering a stall and marking on the inside door. The custodian followed into the hallway, searched him, and led him away to school administrators. The student was arrested and charged with a felony. The student filed suit to challenge the search.

Did the educators comply with the Safford standards in this search? Y  N

4 High school administrators asked a female SRO to assist in randomly searching female students as they arrived on school buses. The searches were in response to reports by teachers that girls were starting to bring in cigarettes and marijuana cigarettes in their bras and their socks and possibly their underwear. The SRO asked the students to unhook their shirts, lift their bras away from their chest, and shake the bra so that anything tucked in it would fall out. One student filed a lawsuit after submitting to such a search.

Will the validity of the searches be upheld? Y  N

5 During the semester, administrators received reports on a student who was suspected of bringing cocaine and marijuana to school. Both the police and a student supplied information that the student was selling the drugs on campus. Later, the student was found in possession of a live bullet while on campus. The next day, a teacher discovered the student outside the building in violation of school rules. When she reported the infraction, she shared her belief that the student was crouching drugs. Administrators also observed an unusual bulge in the student’s crotch area. They escorted the student to the boys’ locker room where the student removed his street clothes and put on a gym uniform during which the administrators inspected his naked body and physically inspected his clothes. They found no evidence of drugs or any other contraband.

Is this strip search legal? Y  N

SAFFORD & STUDENT’S EXPECTATION OF PRIVACY

Everyone in the school safety movement believes that educators have a duty to maintain a safe, effective learning environment. But there remains a fair amount of tension over how to apply the 1985 ruling in TLO to the modern campus climate. The ideological tug of war is not
over the rule of the landmark case -- that student searches will be valid if "reasonable" -- but instead is over identifying the line of reasonableness. A compromise of sorts has been reached among courts and policymakers. The bright line of reasonableness changes in relation to the variety of circumstances facing educators today. The law after TLO is, in fact, the collection of these agreements that treat lockers, bags, purses, pat-downs, vehicles, PDAs, phones and strip searches differently for purposes of balancing student rights and school safety.

Safford is a landmark decision in its acceptance and its contribution to this drawing of lines to fit the unique circumstances of the public school climate. The court makes a positive assessment of the work of the lower courts since TLO and adds its contribution -- a clearer line of reasonableness for strip searches. The Safford court leaves TLO in place, its foundation unaffected despite the liability imposed on the educators who conducted the strip search. ("Nothing the Court decides today alters this basic framework. It simply applies TLO to declare unconstitutional a strip search of a 13-year-old honor student that was based on a groundless suspicion that she might be hiding medicine in her underwear." 129 S. Ct. 2633, 2644. Justice Stevens, concurring in part). The justices then set forth the basis for drawing a brighter line to be applied in future litigation.

"To limit a [strip] 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." 129 S. Ct. 2633, 2643.

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This bright line requires no further explanation or refinement beyond the obvious impact on school search policy: even when educators have an individualized suspicion that a student has violated or is violating either the law or the rules of the school. (T.L.O., 469 U.S. at 341-42), a strip search will be unconstitutional unless there is an indication of danger or any reason (based on additional facts) to cast suspicion on underwear as the hiding place. Therefore, it should come as no surprise that lower courts after Safford have been strict in finding liability in circumstances that fail to meet the new standards.

Some courts have found liability despite the good-faith attempt of school officials to prevent actual disruptions and vandalism. See C.H. v. Folks, 2010 U.S. Dist. LEXIS 84442 (W.D. Tex. 2010). Other courts have ruled that a strip search to uncover items that do not pose a threat to the health and safety of students serve "a less weighty governmental interest than a search... for drugs or weapons". Kinsley v. Pike County Joint Voc. Sch. Dist., 604 F.3d 977, 981 (6th Cir. 2010), cert denied, 131 S. Ct. 498 (2010). Finally, courts have held that an intrusive search of a student over a non-dangerous item without individualized suspicion is a per se violation of that student's constitutional rights under the T.L.O. standard. See Foster v. Raspberry, 652 F. Supp. 2d 1342 (M.D. Ga. 2009).

POLICY REFORM IN STATE LAWS

This movement toward settling rules and expectations on strip searches is also affecting two related and significant areas of education law. Both are in response to the fact that students have a clearly established expectation of privacy as to their underclothing.

First, lower courts are denying educators qualified immunity in cases involving strip searches. The usual basis for applying immunity had been the lack of clarity on the Fourth amendment rules in this area. Now courts all agree that Safford is sufficiently clear to defeat assertion of immunity. ("[C]ase law on this issue put[s] the school and its employees on notice that this search [is] unconstitutional, so [they] are not entitled to qualified immunity protection." Kinsley v. Pike County Joint Voc. Sch. Dist., 604 F.3d 977, at 983). The absence of qualified immunity increases the probability of supervisory liability for individuals and municipal liability for school districts and police departments for failure to train and monitor the implementation of the new rules to school safety personnel.

Second, the need for clarity has encouraged state and local policies to regulate strip searches by removing discretion to conduct strip searches. Five states prohibit educational personnel from conducting strip searches: New Jersey, Oklahoma, South Carolina, Washington, and Wisconsin. See New Jersey: 18A:37-6.1; Oklahoma: 70 Okl. St. Ann. § 24-102; South Carolina: Code 1976 § 59-63-1140; Wash-

BEST PRACTICES ON STRIP SEARCHES

Educators, SROs and those with whom they collaborate are not less well off after Safford. The tools that survive the bright line test are more than adequate to provide workable policies when suspicions point to the underwear of a student.

- Educators and SROs should use strip searches as a last resort unless circumstances point to an exigency involving health or safety.

- Safe schools teams should seek greater involvement of parents, including their presence at, and/or consent to, the search.

- More detailed information sharing between educators, police and other local agencies regarding past misconduct may establish a factual predicate to meet the reasonable suspicion standard on the search of underwear. A single past event is enough.

- Conditions of probation and terms of diversion programs should include language that diminishes the expectation of privacy for juvenile offenders who return to school after drugs or weapons offenses.

- Use of anonymous tip lines will add to the base of information about students and events, giving educators both the ability to anticipate disruptions as well as establishing enough of a factual predicate to meet the reasonable suspicion standard.

I.Q. TEST ANSWERS

In the I.Q. test, the strip searches are invalid in every case EXCEPT in Question Five. In Question One, the iPod case, the court found that the student was subjected to an intrusive strip search as to an object that posed no immediate danger to anyone at the school. Moreover, the SRO and educator had no individualized suspicion that the student had the iPod in her possession such that a jury would be authorized to find that the search violated the student's Fourth Amendment right. See Foster v. Raspberry, 652 F. Supp. 2d 1342 (M.D. Ga. 2009).

In Question Two, the court held that the lack of individualized suspicion and the fact the entire class was searched diminished the government interest. The students did not waive their right to privacy by consenting to the search and the need of the educators to find the missing money did not justify the intrusiveness of the searches. See Knisley v. Pike County Joint Vocational Sch. Dist., 604 F.3d 977 (6th Cir. 2010), cert. denied, 131 S. Ct. 498 (2010).

In Question Three, the court ruled that the searches were both subjectively and objectively unreasonable. There was no indication that educators had a reasonable belief that a crime was taking place when the student entered the restroom or the stall. The educators violated a clearly established constitutional right when the custodian peeked into the restroom stall and would not be entitled to qualified immunity. See C.H. v. Folks, 2010 U.S. Dist. LEXIS 84442 (W.D. Tex. 2010).

In Question Four, the court ruled that even if the search was justified at its inception to uncover items brought into the school in violation of school rules, the character of the intrusion was invasive and the complete lack of any reasonable belief that any student on the bus possessed contraband diminished the compelling nature of the government interest. See Pendleton v. Fassett, 2009 U.S. Dist. LEXIS 78322 (W.D. Ky. Sept. 1, 2009).

Question Five presents a pre-Safford case where the search was ruled valid and that would be upheld under the Safford rules. The school official's actions were in response to legitimate concerns of a dangerous condition brought onto campus by a known student with past infractions involving a dangerous item. The information received considered in light of the totality of the circumstances, provided educators with reasonable suspicion that the student might have drugs on school property, justifying the search. The bulge in the crotch area is additional evidence that the contraband might be in the underwear. The fact that no drugs were found does not change the result. See Lewis ex rel. Comfield v. Consolidated High School District No. 230, 991 F.2d 1316 (7th Cir. 1993).

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