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STUDENT STRIP SEARCHES: WHAT WILL THE SUPREME COURT SAY?

Overview

Through out the Seventh Edition of our text, LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS (2008), my colleague Professor Bosher and I make it clear that courts have consistently held that public school principals are responsible for the safety and welfare of all students in their schools. What is more, we stress that parents expect school administrators as disciplinarians be proactive and not reactive and keep their children safe, secure, and protected from harm while at school and in attendance at school sponsored events and activities.

Student Searches

In Chapter 10.4 of our text we focus on the disciplinary authority of public school principals to conduct warrant less searches whenever there is *reasonable suspicion* to believe that a student or students may be harboring something illegal or harmful. However, we point out that the legal authority and prerogatives of public school principals to conduct student searches are not without limits and must be balanced with the Forth Amendment rights of students.

The Constitution and TLO. The Fourth Amendment states in relevant 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…." In 1985, the United States Supreme Court extended the unreasonable search and seizure protection of the Fourth Amendment to public school students. New Jersey v. T.L.O. (1985) To balance the legal prerogatives of school administrators to conduct searches of students with the Fourth Amendment rights of students the high court in T.L.O (1985) created a two-pronged standard of analysis. When judging the constitutionality of a student search conducted by public school administrators the following questions must be asked: (1) Was the search justified at its inception? More specifically, did the administrator launching the search have *reasonable suspicion* to believe that present was something in violation of the law and/or school policy? (2) Did the scope of the search remain reasonably related and confined to the purpose of the search (i.e., the search was neither *overly broad* [a "fishing expedition"] nor *excessively intrusive*?

The Intrusiveness Factor. As a general rule, the closer a school administrator's search comes to the student, his/her body, and his/her private property, the reasonable suspicion needed by school administration to launch and carry out the search grows in degree. Some experts argue that in highly intrusive searches *reasonable suspicion* actually morphs into "probable cause supported by substantial evidence." Drake and Roe (2003) and Alexander and Alexander (2009) Thus, in conducting intrusive searches: (1) individualized suspicion of specific students is needed to launch the search, and (2) the scope of the search must be limited to seeking out specific items possessed by those individual students. Bellnier v. Lund (N.D.N.Y. 1977), M.M. v. Anker (2nd Cir. 1979), and Thomas, ex rel. Thomas v. Roberts (11th Cir. 2003)

Strip Searches. In the early 2000's there was an escalation of student "strip search" cases reaching the courts, and the inconsistent results of the court decisions sent mixed signals to school administrators. Doe v. Little Rock School District (2003), Panuef v. Cipriano (D. Conn. 2004), and Beard v. Whitmore Lake School District (6th Cir. 2005) To clarify the situation for educational policy-makers, I devoted my January (2005) commentary to the legal and policy issues involved in strip searching students. In the piece I posed the following question: Have conditions in public schools become so dire, that school administrators need to strip search students? Based on my research at the time, I answered that question with a "No," and supported my answer with the following statement: 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. Vacca (2008) In 2009 my opinion has changed.

Student Strip Search and the Supreme Court: The Redding Case (2008)

This coming June (2009), public school policy-makers and school administrators may receive a definitive answer to their questions involving the use of and reliance on "strip searches" as a disciplinary option. On Tuesday April 21, 2009, the United States Supreme Court heard oral arguments in a public school student search case out of the United States Court of Appeals for the Ninth Circuit. Stafford U.S.D. v. Redding (9th Cir. 2008) While a federal district court judge had ruled in favor of school officials, the Ninth Circuit Court (*en banc*) reversed that ruling. To the appellate court the strip search as conducted in this case was unreasonable and unconstitutional. What is more, the appellate court held that the school officials who ordered the search were not immune from liability for damages. The Supreme Court granted certiorari.

Three factors make this case extremely important for public school officials to watch. First, other than student drug testing, Vernonia v. Acton (1995) and Board of Education v. Earls (2002), the Supreme Court has not taken up the subject of public school student searches since handing down its landmark decision in New Jersey v. T.L.O (1985). Second, the Redding (2008) case (which has taken six years to get to this point) involves school personnel not looking for "street drugs" (they were looking for a prescription drug [Ibuprofen)]), conducting a strip search of a thirteen-year-old (at the time of the search) female, middle school honor student with no prior disciplinary or criminal record. Third, the information that caused a male assistant principal to (1) launch the strip search (subsequently carried out by two female employees—a school nurse and a secretary), and (2) suspend the student from school for violating the school system's anti-drug policies, came from one student informant.

In addition to bringing *prong #*1 (reasonable suspicion to launch the search) and *prong #2* (scope of the search) of the T.L.O. (1985) standard together within the context of a very narrow and intrusive search, legal experts tell us that the set of facts in Redding (2008) tests the importance and reliability of information given to school administrators by student informants. Mawdsley and Cumming (2009) Thus the questions to be answered are

these: (1) Is information from one student informant enough to establish reasonable suspicion (i.e., reason to believe) that present in school is something in violation of law and/or school system policies? (2) Is the information given by one student enough information on which to conduct a "strip search" of another student?

Policy Implications

In an era when communities live under a potential threat of terrorist acts and parents worry about the safety and security of their children while at school and in attendance at school sponsored events and activities, it behooves public school officials and administrators to remain extremely diligent and proactive. School officials and administrators can not wait for something to happen before they spring into action. It is little wonder that the literature in public school law is filled with discussions of student disciplinary options. Among the topics of discussion by legal scholars student search and seizure (especially *strip searches*) remain prominent.

In anticipation of the forthcoming decision reached by the United States Supreme Court in Redding (2008), the following statement from Alexander and Alexander (2009) might provide a helpful clue to the Court's bottom line rationale: "…the pervasiveness of drugs in American society and their deleterious effects on schools have led some courts to give school officials increasing latitude in the conduct of searches. Strip searches have been upheld where reasonable suspicion was established by word of mouth among school employees and students, bulges in clothes, and other implications of concealment of drugs."

As I discovered early in my forty-plus years of professional practice, it is a risky business to guess with certainty how the United States Supreme Court will decide a specific case. However, in an effort to spot the potential policy implications of the decision (June 2009) in Redding v. Stafford U.S.D. No.1 (2008) here are my predictions. The Supreme Court will, by a narrow majority, reverse the Ninth Circuit and will:

- Reiterate its case hardened view that students in public schools possess Fourth Amendment rights and protections
- Insist that school safety and security are compelling interests of public school officials.
- Insist that the school's learning environment has special needs and must be kept drug-, weapon-, and thug-free.

- Make it clear that school officials and administrators possess the authority and must act quickly and decisively to protect all students and staff from harm.
- Clearly state that student searches remain a viable and necessary disciplinary tool that must be available to school administrators.
- Rely on and not change the two-pronged T.L.O. (1985) standard of analysis.
- Demonstrate how the two-pronged T.L.O. (1985) standard is the viable standard to apply in judging the constitutionality of student strip searches conducted by public school principals.
- Apply the *special needs analysis* developed in Vernonia v. Acton (1995) and Board of Education v. Earls (2002).
- Caution school officials that because student strip searches are "highly intrusive" they are only appropriate: (1) where credible information and substantial evidence exist that individual students actually possess drugs, weapons, or other illegal/harmful/dangerous materials or devices, or items in violation of school policies, (2) as a last resort and where the facts of the situation require such, and (3) remain narrow in scope.

One final thought is in order. Even though the high court in Redding (2008) will sanction strip searches as a viable disciplinary option, the constitutional issues in situations that reach the lower courts will be decided on a case-by-case basis. In other words, student strip search cases will remain fact based.

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