

Video Surveillance: The Right To Privacy & Safe Schools

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It is not surprising that educators have an interest in VST for the purpose of increasing security and furthering their duty to provide a safe and effective learning environment. However, despite the duty to provide a safe school, video surveillance is inherently intrusive. The camera sees and records everything in its field of vision. The footage can be stored and maintained for years. Without proper safeguards, dissemination of its images and contents could extend to those without a proper interest in the education mission.

Some forms of VST that are useful to promote and maintain school safety have been found by the courts to not violate the law. Nevertheless, not all forms of video and audio surveillance are lawful for school officials. Some of the uses to which this technology may be put are clearly unconstitutional. The law in this area is developing as rapidly as the technology. Both educators and school resource officers should be mindful of the requirements imposed by the United States Constitution and by state and federal law.

Test Your “Video Surveillance IQ” on the following scenarios:

- 1) In an effort to improve security at a local high school, the school board approved the installation of video surveillance equipment throughout the school building. Cameras were located throughout the school in areas facing the exterior doors, in the hallways leading to exterior doors, in the cafeteria, gymnasium, and in the boys’ and girls’ locker rooms. The locker room cameras were videotaping areas in which students routinely dressed for athletic activities and placed their valuables in lockers. The students and their parents filed a lawsuit challenging the new policy. Did the school violate the civil rights of the students by installing the equipment?
- 2) Joe was hired as a probationary school bus driver with the Utopia School District to provide school bus service for the students. Joe’s school bus was equipped with a video camera. School officials used the video from the bus to evaluate his performance. After a few weeks, Joe received a letter telling him that he would not be approved to be a full-time driver. Several incidents involving safety were captured in the video footage and were cited by the school as the reason for his dismissal. Joe filed a lawsuit. Did the school violate his civil rights by installing a video camera?
- 3) Joanne is employed as a special education teacher by the school district. In response to allegations of bullying taking place against special education students, the school district decided to install audio/visual recording equipment in these classrooms. The equipment was installed in classrooms where the most vulnerable children were assigned. Joanne filed suit to challenge the policy. She claims that the recordings will violate her Fourth Amendment right to be free from unreasonable searches and seizures as well as the State Eavesdropping Act. Did the school violate her civil rights by installing the equipment?

4) A school administrator placed a video camera in the staff locker room in response to serious concerns that a particular teacher might be responsible for items that were being stolen from the boy's locker room next door. The camera was installed in the ceiling of the office and connected to a video recorder with a storage capacity of 30 days. Before suspicions about the teacher could be investigated, a staff member discovered the camera and a lawsuit was filed. Did the school violate his civil rights by installing a video camera?

Video Surveillance & School Safety

Despite the sophistication of VST, the law that applies is familiar and well known to both educators and law enforcement. Federal law claims will arise out of the Fourth Amendment and statutes on data privacy. State claims may also arise out of similar state provisions.

As to the Fourth Amendment, it is important for all educators and SROs to remember that not all forms of VST in public schools will be considered a "search". The Fourth Amendment comes into play only in those situations where the individuals who fall under the lens of the camera have a reasonable expectation of privacy and requires that educators have at least individualized suspicion. See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

In all other cases, the validity of VST is straightforward and uncomplicated. If all methods of video surveillance were regulated by the Fourth Amendment, T.L.O. would be read to prohibit educators' use of the technology, unless they first developed individualized suspicion. That would effectively eliminate VST as a deterrent and seriously limit its usefulness as a school safety device, except in those rare instances when individualized suspicion is developed in other ways and cameras are needed to provide corroboration or help capture a person who continues to disrupt the school environment.

Therefore, in public places, the validity of the use of VST is a moot issue. School officials may observe and record what they lawfully can see with the naked eye. The Fourth Amendment protects people, not places. Activities occurring in parking lots, hallways, classrooms, auditoriums and the open areas of bathrooms do not involve reasonable expectations of privacy. Moreover, there are also no First Amendment claims to be asserted in the school context; VST "does not violate First Amendment rights, even though it may be directed at communicative or associational activities, and even though it may inhibit those activities." *Reporters Committee for Freedom of Press v. AT.T.*, 593 F.2d 1030, 1058 (D.C. Cir. 1978). The First Amendment affords no protection against VST beyond what is provided by the Fourth Amendment.

In all other circumstances, the use of VST is a judicial matter over the reasonable expectation of privacy. As to students only, the video surveillance cases in education have been simplified by prior rulings of state and federal courts on student rights and school safety. The courts have held that while students do not give up their rights when

attending school, the “school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search.” *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). The courts have agreed that “the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children”. *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 656 (1995). As a result, “a student’s privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.” *Bd. of Educ. v. Earls*, 536 U.S. 822, 831 (2002).

For students, the legalism of video surveillance is the customary formula for student searches under T.L.O. In short, (1) whether the state action (the installation of the cameras) is “justified at its inception”; and (2) whether the search (videotaped surveillance) is reasonably “related in scope” to the circumstances which justified the video surveillance in the first place. See *T.L.O.*, 469 U.S. at 341. Therefore, when the use of video surveillance constitutes a search, courts tend to bring the traditional deference to school officials when “there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.” *T.L.O.*, 469 U.S. at 341.

The video surveillance method chosen by educators to improve school safety need not be the only method available or even the most sophisticated. It is valid when “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” *T.L.O.*, 469 U.S. at 342. When educators cross the constitutional line, it is usually beyond quibble or debate. The surveillance is overzealous and captures students in settings and at times when the expectation of privacy is beyond any intrusion, i.e. the private areas of school bathrooms, lockers, off-campus dwellings and automobiles.

For faculty and staff, the guidelines in the area of the Fourth Amendment come from the U.S. Supreme Court. The Court has ruled that the expectation of privacy is “reasonable” when: (1) a person acts as though he or she has a subjective expectation of privacy, and (2) the courts agree that the expectation in a specific context is reasonable. See *California v. Ciraolo*, 476 U.S. 207 (1986). When this standard is applied in the school employee setting, a reasonable expectation of privacy exists in those areas that have been given over to an employee use such as an office, room or cubicle reserved for that individual’s exclusive use. This would exclude break rooms, school buses and common areas in locker rooms, bathrooms and classrooms.

The rule is straightforward; there is no reasonable expectation that actions during working hours in a non-private office or other work area will not be subject to job-related scrutiny. See *State v. McLellan*, 144 N.H. 602, 604-05, 744 A.2d 611 (N.H. 1999) (no reasonable expectation of privacy by janitor in public school classroom because classroom was open to students and school staff); *Goodwin v. Moyer*, 2006 U.S. Dist. LEXIS 18492 (M.D. Pa. 2006) (no reasonable expectation of privacy for public school’s bus driver subjected to video monitoring on school bus); *Thompson v. Johnson County Community College*, 930 F.Supp. 501, 507 (D. Kan. 1996) (no reasonable expectation of privacy in locker area used by security personnel of community college because area

video taped was not reserved for the exclusive use of security personnel); *Brannen v. Kings Local School Dist.*, 144 Ohio App.3d 620 (12th Dist. 2001) (no reasonable expectation of privacy in public school's break room used by third shift custodians because teachers and principal also had "unfettered access" to break room).

The same rules that govern VST apply to disputes over audio surveillance. Collecting audio data is prohibited under Title I of the Electronic Communications Privacy Act of 1986. See U.S.C. §§ 2510-2521. State statutes similarly provide a right of action in court for persons whose conversations have been recorded. However, all of these laws, federal and state, only protect communications in circumstances where the speaker has a reasonable, as well as a subjective, expectation of privacy. See *Kee v. City of Rowlett, Texas*, 247 F.3d 206 (5th Cir. 2001), and *United States v. Longoria*, 177 F.3d 1179 (10th Cir. 1999).

State legislators are beginning to provide a context for the use of VST. The laws of 13 states expressly prohibit the installation or use of cameras in private places. In these states, installation of VST without permission is against the law. See Ala. Code §§ 13A-11-31, 13A-11-32; Ark. Code § 5-16-101; Cal. Penal Code § 632; Del. Code Ann. tit. 11, §§ 1335, 1336; Ga. Code Ann. § 16-11-60 to 16-11-64; Hawaii Rev. Stat. § 711-1111; Kan. Stat. Ann. § 21-4001; Me. Rev. Stat. Ann. tit. 17-A § 511; Mich. Comp. Laws Ann. § 750.539d; Minn. Stat. § 609.746; N.H. Rev. Stat. Ann. § 644:9; S.D. Codified Laws Ann. § 22-21-1; Utah Code Ann. § 76-9-401, 76-9-403, 76-9-702.7.

Video Surveillance & Model School Policy

Generally, as the expectation of privacy of students, faculty and staff increases, the authority of school officials to use video surveillance decreases. The legal question is whether, given the purpose for which the cameras are operating, the use of VST is reasonable. Every public school district should have a clear policy on VST that is disclosed to the school community and that is frequently assessed to determine its workability as a school safety component. The policy will effectively defeat questionable assertions of privacy on campus and provide fair notice to those against whom it is enforced. The Oregon School Boards Association has developed the following policy on VST that serves as a good model for school districts in other states:

- The Board authorizes the use of video cameras on district property to ensure the health, welfare and safety of all staff, students and visitors to district property, and to safeguard district facilities and equipment. Video cameras may be used in locations as deemed appropriate by the superintendent.
- The district shall notify staff and students through student/parent and staff handbooks that video surveillance may occur on district property.
- Students or staff in violation of Board policies, administrative regulations, building rules, or law shall be subject to appropriate disciplinary action. Others may be referred to law enforcement agencies.

- Video recordings may become a part of a student’s educational record or a staff member’s personnel record. The district shall comply with all applicable state and federal laws related to record maintenance and retention.

How Did You Score?

In the I.Q. test, the answer is “yes” to fact patterns One and Four and “no” to fact patterns Two and Three. In Question One, use of VST represents a valid policy as to the common areas. This is an appropriate and common sense security measure. However, videotaping students in a school locker room is an invalid search. Students retain a privacy interest in their unclothed bodies and reasonably expect that no one, including school administrators, will videotape them without their knowledge. *Brannum v. Overton County Sch. Bd.*, 516 F.3d 489 (6th Cir. Tenn. 2008).

In Question Two, the school bus driver has a diminished expectation of privacy such that the onboard video camera is not an intrusion upon his privacy. He is not located in a private area; he is surrounded by others and in view of the public through the bus’s windows. The school district has a compelling interest in protecting children entrusted to it, as well as in protecting the bus driver from the children. *State v. Duchow*, 749 N.W.2d 913 (WI Sup Ct. 2008). See also, *Goodwin v. Moyer*, 549 F. Supp. 2d 621 (M.D. Pa. Mar. 29, 2006).

Question Three involves public school property dedicated for use in the education mission. Teachers do not have an expectation of privacy in their classrooms. The classroom is not reserved for the teacher’s private use, but is open to students, other faculty, administrators, custodians and parents. There is nothing private about communications, which take place in this setting. *Plock v. Bd. of Educ.*, 545 F. Supp. 2d 755 (N.D. IL 2007).

Question Four is simply an overzealous search, which crosses the line. Teachers have a constitutional right to be free from unreasonable video searches of their shared office as to exclusive areas such as lockers. In this case, the teachers had an expectation of privacy in their locker room from the students and other staff members; it contained lockers so that the teachers could change their clothes. Although at its inception, the videotape search may have been justified to determine whether a specific teacher was stealing, the measures adopted were not reasonably related to the objectives of the search. There were other teachers who shared the locker room who were not suspects and as to them, the search was excessively intrusive. *Doe v. Dearborn Pub. Schs*, 2008 U.S. Dist. LEXIS 25514 (E.D. Mich. 2008).

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