

THE RISK OBSERVER

FOUNDED 2006 — VOL. CLXI

PROFESSIONAL UNDERWRITERS

DAILY 5 CENTS, SUNDAY 15 CENTS

STUDENT SEARCHES

The Fourth Amendment to the United States Constitution protects citizens against unlawful and unreasonable searches and seizures. Pupils are citizens. Any search of a pupil or his or her belongings raises a Fourth Amendment question.

Two important U.S. Supreme Court decisions have helped to define the issue. The first, *Tinker vs. Des Moines* (1968) established clearly that students are citizens, with rights under the constitution. The second case, *New Jersey vs. T.L.O.* (1985) agreed with *Tinker* and went on to establish that students are to be free from unreasonable searches and seizures. (The court, however, found that in the specific case of *T.L.O.*, the search and seizure was, in fact, reasonable and hence sustainable.)

In general, the courts have given the schools wider search and seizure latitude in dealing with students than law enforcement agencies. For example, schools generally do not have to meet a probable cause test, but only have a reasonable suspicion that a search is necessary. Search warrants are not required. The searcher must be non-invasive and mindful of the student's constitutional rights.

For the searcher, the importance of this issue is two-fold. First, if the search is perceived to be excessively invasive or made with malice, the searcher and his or her school district are open to suit by the student searched.

Second, if the search was conducted improperly or without cause, any evidence of wrongdoing on the part of the pupil uncovered by the search will probably be suppressed, thus frustrating the entire process and weakening the administrative grip on undesirable student activities.

There is an important caveat that must be understood here before we proceed. Some state high courts may have chosen to retain the probable cause threshold for a school search to be lawful under that state's constitution. If this is the case, the school administrator conducting a search must not undertake it haphazardly and without careful consideration of the factors, which make a search and/or seizure acceptable to the state courts in spite of the finding in *New Jersey vs. T.L.O.*

LOCKER SEARCHES

Student searches and seizures can be arranged in two broad categories; the person and his or her property, or occupied space such as a locker. The latter category can be dealt with rather straightforwardly. As a matter of school district policy, which is clearly communicated to both students and their parents, school lockers, desks or other space used by students are school property loaned to the student for his or her use. Further, the student should understand that searches of these areas by school officials for any purpose including public health might be made at any time. Schools should loan keyed alike locks for student use and prohibit private locks from being used. Such a policy, when properly advertised, will significantly reduce the student's expectation of privacy and avoid a number of Fourth Amendment problems unless it is used to harass a specific student without concrete justification for a search.



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VEHICLE SEARCHES

Searches of student vehicles on school property can be conducted under the same general theory by requiring a parking permit, which requires an application form including permission to search. Care should be taken to avoid damaging the vehicle and reasonable cause would be a good guideline to follow. Contraband inadvertently left in plain view by a student can usually justify a seizure depending on a clear and present danger or serious threat. Having a hunting rifle hung on a rack in the back window of a pick-up truck may or may not constitute a danger or threat of danger in your community. It would be wise however; to prohibit bringing guns, knives, drugs or other defined contraband on school property by school policy, again, clearly disseminated. The searching of the person is a much more complex issue which places the school administrator's important obligation to provide a safe learning environment squarely in opposition to the student's expectation of privacy.

BODY SEARCHES

There are numerous levels of invasiveness in personal searches ranging from the observation of a bulge under someone's clothing indicating the possible presence of a handgun, to the use of metal detectors or to the use of drug sniffing dogs to the strip search and manual examination of body cavities. This last, the examination of body cavities should never take place in a school setting. This kind of search is so intrusive as to be repugnant from any point of view with respect to a person of school age except when conducted by law enforcement officers under special circumstances away from school.

SEARCH AND SEIZURE ADMINISTRATIVE PROCEDURES

The conditions under which search and seizure are appropriate should be the subject of carefully drawn policy and administrative regulations, which are reviewed by those with a demonstrated expertise in the field. School staff members who are most likely to be involved in school searches should be brought together and instructed in the regulations and the law. There should be no misunderstanding of intent in this matter. Again, such policies and regulations must be communicated to the students, staff and community.

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Some of the elements, which determine the constitutionality of a search and seizure in school, should be a part of the administrative regulations. These include:

- Searches must be based on a reasonable belief that the student has violated a published and understood school regulation or law.
- Those conducting or authorizing the search must be able to state which rule is suspected of being violated and that it is normal past practice to search students under similar circumstances rather than ignore the rule or selectively enforce it. The information whether by observation of an adult or a tip by a student, must be recent, believable, and directly related to the object of the search and not based on supposition or vague impressions. It must connect the student to the rule.
- Searches must be reasonable in extent in light of the age and sex of the pupil, the seriousness of the suspected contraband expected to be found and the immediacy of any danger the contraband may present.
- The search stops when the suspected item or items are found.
- The search is conducted in private by persons of the same sex as the student being searched with adult witnesses of the same sex.
- The contraband found is packaged, sealed and identified in all respects as to time, date, place, persons and contents.
- If school security officers are present, they should not take the lead in the search but merely observe since they may be treated as police and place the requirement for the search on the higher "probable cause" level.

In addition, the administrator may consider the school record of the person suspected of having contraband as well as the general school atmosphere and necessity to deal with a serious school wide problem. However, the extent of the search must be related to the items expected to be found. A strip search would be clearly unacceptable when looking for cigarettes or a small amount of money. Such a search would probably be sustained when looking for a dangerous weapon or exotic and powerful drugs.

A student who consents to a search cannot claim a violation of rights if the consent is not coerced. Always ask. If the student declines and the reasonable suspicion standard cannot be met, don't search. Parents should always be contacted and informed as to what is suspected and your procedure. If the student declines but the reasonable suspicion standard is met, proceed with the search as indicated above.

UNANNOUNCED SEARCHES

Periodic unannounced searches of lockers and book bags or packs can be conducted as deterrence to carrying contraband in a school. Such searches must apply to everyone equally and not go any further than indicated. Prior general warning of such searches sent to parents in writing as well as clearly informing the students of the procedure and its purpose is a good precaution against suits. Whenever there is reasonable suspicion that danger may be imminent because of the possibility that a student is carrying a dangerous weapon or device, you should conduct a search immediately. The rest of the students and the staff have the expectation of being protected from someone carrying such contraband. Certainty that the suspect is armed is not required, but there must be more than an unconfirmed, generalized suspicion.



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Under no circumstances should a search be conducted unless the conditions above have been met. The school staff should be carefully and fully informed of the issues, the district policy and regulations and the appropriate steps to be taken prior to a search of any depth.

ADULT INTRUDERS

If an adult intruder or visitor is suspected of carrying weapons or illicit drugs, you should attempt only to have the suspect isolated from the student population and call the police to deal with the matter. While the police must observe a more stringent "probable cause" trigger to conduct a personal search, they have a greater expertise in these matters and can work with you to get the desired results. Remember, in this circumstance an adult is anyone 18 years of age or older who does not regularly attend the school in which his or her suspicious activity is observed.

SUMMARY

School officials generally have good faith immunity against charges of rights violations; however, they have also been successfully sued for the violation of those rights, especially if the school authority cloaks a willful persecution in the authority of the school.

It is important, in spite of the constraints and perceived difficulties, not to shrink from necessary searches and seizures. As a school administrator, you are in the best position to judge the reasonableness of a search and you are as aware of the need to balance individual rights against the safety and security of the entire school as anyone. Use your experience and your good judgment to tell you what is appropriate in light of the discussion above.

