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Dr. Richard S. Vacca, Editor; Senior Fellow, CEPI

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STUDENT SEARCH AND SEIZURE 2004: A BALANCING OF INTERESTS**Overview**

The *Fourth Amendment* to the United States Constitution establishes that “The right of the people to be secure...against unreasonable searches and seizures, shall not be violated...” This past November, the Fourth Amendment rights of students became a topic of heated discussion when the news media featured a story (with pictures) of students being searched by police officers during a drug sweep at a public high school in South Carolina. While stories of police-initiated drug searches in contemporary public schools are no surprise to most people, what made the story newsworthy, and somewhat shocking, was the way in which this particular drug sweep was carried out. In what the media described as a “frantic scene,” fully armed police officers dressed in SWAT-type gear, some with weapons drawn and some with drug-sniffing dogs, searching students in a school hallway. No drugs were found. The Post Courier (Charleston, South Carolina), December 6, 2003, page 1B

Subsequently, a class action lawsuit on behalf of the students was filed in a federal district court. The plaintiffs alleged in their complaint that the Fourth Amendment’s prohibition against “unreasonable searches and seizures” had been violated by the actions of the police officers during the drug sweep. In the opinion of a lawyer for the students, “this incident represents an open and shut case of excessive police force against innocent children.” Post Courier, page 1B As of this writing, the status of the lawsuit is not known.

Because the above situation happened in a public school building during school hours, this commentary is devoted to a brief review and restatement of what the courts have said regarding search and seizure in public schools. Especially important in the discussion is the critical difference between *school searches* and *police searches*.

Search and Seizure in Public Schools. Through out the early years of American public education, search and seizure issues were few. Prior to the early 1960’s, consistent application of the traditional *in loco parentis doctrine* (standing in place of the parent) granted broad discretionary authority to school administrators and classroom teachers to do what was necessary to take immediate possession of any item that was in violation of school board policy and/or rules. Application of the *in loco parentis doctrine* gave principals and teachers a “private person” status, thus taking them out from under the restrictions of the Fourth Amendment.

The Impact of In re Gault (1967). As public education moved through the late 1960's, however, the scene changed as protections of the United States Constitution were extended to children. In a landmark decision involving juvenile justice, and not schools, the United States Supreme Court held that children are "persons" under the United States Constitution. It therefore follows, said the high court, that children are entitled to "due process of law" under the Fourteenth Amendment. In re Gault (1967)

In the late-1960's application of *Gault* to student disciplinary matters was consistent. The modern era in student discipline and control (including search and seizure) had begun, and educational policies had to keep in step with the times. Vacca and Bosher, (2003)

Drugs and Violence in Schools. By the late 1960's public school systems across the country experienced a growing number of incidents of violence and drug-related activities on school grounds and at school related events. Thus, an immediate need to enact policies enabling administrative search and seizure efforts in schools was of paramount importance.

By the early to mid-1970's local public school system policy-makers assumed a proactive approach. Cooperative arrangements with local law enforcement agencies were crafted and implemented, including but not limited to the use of police K-9 units in schools. These efforts were intended to effectively deal with growing problems, especially where criminal activity was suspected. As such, what had existed as a relatively simple process in the "*in loco parentis era*" now became more complicated. Litigation was inevitable.

School Searches v Police Searches. Between 1975 and 1985, search and seizure issues dominated the literature in public school law, as court decisions grew in number in every jurisdiction. Federal and state courts were busy trying to decide whether or not public school administrators exercised in loco parentis (in place of the parent) authority or whether they acted as government officials. Elenberger (2002)

A major issue producer during this period involved student searches where both school administrators and local police officers were present. It was during this same period that many school systems employed school security officers, while other school systems relied on School Resource Officers. One result was that the distinction between school searches and police searches became blurred.

New Jersey v T.L.O. (1985). In T.L.O. the United States Supreme Court specifically addressed search and seizure in public schools. In an opinion written by Justice White, the high court made it clear that (1) Fourth Amendment search and seizure protections apply to public school students, (2) school officials are government officials and as such are not acting in loco parentis when conducting student searches, (3) the Fourteenth Amendment protects the rights of students "against encroachment by public school officials," (4) school searches are different from police searches, and (5) the constitutional standard applied to school searches is "*reasonable suspicion*," while the standard applied to in police searches is "*probable cause*." Moreover, said the Court, "[t]he warrant requirement, in particular, is unsuited to the school environment...." T.L.O. (1985)

The T.L.O. Standard and School Searches. To evaluate the constitutionality of a *school search* the Supreme Court iterated the following *two-pronged standard*: (1) To launch a search a school official must have *reasonable suspicion* to believe that present in the situation is something in violation of school policy or rules, or the law. (2) The search, as carried out, must remain directly related to the reason for the search and must remain reasonable in scope. In Justice White's view, this standard will "strike a balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place." T.L.O. (1985)

In the post- T.L.O. era, policies and procedures dealing with student search and seizure needed serious revision. One reason for this was the Supreme Court's distinction between the strict *probable cause* standard applied to police searches, and the more subjective and flexible *reasonable suspicion* standard applied to school searches. *Reasonable suspicion*, said the experts, means "reasonable suspicion under the circumstances." In other words, "Given the facts of a particular situation, what would a reasonable and prudent school official do?" Hudgins and Vacca (1985)

Emerging Issues

Over the past two decades judges have been busy deciding cases involving a variety of issues. The list below contains 10 examples of questions that came before the courts post-T.L.O.:

- To classify as a *school search*, must a search of a student be solely initiated by and remain under the exclusive control of a school administrator?
- Does the mere presence of an officer of the law during a student search conducted by a school administrator classify the search as a *police search*?
- Is the standard applied to a student search conducted by a School Resource Officer *probable cause* or *reasonable suspicion*?
- Does a student search conducted by a school security officer (who is not a sworn officer of the law) classify as a *school search* or is it a *police search*?
- Is a student suspected of engaging in criminal behavior on school grounds, who is being questioned by a school administrator within the confines of the administrator's office, entitled to a Miranda warning? Does the answer to this question change if a police officer is present? What if the police officer does not actively engage in the questioning? What if a School Resource Officer is present during the questioning? What if a school security officer is present?
- Which standard applies to a student search where both school administrators and police K-nine unit officers are cooperatively engaged in a drug sweep within the school building?
- Does the *reasonable suspicion* standard equally apply to administrator searches of school lockers, student book bags, and cars parked on the school parking lot? What about searches of a student's person?
- What happens to the *reasonable suspicion* standard when a school administrator uses a metal detector, or conducts a "pat down" search, or a "strip search"?
- When does a school administrator need "individualized suspicion"?
- Is student drug testing classified as a school search?

Case Law

Contemporary public school administrators have come to rely on police officers and school system security personnel to maintain discipline and control of students, especially where drugs and weapons are present. A random sample of case law on point demonstrates how recent courts have ruled on matters of search and seizure.

In Patman v State (2000), a police officer on special detail in a public high school was told by a school secretary that a particular student smelled of marijuana. The officer stopped the student in a school hallway and frisked him. He felt some stamp sized bags in the student's pocket. At that point the student said: "Come on and let me slide." Hearing the student's words the officer reached into the student's pocket and removed bags of marijuana. The officer treated the situation as a police matter, even though the search took place on school

property. Subsequently, a lawsuit was filed on behalf of the student contesting the search on Fourth Amendment grounds. Even though the search took place on school property, the *court applied the probable cause standard*. The court held that the police officer did have probable cause. When the officer felt the packages, smelled marijuana, and heard the student's statement he had *probable cause* to search the student.

In re D.D (2001) involved a search conducted by a school principal, with the assistance of a school resource officer, and school security personnel. The principal received information that there was going to be a fight on school grounds. He alerted the school resource officer. Four juveniles were spotted in the school parking lot. They were identified as "non-students." The principal, the resource officer, and school security went to the scene. Subsequently the kids were asked to empty their pockets. A box cutter was found. The kids were taken to court on delinquency charges, where a motion was filed to suppress the evidence. The motion was denied. On appeal the court applied the *reasonable suspicion standard* and held that the search was reasonable. In the opinion of the court, (1) the search was initiated by and remained under the control of the school principal, and (2) the purpose of the search was to maintain a safe and proper educational environment at the school and not to collect evidence of a crime. The fact that a resource officer and a security officer were present did not make the search a police search.

A.N.H. v State (2002) is a Florida case involving a search conducted by a school staff member and not an administrator. A school counselor asked a student to empty his pockets, because in the counselor's opinion "the student was not acting right." Marijuana was found. Subsequently the matter went to court where the court ruled in the student's favor. In the court's opinion insufficient evidence existed to create reasonable suspicion that this student was involved in activities that were either in violation of school rules or the law. In other words the first prong of the T.L.O standard had not been satisfied.

In M.W. v Madison County (2003) a federal district court in Kentucky heard a case involving a female, ninth grade student who was taken to the principal's office by her ROTC/physical education teacher. The teacher left the student in the principal's office and returned to class. The principal asked the student to identify herself, but she did not answer him. The principal asked a police officer who was assigned to the school to help in the identification process. The student remained silent. Ultimately the police officer took her to the police station where she was placed in detention.

The student's parents filed suit in federal district court alleging that their daughter's removal from school and placement in detention were violations of the Fourth Amendment's protection from *unreasonable seizure*. In the court's opinion the principal's conduct in detaining the student to establish her identity and his turning the matter over to the police were reasonable under the circumstances. Just because a student is removed from school by a police officer does not establish a constitutional violation.

United States v Aguilera (2003) is a California case involving the arrest of a non-student who had come onto school grounds. In response to an anonymous tip that a "male who had flashed a weapon by lifting his shirt above his waist was approaching the school," two school security rushed to a portable classroom area where they confronted the intruder. Subsequently they searched him and found a sawed-off shotgun in his waistband. The intruder was arrested and charged with possession of an unregistered firearm on school property. The non-student/intruder filed suit in federal district court alleging that he had been subject to an "unlawful search and seizure." The court did not agree, based on the following points of law: (1) Under California law a school official is allowed to make subjective judgments involving the removal of persons from school property, (2) school security personnel had reasonable suspicion to search the non-student intruder, and (3) the search as conducted by the security officers was [a] directly related to its initial purpose, and [b] reasonable in scope.

Finally, the court did not consider the search of the student's clothing (he was initially subjected to a pat down search of his clothing) "excessively intrusive."

Policy Implications

According to recent reports (2001-2002 figures) regarding discipline, crime, and violence in public schools (involving students from five years old to nineteen years old), the number of alcohol, drugs (including look alike drugs), weapons (including look alike weapons), and youth gang-related activities has increased. Needless to say, public school boards and administrators realize that they alone cannot keep school grounds safe, secure, and disruption free. Thus, the need to cooperate with law enforcement agencies has never been greater, especially in situations where student search and seizure procedures are required. To place this relationship on a strong foundation and be proactive, the following suggestions for school system policy are suggested. All policies must

- Be written in non-legal, non-education jargon, and unambiguous language.
- Clearly state the school board's belief that effective education only takes place in a non-disrupted, safe, secure, and crime-free learning environment.
- Clearly state the school board's intent to consistently and vigorously enforce all policies and rules regarding student discipline and control.
- Clearly state that while the board recognizes and respects the constitutional and legal rights of students, no student is immune from discipline and control.
- Empower all school building principals to take all disciplinary actions necessary to maintain a safe, secure, and non-disrupted learning environment; and, that they (the school principal) possess the discretionary authority to involve school staff members, school security personnel, school resource officers, and community police agencies when the situation requires them to do so. (As a part of this statement, the policy must clearly differentiate between the terms *School Resource Officer* and *School Security Personnel*.)
- Empower school building principals to conduct routine inspections of school property.
- Empower school building principals to initiate and conduct searches of students (including but not limited to their belongings), and non-students who are on school property or in attendance at school sponsored functions, when in the principal's judgment reasonable suspicion exists to believe that present is something in violation of school policy and/or rules, unlawful, or otherwise harmful, or disruptive. These searches will be conducted using the least intrusive means available and appropriate to the particular situation.
- Clearly state that the school system intends to fully cooperate with federal, state, and local law enforcement agencies in a effort to keep students, administrators, teachers, and staff safe and secure, and to keep school grounds crime-free. (*Formal agreements and plans of action* must be crafted, on file, and implemented.)
- Clearly state that all prohibited items discovered during a school search will be immediately seized and kept in the control and custody of the school building principal.
- Clearly state the intent of the school board to inform and involve parents and legal guardians in the early stages of the disciplinary process.

All student disciplinary policies, rules, and procedures (including but not limited to police involvement) must be made available and fully explained to students and their parents, and school system staff at the beginning of each school year.

One final note is important. Based upon a review of the case law and literature available at this time, it is the opinion of the author that school officials should only resort to a “strip search” of a student as a last resort, and only after consultation with the school system’s attorney.

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Richard S. Vacca
Senior Fellow CEPI

Note: The views expressed in this commentary are those of the author.