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Update on School Searches

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Education leaders must develop policies that ensure safety and comply with the Fourth Amendment's prohibition of unreasonable searches and seizures.

School safety continues to present significant challenges for education leaders. Yet as educators work to maintain school safety, boards face a steady stream of litigation because officials have searched students suspected of putting themselves or others in danger. For example, students have been searched because they were suspected of bringing into schools such prohibited items as alcohol, weapons, and drugs.

Education leaders must develop up-to-date policies that ensure safety but that also comply with the Fourth Amendment's prohibition of unreasonable searches and seizures.

A recent dispute from New York illustrates the kinds of issues that can arise when educators act on their concerns for student safety. The case arose when a high school student and her mother sued the school board and various officials who searched her after they observed a depiction of a cat carved into her leg. The cuts on the student's leg led educators to ask her to lower her pants and lift her shirt to look for bruises and cuts on her body.

Officials said they acted as they did because they had seen photos on the student's cell phone that gave rise to their fear that she engaged in self-harm. The search did not reveal any bruises or other cuts on the student.

In response to the student's claim that officials engaged in what her lawyers characterized as a strip search and to a variety of other allegations, the federal trial court rejected all the student's claims and granted the school board's motion to dismiss the suit. The court ruled that officials did not violate her Fourth Amendment rights, in particular because by examining her for signs of possible self-harm, they were motivated by determining whether she might need medical care (*Masciotta v. Clarkstown Central School District* 2015).

Litigation on the Fourth Amendment

The Supreme Court has weighed in on two cases regarding a student's Fourth Amendment rights: *New Jersey v. T.L.O.* and *Safford Unified School District No. 1* v. *Redding*.

New Jersey v. T.L.O.

At issue in *New Jersey v. T.L.O.* (1985) was an assistant principal's search of a student's purse that led to her being adjudicated a juvenile delinquent for possessing marijuana. Ruling in favor of the State of New Jersey, the justices devised a two-part test to evaluate the legality of searches by school officials:

1. Consider whether the action was justified at its inception, meaning that reasonable grounds exist for suspecting that a search would turn up evidence that the student "has violated or is violating either the law or the rules of the school" (p. 342).
2. Determine whether the search was "reasonably related in scope to the circumstances which justified the interference in the first place" (p. 341).

The Court added that "a search will be permissible in its scope 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" (p. 342).

Insofar as school searches are designed to ensure safety where there are usually large numbers of students and relatively few adults present, educators need only articulable justification in order to proceed. As such, the vast majority of courts have ruled in favor of school officials and boards

if they comply with the two-part *T.L.O.* standard.

Recognizing how different types of searches involve varying levels of intrusiveness, courts typically uphold searches of students' cars in school parking lots (*State v. Best* 2010), lockers (*In re F.B.* 1999a, 1999b), and backpacks (*State v. A.J.C.* 2014) for routine administrative purposes connected with the general welfare of schools. Courts have also upheld off-campus searches (*Shade v. City of Farmington* 2002) and the use of sniff dogs (*Burlison v. Springfield Public School* 2013a, 2013b) and metal detectors (*D.H. ex rel. Dawson v. Clayton County School District* 2014), with the latter being upheld because they are minimally intrusive and highly reliable. Courts continue to reach mixed results over searches of student cell phones.

Safford Unified School District No. 1 v. Redding

Controversy over the Fourth Amendment in schools continued with regard to an even more intrusive form of searches: strip searches. Following *T.L.O.*, the majority of courts struck down strip searches for personal items rather than drugs or other contraband. In addition, most refused to impose personal liability on officials who carried out or directed others to conduct strip searches.

In a dispute from Arizona, *Safford Unified School District No. 1* v. *Redding* (2009), the Supreme Court entered the fray over strip searches. *Safford* arose when an assistant principal (AP) ordered a school nurse and an administrative assistant to strip-search a middle school student in an attempt to locate ibuprofen.

Relying on *T.L.O.*, the *Safford* Court affirmed that the search was unconstitutional because the AP lacked the requisite level of suspicion, insofar as he was looking for what he knew were over-the-counter medications. The Court noted that no matter how much the presence of the pills in school violated board policy, the AP had no reason to suspect that the student was distributing large amounts of drugs or that she was hiding painkillers in her underwear.

The justices explained that such an intrusive search could not have been based on general possibilities absent evidence that students in the school had pills in their underwear. The Court added that without evidence that the student posed a threat to her peers because of the power or quantity of the drugs or that she was hiding pills in her underwear, the search was unreasonable. Focusing on searches for drugs as unconstitutional, the Court left the door open to the possibility that strip searches may be permissible for weapons.

Reversing in the AP's favor, the Supreme Court decided that the AP who ordered the search was entitled to a grant of qualified immunity, because the law concerning strip searches was unclear at the time he ordered the search and the student's rights were not clearly established.

Later Developments

In the vast majority of the hundreds of disputes applying *T.L.O.*, school boards prevail, which highlights the need for school boards to have sound policies in place.

A 2010 dispute from Kentucky illustrates the status of strip searches. The Sixth Circuit affirmed that school officials who strip-searched students for money, a credit card, and other items of value were *not* entitled to qualified immunity (*Knisley v. Pike County Joint Vocational School District* 2010a, 2010b), meaning they were personally liable for damages. The court pointed out that clearly established case law put the school board and its employees on notice that such a search was unconstitutional.

Consent for a search must be voluntary (*Lopera v. Town of Coventry* 2011); however, as noted in the discussion of the New York case earlier—where school officials asked a student to lift her shirt to look at a cut on her body and examined her cell phone for evidence of self-harm—a federal trial court in New York rejected her claims that they violated her Fourth Amendment rights (*Masciotta v. Clarkstown Central School District* 2015).

Recommendations

Pursuant to the two-part test the Supreme Court enunciated in *T.L.O.*, officials can search student property under a variety of circumstances. Yet confusion remains regarding strip searches. It is worth noting that although the *Safford* Court invalidated the search for over-the-counter medications as unconstitutionally intrusive because it was not reasonable under the *T.L.O.* standard, it did not forbid the use of strip searches in all circumstances, such as when officials might be seeking weapons. Even so, educators should resort to strip searches only after using less intrusive means, such as using handheld wands to detect the presence of metal.

When dealing with searches, especially strip searches, educators should proceed with extreme caution in balancing legitimate student expectations of privacy and school safety. Even though the vast majority of strip searches based on individualized suspicion have not resulted in personal or financial liability, the expense of litigation and the resulting turmoil in districts are costs that cannot be measured adequately. In fact, the human cost in bad feelings and distrust over strip searches may fester for years.

When updating search policies, education leaders, acting in conjunction with their attorneys, should consider the following key elements:

1. Involve faculty, staff, parents, and students in developing search policies. When dealing with searches of students or their property, including strip searches, policies should be

clear that insofar as their goal is to ensure safety, students have diminished expectations of privacy in school.

2. Ensure that policies are consistent with federal and state case law and statutes.
3. Include policies in handbooks and on district Websites to inform faculty, staff, students, and their parents about their contents. By way of illustration, Ohio law directs boards with search policies in place to post them conspicuously at or near the entrances to schools (Ohio Revised Code, 3313.20[a], 1995).
4. Students, their parents, or both should be required to sign acknowledgment forms indicating that they understand and will abide by school rules, especially with regard to grounds for searches.
5. Policies should include guidelines and strategies limiting the discretion of school personnel during searches, including who can conduct searches, such as the principal, AP, or a school security officer, along with where they can look, requiring them to use the least-intrusive means possible in order to safeguard the legitimate privacy interests of students in their persons and property. Ordinarily, no one should conduct searches alone, as doing so leaves individuals open to liability.
6. Before conducting searches—unless exigent circumstances exist, such as when looking for weapons—educators should clearly document the need to act. In other words, as in *Safford*, since time is not usually of the essence, if educators spend a little extra time investigating the necessity to search, they greatly increase the likelihood that their actions will be upheld in the face of judicial challenges. During investigations, students should not be left alone, whether waiting in an office or attending class.
7. Policies should call for witnesses to be present when officials search students' lockers, backpacks, cars, or persons. Further, if time permits—particularly for more intrusive searches, such as those of students, their lockers, or cars—officials may wish to call parents to afford them the option to be present for the searches, along with their children.
8. To protect the due process rights of students and to have a record of what occurred, school officials should videotape searches.
9. Educators should, if at all possible, avoid strip searches as overly intrusive. As such, educators should use strip searches only as a last resort by, for instance, using handheld wands to search students. If educators still find it necessary to conduct strip searches, then they should do the following:
   - Take extra precautions to ensure that they are relying on accurate information, not uncorroborated evidence.
   - At a minimum, make sure that the school personnel who conduct strip searches as well as witnesses are of the same gender as the students to protect their privacy rights. For instance, Oklahoma law calls for witnesses of searches to be of the same sex as the students(s) being searched if practical while also forbidding strip searches (70 Oklahoma Statutes, Title 70, § 24-102, 2001).
10. Because case law with regard to searches is ever-evolving, education leaders should consult with their attorneys in updating their policies regularly.

Conclusion

Insofar as legal issues tend to evolve at a faster pace than most areas involving schools, and the cost of litigation continues to escalate, district leaders should ensure that their policies are up-to-date. By keeping policies current, school business officials and other education leaders can enhance the likelihood of helping their boards save money by devising plans designed to protect student safety while avoiding costly legal battles.

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