

9-2013

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Russo, Charles J., "Sniff Dogs in Schools: Do the Noses Know?" (2013). *Educational Leadership Faculty Publications*. 148.
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Sniff Dogs in Schools: Do the Noses Know?

By Charles J. Russo, J.D., Ed.D.

The use of drug-sniffing dogs in schools raises questions about Fourth Amendment Rights.

As drugs and other contraband made their way into schools starting in the 1960s, education leaders turned to drug-sniffing dogs, which typically work in conjunction with law enforcement officials, to detect the presence of contraband in learning environments. In fact, sniff dogs—or their noses—are a highly effective, reliable, and unobtrusive means of discovering potentially dangerous contraband, such as drugs, alcohol, and even gunpowder from firearms. Accordingly, the vast majority of courts have upheld the use of sniff dogs in schools when challenged under the Fourth Amendment’s prohibition against unreasonable searches and seizures.

The use of drug-sniffing dogs has come to the legal forefront in two recent Supreme Court cases from Florida. Although these disputes did not arise in schools, they are worth reviewing because they raise important questions about the use of sniff dogs in educational contexts.

In February 2013, in *Florida v. Harris*, the Court ruled that it was unnecessary for police to rely on a lengthy certification checklist in order to establish the reliability of sniff dogs. Then in March 2013, in *Florida v. Jardines*, the Court found that the use of a sniff dog in a police drug investigation—albeit at a private residence rather than a school—was a search within the meaning of the Fourth Amendment.

School-Related Litigation

In early cases, a federal trial court in Indiana with regard to a classroom search (*Doe v. Renfrow* 1979, 1980a, 1980b, 1981) and the Fifth Circuit, in a lengthy dispute over a search of a car in a school parking lot in Texas (*Jennings v. Joshua Independent School District* 1989a, 1989b, 1990, 1991, 1992a, 1992b), upheld the use of sniff dogs

as not being searches under the Fourth Amendment. Earlier in a case from New Mexico, the Tenth Circuit allowed the use of sniff dogs in searches of student lockers (*Zamora v. Pomeroy* 1981). In cases with a twist, a federal trial court in Virginia (*Burnham v. West* 1987, 1988) decided on the merits, whereas another in Texas suggested in dicta (meaning that it was not part of the actual judgment) that when educators, rather than dogs, sniffed the hands of children, they did not perform searches (*Jones v. Latexo Independent School District* 1980).

The supreme courts of Pennsylvania and Indiana, along with federal trial courts in Texas, Alabama, and Tennessee, upheld the use of sniff dogs. The court in Pennsylvania reasoned that the use of a sniff dog in a general search of 2,000 lockers that led to the discovery of drugs and drug paraphernalia in one student’s locker was permissible (*Commonwealth v. Cass* 1998a, 1998b). The court observed that the search was constitutional because it was a minimally intrusive invasion of the student’s limited privacy interests in his locker; officials forewarned students of the possibility of a search, which followed stringent guidelines in which its date and time were set weeks in advance; its scope was predetermined; and the drug dog was used to limit the search’s intrusiveness.

The court in Indiana affirmed that when officials used a canine to search for drugs but instead discovered a firearm in an unoccupied car in the school’s parking lot, their actions were legal (*Myers v. State* 2005, 2006). According to the court, since educators did not need reasonable suspicion of criminal activity in order to proceed, there was no reason to suppress the evidence where the student was charged with felony possession of a firearm on school property.

In Texas, a sniff dog alerted officials to a possible violation of a rule involving illegal narcotics or alcohol in a student's truck that was parked at school. Even though the search failed to discover drugs, the court permitted the student's suspension because educators uncovered a machete in the toolbox of his truck in violation of a rule prohibiting the possession of illegal weapons (*Bundick v. Bay City Independent School District* 2001).

Similarly, a federal trial court in Alabama determined that where a dog detected the odor of narcotics in a car in a school's parking lot, but none were discovered, a student could be placed in an alternative educational setting because officials uncovered an Xacto knife and a large pocketknife in violation of rules against weapons (*Marner v. Eufaula City School Board* 2002).

A federal trial court in Tennessee refused to suppress evidence where a student was disciplined under a zero-tolerance policy after a random sweep by a sniff dog in a school parking lot led to the discovery of alcohol in a duffel bag inside his vehicle (*Hill v. Sharber* 2008). The court indicated that insofar as the dog that alerted the police to search the car was properly trained and possessed the requisite indicia of reliability, the search was constitutional.

The federal trial court in New Hampshire rejected a challenge to the use of sniff dogs to search a school with a history of drug problems (*Doran v. Contoocook Valley School District* 2009). At the outset, educators directed students to leave their belongings in the school and report to the football field where they were told that officials were conducting a safety check of the building. Along with refusing to treat the use of the dogs as a Fourth Amendment search, the court rejected the claim that educators engaged in an impermissible seizure

when they had students gather on the football field.

An appellate court in Texas rejected the claim of a student who was adjudicated delinquent where a sniff dog discovered marijuana in her backpack (*In re D.H.* 2010). The court affirmed that insofar as the student and her peers were in a school hallway while the dog was in their classroom seeking drugs, the search was legal because the canine sniffed only the belongings and not the people.

Most recently, the Eighth Circuit unanimously affirmed that school officials and police in Missouri did not violate the Fourth Amendment rights of a student when a sheriff directed him to leave his backpack in his classroom for about five minutes while it was examined by a sniff dog even though it did not uncover drugs (*Burlison v. Springfield Public Schools* 2013).

The search was legal because the dog sniffed objects, not people.

Insofar as it agreed that the search was part of a reasonable procedure designed to maintain school safety and security, the court concluded that officials did not violate the student's rights. The court found that the search was constitutional because (1) the student was separated from his belongings for only a short time, (2) the dog's actions were minimally intrusive and provided an effective means for meeting the requisite degree of individualized suspicion to conduct more intrusive searches, and (3) educators had an immediate need for the search in light of substantial evidence of a drug problem in district schools.

In one of two cases at least partially rejecting the use of sniff dogs, the Fifth Circuit invalidated a search of students in Texas in explaining that educators lacked the needed individualized reasonable suspicion and that the canines' having placed

their noses directly on students was a particularly intimidating invasion of their privacy. Yet the court pointed out that a search of student lockers and cars was permissible because since the dogs were sniffing only inanimate objects, the sole legal inquiry was about their record of reliability (*Horton v. Goose Creek Independent School District* 1982, 1983).

Subsequently, the Ninth Circuit expanded the Fifth Circuit's rationale in affirming that positioning a sniff dog at classroom doors in California, in proximity to students, violated their rights to privacy (*B.C. v. Plumas Unified School District* 1999). Moreover, the court upheld the dismissal of a student's damages claim for lack of standing since he did not attend the school where the search occurred.

Nonschool Litigation

The first of two nonschool cases, *Florida v. Harris* (2013), concerned whether a police officer who stopped a motorist for a routine traffic check could use a dog to sniff the truck for drugs since the driver appeared to be nervous and had an open beer can. The driver refused to consent to the sniff search. The dog alerted the officer to the driver's-side door handle, leading him to believe that he had probable cause for a search that ultimately discovered nothing that the canine was trained to detect. Even so, the search uncovered pseudoephedrine and other ingredients for manufacturing it, resulting in the driver's arrest for illegal possession of those ingredients.

In a later stop while the driver was out on bail, the same dog sniffed the same truck but found nothing of interest. After lower courts refused to suppress the results of the first search, the Florida Supreme Court invalidated the search on the basis that a wide array of evidence was necessary to establish probable cause.

On appeal, a unanimous Supreme Court, in an opinion by Justice Elena

Kagan, upheld the search. The Court noted that insofar as the dog's training and testing records demonstrated its reliability in detecting drugs and the defendant failed to undermine the evidence, the officer had probable cause to search the truck. The Court expressly rejected the notion that a drug-detection dog's reliability should depend on a lengthy checklist of evidentiary requirements.

Educators must act cautiously when using canines to search items.

Florida v. Jardines (2013)

involved a defendant who challenged the actions of police who used a sniff dog that was trained to detect the odor of marijuana, cocaine, heroin, and other drugs for bringing the canine onto the front porch of his residence to investigate an unverified tip that marijuana was being grown inside the dwelling. On further review of orders suppressing the search, the Supreme Court affirmed in favor of the defendant.

In a five-to-four judgment authored by Justice Antonin Scalia, the Supreme Court viewed the actions of the police as an impermissible trespassory invasion because the defendant had not invited them onto his property. Since *Jardines* is the first case wherein the justices agreed that the use of sniff dogs was a Fourth Amendment search, educators must act cautiously when using canines to search items such as backpacks where students may have reasonable expectations of privacy.

Discussion and Recommendation

Harris and *Jardines* are unlikely to have a major impact on the use of sniff dogs in schools for two reasons. First, policies calling for the use of sniff dogs with demonstrated reliability, the position that the Supreme Court enunciated in *Harris*, should withstand judicial scrutiny when educators continue to work closely

with police who, as a matter of standard operating procedure, use highly trained canines.

Second, *Jardines* involved a private home, a location that is typically entitled to greater privacy than a school. The Supreme Court relied heavily on the fact that the search was in a private dwelling. Consequently, given concerns for school safety, especially if reliable, well-trained dogs and their handlers are invited in by educators in response to articulable concerns, a rationale that Justice Alito's dissent raised in *Jardines*, policies are likely to survive challenges.

Harris and *Jardines* are worthy of consideration in the context of school-related sniff dog litigation because they offer guidance to school business officials, their boards, and other education leaders as they seek to craft effective guidelines. These educators, then, should enact policies designed to balance the legitimate privacy interests of students in their persons and property against their duty to maintain safe and orderly learning environments by keeping contraband out of schools. In developing policies, educators should keep the following points in mind:

1. Consistent with the general approach to developing policies, teams should include representatives of key constituencies when they are initially developed and when they are revised because ensuring broad-based cooperation is of invaluable assistance. At a minimum, policy-writing teams should include board members, the board lawyer, the school business official, building-level administrators, teachers, staff, parents, and students, especially in high schools and perhaps in middle schools. It would also be wise to include on such teams a member of the law enforcement community who works with sniff dogs.

2. Policies must include clear rationales, such as highlighting problems with drugs, alcohol, or

weapons-related violence in a particular school or schools, when seeking to employ generalized preventative sniff dog searches. As noted, although dogs are typically under the direction of the police, policies should insist that law enforcement officials test their canines regularly to ensure their reliability.

3. Policies should specify that insofar as schools are public property subject to searches at the discretion of educators, students have diminished expectations of privacy, thereby permitting the use of sniff dogs more readily than in locations such as private residences. In a related matter, since parking on typically limited school property is a privilege rather than a right, policies can require students and their vehicles to be subject to sniff searches if they wish to park their cars on campus.

4. Policies should be included in student and faculty handbooks. Further, students and parents should be required to acknowledge in writing that they have read, understand, and agree to abide by handbook provisions.

Policies must include clear rationales.

5. Policies should require the presence of witnesses at sniff searches. As an added safeguard, searches should be videotaped to avoid charges that educators or police "planted" evidence.

6. Policies should identify who can request canine searches, time frames for doing so, the scope of searches, and the locations in schools and at school events that are subject to sniff searches.

7. Policies should establish guidelines for handling dogs, ensuring that they sniff property and not persons per se, since courts have invalidated searches in which canines came into physical contact with students.

8. If searches are conducted by staff, such as school resource officers, rather than law enforcement personnel, policies should indicate that the discovery of contraband may be reported to the police if there is evidence of possible criminal violations.

9. Since the law of searches, whether via sniff dogs or other means, continues to evolve, school districts should review their policies annually to ensure that they are up-to-date with developments in state and federal law.

Conclusion

Since sniff dogs represent an effective, reliable, unobtrusive means to help educators ensure safe and orderly learning environments by keeping contraband out of schools, school districts should devise or reexamine their policies in line with the legal principles enunciated in the cases discussed above. The

sooner leaders enact such policies, the sooner building-level educators will have another tool to help maintain schools as safe learning communities.

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