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**STUDENT STRIP SEARCHES 2005: LEGAL AND POLICY ISSUES****Overview**

As public education moves into the second half of the 2004-2005 school year, several topics remain ripe for lively discussion. At the top of the list are those topics related to school security and student discipline; and, among these topics is a continued interest in exploring the legal and policy issues associated with student search and seizure. Of specific interest to legal scholars are issues that have recently emerged from a renewed use of “strip searches” of public school students.

Have conditions in public schools become such, that school administrators and teachers need to “strip search” students?” Can school officials cite special needs (e.g., increased gang-related violence, weapons violations) to justify this intrusive procedure? While some experts say yes, it is difficult to grant a blanket approval of this method of search. In this writer’s opinion, strip searches, especially those that might reveal evidence of criminal activity (which in turn requires turning over the evidence to law enforcement officers) are too replete with potential Fourth Amendment issues to serve as routine disciplinary options for public school administrators.

**The Intrusiveness Factor.** As a general rule, the more intrusive the search of a person and/or his/her belongings (private property) the more sensitive the searcher must be to the privacy expectations of the person being searched. A strip search is by nature intrusive. As one source suggests, “strip searches constitute a gross invasion of privacy especially when the subject of the search is a child.” Virginia School Search Resource Guide (2000) It therefore follows that the more intrusive the search of a student (his/her body), and his/her belongings (private property), the more individualized suspicion is needed to launch the search. *M.M. v Anker* (2nd Cir. 1979) Moreover, as one source specifically written for school principals cautions practitioners, “With respect to strip searches, because of their intrusiveness, courts have required probable cause and substantial evidence.” Drake and Roe (2003)

**What Constitutes a Strip Search?** Broadly defined, a strip search can involve everything from merely asking a student to open a coat, to requesting removal of one item of clothing (e.g., a shoe), to asking a student to rearrange his/her clothing, to inspecting undergarments, to conducting a completely nude examination. Physical examinations as well as blood tests are considered “highly intrusive” per se and are automatically subject to strict application of the Fourth Amendment. *Thomas, ex rel. Thomas v Roberts* (11th Cir 2003)

Fourth Amendment Implications. The Fourth Amendment to the United States Constitution states, in part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....” It is important to note that the Fourth Amendment does not free citizens from all governmental searches and seizures, only from unreasonable ones. Vacca and Bosher (2003) In applying the Fourth Amendment to searches of public school students the United States Supreme Court has held that reasonableness is the ultimate measure of the constitutionality of a search. *Vernonia v Acton* (1995)

The Fourth Amendment and Public School Searches. Initially, the Fourth Amendment only applied to the federal government. In 1949, however, it was made applicable to the states (initially in cases involving police officers and criminal matters) through the Fourteenth Amendment. *Wolf v Colorado* (1949) It was not until 1985 that the protections of the Fourth Amendment were made applicable to public school administrators and school personnel engaged in student searches. *New Jersey v T.L.O.* (1985) In doing so, the United States Supreme Court deviated from the traditional judicial application of the *in loco parentis* doctrine (which gave nearly unlimited discretion to public school administrators) when it characterized school administrators as governmental officials.

T.L.O. Plus Acton Plus Earls. Until recently, most courts saw strip searches as too intrusive and therefore in violation of the Fourth Amendment. Alexander and Alexander (2005) As a general rule, judges considered such searches as beyond the bounds of necessity, prudence, common sense, and outrageous in nature. Vacca and Bosher (2003). As one court opined two decades ago, strip searches are “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.” *MaryBeth G. v City of Chicago* (7th Cir. 1983)

Between 1985 and 2002, however, because of three Supreme Court decisions, judicial attitudes toward student privacy expectations and intrusive searches began to change.

In *New Jersey v T.L.O.* (1985), the United States Supreme Court ruled that even though public school officials engaged in student searches act as government agents, they are not bound by the probable cause standard applied to police officers. Instead, public school officials are bound by the less ridged standard of reasonable suspicion. Three reasons were articulated for this view. First, the necessity to maintain school discipline requires flexibility in decision-making. Second, the prerogative of school officials to maintain discipline and security in schools outweighs a students privacy rights. Third, the constitutionality (i.e., reasonableness) of a student search depends on the totality of the circumstances.

The high court in *T.L.O.* established the following two-pronged analysis to apply when judging the constitutionality of a student search: (1) Was the search justified at its inception? More specifically, did the searcher have reasonable suspicion to believe that present was something in violation of school policy, or school rules, or the law? (2) Was the scope of the search reasonably related to the purpose of the search? More specifically, is the scope of the search directly related and reasonably confined to the purpose of the search? In other words, a student search that is either overly broad or excessively intrusive will not pass muster under the Fourth Amendment. Vacca and Bosher (2003)

*Vernonia v Acton* (1995) involved issues associated with a local public school district policy authorizing random urinalysis drug testing of all students who participated in school sponsored athletic programs. While drug use and abuse had not been a problem in the school district, teachers and administrators did begin to see an increase in student drug-related activities and disciplinary problems. It is important to note that not all disciplinary problems involved student athletes. In the fall of 1989 the school board adopted a random drug

testing policy the expressed purpose of which was prevention (health and safety) and not punishment. As a precondition to participation in school sponsored sports activities students had to sign a consent form and had to present a signed parental consent form permitting random drug testing. The policy was challenged in federal court on Fourth and Fourteenth Amendment grounds. Ultimately the United States Supreme Court decided the matter.

Characterizing the drug-testing program as a search, the Fourth Amendment's reasonableness test was applied. In upholding the policy, Justice Scalia, for the Court, focused on the following four points: (1) The custodial and tutelary (i.e., guardian, custodian) responsibility of school officials for children. (2) The reduced expectation of privacy of student athletes. (3) The importance of deterring drug abuse among schoolchildren. (4) The confidentiality of the process. Of specific significance is the fact that the Supreme Court did not require that the school system have individualized suspicion of students prior to their being tested.

The Supreme Court's rationale in the *Acton* opinion created a four-part standard to apply in future drug-testing cases. To judge the reasonableness of the policy and procedures applied, the new standard probes the following elements: (1) the nature and extent of the student's privacy expectation, (2) the degree of intrusion on that expectation, (3) the reasons for and intent of the school system's policy and procedure, and (4) the relationship between the procedure and the purpose of the policy.

Seven years later, by a vote of 5 to 4, the United States Supreme Court upheld a local public school board's policy that required random drug testing (urinalysis) of all middle and high school students as a precondition to participation in all competitive extra-curricular activities. Once again, as in *Acton*, the school system had not experienced persistent drug abuse problems among students and individualized suspicion was not a factor. In writing for the majority, Justice Thomas applied a special needs (or circumstances) analysis. The privacy interests of students, he said, "are limited in a public school environment where the state is responsible for maintaining discipline, health, and safety....Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults." *Board of Education v Earls* (2002)

### **Emerging Issues and Court Decisions**

In *Cornfield by Lewis v Consolidated High School District* (7th Cir. 1993), a male student in a behavior disorder program, who was suspected to hiding drugs in the crotch area of his clothing, was strip searched (his naked body visually inspected and his clothes inspected) by a male teacher and administrator. No drugs or contraband were found. However, applying the T.L.O. standard the court determined that the search was "reasonable under the circumstances."

In *Jenkins v Talladega City Board* (11th Cir. 1996) two female elementary school students were twice strip searched after being accused of stealing money from another student and hiding it in their backpacks. No money was found. Even though the appellate court said that school personnel did not exercise good judgment in conducting the searches, it refused to interfere with their judgment and decision-making.

*Thomas v Roberts* (11th Cir 2001) involved the strip-search of a group of fifth grade students. The purpose of the search was to find \$26.00 reported missing from a teacher's classroom desk. Both a federal district court and the Eleventh Circuit Court held that because individualized suspicion did not exist, and the scope of the search was too broad, the search was "egregious" and therefore unconstitutional.

Rudolph v Lowndes County Board of Education (M.D. Ala. 2003) involved a strip search of secondary school students following a law enforcement “sniff-dog” drug sweep at the school. While the superintendent of schools had requested the drug sweep, a law enforcement officer conducted each strip search. The court upheld three of four student strip searches. To the court, the constitutional searches were: (1) based on individualized suspicion, (2) reasonable at their inception, and (3) narrowly focused and reasonably related to the objective of the search (the discovery of drugs).

In Rinker v Siper (M.D. Pa. 2003) an assistant principal asked a school resource officer to search a student down to the waistband of his underwear (no nude search was conducted). He also requested that a school nurse take the student’s vital signs, and he required a urine sample from the student. In addition, the student’s locker and possessions were also searched. The assistant principal took these actions based on a “tip” from another student and the personal observations of the student (student looked “stoned,” was incoherent, smelled of marijuana). In the court’s view, the actions of the assistant principal were reasonable under the circumstances. They were triggered by sufficient individualized suspicion, reasonable in scope, and reasonably related to the purpose of the search.

Doe v Little Rock (8th Cir. 2004) involved a challenge to a local school board’s policy that allowed random, suspicionless searches of student property. The court challenge came from students who had been ordered to empty their pockets and place their belongings, backpacks, and purses on their classroom desks. Students then went into the hallway while school officials searched the belongings left in the classroom. Marijuana was found in one of the purses. While the school system prevailed at federal district court, the Eighth Circuit applied the T.L.O. standard, reversed the lower court, and held for the students. Emphasizing that students possess a privacy interest in their belongings while at school, the appellate court said the school officials could not deprive students of their Fourth Amendment protections by simply announcing ahead of time that their privacy expectations “will no longer be honored.” Characterizing the search as “highly intrusive,” the court opined that school officials in this case lacked enough specific and credible information to warrant such a broadly based search policy.

### **Policy Implications**

In an era when both federal and state laws require that children receive a meaningful, quality education in safe, secure, and disruption-free schools, it is little wonder that the literature in public school law is filled with articles discussing student discipline and control. And, among the topics probed by legal scholars, student search and seizure (especially strip searches) remains one of the most discussed subjects.

While it is doubtful that school systems can establish and maintain safe and secure schools absent effective and enforceable student search and seizure policies and procedures, as the above case law demonstrates, however, the potential for issues springing up is very real, especially in circumstances where student searches are “highly intrusive in nature.”

What follow are six questions to pose as existing student search and seizure policies are reexamined and new policies are drafted. Does the policy make it clear that:

- The school board recognizes and respects the Fourth Amendment rights and protections of all students, and will do its best to balance those rights and protections with the legal prerogatives of the school board.

- The school board, administration, faculty, and staff will do all that is necessary to establish and maintain a safe, secure, and disruption-free learning environment in every school in the district so that teachers can teach and students can learn?
- The school board, administration, faculty, and staff will do all that is necessary to keep every school in the district free from crime, weapons, drugs, and other forms of dangerous, destructive, and unhealthy behavior?
- Student search and seizure procedures will be in place and regularly implemented as a part of the school system's efforts?
- Students can expect that they might be subject to a search while in school or in attendance at school-sponsored activities, or as a participant in a school sponsored activity?
- Students will be randomly subject to a search of their persons and/or personal belongings where special circumstances exist or whenever direct, substantial, and credible evidence exists that individual students are in possession of weapons, drugs, or other illegal/harmful/dangerous materials or devices.

One last thought is offered for consideration. As a general rule “strip searches” of students are “highly intrusive” in nature. Thus, the potential for litigation is real. In this writer’s view, “strip searches” must only be used where the facts of the situation require this procedure and no other.

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