

PUBLIC SCHOOL SEARCH AND SEIZURE LAW

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SEARCHING STUDENTS AT SCHOOL

I. Background Legal Foundation

1. Legal Issues Connected With Searches Of Students in Public Schools -- The Fourth Amendment to the United States Constitution.

- A. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. The Fourth Amendment to the United States Constitution states:
- “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.”
- B. The purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials and to give concrete expression to a right of the people which “is basic to a free society.”¹
- C. An unlawful “search” occurs when the government infringes upon an individual’s legitimate expectation of privacy.² The test used to determine the existence of a “reasonable expectation of privacy” is whether the person expects his actions will be free from government intrusion.
- D. The Fourth Amendment requires that governmental searches meet a “reasonableness standard.”
- (1) Reasonableness is measured by examining the totality of the circumstances surrounding the search and balancing the intrusion “on the individual’s Fourth Amendment interests” against the search’s “promotion of legitimate governmental interests.”³

¹ *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967), citing *Wolf v. Colorado*, 338 U.S. 25, 27 (1949); O’Pry, *A Constitutional Mosh Pit: The Fourth Amendment, Suspicionless Searches, and the Toughest Public School Drug Testing Policy in America*, 33 Tex. Tech L. Rev. 151, 159 (2001).

² *Katz v. United States*, 389 U.S. 347, 361 (1967).

³ O’Pry, *supra*, 33 Tex. Tech L. Rev. 151, 163 (2001), citing *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); and, *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652-53 (1995).

- (2) Generally, any search will be found to be unreasonable “where the government or its agent has not proven it to be necessary.”⁴
- E. The most common method of demonstrating the “reasonableness” of a search is by a showing of “probable cause” which is the “level of suspicion which is required to justify government intrusion upon interests protected by the Fourth Amendment.”⁵

2. Development of the “Special Needs” Exception To the Probable Cause and Warrant Requirements of the Fourth Amendment.

- A. The Courts have also recognized that certain environments and circumstances require an exception to the “probable cause” standard which are called “special needs exceptions.”
 - (1) Searches that meet the special needs exception carry a presumption of reasonableness without a warrant.⁶
 - (2) In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court established a special needs exception that justified a police officer’s warrantless search for weapons. *Id.* at 20. In so doing, the Court asked if the search was justified at its inception and if the search was reasonably related in scope to the goal to be achieved. *Id.* at 19-20.
 - (3) The “Special Needs” exception to the probable cause and warrant requirements of the Fourth Amendment widened after *Terry, supra*.⁷

⁴ Heder, *The Development of Search & Seizure Laws in Public Schools*, 1999 BYU Educ. & L.J. 71, 82 (1999); and, O’Pry, *supra*, 33 Tex. Tech L. Rev. 151, 163.

⁵ *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

⁶ Heder, *supra*, 1999 BYU Educ. & L.J. 71, 80; O’Pry, *supra*, 33 Tex. Tech L. Rev. 151, 166.

⁷ *O’Connor v. Ortega*, 480 U.S. 709 (1987) (employee did not have an expectation of privacy in his desk and file cabinets); *United States v. Ward*, 131 F.3d 335 (3rd Cir. 1997)(involuntary HIV testing of individuals accused of sexual assault was constitutional based on government’s need to insure that victims of sexual assaults are notified if their attacker carried HIV); *Skinner v. Railway Labor Executives’ Association*, 489 U.S. 602, 109 S.Ct. 1402 (1989)(Suspicionless searches and seizures upheld to conduct drug testing of railroad personnel involved in train accidents); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384 (1989)(random drug testing of federal customs officers who carry arms or are involved in drug interdiction).

- B. The Supreme Court has identified four factors that “trigger” the “special needs” exception to the Fourth Amendment’s warrant and probable cause requirements.⁸ The four factors are:
- (1) Whether the intrusiveness of the search violates a person’s expectation of privacy. *Terry, supra*, 392 U.S., at 9.
 - (a) defining the relationship between the party being searched and the one conducting the search.
 - (b) determining whether the voluntary nature of the action leading to the search diminished the individual’s expectation of privacy.
 - (2) Whether the interest of the government to be advanced by the search is “compelling.”
 - (3) Whether the need for the search is immediate, and whether the search insures a higher likelihood of success than other available alternatives.
 - (4) Whether the degree of risk that the government would conduct the search arbitrarily.

II. The Fourth Amendment Applied To Public Schools

1. The “Special Needs” Exception Applied To Public Schools In *New Jersey v. T. L. O.*

- A. In 1985, the Supreme Court applied the “special needs” exception to a case arising in a public school environment.⁹
- B. In *New Jersey v. T. L. O., supra*, the Court found that the warrant requirement was not suited for a public school environment because it would unduly interfere with the school’s need to maintain the swift and informal disciplinary procedures that were necessary in a school setting. *Id.* at 340.
- (1) In *T. L. O., supra*, female students were discovered smoking in a restroom. Vice-Principal opened TLO’s purse and found cigarettes, rolling papers, marijuana and drug paraphernalia.

⁸ Floyd, *Searches in the Absence of Individualized Suspicion: The Case of Vernonia School District 47J v. Acton*, 50 Ark L. Rev. 335, 341 (1997). See also: O’Pry, *supra*, 33 Tex. Tech L. Rev. 151, 174-175.

⁹ *New Jersey v. T. L. O.*, 469 U.S. 325 (1985).

- (2) The Court held that a search in a school environment was justified at its inception when reasonable grounds existed for suspecting that a search would produce evidence of a student's violation of a law or school rule. *Id.* at 345.
- (3) The Court further found that "the power that school officials exercise over their students is "custodial and tutelary" and that a school may exercise a degree of control and supervision over students that would otherwise be unconstitutional if exerted over a free adult.¹⁰

2. The Concept of "Reasonable Suspicion" in Public Schools.

- A. The overwhelming majority of student searches in a public school result from some "reasonable suspicion" by a school district employee that the student has engaged in conduct which violates school rules or the laws of the state.¹¹
- B. In order to have "reasonable suspicion," a school employee must have facts which are of sufficient quantity and certainty to establish a sufficient probability that the suspicion is true. To justify the search, the school employee must be able to:
 - (1) Identify specific observations or knowledge;
 - (2) Indicated the rational inferences that were drawn from all available observations and facts considered as a whole; and,
 - (3) Explain how the available facts and rational inferences provided a particular and objective basis for the suspicion when they were combined with the special background, training and experiences possessed by the school employee.¹²
- C. In order to be "reasonable" the school employee's "information" or "knowledge" must come from valid sources which can include:
 - (1) The Employee's Personal Observations and Knowledge. The employee's training, background, expertise, skills and other knowledge may provide the

¹⁰ *T. L. O.*, *supra*, 469 U.S., 341, cited by O'Pry, *supra*, 33 Tex. Tech L. Rev., 180. *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 109 S.Ct. 1402 (1989)(Suspicionless searches and seizures upheld to conduct drug testing of railroad personnel involved in train accidents); *Nat' Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384 (1989)(random drug testing of federal customs officers who carry arms or are involved in drug interdiction).

¹¹ Doggett, *School Law's Balancing Act*, 24-DEC Mont. Law. 11 (1998).

¹² Van Dyke and Sakurai, *Checklists for Search and Seizure in Public Schools, Search and Seizure in Public Schools*, SRCHSCHLS § 3:1 (2007).

employee “an acute perspective for interpreting any observations in the school setting.”¹³

- (2) Reliable Reports of Other School Officials. There is a “general presumption of reliability” for any observations related from one official to another official.¹⁴
- (3) Reports of Eyewitnesses and Victims. These reports must be determined to be objective and credible by the school employee.
- (4) Informant Tips. These reports must be determined to be objective and credible by the school employee.

D. The suspicion must be based on facts that are of sufficient quantity and certainty to create a “sufficient probability” that the suspicion may be true. *T. L. O.*, *supra* at 346. “Reasonable suspicion” can exist even if it is just as likely, but not more likely, that the facts supporting the suspicion might have an innocent explanation.¹⁵

E. In order to justify a student search, a school employee's suspicion must include each of the following elements:

- (1) There must be a reasonable suspicion that a particular student has committed or is committing an infraction; and,
- (2) There must be a nexus or direct connection between the particular item sought and a specific suspected infraction; and,
- (3) There must be a link between the sought-after item with the particular place to be searched.¹⁶

F. The first element requires that the school employee have sufficient facts and observations to explain how and why a particular student is suspected of having committed a violation of the school rule.

¹³ Van Dyke and Sakurai, *supra*, SRCHSCHLS at § 3:7 (“It is generally accepted . . . that school officials may see something suspicious in student conduct that might not be recognized by the casual or untrained observer.”)

¹⁴ Van Dyke and Sakurai, *supra*, SRCHSCHLS at § 3:7.

¹⁵ Van Dyke and Sakurai, *supra*, SRCHSCHLS at § 3:2, citing *In re Frederick B.*, 192 Cal. App. 3d 79, 87 (1987).

¹⁶ Van Dyke and Sakurai, *supra*, SRCHSCHLS at § 3:2, citing *T. L. O.*, *supra*, 466 U.S., 345 and *U.S. v. Thomas*, 757 F.2d, 1359, 1367-68 (2d Cir. 1985).

- (1) Generally school officials can not indiscriminately search a large group of students just because they suspect that a school rule has been violated when they cannot connect the violation to any particular student.¹⁷
- (2) However, In *Thompson v. Carthage (AR) School District*, 87 F.3d 979 (8th Cir. 1996), the Eighth Circuit reviewed a decision by a high school principal to undertake a generalized search in which all male student from grades six to twelve were searched for dangerous weapons by emptying their pockets and being patted down if a metal detector sounded.
 - (a) The decision to search the male students was made after a bus driver reported that several bus seats were cut on the bus. The Plaintiff student was searched. A book of matches, a match box and a cigarette package were found in the student's coat pocket. The match box had a small quantity of crack cocaine in it. The student was expelled for the rest of the school year.
 - (b) The Court first looked at whether the Fourth Amendment's exclusionary rule applied to the circumstances of the case. The Court refused to apply the exclusionary rule, citing *T. L. O.*, *supra*.¹⁸
 - (c) Citing the Supreme Court's decision in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), the Eighth Circuit framed its inquiry into the constitutionality of the search by focusing on “whether the search is one that a reasonable guardian and tutor might undertake.” *Thompson, supra*, 87 F.3d, 982.
 - (d) The Court concluded that the principal’s decision “to undertake this generalized but minimally intrusive search for dangerous weapons was constitutionally reasonable.” *Thompson, supra*, 87 F.3d, 983.

¹⁷ Van Dyke and Sakurai, *supra*, SRCHSCHLS at § 3:2, citing *U.S. v. Cortez*, 449 U.S. 411, 417-418 (1981) and *Bellnier v. Lund*, 438 F.Supp. 47, 54 (N.D. N.Y. 1977).

¹⁸ The Court stated that:

“the societal costs of applying the rule in school disciplinary proceedings are very high. For example, the exclusionary rule might bar a high school from expelling a student who confessed to killing a classmate on campus if his confession was not preceded by *Miranda* warnings. We doubt that any parent would compromise school safety in this fashion. To the extent the exclusionary rule prevents the disciplining of students who disrupt education or endanger other students, it frustrates the critical governmental function of educating and protecting children.” *Thompson, supra*, 87 F.3d, 981.

- (3) Examples of observations that connect a particular student with a specific infraction may include:
- (a) Suspicious conduct and/or furtive gestures including innocent behavior that is out of context with surrounding circumstances, efforts to conceal an item, stealthy movements, attempts to hide, refusing to answer reasonable questions, time of day when observed.
 - (b) The demeanor of the student including nervousness or agitation.
 - (c) An unusual physical state including possible impairment from drug or alcohol consumption or disheveled appearance.
 - (d) Matching a description of an alleged perpetrator.
 - (e) Attempts to flee from school officials.
 - (f) Presence in “suspect” locations or proximity to the scene of the infraction.
 - (g) The “prior history” of the student.¹⁹

G. The second element, or “nexus” element requires the school employee to explain how and why the particular item sought is linked to a suspected infraction of the school rules. “The observation and known facts must raise a sufficient probability that the item is contraband or the fruits, instruments, or evidence of some specific infraction.”²⁰

H. The third element requires the school employee to be able to explain “how and why” there is a reasonable suspicion that the item sought would be found in the place that was searched.

3. Emergence of “Suspicionless” Searches in Public Schools.

A. In *Schail v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988), the Seventh Circuit issued the first Federal Court of Appeals opinion regarding the constitutionality of suspicionless school drug tests and upheld the drug testing program for student-athletes and cheerleaders.

¹⁹ Van Dyke and Sakurai, *supra*, SRCHSCHLS at § 3:5.

²⁰ Van Dyke and Sakurai, *supra*, SRCHSCHLS at § 3:2, citing *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967)

- (1) The Court recognized the impracticality of developing reasonable suspicion due to the specific situational circumstances found in a school setting.
 - (2) The Court stated that there is a “heightened expectation of privacy” in the act of urination, but that factor was mitigated by the fact that only athletes were tested and the collection method was minimally intrusive.
- B. In *Brooks v. East Chambers Consolidated Independent School District*, 730 F. Supp. 759 (S.D. Tx. 1989) *aff’d* 930 F.2d 915 (5th Cir. 1991), the Fifth Circuit issued an opinion that found a school district suspicionless drug testing program to be unconstitutional.
- (1) The Court found that the “special needs” needed to justify the suspicionless drug testing program would only be present if the district could demonstrate that the athletes and other participants in the district’s extracurricular activities were much more likely to use drugs than non-participants, or that the drug use by participants interfered with the district’s educational mission.
 - (2) The Court also ruled that the district’s drug testing program was not likely to discourage drug use by students.

4. The Supreme Court's Decision In *Vernonia School District 47J v. Acton*.

- A. The Supreme Court's decision in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) found that the district’s student athlete drug policy, which authorized random urinalysis drug testing of student’s who participated in its athletic programs, did not violate the student’s federal or state constitutional right to be free from unreasonable searches in that the school district had immediate, legitimate concerns to prevent student athletes from using drugs, invasion of student privacy was negligible and district was not required come up with the “least intrusive” search.
- B. The Vernonia school district is located in northwestern Oregon. During the two years prior to the development of the drug testing program, the district's disciplinary problems had nearly tripled. After unsuccessfully trying other intervention strategies, the district implemented a drug assistance program, that contained a drug testing component, with the stated purpose “to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs.” The policy applied to all students who were participating in extracurricular athletics and required written consent of the student athlete and his/her parents.
- C. The *Vernonia* Court relied on its decision in *T. L. O.*, *supra*, where it found “special needs” existed in a public school context because the warrant requirement would unduly interfere with maintaining the swift and informal disciplinary procedures needed in schools and because strict adherence to a probable cause requirement

would undercut the substantial need of teachers and administrators to maintain order in their schools. *Vernonia, supra*, 515 U.S. at 653.²¹

D. The *Vernonia* Court reviewed the “triggers” for “special needs” that it had identified in previous cases. The Court looked at the nature of the privacy interest, the degree of intrusion, the nature and immediacy of the district’s concerns and whether the drug program could be less intrusive to accomplish the same goal. The *Vernonia* Court found as follows:

- (1) Privacy Interest -- The *Vernonia* Court found that “a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.” *Vernonia, supra*, 515 U.S., 655, citing *T. L. O., supra*. The Court also stated that “. . . for many purposes, ‘school authorities act in loco parentis,’ with the power. . . to ‘inculcate the habits and manners of civility.’” and that “the nature of [a student’s constitutional] rights is what is appropriate for children at school.”²² The student’s legitimate expectation of privacy was less than members of the population generally, and even less with regard to student-athletes who have reasons to expect intrusions. *Id.* at 657.²³
- (2) Degree of Intrusion. The *Vernonia* Court found that the degree of intrusion in this case would depend on the manner in which the production of the urine sample was monitored. In this case, the Court found that the collection process used by the district limited the intrusion on the area where student’s had an expectation of privacy.
- (3) Nature of Immediacy of the School's Concern. The *Vernonia* Court found that the district's concern -- deterring drug use among students -- was equal to the governmental interest found in previous suspicionless cases.²⁴

²¹ The *Vernonia* Court noted that in *T.L.O., supra*, there was “individualized suspicion” present to support the search. However, the Vernonia School District's drug testing program did not have “individualized suspicion.” The *Vernonia* Court found that the Fourth Amendment imposed no requirement of “individualized suspicion.” *Vernonia, supra*, 515 U.S. at 653.

²² See: O’Pry, *supra*, 33 Tex. Tech L. Rev., 186.

²³ The Court found that there was a difference between students and athletes with respect to the expectation of privacy. In particular, students were required to have physical examinations and screenings such as vision and hearing screenings and vaccinations while student athletes were usually subjected to additional requirements such as team rules and physicals, communal undress and showers and had engaged in the activity voluntarily.

²⁴ *Vernonia, supra*, 515 U.S. at 660.

- (4) Less Intrusive Means. The *Vernonia* Court found that the drug testing policy was constitutional based upon the student’s decreased expectation of privacy, the relative unobtrusiveness of the search and the severity of the need met by the search.²⁵

5. Post-Vernonia Decisions Of The Eighth Circuit Court of Appeals Regarding Suspicionless Searches.

- A. After the Supreme Court issued *Vernonia*, the Eighth Circuit Court of Appeals issued two decisions regarding suspicionless searches conducted in a public school environment.
- B. *Thompson v. Carthage (AR) School District*, 87 F.3d 979 (8th Cir. 1996), noted above.
- C. In *Miller by Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999), the Eighth Circuit reviewed a challenge to the Cave City, Arkansas school district's student drug testing policy.
- (1) The Cave City School District’s “Chemical Screen Test Policy” provided for random testing of urine samples from students in grades seven through twelve. The student and his/her parent were required to sign a consent form if the student was randomly selected for testing. If the student or parent refused to sign the form, the “student shall [not] be allowed to participate in any school activity (any activity outside the regular curriculum).”²⁶
- (2) The Court reviewed the Cave City drug testing program under the standards set forth in *Vernonia, supra*, and recognized that the program was “not supported by a warrant, probable cause, or individualized suspicion.” *Miller by Miller v. Wilkes*, 172 F.3d at 577.
- (3) The Court reviewed the four “triggers” for “special needs” identified in *Vernonia, supra*.
- (a) Privacy Interest -- The Court adopted the *Vernonia* Court's analysis that “children in the public schools have a lower expectation of privacy than do ordinary citizens” – and – “all students have a

²⁵ O’Pry, *supra*, 33 Tex. Tech L. Rev. 151, 188-189.

²⁶ Miller, *supra*, 172 F.3d, 576.

limited expectation of privacy in the public school environment.”
Miller, supra, 172 F.3d at 578.²⁷

- (b) Degree of Intrusion. The Court found that the inclusion of non-athletes in the policy did not make it unconstitutional and the district’s policy was careful to minimize the intrusion of the program into areas where the students did have a reasonable expectation of privacy. *Miller, supra*, 172 F.3d at 579-580.
- (c) Nature of Immediacy of the School’s Concern. The Court acknowledged that there was not the same degree of “immediacy” that existed in *Vernonia*. While there was no record evidence of and “immediate crisis” or of “drug or alcohol problems in the schools,” the Court found that the lack of such factors meant “that the need for deterrence is not imperative.” *Miller, supra*, 172 F.3d at 580. The Court concluded that “[e]ven though no harm . . . is yet quantifiable .

²⁷ In response to the Plaintiff’s argument that the student’s expectation to privacy is limited to student athletes by the *Vernonia* decision, the Court stated:

“The [*Vernonia*] Court did say that ‘[l]egitimate privacy expectations are *even less* with regard to student athletes.’ [citation omitted](emphasis added)[footnote omitted]. That is not to say, however, that it is only the student who seeks to engage in extracurricular school sports activities whose legitimate expectation of privacy is so diminished that a search such as this one can stand up to constitutional scrutiny. As we noted above, the *Vernonia* Court observed that simply being a student in a public school is ‘[c]entral’ to a lowered expectation of privacy. . . . Granted, the . . . policy goes beyond student athletics to include all manner of extracurricular activities. Nevertheless, as with athletics there are features of extracurricular but non-athletic school activities that will lower the privacy expectations of those who opt to participate to a point below that of fellow students, . . . extracurricular clubs and activities will have their own rules and regulations for participating students that do not apply to students who do not wish to take part in such activities. As with student athletes, someone will monitor the students for compliance with the rules that the clubs and activities dictate. Thus students who elect to be involved in school activities have a legitimate expectation of privacy that is diminished to a level below that of the already lowered expectation of non-participating students.” *Miller, supra*, 172 F.3d at 579.

. . the possible harm against which the [School District] seeks to guard is substantial.” *Miller, supra*, 172 F.3d at 581.²⁸

- (d) Less Intrusive Means. The Court found that the method used by the district to deter the use of drugs was appropriate and constitutional.²⁹

6. The Supreme Court’s Decision In *Board of Education of Independent School District No. 92 of Pottawatomie County v Earls*.

- A. In 2002, the Supreme Court reexamined its decision and *Vernonia* and resolved the split in decisions issued by several Federal Circuit Courts of Appeal, including the Eighth Circuit. The Court's decision in *Board of Education of Independent School District No. 92 of Pottawatomie County v Earls*, 536 U.S. 822 (2002), held that the school district’s policy which required all students who participated in competitive extracurricular activities to submit to drug testing was a reasonable means of furthering the district’s important interest in preventing and deterring drug use among its students.
- B. The school district is located in and around the city of Tecumseh, Oklahoma. In the Fall of 1998, the district implemented a Student Drug Testing Policy. The Policy required that students must consent to urinalysis in order to participate in any extracurricular activity. The Policy was applied only to competitive extracurricular activities sanctioned by the Oklahoma Secondary Schools Activities Association (OSSAA). The activities that were covered by the policy included the academic team, FFA, FHA, band, choir, pom-pon, cheerleading and athletics. The Policy was administered as follows:
- C. Like *Vernonia, supra*, the *Earls* Court reviewed the four “triggers” for “special needs” identified in *Vernonia*.

²⁸ The Court further stated:

“We see no reason that a school district should be compelled to wait until there is a demonstrable problem with substance abuse among its own students before the district is constitutionally permitted to take measures that will help protect its schools against the sort of 'rebellion' proven in *Vernonia*, one ‘fueled by alcohol and drug abuse as well as the student's [sic] misperceptions about the drug culture.” *Miller, supra*, 172 F.3d at 581 (citation omitted).

²⁹ The Court stated:

“When the mission of the public schools can be so thoroughly thwarted by substance abuse among pupils, a random search policy such as the one at issue here, which is designed to effectively deter students who may be disposed to such abuse, is reasonable and therefore constitutional.” *Miller, supra*, 172 F.3d at 582.

- (1) Privacy Interest -- The Court adopted the *Vernonia* Court's analysis that "a student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health and safety." *Earls, supra*, 536 U.S. at 830. The *Earls* Court expanded *Vernonia* by finding that participation in competitive, non athletic extracurricular activities that were governed by the Oklahoma Secondary Schools Activities Association diminishes the student's expectation of privacy.³⁰
- (2) Degree of Intrusion. The *Earls* Court found that the district's policy was "minimally intrusive" and its "invasion of students' privacy [was] not significant." *Earls, supra*, 536 U.S. at 832-834. The principal reasons for this holding were the following observations:
 - (a) The collection method used was nearly identical to the one reviewed in *Vernonia* which that Court concluded was a "negligible" intrusion. *Earls, supra*, 536 U.S. at 833.
 - (b) The test results were kept in confidential files separate from the student's other educational records and were released to school personnel only on a "need to know" basis. *Id.*
 - (c) The test results were not turned over to any law enforcement authority and a positive test result did not lead to the imposition of discipline or have any academic consequences. *Id.*
- (3) Nature of Immediacy of the School's Concern. The *Earls* Court reaffirmed the finding in *Vernonia* concerning "the importance of the governmental concern in preventing drug use by schoolchildren." *Id. at 835*. The *Earls* Court reviewed the evidence of school drug used presented by the district³¹

³⁰ The *Earls* Court explained its finding in this area as follows:

"In any event, students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes. Some of these clubs and activities require occasional off-campus travel and communal undress. All of them have their own rules and requirements for participating students that do not apply to the student body as a whole. For example, each of the competitive extracurricular activities governed by the Policy must abide by the rules of the Oklahoma Secondary Schools Activities Association, and a faculty sponsor monitors the students for compliance with the various rules dictated by the clubs and activities. This regulation of extracurricular activities further diminishes the expectation of privacy among schoolchildren." *Earls, supra*, 536 U.S. at 831-832.

³¹ Teachers testified that they had observed students they believed were "under the influence" of drugs; students have been overheard discussing drug use; a drug dog found marijuana cigarettes near the parking lot; drugs and drug paraphernalia was found in the car driven by a FFA member; and, the Board President testified that parents and adults in the community perceived the district to have a "drug problem." *Earls, supra*, 536 U.S. at 834.

and found that the district had provided evidence that it did have a drug problem. The *Earls* Court then went further to explain that:

(a) “[A] demonstrated drug abuse problem . . . is not always necessary to the validity of a testing regime,” but that some showing does “shore up an assertion of a special need for a suspicionless general search program.” *Id.* at 824.

(b) “. . . this Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing.” *Id.*

(4) Less Intrusive Means. The *Earls* Court found that the method used by the district to deter the use of drugs was appropriate and constitutional. In particular, the Court stated:

(a) “. . . we find that testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District’s legitimate concerns in preventing, deterring, and detecting drug use.” *Id.* at 837.

(b) “*Vernonia* did not require the school to test the group of students most likely to use drugs, but rather considered the constitutionality of the program in the context of the public school’s custodial responsibilities.” *Id.* at 838.

III. Specific Problem Areas For Schools

1. Student Searches Conducted By School Resource Officers.

A. School Resource Officers may or may not be certified law enforcement officers. In order to conduct a lawful search under the Fourth Amendment, a “law enforcement officer must have “probable cause” (or an exception of “probable cause” like, consent or plain view). The standard of school employees is much less – “Reasonable suspicion.”

B. Where a School Resource Officer is acting in a “law enforcement capacity” as opposed to a “school related capacity”, the SRO must have probable cause to engage in any search. The deciding factors to determine the status of the SRO will include the following:

(1) Whether the request for the search was directed by school administrators or as a result of law enforcement information.

(2) Whether the subject of the search constitutes a violation of school rules.

- (3) Whether the SRO is an employee of the school district or an employee of a law enforcement entity.
 - (4) Whether the location and circumstances of the search appeared to be “school related” or “law enforcement related.”³²
- C. While there are cases that support the proposition that a city police officer who is assigned full-time to a school as a “liaison officer” is in the same position as a school official for Fourth Amendment purposes,³² caution should be exercised when an SRO searches students at school.

2. **“Strip Searches” of Students.**

- A. Strip searches of Students are generally prohibited by Section 167.166, RSMo.
- B. A “strip search” is defined by the statute as meaning “the removal or rearrangement of some or all of the clothing of a person so as to permit an inspection of the genitals, buttocks, anus, breasts or undergarments of such person, including but not limited to inspections conducted visually, manually or by means of any physical instrument.”³³
- C. The term "strip search" under Missouri Law does not include “the removal of clothing in order to investigate the potential abuse or neglect of a student; give medical attention to a student; provide health services to a student; or screen a student for medical conditions.” *See*: Section 167.166.3 RSMo.
- D. Exceptions to the general prohibition of “strip searches” include the following:
 - (1) A “strip search” conducted by, or under the authority of, a commissioned law enforcement officer. *See*: Section 167.166.1 RSMo.

³² *See*: *State v. D. S.*, 685 So.2d 41, 42 (Fla. Dist. Ct. App. 1996)(mere presence of police officer during search of student by school principal did not violate Fourth Amendment because officer did not participate, direct or acquiesce in the search); *State v Tywayne H.*, 933 P.2d 251, 254 (N.M. App. Ct. 1991)(police officer who provided security at school dance must have probable cause to search students); *In re Josue T.*, 989 P.2d 431,437-38 (N.M. App. Ct. 1999)(school liaison officer needs only “reasonable suspicion” to search students at request of school administrator); *State v. Felicelli*, 600 N.W.2d 54 (Wis. Ct. App. 1999)(police liaison officer who supervised principal’s search of a student was a “school official”); and *Commonwealth v. Williams*, 749 A.2d 957 (Pa. 2000)(school security officers exceeded their jurisdiction by searching a student's automobile that was located off-campus). *See Also*: Yearout, *Individualized School Searches and the Fourth Amendment: What’s A School District To Do?*, 10 Wm & Mary Bill Rts. J. 489, 513-520 (2002); and Mansukhani, *School Searches After New Jersey V. T. L. O.: Are There Any Limits?*, 34 U. Louisville J. Fam. L. 345, 365-370 (1995).

³² *See*: *People v. Pruitt*, 662 N.E.2d 540, 544 (Ill. App. 1996).

³³ *See*: Section 544.193, RSMo.

- (2) A “strip search” conducted by a school employee where:
 - (a) A commissioned law enforcement officer is not immediately available; and,
 - (b) The school employee reasonably believes that the student possesses a weapon, explosive, or substance that poses an imminent threat of physical harm to himself or herself or another person. *See*: Section 167.166.2 RSMo.
- E. The statute defines the penalty for violation of Section 167.166 by school employee to be immediate suspension without pay, “pending an evidentiary hearing when such employee is entitled by statute or contract to such hearing. If an employee is not entitled to such evidentiary hearing, the employee shall be suspended pending completion of due process or further disciplinary action as provided in the district’s personnel policies, as applicable.” *See*: Section 167.166.5, RSMo.

3. Use of “Drug Sniffing Dogs”.

- A. Use of drug sniffing dogs to conduct general searches of the outside of a person’s suitcase or bags has been upheld on the theory a person does not have a reasonable expectation of privacy in air surrounding an inanimate object in a public place and consequently the use of the drug sniffing dog does not constitute a “search” under the Fourth Amendment.³⁴
- B. Use of a drug sniffing dog to “search” the air around inanimate objects such as student lockers, student automobiles or student items (backpacks, book bags, gym bags, purses) that are not “connected” to a student is permissible. “Moreover, probable cause becomes established once a dog has been alerted to the presence of contraband, providing sufficient justification to undertake a physical search of the vehicle or item.”³⁵
- C. The Eighth Circuit has found that “[a] dog sniff is not a search within the meaning of the Fourth Amendment, and thus requires no probable cause to be performed. *United States v. Sanchez*, 417 F.3d 971, 976 (8th Cir. 2005) citing *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005). *See also*: *United States v. Bloomfield*, 40 F.3d 910, 919 (8th Cir. 1994)(“a dog’s identification of drugs in

³⁴ Doggett, *supra*, 24-DEC Mont. Law 11at 23, citing *United States v. Place*, 462 U.S. 696 (1983). *See Also*: *State v LaFlamme*, 869 S.W.2d 183 (Mo. App. 1993).

³⁵ Gomez, *Practical Guidance Regarding Using Drug-Sniffing Dogs On Students*, National School Boards Association (NSBA), Inquiry & Analysis, July, 2006, page 5, citing *Myers v. State*, 839 N.E.2d, 1154, 1158 (Ind. 2005).

luggage or in a car provides probable cause that drugs are present”); *United States v. Alexander*, 448 F.3d 1014, 1017 (8th Cir. 2006)(a dog sniff at the end of a legal traffic stop constitutes “a de minimis intrusion on the driver’s personal liberty that does not violate the Fourth Amendment”); and, *United States v. Martin*, 411 F.3d 998, 1002 (8th Cir. 2005)(a dog sniff conducted during a traffic stop that is “lawful at its inception and otherwise executed in a reasonable manner” does not infringe upon a constitutionally protected interest in privacy).

- D. Removal or moving of bags or luggage does not constitute an illegal search or seizure. See: *United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 2644-45 (1983)(exposure of an airline passenger’s luggage to a drug-sniffing dog did not constitute a search within the meaning of the Fourth Amendment); *United States v. Gant*, 112 F.3d 239, 241 (6th Cir. 1997)(removal of bags from overhead compartments and placing them on the seats below for drug-sniffing dog did not constitute a search); and, *United States v. Goldstein*, 635 F.2d 356, 361 (5th Cir. 1981)(removal of bags from luggage cart to be sniffed by drug-sniffing dog did not constitute an unreasonable seizure).
- E. Use of drug sniffing dogs to “search” the air around students is not favored by the Courts and consequently, is not recommended here.³⁶

4. Searches of School Lockers.

- A. Students have no “reasonable expectation of privacy” in their lockers where the school has published a written policy that indicates that school lockers are under the ownership and control of the school.³⁷
- B. Where the school has an established written policy which clearly indicates that school lockers are under its ownership and control, school employees may conduct generalized suspicionless searches of the lockers.

³⁶ See: *Horton v. Goose Creek Independent School District*, 690 F.2d 470, 482 (5th Cir. 1982)(lack of individualized suspicion does not justify “intrusion on dignity and personal security” that results from a “canine inspection of the student’s person”); *B.C. v. Plumas Unified School District*, 192 F.3d 1260, 1268 (9th Cir. 1999)(use of drug sniffing dog is “highly intrusive” on areas that “are highly personal” to a student); and, *Jones v. Latexo Independent School District*, 499 F.Supp 223, 236 (E.D. Tex. 1980)(use of drug-sniffing dog not appropriate without articulable facts focusing suspicion on specific students). But See: *Doe v. Renfrow*, 475 F.Supp 1012, 1022 (N.D. Ind. 1979), *aff’d in part* 631 F.2d 91 (7th Cir. 1980)(use of drug sniffing dogs did not constitute a “search”).

³⁷ Doggett, *supra*, 24-DEC Mont. Law, 11, 22, citing *In Interest of Isiah B.*, 400 N.W.2d 637 (Wis. 1993) and *State v. Engerud*, 463 A.2d 934 (N.J. 1983). See Also: Yearout, *supra*, 10 Wm & Mary Bill Rts. J. 489, 500-502 (2002).

5. Searches of Student Automobiles.

- A. Student automobiles that are parked on school premises are subject to search by school officials where the *T. L. O.* standards of reasonableness are met. A number of state courts have found that school officials need only have “reasonable suspicion” to search the student's automobile.³⁸
- B. Student automobiles may always be searched by school officials, if the item creating a violation of the school rule (drugs, alcoholic beverages, weapons) is in “plain view.”
- C. It is recommended that schools include a statement in the parking permit application that states that student automobiles that use the school parking lot or are parked on school property are subject to search.

6. Use of Metal Detectors.

- A. When conducted by a police officer, a metal detector walk-through is a search for Fourth Amendment purposes.³⁹ However, the minimally intrusive nature of a metal detector search coupled with incidents of violence, have satisfied the Fourth Amendment’s basic concern of reasonableness.⁴⁰
- B. In *Thompson v. Carthage School District*, 87 F.3d 979 (8th Cir. 1996), the Eighth Circuit approved of the use of hand held metal detectors to "search" students and their possessions. The Court further refused to apply the Fourth Amendment’s “Exclusionary Rule” because it would deter educators from undertaking disciplinary proceedings that are needed to keep schools safe and to control student misbehavior. Any deterrence benefit would not begin to outweigh the high societal costs of imposing the rule.
- C. Use of hand held metal detectors can always be used in cases where there is “individualized suspicion” that a particular student or the possessions of a particular

³⁸ See: *Covington County v. G.W.*, 767 So.2d 187 (Miss. 2000)(search of student’s truck for alcoholic beverages); *F. S. E. v. State*, 993 P.2d 771 (Okla. Crim. App. 1999)(search of trunk of student's automobile for drugs); *People ex. rel. P. E. A.*, 754 P.2d 382 (Colo. 1988)(search of student’s vehicle for drugs). See also: Yearout, *supra*, 10 Wm. & Mary Bill Rts. J. 489, 504-508; Doggett, *supra*, 24-DEC Mont. Law. 11, 23; and, Mansukhani, *supra*, 34 U. Louisville J. Fam. L. 345, 361-367 (1995); and, Harper, *School Searches--A Look Into The 21st Century*, 13 Miss. C.L. Rev. 293 (1993).

³⁹ *McMorris v. Alioto*, 567 F.2d 897 (9th Cir. 1978)(persons entering a state courthouse required to walk through metal detectors); *United States v. Epperson*, 454 F.2d 769 (4th Cir. 1972)(airport passengers required to walk through metal detectors to reach airplanes). Stationary and hand held metal detectors).

⁴⁰ *People v. Pruitt*, *supra*, 662 N.E.2d at 545.

student have prohibited materials contained within them. Generalized screening of students with hand held or stationary metal detectors has been upheld, especially where a history of acts of violence have occurred.⁴¹

- D. Random use of hand held metal detectors without any "individualized suspicion" or without a legitimate educational concern, is risky.

7. Use of Breathalyzer Tests.

- A. Breathalyzer tests for the presence of alcohol in a person's system have long been accepted by Courts as evidence of legal intoxication.
- B. Use of a breathalyzer test on students should be limited to situations where "individualized suspicion" of consumption of alcoholic beverages has been established.⁴²
- C. Breathalyzer tests should not be used as a random test for alcohol use.

⁴¹ *People v. Pruitt, supra*, (violence and threats of violence coupled with 183 confiscated weapons); *In the Interest of S.S.*, 680 A.2d 1172 (Pa. Super. 1996)(high rate of violence in Philadelphia schools); *In re F.B.*, 658 A.2d 1378 (Pa. Super. 1995)(violence in city schools); *State v. J.A.*, 679 So.2d 316 (Fla. App. 1996)("backdrop of escalating violence" in schools).

⁴² *See: Anable v. Ford*, 653 F.Supp. 22 (W.D. Ark. 1985).

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