LAW UPDATE

SUSPICIONLESS STUDENT SEARCHES:

When, Why, and How?

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The Fourth Amendment is most worthy of the attention school safety professionals cast in its direction. Confidence regarding the rules of search and seizure is hard won by policymakers. Most school resource officers must convert their thinking from traditional police academy training to the more fluid set of public education rules. Educators must stay alert to the slightest modification to their authority in this regard, knowing that their duty to protect students will remain fixed.

Thankfully, for all members of the safe school team, courts have consistently applied search and seizure rules favorably in light of the common goal. The United States Supreme Court, in four landmark decisions, equates the duty to maintain safe schools to a compelling governmental interest. In recognition, all lower courts agree that the Fourth Amendment applies in a different, more flexible manner in public schools in order to prevent the rigid traditional rules from making a farce of student discipline and campus safety. “Individualized reasonable suspicion” and its use by all members of the school safety team, including the SRO, is so clearly established that the rare case that successfully challenges the search of a student is presumed to involve clothing and disrobing in the incident.

However, a penumbra of tension remains around student search policies that cannot be justified by individualized reasonable suspicion. In these cases, the blanket of suspicion is cast over the entire student body in response to an incident or in fear of a harmful occurrence. The so-called “suspicionless searches,” represent the remaining source of confusion by school officials and SROs, primarily because the U.S. Supreme Court has remained silent over its proper place in school safety law. In the absence of guidance, the lower courts are not in accord. However, the question is a simple one: can a teacher search the entire classroom of students when an iPod comes up missing? Is the bus driver allowed to search the busload of students after noticing an odor of marijuana on the bus?

Test your “Suspicionless Search IQ” on the following scenarios:

1) The local public high school conducts frequent “point of entry searches” to prevent weapons and drugs. The search policy is in the manual of the School District and notices are posted throughout the school and mailed home. All students are required to stand in line before a table and empty their pockets while their backpacks and coats are searched. The students are each scanned by a hand-held metal detector before being permitted to enter the school. The actual searches are conducted by SROs.

Will students win a lawsuit brought against the school for an illegal suspicionless search? Y  N

2) A student at a public high school, was observed by an SRO returning to campus in the middle of the school day. The student had been absent from his period 1 and 2 classes, present for his period 3 class, and then absent from his period 4 class. The high school searches students who leave campus and then return during the school day. The policy is in the behavior code section of the student handbook. The purpose of the rule is to keep students from bringing contraband onto campus. The assistant principal called the student to his office and asked him to empty his pockets, finding a plastic bag containing 44 pills of ecstasy.

Should the court grant the student’s motion to suppress evidence obtained as a result of the search? Y  N
The Supreme Court and Suspcionless Searches in Public Schools

In New Jersey v. TLO (469 U.S. 325 (1985)), the U.S. Supreme Court recognized the legitimate need of schools to maintain a safe environment. In a case arising out of an individualized search of a student caught smoking in violation of school policy, the Court ruled that the requirement of probable cause would be inappropriate for the school environment. Instead, reasonable suspicion on the part of school officials would satisfy the Fourth Amendment. The Court announced that the “special needs” exception to the Fourth Amendment would be used to chart the future course for school officials in the public school environment. (469 U.S. at 333).

TLO purposely left open the legality of suspicionless student searches when the justices opined that it was not deciding “whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities.” (469 U.S. at 342 (footnote 8)). However, any doubt about the possibility of suspicionless student searches was quickly resolved in favor of educators because government officials in other “special needs” settings were allowed to dispense with the element of individualized assessments. In fact, in criminal cases to which the higher standard of probable cause was applicable, the Court ruled that “the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion.” United States v. Martinez-Fuerte, (428 U.S. 543, 561 (1976)). The justices began eliminating the requirement in non-school contexts where suspicionless searches were required to meet a “special need” . . . divorced from the State’s general interest in law enforcement.” Ferguson v. Charleston, 532 U.S. 67, 79 (2001). This rationale seemed tailor-made for school officials.

Just two years after TLO, the justices confirmed this when they noted that, “[a] State’s operation of a probation system, like its operation of a school . . . presents “special needs” beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.” Griffin v. Wisconsin (483 U.S. 868, 873-874 (1987)). Two years later; the justices were in agreement that the individualized probable cause standard, “is peculiarly related to criminal investigations” and would be inapplicable when the “[g]overnment seeks to prevent the development of hazardous conditions.” Treasury Employees v. Von Raab, 489 U.S. 656, 667-668, (1989).

Therefore, it came as no surprise when the Supreme Court announced that school searches would not always need to be sup-ported by individualized suspicion. In Vernonia Sch. Dist. 47 v. Acton, 515 U.S. 646 (1995), the Court applied the “special needs” doctrine to validate a school district’s policy of searching student athletes through random, suspicionless drug testing. Sometime later, the Court expanded the authority of school officials to conduct random, suspicionless drug tests not only of student athletes but also of students who participated in other school sponsored activities. See Board of Education No. 92 v. Earls, 536 U.S. 822 (2002). In Earls, the Court sought to provide structure for lower courts, announcing that “[i]n certain limited circumstances, the Government’s need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion.” (536 U.S. at 836).

The Lower Courts and Suspicionless Searches in Public Schools

The lower courts have earnestly striven to develop workable rules after the Acton and Earls cases. The Supreme Court’s logic of allowing suspicionless searches in the rigorous area of criminal law remains the authority for upholding suspicionless student search policies under the more forgiving reasonableness standard of TLO. The validity of group student searches is a relatively easy matter using TLO; such a search is justified at its inception when there are grounds for suspecting that the search will turn up evidence that the student has violated, or is violating, either the law or rules of the school.” (469 U.S. at 341-42). Therefore, in the majority of decisions by federal and state courts, suspicionless search policies have been upheld. An educator is allowed to search the entire classroom of students when an iPod comes up missing. See Broussard v. Through Broussau v. Town of Westerly & Through Perri, 11 F. Supp. 2d 177 (D.R.I. 1998), (entire cafeteria searched in effort to recover missing item). Moreover, school officials have authority to search a busload of students after noticing an odor of marijuana on the bus. See Koontz v. Dustin, (2010 U.S. Dist. LEXIS 101061 (M.D. Fla. Sept. 24, 2010)), (entire busload of students searched in effort to find bomb that was rumored to be onboard).

TLO remains the starting point for understanding the validity of suspicionless public school search policies. After TLO courts are required to look at the subjective intent of school officials who make decisions under the duty to intervene to protect the learning environment. When doubt has been cast on the
validity of a suspicionless search policy, the rationale of Acton and Earls comes into play. Neither Acton nor Earls are just about extracurricular school activities. Both cases extend the authority of school officials to intervene however the incident requires. Earls is the most useful in this regard: "[T]he Fourth Amendment does not require a finding of individualized suspicion, and we decline to impose such a requirement on schools attempting to prevent and detect drug use by students." (536 U.S. at 837). Lower courts are hard pressed to invalidate such policies without evidence of abuse by educators as to either: (1) the manner in which the search is conducted in light of the age and gender of the students, or (2) the intrusiveness scope of the search in light of the object sought or the peril sought to be avoided. A recent decision by a lower federal court sums up the typical judicial attitude toward empowerment:

"In these days of heightened sensitivity to recurring outbreaks of deadly violence in our schools, comments that might once have been taken as foolish schoolboy exclamations must now be regarded as serious threats to safety and security. Thus, even though the educator had formed the subjective belief that the instant threat was not credible, the objective circumstances clearly compelled a search that was justified at its inception. The fact that the [student] who claimed possession of a bomb did not have any explosive device on his person did not exclude the possibility that a bomb had been placed elsewhere on the bus or in another student's book bag. . . . We can only imagine what would have happened if the school officials, after learning of the threat did nothing about it and the threat was then carried out with resulting death or serious bodily harm." Kootz v. Dustin, (2010 U.S. Dist. LEXIS 101061, at page 14).

When Lower Courts Invalidate Susicionless Searches in Public Schools

There is a presumption of validity for a school suspicionless search policy that is conducted in good faith for the purpose of safety and security. However, litigation over suspicionless search policies has not resulted in a rubber stamp in favor of public educators. It would be a mistake to think that educators, after TLO, Acton, and Earls, have a blank check to search students. The validity of a student search still depends on the reasonableness, under all the circumstances, of the search:

"Determining the reasonableness of any search involves a twofold inquiry: first, one must consider whether the . . . action was justified at its inception. Second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place." TLO (469 U.S. at 341).

Along side TLO is a rigorous rule of thumb used by lower courts to invalidate search policies by school officials that are tacit law enforcement operations or criminal investigations rather than school discipline and order. See Doe v. Little Rock Sch. Dist., 380 F.3d 349 (8th Cir. Ark. 2004) (targeted searches for evidence of illegal activity require individualized suspicion). See also, In re T.A.S., 713 S.E.2d 211 (N.C. Ct. App. 2011). Therefore, the presumption of validity is highlighted by a bright line that both courts and school officials tend to see and follow.

It is important to note that a few courts still struggle with the suspicionless student search cases. The error in these decisions is easy to identify and explain. Policymakers need to understand this and avoid implementing policies that confuse the presumption of good faith and fair focus. When lower courts struggle, it is usually with respect to one or both of the following two elements:

(1) Ignoring the "Special Needs" Inherent in Public Schools

A few lower courts have raised the hurdle of validity for suspicionless student search policies by requiring an empirical and specific "special need" or at least a crisis of undeniable proportion. In these decisions, individualized suspicion is seen as the standard unless educators can articulate a dire need to search the group. Acton and Earls are tolerated by these courts as decisions limited to the narrow area of extra-curricular policies. The error is a common one. It is attributable to the failure of these judges to understand the unique evolution of the "special needs" doctrine after its introduction into public education law in TLO. This error is combined with a narrow characterization of Acton and Earls to effectively remove an essential tool from school safety teams.

The possibility of this error was anticipated by the Court in Acton and Earls. In each case, the Supreme Court speaks beyond the extra-curricular facts before it. Ruling more broadly, the justices give judicial notice of a new branch of "special needs" unique to public education law where "special needs" automatically exist because the duty to protect exists. In Acton, the Court quotes TLO to announce that, ""special needs" inhere in the public school context." Acton, (515 U.S. at 653); T.L.O. (469 U.S. at 339-340). Later the justices hold that,

"Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." Acton, 515 U.S. at 656. In Earls, the Court is explicit:

We reject the Court of Appeals' novel test that "any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem." Earls (536 U.S. at 836).

In other words, when, a group search is conducted in good faith for the purpose of safety and security individualized suspicion is not required. Undesirable incidents that are forseeable, but not chronic, as well as those that are routine and disruptive, justify suspicionless searches. The need to prevent and deter the activity from taking root on campus provides the justification for the search at its inception. The critical mass of lower court decisions apply this standard because to do otherwise makes for poor logic as well as unnecessary student victimization by requiring educators to wait until a problem is deeply rooted before intervention is permitted.

(2) Second-Guessing the Subjective Intent of School Officials.

More than a few lower courts cannot resist second-guessing school officials' judgment, missing the unique evolution of the "special needs" doctrine in public education law after TLO in three distinct ways. First, these judges ignore the special deference that should be given to local educators' and communities' decisions about what policies best serve their responsibilities as educators and protectors of campus safety. This deference has been applied by the Court as far back as Epperson v. Arkansas, 393 U.S. 97, 104 (1968), when the justices, while resolving a conflict over the teaching of evolution, noted: "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint...By and large, public education in our Nation is committed to the control of state and local authorities." Since, Epperson, the Court have confirmed a position of deference to school policies in the absence of proof of bad-faith in light of clearly established law. See Bethel School Dist. No. 403 v. Fraser, (478 U.S. 675, 685 (1986)), Hazelwood School District v. Kuhlmeier, (484 U.S. 260, 266 (1988)), Gutter v. Bollinger, (539 U.S. 306, 328.
The Fourth Amendment is now part of this relaxed standard of judicial review. In Acton, the Court applies it with little fanfare, upholding the drug testing policy because the "relevant question is whether the search is one that a reasonable guardian and tutor might undertake." Acton, (515 U.S. at 665). Many lower court judges, less familiar with education law, bring a more rigorous level of judicial review to the analysis.

Second, lower courts refuse to credit the subjective intentions of educators, missing the shift in application of the Fourth Amendment in the "special needs" context. Outside of this context, Fourth Amendment reasonableness is an objective inquiry in which courts ask whether the circumstances, viewed objectively, justify conduct of the government official. See, Scott v. United States, 436 U.S. 128, 138 (1978). Valid policies are deemed reasonable without regard for the subjective intent motivating the government official. See, Whren v. United States, 517 U.S. 806, 814 (1996). In other words, outside of the "special needs" context, the Fourth Amendment regulates conduct rather than intention. See, Bond v. United States, 529 U.S. 334, 338, n. 2 (2000). However, the "special needs" cases are dispositive exceptions to this rule. Therefore, in suspicionless search cases the actual intent of educators matter to the outcome, for example, the intent to deter drug use in public schools. See, Acton (515 U.S. at 653). In the absence of an abuse of discretion, judicial second-guessing is not appropriate. In public education law, the standard for an abuse of discretion is a high one:

An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion, the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will, as shown by the evidence of record, discretion is abused. Parents United for Better Schools v. Board of Education, 148 F.3d 260 (3rd Cir. 1998).

The third way courts err is merely an object lesson of the preceding two. Courts err in invalidating suspicionless search policies by pointing to a host of alternative ways in which educators might have acted without intruding on student's Fourth Amendment rights. The U.S. Supreme Court has repeatedly refused to declare that only "the least intrusive" search practicable can be reasonable under the Fourth Amendment. Acton, (515 U.S. at 663). See also Earl's, (536 U.S. at 837). This is especially discouraging in the "special needs" context because, "judges engaged in post hoc evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might have been accomplished." Skinner v. Railway Labor Executives' Ass'n, (489 U.S. 602, 629 (1989)). Therefore, even when there are ways that school officials could have performed a search in a more selective or less intrusive manner, it does not mean that the school policy is invalid. When a suspicionless search is motivated by a legitimate school safety purpose, and not excessive in scope, the search carries a presumption of validity. Lower courts err by holding to the contrary.

IQ Test Answers

In the I.Q. test, the answer is "Yes" to fact pattern Four and "No" to fact patterns One, Two, Three, and Five.

In Question One, the court upheld the policy, ruling that although students possess a legitimate expectation of privacy concerning their person and personal belongings, that right is limited in public school. The actual nature of the intrusion suffered by the students was minimal and the fact that notice was provided about the reason for the search policy provided an additional safeguard for the search. The court ruled that the interest in keeping weapons out of public schools is a matter so obvious that no logical argument could be made opposing the decision of a public school to prohibit students, or anyone else, from entering a school with weapons. The policy was reasonable in light of the duty and responsibility of the school administrators to keep students safe. In the Interest of F.B., (555 Pa. 661, 726 A.2d 361 (1999), cert denied, 528 U.S. 1060 (1999). See also, In the Interest of S.S., (452 Pa. Super. 15, 680 A.2d 1172 (1996)).

In Question Two, the court ruled that the policy did not require individualized suspicion. It ruled that strict application of the principles of the Fourth Amendment did not fit the school environment. The need to maintain discipline, provide a safe environment for learning, and prevent the harmful impact of drugs and weapons gave educators a compelling interest. The purpose of the policy was to prevent students who have left and returned in violation of the school rules from bringing in harmful objects. In re Sean A., (191 Cal. App. 4th 182 (Cal.App. 4th Dist. 2010)).

In Question Three, the court upheld the search policy. The court ruled that there is no absolute requirement that the search be the least intrusive search practicable in order to be reasonable under the Fourth Amendment. The availability of less intrusive alternatives clearly is a consideration. The search was limited both in terms of the methods employed and the information revealed. Moreover, its scope was restricted to what was reasonably necessary to ascertain whether any of the students possessed the missing knife. The interest of school officials in searching for drugs or weapons is compelling and immediate action was required after other efforts to find the knife had been exhausted. Broussard by & Through Broussard v. Town of Westerly by & Through Perri, (11 F. Supp. 2d 177 (D.R.I. 1998)).

In Question Four, the court held, perhaps in error, that the searches were an unconstitutional criminal investigation. Despite the interest schools have in keeping the campus safe from weapons and drugs, the court ruled that educators are not entitled to conduct random, full-scale searches of students' personal belongings because of a mere apprehension. Instead of the usual valid school safety policy, that is conducted in good faith for the purpose of safety and security, this one was seen by the court as a targeted search for evidence of illegal activity. The court ruled that, "[f]ull-scale searches that involve people rummaging through personal belongings concealed within a container are manifestly more intrusive than searches effected by using metal detectors or dogs." Doe v. Little Rock Sch. Dist., (380 F.3d 349 (8th Cir. Ark. 2004)). See also, In re T.A.S., (713 S.E.2d 211 (N.C. Ct.App. 2011)).


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